IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.17434 of 2017

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Ram Swarath Mahto, son of late Ram Bilash Mahto, resident of Village/Mohalla Rambagh Chauri, Shastri Nager, P.O. Ramna, P.S. Mithanpura, District Muzaffarpur

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna
2. The Principal Secretary, Department of Health, Bihar, Patna
3. The Regional Deputy Director, Health Department, Tirhut Division, Muzaffarpur
4. The Civil Surgeon-cum-Chief Medical Officer, Muzaffarpur
5. The Additional Sub-Medical Officer, East Muzaffarpur
6. The Incharge Medical Officer, Primary Health Centre, Mushari, Muzaffarpur.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Sandeep Kumar, Advocate
Mr. Shivaji Singh, Advocate
Mr. Mukesh Kumar, Advocate

For the State : Mr. Kamlesh Kishore, AC to SC-12

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 29-10-2018

Heard learned counsel for the petitioner and learned counsel for the State.

2. In the present writ petition, the petitioner is challenging the order vide Memo No. 525 dated 13.10.2017 passed by the office of the Incharge Medical Officer, Primary Health Centre, Mushari (respondent no.6), whereby and whereunder he has directed for recovery of an amount of Rs. 14,70,366/- (Fourteen Lacs Seventy thousand and three hundred sixty six only) on account of excess payment made to the petitioner and accordingly while implementing the aforesaid order, Rs. 10,000/- has been deducted

from the salary.

3. The short facts of this case are that the petitioner was appointed on the post of Clerk vide Memo No. 393 dated 19.05.1981 issued from the office of the Regional Deputy Director, Health Services, Tirhut Division, Muzaffarpur (Respondent no.3) and his service was approved vide letter no. 716 dated 29.09.1993.

4. The petitioner was transferred to Primary Health Centre, Jogapatti, Sitamarhi vide Memo No. 873 dated 12.09.1981.

5. The petitioner appeared in Hindi Notings and Drafting Examination which he cleared the same on 23.10.1983, accordingly he was granted pay scale of Rs.580 to 860 to pay scale of Rs. 1200-1800 in terms of letter no. 6021 dated 18.12.1989 issued by the Finance Department. Pay fixation of the petitioner was done on 20.05.1991, thereafter his pay was merged to Rs.1380-150 the same came to Rs.1530 or 1560, in course of time the petitioner was granted the first time bound promotion on account of the fact that he had cleared elementary accounts examination, conducted by the concerned department vide letter number 18.2.1991-92 dated 06.08.1992. The first time bound promotion was granted vide letter no. 4652 dated 29.12.1992 issued from the office of the Civil Surgeon-cum-Chief Medical

Officer, Muzaffarpur, accordingly his pay was fixed as Rs1530/-.

6. The 5th pay revision vide letter no.660 was implemented vide letter dated 08.02.1999 issued by the Finance Department with effect from 01.01.1996. After the implementation of the 5th pay revision the provision of grant of time bound promotion was scrapped, later on, vide notification no.4685 B-2 dated 25.6.2003 the provision of ACP was implemented, accordingly his pay was fixed as Rs. 7075/- on 21.12.2006.

7. The petitioner was also granted benefit arising out of the resolution no. 3590 dated 24.05.2017, accordingly the pay of the petitioner was fixed at Rs. 47,500/-, but the Incharge Medical Officer, Primary Health Centre, Mushari, Muzaffarpur vide letter no. 482 dated 21.08.2017 recorded that the petitioner has wrongly been given first ACP and second ACP as he has not passed the accounts examination is sine qua none for granting the benefit for the ACP which the petitioner failed to achieve and as such the payment which has been made on account of grant of benefit of ACP is the payment of excess amount to the petitioner. Accordingly, direction was given for realization of the excess amount paid to the petitioner and accordingly another letter was issued vide letter no. 2435 dated 26.08.2017 in which the Civil Surgeon-cum-Chief Medical Officer, Muzaffarpur has directed

Incahrge Medical Officer to examine the matter about excess payment made to the petitioner on account of grant of ACP, after that the Incharge Medical Officer vide Memo no. 525 dated 13.10.2017 calculated the purported excess payment arrived to a finding of Rs.14,17,366/- was directed to be recovered from the Provident Fund amount in case of deficit rest amount will be adjusted from another head, started deducting in seventeen installments at the rate of Rs. 10,000/- which is under challenge.

8. In the present case the argument has been led by the petitioner that for grant of ACP there is no requirement for passing the accounts examination and that has been dealt with in the judgment and order dated 19.03.2018 passed in LPA No. 599 of 2015 in which the Division Bench has considered the provision of Assured Career Progression under the Bihar State Employees Conditions of Service (Assured Career Progression Scheme) Rules, 2003 as well as provisions of Rule 157(3)(J) of the Bihar Boards Miscellaneous Rules, 1958, after due consideration. Division Bench has held for grant of ACP there is no need to pass the accounts examination. The judgment of Division Bench order is binding upon me and another argument has been made that as this order for recovery has been passed after superannuation from service of the petitioner which is illegal in eyes of law, placed

reliance on the judgment in the case of State of Punjab and others v. Rafiq Masih, reported in 2015 (1) PLJR 261 (SC) and judgment of the Hon'ble Supreme Court in the case of State of Punjab and others v. Rafiq Masih, reported in 2014 (4) SCC 36, in both the judgments the Court has dealt with the issue of recovery of amount from employees of Class III and Class IV during the service period as well as after superannuation from service, the Court has taken a view that if no fraud or misrepresentation has been acted upon by the petitioner upon the respondent any excess payment will not be subject matter of the recovery after superannuation that too from the salary of Class III and Class IV employees as they are low paid employees. In such circumstances, the action of respondents in receiving the excess amount, which has already been paid on account of mistake committed by the respondent, not permissible in law. It will be relevant to quote para 12 of Rafiq Masih case (supra):

> "12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
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> (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

> (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
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> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

9. The State has tried his best to justify the action of the respondent and submitted that passing the accounts examination is must before an employee is made to entitle the benefit in terms of Rule 4 (5) of the ACP Rules which is condition precedent for grant of promotion will equally be applicable in the matter of ACP.

10. Having considered the rival contentions of the parties this writ petition is to succeed on both counts, as judgment of Division Bench of this Court in LPA 599 of 2015 unequivocally held that passing the accounts examination is not required in the matter of grant of benefit of ACP, second, when there is no allegation of fraud or misrepresentation, recovery of amount on the ground of excess payment cannot be allowed to be

acted upon as Hon’ble Supreme Court having held that after superannuation from service excess payment on account of mistake committed by the respondent will not be subject matter of recovery.

11. In such view of matter, the impugned order dated 13.10.2017 is set aside and any recovery made from the salary or from the provident fund will be returned to the petitioner along with 6% simple interest.

12. With the aforesaid observations and directions this writ petition is allowed.

(Shivaji Pandey, J)

Vinay/Sunny

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	20.11.2018
Transmission Date	NA