

CWP-3294 of 2015

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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-3294 of 2015

Date of decision: 19.07.2019

Suresh Kumar

.... Petitioner

versus

State of Punjab and another

.... Respondents

CWP-4479 of 2015

Harvinder Singh

.... Petitioner

versus

State of Punjab and another

.... Respondents

CORAM:HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. I.D. Singla, Advocate
for the petitioner (s).

Mr. Vikas Mohan Gupta, Addl. A.G. Punjab.

HARSIMRAN SINGH SETHI, J.

Both the above writ petitions are being disposed of together as the same question of law and similar facts are involved. However, for the sake of brevity, facts are being taken from CWP No.3294 of 2015.

The grievance raised by the petitioner is against the order dated 11.02.2015 (Annexure P/4) by which the claim of the petitioner in respect of

recovery of an excess amount to the tune of Rs.1,15,681/- has been ordered to be recovered from him. Further prayer of the petitioner is that the amount of Rs.53,880/- already recovered out of the total amount of Rs.1,15,681/-, be also refunded to the petitioner.

Though, a prayer has been made for the grant of ACP, but at the time of arguments, counsel for the petitioner restricts his claim only with regard to the recovery of the amount of Rs.1,15,681/- which has been imposed upon the petitioner and for the refund of the amount of Rs.53,880/- already recovered.

The facts which have been mentioned in the writ petition are that the petitioner was appointed as Constable on 8.6.1973. Thereafter, he was promoted as Head Constable (Battery Charger) on 19.06.1990 and, thereafter vide order dated 04.10.1993, w.e.f. 26.8.1993, the petitioner was promoted as Assistant Sub-Inspector (Battery Charger) and he continued working as such, till he retired on 31.12.2014. On 18.10.2002, the petitioner was granted the benefit of ACP after completing 28 years of service. Petitioner continued getting the said benefit, till 24.5.2011, when the said benefit was withdrawn as per the Instructions dated 01.09.1989 issued by the Punjab Government. According to said instructions, the period spent on adhoc basis is not to be taken into consideration while computing 08 years for the grant of ACP as only regular service is to be taken for the grant of the benefit of ACP.

Keeping in view the order passed on 24.05.2011 withdrawing the benefit of ACP extended to the petitioner on 18.10.2002 and upon refixing his pay, it was found that a sum of Rs.1,15,681/- has been paid in excess to the petitioner on account of wrongly granting petitioner benefit of ACP in the year 2002. Out of the said amount, a sum of Rs.53,880/ was immediately recovered

from the petitioner.

The petitioner challenged the said recovery by filing CWP No.11751 of 2013, which was disposed of by this Court vide order dated 23.4.2014 directing the respondents to grant an opportunity of hearing to the petitioner and follow due process of law, in case any recovery is to be effected. Case was remanded back to the State Government for passing fresh orders. In pursuance to the directions issued by this Court in CWP-11751 of 2013, on 23.04.2014, respondents passed a fresh order dated 11.02.2015 (Annexure P/4). By the said order, the respondents held that the grant of proficiency step up given to the petitioner after rendering eight years of service of ASI (Battery Charger) on which post, petitioner was working on adhoc basis and the grant of the said benefit was not correct and the same is liable to be withdrawn and was rightly withdrawn keeping in view the instructions dated 01.09.1989 issued by the Punjab Government. Order of recovery was also upheld and the petitioner was directed to deposit the remaining amount of Rs.61,801/- out of the total amount of Rs.1,15,681/- This order dated 11.02.2015 (Annexure P/4) is under challenge in the present writ petition.

Respondents in their reply have defended the order by which the pay of the petitioner was refixed on 24.5.2011 and also the order of recovery of the excess amount, which was to be done from the petitioner upon refixation of his salary. It has been mentioned in the written statement that once the benefit was wrongly given to the petitioner, the same was rightly withdrawn. Counsel for the respondents states that the promotion of the petitioner, which was effected in the year 1993 to the post of ASI (Battery Charger) was totally fortuitous. No benefit of the said service could be given to the petitioner keeping in view the Instructions dated 01.09.1989 as according to said instructions, only regular

service is to be taken into consideration for the grant of benefit of ACP. Counsel for the respondents states that the writ petition is liable to be rejected as the recovery was initially ordered in the year 2011, when the petitioner was in service, though, upon remanding of the case by this Court, fresh order, which has been impugned in the present writ petition, was passed on 11.2.2015, that was after the retirement of the petitioner and, therefore, the writ petition is liable to be dismissed.

I have heard learned counsel for the parties and have gone through the records with their able assistance.

Counsel for the petitioner has already given up the plea challenging the refixation of his salary after withdrawal of the benefit of grant of ACP which was extended to the petitioner in the year 2002, granting him proficiency step up in the cadre of ASI (Battery Charger). Once the refixation is not under challenge, no order is required to be passed in this regard as to whether benefit of ACP granted to the petitioner in the year 2002 was liable to be withdrawn or not.

The only grievance of the petitioner is qua recovery, which is being done in pursuance of refixation. Hon'ble Supreme Court of India in **State of Punjab & Others vs Rafiq Masih (White Washer) etc (2014) 8 SCC 883** laid down guidelines by which it has been made clear that no recovery can be ordered from employees belonging to group C or D.

It is not disputed by counsel for the respondents that the petitioners in both the writ petitions were working on group C post and, therefore, their case is covered by the judgment in Rafiq Masih case (supra). Relevant part of the judgment is as under;-

“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:

(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.

(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.

As petitioners in both the writ petitions were working on group C post, no recovery could have been effected. Further, as per the judgment passed by Hon'ble Supreme Court of India in Rafiq Masih case (supra), if any benefit, which was given to an employee is sought to be withdrawn after a period of five years, no recovery can be done. In the present case, benefit of grant of ACP was given to the petitioner in the year 2002, whereas, the same was withdrawn in the year 2011. Therefore, even under Clause (iii) of para 12 detailed in Rafiq Masih case (supra), the case of the petitioner is covered to the effect that no recovery can be done which is sought to be done after a period of five years.

Counsel for the respondents argues that order of recovery was passed effecting recovery from the petitioner in the year 2015, whereas, the

judgment in Rafiq Masih Case (supra) came in the year 2016 and, therefore, same cannot have retrospective effect. Even this plea is not available with the respondents as per the law laid down by Division Bench of this Court in LPA No.2448 of 2016, wherein the Division Bench has held that judgment in Rafiq Masih case will have retrospective effect. The said judgment is as under:-

“(1) This order shall dispose of LPA Nos.2448 of 2016 and LPA Nos.408,409,77,108,109&444 of 2017 as all the appeals have been preferred by the State of Punjab against a common order passed by learned Single Judge dated 16.03.2016 whereby the recovery of excess amount from the respondents has been set aside.

(2) All the appeals are accompanied with the applications under Section 5 of the Limitation Act for condonation of delay of 245 days or more. In the lead case i.e. LPA No.2448 of 2016, it is averred in the application for condonation of delay that since the judgment under appeal involved financial implications, hence the matter was referred to Finance Department on 11.04.2016 to which the Department of Finance sent its response on 10.06.2016. The Administrative Department again referred the matter back to O/o CE/RSDC on 15.06.2016 and after exchange of correspondence, the Administrative Department eventually sent the case to the office of Advocate General, Punjab on 26.07.2016 for filing the accompanying appeals. It is further averred that the office of Advocate General, Punjab gave second opinion on 30.11.2016, recommending to file appeals. The appeals were thereafter filed on 16.12.2016. It may thus be seen that the Administrative Department did not want to file appeal(s) rather sought approval of the Finance Department to implement the order of learned Single Judge but due to objection raised by the Finance Department and after intra-departmental correspondence that the appeals were filed after a delay of almost 8 months. There is no satisfactory explanation as to why the authorities could not act promptly to file the appeals at the earliest when the prescribed time limit is 30 days only. We are thus not convinced by the explanation given in the application for condonation of delay.

(3) Regardless thereto, we have heard learned counsel for the parties on merits and have gone through the record.

(4) Shorn of the details, suffice it to mention that the respondents are mostly Group ‘D’ and Group ‘C’ employees working was Mechanics, Masons and Drivers etc. in the appellant-Department. Some of them have retired from service. The respondents were granted higher pay-scales being ITI Diploma holders but the same was later on withdrawn and all of them were uniformly granted the pay-scales admissible to semi-skilled staff. The respondents challenged the re-fixation of their pay in a bunch of writ petitions which were partly allowed by a Division Bench of this Court on 27.03.2009 holding as follows:-

“In view of the said fact, we partly allow the present writ petitions by declaring that the re-fixation of salary from the date i.e. prior to the decision of the Committee, is illegal and void. Since the impugned orders were stayed in few of the writ petitioners, the workmen must have been paid higher pay scale. Therefore, in respect of the

employees, who are petitioners in the aforesaid cases, the respondents shall be at liberty to take appropriate decision in respect of the recovery of the amount so paid to avoid hardship and undue burden at this stage, keeping in view the interim orders passed by this Court.”
[emphasis by us]

(5) The above-stated order was upheld by the Hon’ble Supreme Court also.

(6) It may thus be seen that while re-fixation of pay was upheld by this Court, the appellant-authorities were granted liberty to take appropriate decision to effect recovery of the amount already paid “*to avoid hardship and undue burden*”. The appellants, however, decided to effect recovery and passed the consequential orders, which were again challenged by the respondents before this Court. Learned Single Judge vide judgment under appeal has set aside those orders primarily on the strength of decision of Hon’ble Supreme Court in ***State of Punjab vs. Rafiq Masih (White Washer) & Ors. (2014) 8 SCC 883***.

(7) The question which falls for consideration in these appeals is thus whether the appellant-authorities are justified in ordering recovery of the excess payment of salary made to the respondent-employees?

(8) It appears to us that the spirit and object of the observations made by this Court while upholding re-fixation of pay was that before effecting recovery from the respondents, the authorities would consider the likelihood of ‘*hardship and undue burden*’ on the respondent-employees. Unfortunately, this aspect has not been kept in view by the appellants while deciding to effect recovery. Meanwhile, the Apex Court in ***Rafiq Masih*** (supra) has ruled that the recovery of excess payment can be effected as the employees cannot be allowed to take undue advantage of wrong fixation of pay. Nevertheless, the Hon’ble Supreme Court has carved out some exceptions in favour of retirees or the employees belonging to ‘C’ or ‘D’ Groups, especially when the employees are not guilty of concealment of facts at the time of fixation of pay. There is no gainsaying that the higher technical pay scale was granted to the respondents by taking a conscious decision and the said pay scale was subsequently withdrawn and they were put into the category of semi-skilled staff, again by taking a conscious policy decision. The employees had no say in both the decision-making processes. At this juncture, when some of them have retired and others are at the fag end of their career with multiple family responsibilities, it would cause extreme hardship if recoveries of, what had been already paid to them are allowed to be effected. The issue, to this extent, appears to have been answered in favour of the respondents in ***Rafiq Masih*** (supra) which has been relied upon by learned Single Judge.

(9) The contention that the principles laid down in ***Rafiq Masih*** will apply ‘prospectively’ cannot be accepted as no such limitation has been imposed by the Hon’ble Supreme Court. Taking into consideration the current status of the respondents, namely, that many of them have retired or are near retirement and the fact that they are holding Group ‘C’ & ‘D’ posts, we are satisfied that no interference in the discretion exercised by learned Single Judge is called for.

(10) Dismissed.

Keeping in view the above, action of the respondents recovering the amount of Rs.1,15,681/- from the petitioner in CWP No.3294 of 2015 and amount of Rs.1,31,146/- from the petitioner in CWP No.4479 of 2015 upon refixation of salary is held to be bad, and, is accordingly set aside to the extent it directs recovery of the amount from the petitioners. As the respondents have already recovered a sum of Rs.53,880/- out of the total amount of Rs.1,15,681/- from the petitioner in CWP No.3294 of 2015, which has been set aside in this order, therefore, the same shall be refunded to the petitioner within a period of two months from the date of receipt of copy of this order. Counsel for the respondents inform that no recovery has been done from the petitioner in CWP No.4479 of 2015, hence no order is required to be passed for the refund of any amount.

Both the petitions stand disposed of in those terms.

(HARSIMRAN SINGH SETHI)
JUDGE

19.07.2019
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| 1. | Whether speaking/non-speaking? | Yes/No |
| 2. | Whether reportable? | Yes/No |