IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.5253 of 2016
Date of decision: 16.10.2019

Jai Bhagwan ...**Petitioner**

Versus

The Bhakhra Beas Management Board and another

...**Respondents**

CORAM: HON'BLE MR.JUSTICE G.S.SANDHAWALIA

Present: Mr. ADS Jattana, Advocate for the petitioner

Mr. Rajesh Garg, Senior Advocate with
Mr. Pranav Chadha, Advocate for the respondents

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G.S.SANDHAWALIA, J. (Oral)

Challenge is to the order dated 24.8.2015 (Annexure P/9) passed by respondent no.2 whereby while ordering recovery from the petitioner the order dated 10.2.2015(Annexure P/1) was upheld.

The said authority had been asked to reconsider the issue in an earlier direction passed by this Court vide order dated 20.7.2015 (Annexure P/8) passed in Civil Writ Petition No.14316 of 2015 keeping in view the judgment of the Apex Court in **State of Punjab and others Vs. Rafiq Masih (White Washer) etc. 2015(1) RSJ 177.** The reasoning which had been given to stand by the earlier order is that the petitioner had been granted second time bound promotional scale with effect from 15.9.1995 and had been granted two increments with effect from the said date whereas he was entitled to only one increment after adjusting the previous benefit of proficiency step up drawn on 15.9.1987 which erroneously was not adjusted. Resultantly, it was held that the fixation of pay vide office orders dated 10.2.2015 and 26.2.2015 (Annexures P/2 and P/3) and recovery which had been ordered with effect from 15.9.1995 which was worked out to ₹ 1,79,463/- out of which a sum of ₹ 46,310/- had already been recovered from the salary of the petitioner for the month of July, 2015 by the Executive Engineer, Hydrology Division, BBMB, Nangal were justified. Another aspect which was kept in mind was that the petitioner had retired from service as Assistant Design Engineer (Class-II Gazetted Officer). He was going to receive ₹ 35.43 lakhs (Approximately) out of which ₹ 7.61 lakhs were on account of leave encashment, ₹ 9.81 lakhs as DCRG and ₹ 18.01 lakhs as GPF amount from his parent department as well as from the respondent-Board on account of his retiral dues. Therefore, there would be no hardship to the petitioner to pay the amount of recovery of ₹ 1,79,463/-. Resultantly, the judgment of the Apex Court in **Rafiq Masih's** case (Supra) was distinguished by passing the impugned order.

Counsel for the petitioner has restricted his argument to the extent that he would be satisfied if the order is quashed to the extent that recovery is permissible and does not challenge the impugned order qua entitlement of increment on the basis of which recovery is being effected.

Resultantly only issue which this Court is to consider is to whether the action of the respondents would fall within the ambit of the law laid down by the Apex Court in **Rafiq Masih's** case (Supra).

Senior counsel for the respondents on the other hand has fallen back on the later judgment of the Apex Court in **High Court of Punjab & Haryana & others Vs. Jagdev Singh** **2016(4) S.C.T. 286** to submit that an undertaking as such was given on 2.12.2009 (Annexure R-3) and therefore the petitioner is bound by the same. It is accordingly submitted that if the petitioner was not entitled as per the rules and employer was recovering the amount, there could not no such bar on the employer not to take action and correct the illegality.

There is no dispute qua the above said proposition regarding the bar of employer to correct the wrong as such. However, keeping in view the facts that the petitioner has only restricted his case to seek limited relief that the recovery could not have been effected after the petitioner had been drawing the same for a period of 20 years and there was no fraud or misrepresentation on his part.

From perusal of the impugned order also it would be clear that the petitioner had joined as Draftsman in the Irrigation Department of State of Haryana and thereafter he joined service of the respondent Board on 15.9.1979. He opted for the revised BBMB pay scale in the year 1992 with effect from 1.1.1986. The benefit of proficiency step up was granted on 15.9.1987 after 8 years of service and the first time bound promotional scale was granted with effect from 15.9.1988. Second time bound promotional scale was granted with effect from 15.9.1995 and the two increments whereas entitlement of the petitioner was only to one increment. The petitioner was promoted as Divisional Head Draftsman on 19.11.1998 and further promoted as Sub Divisional Officer on 16.5.2013. He was retired on 31.7.2015 while working as Assistant Design Engineer.

Thus, it is not the case of the respondents that the petitioner was in any way associated with the fixation of his pay as such or he had committed any fraud to obtain the increment in question benefit of which he was drawing for 20 long years. At the fag end of his service career five month prior to his retirement on 10.2.2015 (Annexure P/1), the respondents woke up from their slumber to correct his pay and to recover the amount in question without giving him any notice.

It can thus accordingly be held that the case of the petitioner is squarely covered by judgment of the Apex Court in **Rafiq Masih's** case (Supra) wherein the following observations were made:-

> "...It is apparent from the conclusions drawn in Syed Abdul Qadir's case (supra), that recovery of excess payments, made from employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year of the date of his retirement on superannuation.
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> xxx xxx xxx
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> 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).
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> (ii) Recovery from retired employees, or <u>employees who are due to retire within one year, of the order of recovery.</u>
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> (iii) Recovery from employees, when the excess <u>payment has been made for a period in excess of five years</u>, 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.
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> (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."

Resultantly, it is clear that the petitioner's case would fall within Clauses (ii) and (iii).

Reliance upon the judgment in **Jagdev Singh's** case (supra) as made by counsel for the respondents has been distinguished by the counsel for the petitioner as such that the undertaking is not a part of the speaking order and it was given on 2.12.2009 much later. There was no such undertaking given way back in 1995 by which the petitioner can be held liable in view of the principle laid down in **Jagdev Singh's** case (supra).

The said case was of a Judicial Officer who had given the benefit of the revised pay scale in the selection grade allowed to him on 7.1.2002. He had retired on 12.2.2003 and on 18.2.2004 a letter for recovery of ₹ 1,22,003/- was served upon him by the Registrar of this Court which he had challenged. In such circumstances it was held that it is not a case that falls within the categories as fixed in **Rafiq Masih's** case (Supra) where excess payment had been made for a period of over five years and the recovery as such had been sustained. In such circumstances, the Apex Court had upheld the order of recovery and set aside the judgment of this Court which had quashed the recovery order.

The facts of the present case as noticed are otherwise in view of the length of the period of 20 years the benefit of increment granted and the recovery which is sought to be effected at the fag end of the service. The speaking order passed by respondent no.2 is thus not justified. Reliance has been placed upon the retiral dues which the petitioner had earned after having given long years of service to the Board. For a retired employee each and every penny is valuable and therefore, it would not be justified to say that ₹ 1,79,463/- is a small amount as such and there would be no undue hardship to the petitioner to pay the amount in question. Recovery would also be falling under Clauses (ii) and (iii) of the **Rafiq Masih's** case (Supra).

It is settled principle also that what is not contained in the reasoned order cannot be supplemented by filing written statement in view of the law laid down in case **Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others** reported as **(1978) 1 SCC 405.** Therefore, additional argument which had also been raised of the undertaking on the basis of a legally trained mind is not liable to be accepted. The relevant observations read as under:-

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so

> mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji:
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> Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Resultantly, this Court is of the opinion that the order dated 24.8.2015 (Annexure P/9) is liable to be quashed to the extent that the recovery as such had been justified. The same is set aside to the extent that amount of ₹ 1,79,463/- is to be recovered from the petitioner. It is further directed that recovered amount from the petitioner shall be paid back to him within a period of two months from today. In case the needful is not done within the prescribed period, the respondents shall also pay interest at the rate of 8% per annum from the date the amount was recovered till the date of its repayment. The impugned orders qua reduction of pay of the petitioner are upheld.

Accordingly, the present writ petition is partly allowed.

October 16, 2019 **(G.S.SANDHAWALIA)**
Pka **Judge**

Whether speaking/reasoned Yes/No

Whether reportable: Yes/Nos