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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 23.12.2019

+ W.P.(C) 13601/2019

EMPLOYEES' STATE INSURANCE CORPORATION

..... Petitioner

Through: Ms. Nisha Hans & Mr. V.K.
Singh, Advs.

versus

DR. BHARTI JAIN

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

G.S.SISTANI, J. (ORAL)

CM APPL. No. 54986/2019 (exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

W.P.(C) 13601/2019 & CM APPL. No. 54985/2019 (stay)

Learned counsel for the petitioner submits that the respondent was overpaid due to erroneous fixation of salary at the time when the respondent sought retirement under the Voluntary Retirement Scheme (VRS). This inadvertent error was later sought to be corrected and the excess amount paid was deducted from her gratuity.

2. Reliance is placed on judgment dated 17.08.2012 rendered by the Supreme Court in a case titled *Chandi Prasad Uniyal & Ors. vs.*

State of Uttarakhand & Ors., C.A. No. 5899/2012, more particularly para 16 of that judgment, in support of the contention that any amount paid or recieved without authority of law can be recovered.

3. Relevant facts are that the respondent was engaged as an Insurance Medical Officer (IMO) Grade-II with the ESIC on contractual basis on 30.11.1987 *vide* Memorandum dated 17.06.1991 ; and was thereafter appointed on regular basis from 27.06.1991. The petitioner sought VRS in the year 2015. It is the case of the petitioner that at that stage it was noticed that the respondent had been paid in excess of the salary payable to her ; and an amount of Rs.7,27,499/- was accordingly recovered from her gratuity, which forced the respondent to file an O.A. No. 3491/2016, which has been allowed by the Tribunal and has led to filing of the present petition.

4. In the OA the respondent herein had averred that she had relied upon an Office Memorandum No. 28016/5/85 dated 31.01.1986; and on the basis of para 3 of that OM, she had negotiated her salary on the ground that she was already drawing grade pay of Rs.8700/- and thus she should be continued in the same grade pay, moreso when the post of 'Specialist' carried higher duties and responsibilities.

5. The respondent herein had submitted before the Tribunal that for the above reasons, the ESIC had agreed to grant a higher pay scale to her and she was accordingly paid a grade pay of Rs.8700/- from 2009 till she took voluntary retirement in the year 2015. In support of this contention, copies of pay slips were filed alongwith the O.A.

6. Another ground urged by the respondent herein before the Tribunal was that all persons who were appointed as Specialists and

opted to join were absorbed in the higher grade-pay, which was made personal to them, in case they were drawing a higher pay in the earlier post. The difference of pay-scale allowed was personal to them and was also required to be observed for future increase in pay. She also submitted that her grade-pay did not undergo any future revision from the year 2009 till her VRS was accepted on 15.02.2015.

7. Learned counsel for the petitioner on the other hand submits that there is nothing on record to show that the petitioner entered into any negotiation with the respondent for fixation of her grade-pay at Rs.8700/-.

8. We have heard learned counsel for the parties and have considered their rival submissions.

9. We are however unable to accept the submissions of the petitioner firstly, for the reason that there is no cogent explanation as to why the respondent continued to draw a pay of Rs.8700/- from the year 2009 till 2015. Thus, there evidently is truth in the averment made by the respondent before the Tribunal that she had negotiated her salary in terms of OM No. 28016/5/85 dated 31.01.1986.

10. Moreover, the Tribunal has rightly relied upon a decision in the case titled ***State of Punjab & Ors. vs. Rafiq Masih (White Washer) and Others*** reported as (2015) 4 SCC 334, the relevant para of which is reproduced below :

"18. 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 hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law :

- (i) xxxxx*
- (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.*
- (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*
- (iv) xxxxx*
- (v) xxxxx "*

11. We also deem it appropriate to reproduce para 13.1 of the decision of the Tribunal which reads as under :

"13.1 It is not disputed that the applicant had applied for the post of Specialist Grade-II, Jr. Scale (Radiology) and after due process of selection was appointed to the said post on 24.03.2009. The applicant was working in PB-IV with Grade Pay of Rs.8700/- when she applied for the post of Specialist Grade-II. The applicant has submitted that at the time of joining, she negotiated her salary in terms of Para-3 of the O.M. issued by Department of Personnel & Training on 31.01.1986, which states that:-

"Pay Fixation:

A Government servant selected for a post in a Central Public Enterprise will be free to negotiate his emoluments with the enterprise. On appointment to a post in a public sector enterprise on immediate absorption basis, a Government

servant will be at par with other employees of the enterprise and will be governed by the rules of the enterprise in all respects."

Due to her negotiation, the respondents agreed that she could draw Grade Pay of Rs. 8700/- (which she was already drawing when she joined the respondents Corporation) which would be personal to her. This fact has been denied by the respondents, who state that such an agreement never took place between the applicant and the respondents."

12. In view of the above discussion and for the reasons stated above, more particularly the decision rendered by the Supreme Court in the case of **Rafiq Masih (White Washer) and Others** (supra), we find no infirmity in the order passed by the Tribunal.

13. Accordingly no ground is made-out to entertain this petition.

14. The present petition and the pending application are therefore dismissed.

G.S.SISTANI, J.

ANUP JAIRAM BHAMBHANI, J.

DECEMBER 23, 2019/uj