

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 02.09.2020

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NOS.14620, 14739 & 16376 OF 2013

P.Sittiravel	..Petitioner in WP No.14620/13
S.Murugesan	..Petitioner in WP No.14739/13
S.Candavel	..Petitioner in WP No.16376/13

- Vs -

1. Union of India
rep. By the Secretary to Govt.
Department of Animal Husbandry
Government of Union Territory of
Puducherry, Puducherry.
 2. Pondicherry Veterinary College Society
rep. By its Chairman
Kurumbapet, Puducherry 605 009.
 3. The Dean
Rajiv Gandhi Institute of Veterinary
Education & Research, Kurumbapet
Puducherry 605 009
-Respondents in
WP 14620 & 14739/13

1. Union of India
rep. By the Government of Puducherry
Animal Husbandry & Welfare Dept.
Chief Secretariat, Puducherry.
2. Rajiv Gandhi Institute of Veterinary
and Animal Sciences
Kurumbapet, Puducherry
rep. By its Dean.

3. Ilangovan

4. S. Revathidevi

5. P.Sittiravel
- ..Respondents in
WP No.16376/13

W.P. Nos.14620 and 14739 of 2013 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorari calling for the records on the file of the 3rd respondent relating to the impugned order bearing Ref. No.A.12016/2012-13/A2/RIVER dated 17.5.2013 and quash the same.

W.P. No.16376 of 2013 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorari mandamus calling for the records on the file of the 3rd respondent relating to the impugned order bearing Ref. No.A.12016/2012-13/A2/RIVER dated 17.5.2013, quash the same and consequently direct the respondents to restore the petitioner's promotion with effect from 1.7.05 with all other consequential benefits including the wages on the basis of the promotion with effect from 1.7.2005.

For Petitioners : Mr. Ajaykumar in WP No.16376/13
Ms. Gopika in WP 14620 & 14739/13

For Respondents : Mr.Stalin Abhimanyu, for RR-1 to 3 in
WP Nos.14620 & 14739/13 and RR-1 & 2
in WP No.16376/13

COMMON ORDER

While the petitioners in W.P. Nos.14620 and 14739/13 have challenged the order revising the date of their promotion and consequential recovery of the excess amount paid, the petitioner in W.P. No.16376/13 has challenged the order revising his date of promotion and consequential recovery and has prayed for restoration of his promotion from the initial date of his promotion with all consequential benefits.

2. It is the case of the petitioners that they were appointed as Laboratory Assistants on various dates, as stated in their affidavit filed in support of their respective petition. After obtaining Diploma in Medical Laboratory Technician course (for short 'DMLT'), based on their qualifications, the petitioners were initially granted promotion to the post of Laboratory Technician on 20.4.2010. Thereafter some of the petitioners made representation to the competent authority for retrospective promotion from the date on which they had obtained the requisite qualification of DMLT. On consideration of their representations, vide order dated 30.8.10, revised promotion was granted from the date of the DMLT qualification obtained by the respective petitioners.

However, the competent authority, viz., the 3rd respondent, issued show cause notice on 11.2.13 calling upon the petitioners to show cause as to why the said promotion granted with retrospective effect should not be revised and also for recovery of the excess amount paid on the ground that the date on which retrospective promotion was granted, there was no post available in which the petitioners could be accommodated, to which the petitioners submitted their explanation. However, not satisfied with the reply, the 3rd respondent passed the impugned order of revision of promotion and also recovery of the excess amount paid. Aggrieved by the said impugned order, the present petitions have been filed for the relief supra.

3. Ms. Gopika, learned counsel appearing for the petitioners in W.P. Nos.14620 and 14739 of 2013, while submitted that the petitioners are not against the cancellation of their promotion from retrospective date, however, vehemently contended that for the fault committed by the Management in granting retrospective promotion, the petitioners cannot be penalised by making recovery from the payments made to them, as the promotion was granted by the competent authority with retrospective date. It is the further contention of the learned counsel for the petitioners that the revision of promotion was not on the basis of any misrepresentation or fraud committed by the petitioners and, therefore, recovery of the amount from the petitioners is wholly unsustainable. In this regard, learned counsel for the petitioner placed heavy reliance on the decision of the Hon'ble Supreme Court in State of Punjab & Ors - Vs - Rafiq Mashi (White Washer) & Ors. (2015 (4) SCC 334) to submit that for the fault committed in excess payment, the same cannot be recovered from the petitioners in the absence of misrepresentation and fraud on their part.

4. Mr. Ajay Kumar, learned counsel appearing for the petitioner in W.P. No.16376/13 submitted that the petitioner though joined the post of Laboratory Assistant in the year 2000, acquired DMLT qualification in the year 2005 and, therefore, on and from 2005, the petitioner was entitled for promotion, whereas respondents 3 to 5 acquired qualification only in the year 2007. It is the further submission of the learned counsel for the petitioner that though retrospective promotion was also granted to respondents 3 to 5 from the year 2007, however, recovery has been ordered only from the petitioner and the 5th respondent, for which there is no reason forthcoming from the official respondents. Therefore, the impugned order is wholly unsustainable. It is the further submission of the

learned counsel for the petitioner that the promotion has not been granted on any misrepresentation and, therefore the retrospective promotion granted by the authority and the consequential impugned order along with recovery based on the said impugned order is bad in law.

5. Learned standing counsel appearing for the official respondents submitted that it is not the date of acquirement of qualification by the petitioners that is crucial for the purpose of grant of promotion, but it is the availability of vacancies which is crucial for grant of promotion. It is the further submission of the learned standing counsel that as on the date of retrospective promotion, there was no vacancy available and, therefore, the revision of promotion from the year 2010 with retrospective date is wholly bad in law, which was duly interfered with by the competent authority by passing the impugned order and, therefore, no interference is called for with the order passed by the respondents. It is the further submission of the learned standing counsel that one post of Laboratory Technician was created on 5.5.95; three posts were created on 6.12.95 and 2 posts were created on 4.12.96. In all, as on the crucial date, only six posts were available, which was duly filled up and four more posts were created only on 16.4.2010. Therefore, prior to 16.4.2010, there being no vacant posts, the petitioners are not entitled for retrospective promotion, even though they were qualified for holding the post of Laboratory Technician. It is the further submission of the learned standing counsel that initially the promotion was granted by the competent authority by drawing seniority list on 20.4.10. However, the revision of promotion from retrospective date was only on the basis of the representation by some of the petitioners based on which revision order was passed on 30.8.10 granting retrospective promotion from the year 2005.

6. Learned standing counsel for the petitioner, on the contention that the petitioners have performed their duty and, therefore, recovery of the amount for the duty performed by them is unreasonable, submitted that the petitioners are entitled for promotion only from the date on which there are vacant posts. Prior to the date, the petitioners could not be promoted. Further, the promotion granted from retrospective date clearly shows that on the said date, when retrospective promotion was given, the petitioners were only holding the post of Laboratory Assistant and performing the duties of Laboratory Assistant

and not that of Laboratory Technician and, therefore, the stand of the petitioners that the amount paid to them for their services cannot be recovered is a wholly misconceived notion, which does not have the approval of law.

7. In support of his submissions, learned standing counsel placed reliance on the following decisions:-

- i) BSNL & Ors. - Vs - S.K.Dubey & Ors. (2014 SCC OnLine SC 174);
- ii) Union of India - Vs - K.K.VAdera & Ors. (1999 Supp. (2) SCC 625);
- iii) Sanjay K.Sinha-II & Ors. - Vs - State of Bihar & Ors. (2004 (10) SCC 734);
- iv) Nirmal Chandra Sinha - Vs - Union of India & Ors. (2008 (14) SCC 29);
- v) State of Punjab & Ors - Vs - Rafiq Mashi (White Washer) & Ors. (2015 (4) SCC 334); and
- vi) Union of India & Ors. - Vs - N.C. Murali & Ors. (2017 (13) SCC 575

8. This Court bestowed its best attention to the contentions advanced by the learned counsel on either side and also perused the materials available on record as also the decisions relied on by the parties in support of their respective contention.

9. The facts in issue are not in dispute. The whole gamut of the case lies in a narrow sphere - Whether the promotion granted to the petitioners retrospectively is sustainable and if not, whether recovery of the amount ordered is justified.

10. It is the case of the official respondents that there was no vacant posts either in the year 2005 or in the year 2007 for the petitioners herein to be granted retrospective promotion. It is the further case of the official respondents that only on and from 16.4.2010, four posts were created and, therefore, the petitioners could be considered for promotion only from the said date.

11. Though it is the claim of the petitioners that on and from the date of acquirement of DMLT qualification, the petitioners are eligible for promotion, it is to be pointed out that due promotion is always available only on there being vacant posts. It is not the case of the petitioners that vacant posts were existing in which they have been promoted. The affidavits of the petitioners are silent on this aspect. However, it is the categorical stand of the official respondents that no posts were vacant on the date

of the retrospective promotion of the petitioners. However, only on and from 16.4.2010, four posts were created in which the petitioners were granted promotion vide the initial order dated 20.4.10, only to be revised by way of revised promotion order dated 3.8.10. When there are no vacant posts prior to 16.4.2010, this Court is at a loss to understand as to the basis on which representations were given by the some of the petitioners for giving them promotion from the date of acquirement of qualification. Either the petitioners should have been aware of the vacancy position, in which case, the same would stand reflected in the affidavit filed by the petitioners, and in the absence of the vacancy position being shown by the petitioners in the affidavit, this Court is left with no alternative but to draw an adverse inference with regard to the retrospective promotion given to the petitioners.

12. Even now, it is only the contention of the petitioners that recovery should not be made as retrospective promotion was granted by the authority and no fraud or collusion has been alleged on the part of the petitioners. Though such a contention, on the face of it looks attractive, however, the petitioners having not established that vacancy was existing as on the date, when they claim retrospective promotion, it is not open to the petitioners to contend that no recovery should be made as the petitioners were not at fault, since as on the said date, in the absence of any vacancy, the petitioners could not have been promoted. Further, it is to be pointed out that the said retrospective promotion was granted only on the basis of representation submitted by some petitioners.

13. In State of Punjab - Vs - Rafiq Masih (2015 (4) SCC 334), the Supreme Court had considered the case of recovery of amount, which is paid to an employee and the effect of the same and has enumerated the circumstances in which the said recovery could stand justified. The relevant portion of the said decision is extracted hereunder for ready reference :-

"13. First and foremost, it is pertinent to note, that this Court in its judgment in Syed Abdul Qadir case [Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475 : (2009) 1 SCC (L&S) 744] recognised, that the issue of recovery revolved on the action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorised payment is detected within a short period of time, it would be open for

the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference because an action is iniquitous, must really be perceived as, interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements, and a variety of sundry expenses. Based on the above consideration, we are of the view, that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee."

(Emphasis Supplied)

14. The above decision in Rafiq Masih's case is pressed into service by both the parties to substantiate their claim, either for or against the recovery. However, two aspects are relevant, which renders the excess payment liable for recovery. Though it is the contention of the petitioners that they have discharged their work for which payment has been made and, therefore, the same cannot be recovered, however, it is to be pointed out prior to 20.4.2010, the date on which promotion was granted to the

petitioners, they were only discharging the duties of Laboratory Assistant. Only after 20.4.2010, they stand promoted and only whereinafter, they were discharging the duties of the post of Laboratory Technician. Vide order 30.8.2010, retrospective promotion was granted to the petitioners from the year 2005. As already noted, the petitioners, prior to 20.4.2010, only having discharged the duties of the post of Laboratory Assistant, the payment made to them in the post of Laboratory Technician can very well be recovered, as prior to 20.4.2010, the petitioners have not discharged the duties of the post of Laboratory Technician. Further, the next limb of the decision of the Hon'ble Supreme Court, which is in favour of the official respondents is the fact that the revised promotion with retrospective effect was given on 30.8.2010. The official respondents had issued show cause notice to the petitioners on 11.2.2013, i.e., within a period of a year and a half. The official respondents have not slept over the matter, but have acted diligently and swiftly by issuing the show cause notice within a period of a year and a half. The Supreme Court in the decision noted above, has held that if the mistake is detected within a period of five years, the amount can be recovered. In the case on hand, the official respondents having detected the wrongful revision of promotion, had issued the show cause notice and had issued the impugned order within a period of about one and a half years and, therefore, the decision of the Hon'ble Apex Court in Rafiq Masih's case would stand squarely attracted.

15. The petitioners having been promoted with retrospective effect in vacancies, that were non-existent on the crucial date, cannot come before this Court and claim that their retrospective promotion should be sustained and that recovery of the amount paid to them should not be made. Not only posts were non-existent on the said date, when the petitioners were granted retrospective promotion, but they have not discharged their duties in the promoted posts during the period when recovery is sought to be made and, therefore, the petitioners are not entitled to the relief sought for.

16. For the reasons aforesaid, these writ petitions are dismissed and the respondents are directed to recover the amount from the petitioners as detailed in the impugned order in accordance with law. Further, it is made clear that the recovery of the amount should be without detriment to the livelihood of the petitioners as mandated by the Hon'ble Supreme Court in Rafiq Mashi's case. Consequently,

connected miscellaneous petitions are closed. However,
there shall be no order as to costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

GLN

To

1. The Secretary to Government
Department of Animal Husbandry
Government of Union Territory of
Puducherry, Puducherry.
2. Pondicherry Veterinary College Society
rep. By its Chairman
Kurumbapet, Puducherry 605 009.
3. The Dean
Rajiv Gandhi Institute of Veterinary
Education & Research, Kurumbapet
Puducherry 605 009.

+1cc to Mr.V.Ajayakumar, Advocate, S.R.No.28741
+1cc to the Government Pleader(Puducherry),
S.R.No.28804,28805,28806

W.P. NOS.14620, 14739
& 16376 OF 2013

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