IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9011 of 2018

==

Sabha Nand Sharma son of Late Brij Nandan Sharma resident of village - Nathupur, Post - Doghra, Police Station - Bihta, District - Patna.

... ... Petitioner/s

Versus

1. The State Of Bihar
2. The Director, Primary Education, Govt. of Bihar, Patna.
3. The Additional Secretary, Education Department, Government of Bihar, Patna.
4. The Regional Education Deputy Director, Patna Division, Patna.
5. The District Magistrate, Patna.
6. The District Education Officer, Patna, District - Patna.
7. The District Programme Officer Establishment, Patna.
8. The Head Master, Girls Middle School Lohia Nagar, Circle Mahendru, District - Patna.
9. Ram Babu Sharma son of Late Ram Karan Singh resident of village - Nathupur, Police Station - Bihta, District - Patna.

... ... Respondent/s

==

Appearance :
For the Petitioner/s : Mr.Anil Kumar, Adv.
For the Respondent/s : Mr.Prabhakar Jha -Gp27

==

CORAM: HONOURABLE MR. JUSTICE SANJEEV PRAKASH SHARMA

ORAL ORDER

3 06-09-2022 1. Heard the parties.

2. The petitioner by way of this writ petition assails the order dated 23.01.2018, whereby the promotion awarded to the petitioner by the District Education (Establishment) Committee on 07.09.1991 w.e.f. 01.04.1986 was treated to have been canceled vide order dated 29.06.1992 and, therefore, the pay fixations made on the basis of promotion, in the year 2003 were canceled and recovery was sought to be made from the

petitioner after he has attained superannuation on 31st July 2017.

3. Learned counsel submits that the promotion committee which awarded promotion to the petitioner on 07.09.1991 with effect from 01.04.1986, had also made other promotions and the order dated 29.06.1992 came up for challenge before this Court in a Bunch of writ petitions which were decided by this Court on 22nd November 1989. However, this Court finds that the judgment was passed on 22nd November 1989 and it took into consideration the earlier order of cancellation of promotion dated 04.11.1988, which were in relation to other cases of promotion. The petitioner cannot draw any similarity on the basis of such a judgment.

4. This Court further finds that the petitioner secured Matric trained senior scale on completion of twelve years of service with effect from 01.09.1994 vide order dated 31.12.1997. Thus, after having obtained the senior scale on completion of twelve years service as a Matric trained, he would be entitled for graduation scale only thereafter. However, knowing fully well that he has been granted as Matric trained senior scale, he got his pay fixation done in 2003 based on the promotion order dated 07.09.1991 with effect from 01.04.1986. Although the order of 07.09.1991 stood already cancelled by the

Government vide its Order 29.06.1992. The claim, therefore, was wholly false and it is during service that the petitioner has got his wrongful pay fixations done. After having got his fixation done in 2003, he continued to draw the higher pay scale up to the date of superannuation that is in 2017.

5. The petitioner was issued a show cause notice and was given an opportunity of hearing the illegality came to the notice immediately after retirement of the petitioner while fixing his pension. Notice is found to have been issued on 16.08.2017. Thus, it is not a case where the recovery is being sought on the basis of error committed by others. On the other hand it is a case where the petitioner was actively involved in getting his pay fixation wrongfully revised in the pay scale of graduate trained with effect from 01.04.1986, while he was knowing that he had received the Matric trained senior scale only from 1994 by the orders passed in the year 1997.

6. Learned counsel for the petitioner relies on the Judgment passed by the **Supreme Court in the case (2015) 4 SCC 334 (State of Punjab & Ors. Vrs. Rafiq Masih (white washer) & Ors.** as well as judgments passed by this Court in support of his submission.

7. This Court, however, finds that the case of the

petitioner is distinguishable from the facts and circumstances of the case as mentioned in the **Rafiq Masih (white washer) & Ors. (supra)**. The petitioner was holding the post of in -charge Headmaster and was, therefore, having full knowledge about the accounts. A person who plays fraud and obtains illegally amount, cannot use the umbrage of retirement for the purpose of saving himself from recovery of the undue salary received by illegal means.

8. In case of **(2015) 4 SCC 334 (State of Punjab & Ors. Vrs. Rafiq Masih (white washer) & Ors.)** two Judges Bench of the Hon'ble Apex Court held as under:-

> "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 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."

9. The same view was reiterated by the Hon'ble Apex Court in the case of **2022 SCC Online SC 536 (Thomas Daniel Vrs. State of Kerala & Ors.)** which is held as under:-

> *" 14. Coming to the facts of the present case, it is not contended before us that on account of the misrepresentation or fraud played by the appellant, the excess amounts have been paid. The appellant has retired on 31.03.1999. In fact, the case of the respondents is that excess payment was made due to a mistake in interpreting Kerala Service Rules which was subsequently pointed out by the Accountant General."*

10. The three Judges Bench in case of (**High Court of Punjab and Haryana & Ors. Vrs. Jagdev Singh) (2016) 14 SCC 267** distinguished Rafiq Masih (supra) held as under:-

> *"11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found*

to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.

12. For these reasons, the judgment of the High Court which set aside the action for recovery is unsustainable. However, we are of the view that the recovery should be made in reasonable instalments. We direct that the recovery be made in equated monthly instalments spread over a period of two years."

11. Thus, from above, it is apparent that facts of each case will have to be examined as to whether recovery can be made against the Government servant who has attained superannuation.

12. In the facts of the present case, this Court, the said judgment could not have any application which is essentially based on no fault theory. The State Government and its authorities are an abstract body and is manned by people, who if allowed to act in unscrupulous manner, would fritter away the Treasury of the Government exchequer. If amount has been received by fraudulent means, recoveries in such cases requires to be done even if they are detected after retirement. In **Thomas Daniel (Supra)** the Court was conscious that the appellant has not played fraud or mis-represented, whereas in the present case the petitioner has committed fraud.

13. Keeping in view above, no case for inference is made out, the petitioner who has retired, will have to pay back the amount which it has received wrongfully. However, considering that the petitioner is a retired person, the recovery may be made in installments or the same has been already realised from the gratuity. It is stated that the recovery has been made from the petitioner's gratuity and the complete gratuity amount has not been released. The law in this regard is settled, recoveries are not to be made from the gratuity amount. However, the recoveries can be made from the pension. In view of the directions given above, while the State may release the entire gratuity amount, the recovery shall be made from the pension in 12 equal installments along with interest at the rate of 6 per cent.

14. The writ petition is accordingly, dismissed.

(Sanjeev Prakash Sharma, J)

Pravinkumar/-

Item No. 58

U			