

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 12490 OF 2014

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR

Pritilata Mohapatra

.....

Petitioner

-Versus-

State of Odisha
and others

.....

Opp. Parties

For Petitioner : M/s J.K. Rath, Sr. Advocate
along with Mr. D.N. Rath and
R. Achary, Advocates.

For Opp. Parties : Mr. S. Jena,
Standing Counsel S&ME
[O.Ps. No.1 to 3]

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
HONOURABLE MISS JUSTICE SAVITRI RATHO**

Date of hearing and judgment : 04.05.2022

DR. B.R. SARANGI, J. The petitioner, who retired as a Headmistress, has filed this writ petition seeking to quash the order dated 10.01.2012 passed by opposite party no.3 under Annexure-6, and consequential order dated 12.03.2014 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 910 (C) of 2012 under Annexure-7, and to issue direction to the authority not to recover the so called excess payment made to her.

2. The factual matrix of the case, in brief, is that the petitioner had joined in a Matric C.T. post in L.S.E.S. cadre on 16.08.1978 and was appointed in a trained graduate post w.e.f. 1981. Thereafter, she was promoted to the Jr. S.E.S. cadre (Women Branch) on regular basis, vide order dated 17.08.1989, by the C.I. of Schools, Puri. On promotion to Jr. S.E.S. cadre, she was posted at Dandamukundapur High School, Puri against the vacancy of the year 1981, but she actually joined on 17.08.1989. The name of the petitioner was shown at sl.no.937 of the provisional gradation list for

Jr. S.E.S. teacher published on 17.05.1999 by the opposite party no.2. In the said gradation list, the date of joining in Jr. S.E.S. cadre was shown to be 01.12.1981.

2.1. The Finance Department in its resolution dated 17.04.1998 and 03.06.1998 prescribed the rules for fixation of pay in time bound advancement scale in favour of government employee allowing 1st time bound advancement scale on completion of 15 years of service under O.R.S.P. Rules, 1989. Pursuant to such resolution, the petitioner filed the statement in the prescribed forms for allowing her time bound advancement scale of pay (Rs.5500-175-9000) with effect from 01.12.1996, i.e., on completion of 15 years of service from 01.12.1981, the date on which she joined in Jr. S.E.S. cadre. But the same was returned to the petitioner with an endorsement "she was appointed in Jr. S.E.S. cadre w.e.f. 22.08.1989 against the post, which was lying vacant since the year 1981. Her seniority was stipulated to be counted from 1981 of the

promotion to next higher rank with financial benefit from the date of actual joining with T.G. post. So her 15 years service will be counted from 22.08.89.”

2.2. Aggrieved by the aforesaid order of the opposite parties, the petitioner preferred original application before the tribunal bearing O.A. No. 533 of 2000, which was disposed of with a direction that the petitioner is entitled to TBA scale of pay since 01.12.1981, i.e., since her date of joining in Jr. S.E.S. cadre, but disallowed the petitioner to get any relief regarding payment of consequential arrear and alleged incorrect fixation of her pay.

2.3. Challenging the aforesaid order of the tribunal, the petitioner preferred W.P.(C) No. 3098 of 2011, which was disposed of by this Court with a direction to opposite party no.2 to consider the prayer of the petitioner and take a decision thereon, as early as possible, preferably within a period of three months. Pursuant to the order of this Court, opposite party no.2,

instead of considering the prayer of the petitioner in the light of observation made by this Court, rejected the prayer of the petitioner regarding allowing TBA scale of pay since 01.12.1981, i.e., the date of promotion to Jr. S.E.S. cadre and further directed that necessary steps may be taken to recover the salary amount from the petitioner which is alleged to be wrongly calculated and paid to the petitioner from 01.12.1996 to 31.12.2005. In pursuance of the order of opposite party no.2, opposite party no.3 passed order on 10.01.2012, with a direction to recover the aforesaid amount from the petitioner. It is contended that the order dated 10.01.2012 disallowing the TBA scale of pay to the petitioner since 01.12.1996 and consequential direction for recovery of salary amount, which was rightly disbursed to the petitioner from 01.12.1996 to 31.12.2005, is arbitrary and contrary to the established principle of law. Aggrieved by the aforesaid order of the authority, the petitioner approached the tribunal by filing O.A. No. 910 (C) of 2012, which was dismissed by the tribunal, vide order

dated 12.03.2014, by holding that no illegality or irregularity has been committed by the authority in passing the order impugned. Hence this application.

3. Mr. J.K. Rath, learned Senior Counsel appearing along with Mr. D.N. Rath, learned counsel for the petitioner contended that admittedly the petitioner had been given the benefit from the date she had got promotion w.e.f. 01.12.1981 and accordingly TBA scale of pay was also allowed to her and as a consequence thereof her scale of pay was fixed and salary was paid to her. But, after long lapse of more than 10 years, when the order in Annexure-6 was passed directing to recover the amount from her, the petitioner approached the tribunal. But, the tribunal, without taking into consideration the factual matrix in proper perspective, confirmed the order of recovery passed by the authority, which is arbitrary, unreasonable and contrary to the provisions of law. More so, the said order runs contrary to the judgment passed by the apex Court in the case of ***State of Punjab v. Rafiq Masih***, Civil Appeal No.

11527 of 2014, arising out of SLP (C) No. 11684 of 2012, disposed of on 18.12.2014, reported in (2015) 4 SCC 334, wherein the apex Court held that recovery from retired employees, or employees who are due to retire within one year of the order of recovery, would be impermissible in law. Thus, it is contended that the benefit which has already been extended to the petitioner should not have been recovered. As such, the tribunal has committed gross error in passing the order impugned and accordingly he seeks interference of this Court.

4. Mr. S. Jena, learned Standing Counsel for School and Mass Education Department contended that by mistake of fact and erroneously the benefit had been extended to the petitioner and subsequently when the same was brought to the notice of the authority, the amount was recovered from her and, as such, the principle laid down by the apex Court in the case of **Rafiq Masih**, has no application to the present case. To substantiate his contention, he has relied upon the

judgment of the apex Court in the case of **Thomas Daniel v. State of Kerala**, Civil Appeal No.7115 of 2010 disposed of on 02.05.2022.

5. This Court heard Mr. J.K. Rath, learned Senior Counsel appearing along with Mr. D.N. Rath, learned counsel for the petitioner; and Mr. S. Jena, learned Standing Counsel for School and Mass Education Department appearing for the opposite parties by hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. So far as the factual matrix, as mentioned above, there is no dispute. The only question to be decided by this Court is, whether the financial benefit extended to the petitioner w.e.f. 01.12.1981 is recoverable after her retirement or not.

7. In the case of **Rafiq Masih** (supra), on which reliance was placed by the learned counsel for the

petitioner, the apex Court has laid down certain principles in paragraph-12 of the judgment, which are extracted hereunder:

“12. 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, summaries the following few situations, wherein recoveries by the employees, 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.”*

8. If the above quoted principles are taken into consideration, then the case of the petitioner is fully covered by the same, meaning thereby, in the meantime the petitioner has already retired from service and, as such, the amount paid to her in excess cannot be recovered from her as the same is impermissible under law. But in a recent judgment rendered in **Thomas Daniel** (supra), which was relied upon by the learned Standing Counsel for School and Mass Education Department, the apex Court in paragraph-9 held as under:-

“(9) This Court in a catena of decisions has consistently held that if the excess amount was not paid on account of any misrepresentation or fraud of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/ allowance or on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable. This relief against the recovery is granted not because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered. This court has further held that if in a given case, it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may on the facts and circumstances of

any particular case order for recovery of amount paid in excess.”

9. If the ratio decided in **Thomas Daniel** (supra) is taken into consideration, there is no dispute that the principles laid down by the apex Court in the case of **Rafiq Masih** (supra) are to be adhered to. But there is a rider provided in **Thomas Daniel** (supra), that if it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may on the facts and circumstances of any particular case order for recovery of amount paid in excess.

10. If the aforesaid ratio is applied to the present case, admittedly the benefit was extended to the petitioner from 01.12.1981 in terms of the resolution issued by the Finance Department and, as such, her pay was fixed and the benefit was extended to the

petitioner from that date. It is not that either employer or the employee had no knowledge about such excess payment. If the employee is entitled to get certain benefit and the same was extended to her, the employer cannot absolve its liability or obligation not to pay the amount. Thereby, the demand for recovery of the amount from the petitioner, which was paid by the employer to the petitioner with the knowledge that the same was admissible to her, that too more than 20 years after pointing out that the same was extended wrongly, is not permissible, particularly when the petitioner has already retired from service. Therefore, the apex Court in **Thomas Daniel** (supra) consciously held that if the payment received was in excess of what was due or wrongly paid or in cases where error is detected or corrected within a short time of wrong payment, such payment is only recoverable. But in the present case, since the excess payment made was detected after more than 20 years, the ratio decided in **Thomas Daniel** (supra) may not have any application.

It is of relevance to mention, in paragraph-13 of the judgment in **Thomas Daniel** (supra), the principles laid down in the case of **Rafiq Masih** (supra) have also been taken note of.

11. In the above view of the matter, this Court is of the considered opinion that excess amount sought to be recovered was not paid to the petitioner on account of any misrepresentation or fraud played on the part of the petitioner, but the same was paid as due and admissible to her and, as such, the same was with the knowledge of both the employer and the employee. Therefore, the direction given by the authority to recover the excess amount paid to the petitioner, vide Annexure-6 dated 10.01.2012, cannot sustain in the eye of law, so also the consequential order of confirmation dated 12.03.2014 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 910 (C) of 2012 under Annexure-7, and the same are liable to be quashed and are hereby quashed. The opposite parties are directed not to recover the

excess amount paid to the petitioner in terms of the judgments of the apex Court in the cases of **Rafiq Masih** and **Thomas Daniel** (supra). Needless to say, if the retiral benefits have not been paid to the petitioner, the same shall be paid to her as expeditiously as possible, preferably within a period of four months from the date of production of certified copy of this judgment.

12. In the result, the writ petition stands allowed. However, there shall be no order as to cost.

.....
DR. B.R. SARANGI,
JUDGE

SAVITRI RATHO, J.

I agree.

.....
SAVITRI RATHO,
JUDGE

Orissa High Court, Cuttack
The 4th May, 2022, Ashok/GDS