

ORISSA HIGH COURT: CUTTACK

WPC (OAC) NO. 935 OF 2011

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

AFR

Shantasen Pradhan Petitioner

-Versus-

State of Odisha and others Opp. Parties

For Petitioner : Mr. Anil Kumar Behera,
Advocate

For Opp. Parties : Mr. S.K. Jena,
Standing Counsel for School &
Mass Education Department.

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI

Date of Judgment : 14.10.2022

DR. B.R. SARANGI, J. The petitioner stating to be working as Head Master in Senior SES Cadre has filed this writ petition challenging recovery of excess amount consequent upon fixation of pay on the basis of revised option, vide order dated 04.01.2011 passed by opposite

party no.3 under Annexure-4, wherein the petitioner was directed to deposit the excess amount of Rs.53,940/- in one installment through treasury challan.

2. The factual matrix of the case, in brief, is that while the petitioner was working as Head Master in a Government High School belonging to Senior S.E.S. Cadre, the Government of Odisha revised the pay of the Government Servants by introducing Orissa Revised Scale of Pay Rules, 2008, ("ORSP Rules, 2008" in short) which had been given effect to from 01.01.2006. On the date of coming into effect of ORSP Rules, 2008, i.e., as on 01.01.2006, the petitioner was getting the salary in the pay scale of Rs.5700-9900/-. As per the provisions of ORSP Rules, 2008, the pay of the petitioner was fixed at Rs.14330/- with the grade pay of Rs.4200/- vide order dated 16.01.2009. In the said order, the next increment was allowed with effect from 01.01.2007 by sanctioning ACP, since the petitioner had completed 15 years of service in the grade of Head Master. The petitioner was allowed Head Master scale of pay with effect from

14.01.1992, when he completed 7 years of service as B.Ed qualified teacher. Subsequently, as per the order of the Government dated 08.04.2010, the petitioner re-exercised his option to come over to the Revised Scale of Pay Rules, 2008 w.e.f 15.01.2007 by retaining the pre-revised scale of pay till 14.01.2007 and availing TBA scale of pay in the pre-revised scale. Accordingly, the petitioner was sanctioned TBA scale of pay of Rs.6500-10,500/- of the pre-revised scale of pay of Rs.5700-9900/- with effect from 15.01.2007, as he completed 15 years of service in the pre-revised scale on 15.01.2007. Taking into account the TBA scale of pay, the pay of the petitioner was revised as per ORSP Rules, 2008 and the petitioner was placed in the revised pay band of Rs.15440/- and Grade Pay of Rs.4600/- in revised scale of pay of Rs. 9300-34800/- with effect from 15.01.2007. Taking into account the revised option and consequential re-fixation of pay, the opposite parties assessed the excess amount drawn by the petitioner for the period from 01.01.2006 to 15.01.2007 amounting to Rs.53,940/- and vide order

impugned dated 04.01.2011, the petitioner was directed to refund the said amount in one installment on the basis of the undertaking furnished by him. Aggrieved by such action, the petitioner has approached this Court by filing the present writ petition.

3. Mr. A.K. Behera, learned counsel appearing for the petitioner vehemently contended that the benefit of re-fixation of revised scale for the period from 01.01.2006 to 15.01.2007 was not the outcome of any misrepresentation or fraud. Rather the petitioner is entitled to get the same under ORSP Rules, 2008, which he had received towards salary. To re-exercise the option, the opportunity was given by the opposite parties and as a result thereof, the petitioner re-exercised his option and, accordingly, the pay was fixed as per pay fixation order dated 26.06.2010. Thereby, if at all any excess amount has been paid that cannot be recoverable from the petitioner as it is not an outcome of misrepresentation of fact by the petitioner.

To substantiate his contention, learned counsel for the petitioner has relied upon the judgments of the apex Court in the cases of ***State of Punjab v. Rafiq Masih***, (2015) 4 SCC 334 and ***V. Gangaram v. Regional Joint Director***, AIR 1997 SC 2776.

4. On the contrary, Mr. S. Jena, learned Standing Counsel for School and Mass Education Department contended that as per the provisions of ORSP Rules, 2008, vide notification made on 24.02.2008, the pay of the petitioner had been fixed with effect from 01.01.2006 after receipt of the proposal for fixation of pay along with an undertaking regarding refund of excess payment paid due to fixation of pay as per ORSP Rules, 2008. Pursuant to the Government order dated 08.04.2010 since the petitioner had re-exercised his option to come over to the revised scale of pay after availing TBA scale of pay in the pre-revised scale with effect from 15.01.2007, his pay had been re-fixed on 15.01.2007 after receipt of the recovery statement showing excess payment paid to him earlier due to fixation of pay under ORSP Rules, 2008 on

01.01.2006. As such, the petitioner has also furnished an undertaking on 15.01.2009 to the effect that if any excess amount is paid that will be recovered from the petitioner. Therefore, if the mistake committed by the authority has been detected and subsequently the same has been directed to be recovered, no illegality or irregularity has been committed by the authority and, as such, the petitioner is bound by his undertaking and in terms of such undertaking, the excess amount so paid, is liable to be recovered from the petitioner. He also contended that the principle laid down by the apex Court in **Rafiq Masih** (supra) has no application to the present case.

To substantiate his contention, learned Standing Counsel for School and Mass Education Department has relied on the judgment of the apex Court in the case of **High Court of Punjab and Haryana v. Jagdev Singh**, (2016) 14 SCC 267.

5. This Court heard Mr. A.K. Behera, learned Counsel appearing for the petitioner and Mr. S. Jena, learned Standing Counsel for School & Mass Education

Department, appearing for the opposite parties by hybrid mode, and perused the records. 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. The admitted fact is that the petitioner had exercised his option for grant of revised scale of pay with effect from 15.01.2007 by retaining the pre-revised scale of pay till 14.01.2007 and availing TBA scale of pay in the pre-revised scale. Accordingly, the petitioner was sanctioned TBA Scale of pay of Rs.6500-10,500/- of the pre-revised scale of pay of Rs.5700-9900/- with effect from 15.01.2007, with an undertaking that if any excess amount is paid the same shall be recovered. When subsequently it was detected that he is not entitled to get such benefit, the order under Annexure-4 dated 04.01.2011 was passed for recovery of excess amount of Rs.53940/- in one installment, in view of the undertaking furnished by the petitioner on 15.01.2009 vide Annexure-A/3 to the counter affidavit.

7. It is made clear that the petitioner to whom the payment was made at the first instance was clearly placed on notice that excess payment if found to have been made, the same is required to be refunded. Therefore, in view of the undertaking furnished, while opting for revised scale of pay, that he would refund the excess amount paid, he is bound by such undertaking. The claim made by the petitioner is that the excess amount should not be recovered from him and to substantiate the same, he relied on the judgment of **V. Gangaram** (supra), where the apex Court held that if the department by itself wrongly had given him four increments in that case recovery of excess payment is not allowed to be made. But fact of the said case is distinguishable from the present case. Here, the petitioner has furnished an undertaking that if any excess amount is paid, that can be recovered. Thereby, the ratio of **V. Gangaram** (supra) will not apply to the present case.

8. So far as **Rafiq Masih** (supra) is concerned, the apex Court has laid down the guidelines in paragraph-12 of the judgment to the following effect;-

“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.”*

While laying down the aforementioned principles, the apex Court has taken note of the fact that 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. But fact remains in the present case when the petitioner has re-exercised his option and furnished an undertaking and subsequently it was revealed that excess payment has been made in that case, he is liable for refund of the amount in view of the undertaking given by him.

9. Meaning of “undertaking” and effect of such an undertaking reads as follows:-

Black’s Law Dictionary, 5th Edn. defines “undertaking” in the following words:

“A promise, engagement, or stipulation. An engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other. It does not necessarily imply a consideration. In a somewhat special sense, a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtain some

concession from the court or the opposite party. A promise or security in any form.”

Osborn’s Concise Law Dictionary, 10th Edn,

defines “undertaking” in the following words:

“A promise, especially a promise in the course of legal proceedings by a party or his counsel, which may be enforced by attachment or otherwise in the same manner as an injunction.”

In **M. v. Home Office**, (1992) 4 All ER 97, the expression “undertaking” has been dealt with in the following manner:

“If a party, or solicitors or counsel on his behalf, so act as to convey to the court the firm conviction that an undertaking is being given, that party will be bound and it will be no answer that he did not think that he was giving it or that he was misunderstood.”

Hudson, In re, (1966) 1 All ER 110, the English Court observed as under:

“An undertaking to the court confers, no personal right or remedy on any other party.”

Similar view has also been taken by the apex Court in **Rama Narang (5) v. Ramesh Narang**, (2009) 16 SCC 126 : AIR 2007 SC 2029.

10. In **Jagdev Singh** (supra), the apex Court has also taken note of the decision in the case of **Rafiq Masih** (supra) and in paragraph-11, the apex Court observed as follows:-

“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.”

11. Keeping in view the ratio decided in the case of **Jagdev Singh** (supra), there is no doubt that the petitioner 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 and the petitioner has furnished the undertaking while opting for the revised pay scale. He is bound by such undertaking and, as such, the judgment of the apex Court in **Jagdev Singh** (supra) is fully applicable to the present case. Therefore, the direction

given for recovery of the amount on the basis of the undertaking furnished by the petitioner is well justified.

12. Consequentially, this Court does not find any merit in the writ petition, which is accordingly dismissed. However, there shall be no order as to costs.

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DR. B.R. SARANGI,
JUDGE

Orissa High Court, Cuttack
The 14th October, 2022, Arun/GDS

