IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.187 of 2022
In
Civil Writ Jurisdiction Case No.4791 of 2020

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1. Kishor Kumar son of Keshri Narayan Mahto resident of Village and P.O.- Kawadpur, District- Lakhisarai, Bihar- 811106.
2. Saroj Kumar Singh son of Late Baijnath Singh, Village- Koriawa, P.O.- Hasadih, District- Patna.
3. Md. Israr Ahmed son of Md. Raja Karim, resident of Village and P.O.- Charuawan, P.S. Charuanwan, P.S. Shekhopur Sarai District- Sheikhpura, Bihar- 811103.
4. Nawal Kishore son of Late Gopal Sharan Singh resident of Village- Bakuwan, P.O. Poawan, P.S. Masaurhi, District- Patna- 804452.
5. Ram Prasad Singh Yadav son of Late Ram Chhapit Singh Yadav, resident of New Vikas Nagar, Kothiya, Kurgi, Sadaquat Ashram, District- Patna- 800010.
6. Manju Singh wife of Dharmendra Sharma, resident of 2E, Shivam Kutir, Boring Road, Shivpuri, Phulwari, L.B.S. Nagar, P.O. Phulwari, P.S. Phulwari, District- Patna- 800023.
7. Abha Rani wife of Sanjay Kumar, resident of Village- Madapur Chaube, P.O. Kharaunadih, P.S. Sadar, District- Muzaffarpur.

... ... Appellant/s

Versus

1. The State of Bihar through the Principal Secretary, Education Department, Government of Bihar, Patna.
2. The Principal Secretary, Education Department, Government of Bihar, Patna.
3. The Director, Primary Education, Education Department, Government of Bihar, Patna.
4. The Regional Deputy Director of Education, Patna.
5. The Principal Secretary, Finance Department, Govt. of Bihar, Patna

... ... Respondent/s

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Appearance :

For the Appellants	:	Mr. Nikhil Kumar Agrawal, Advocate
		Ms. Aditi Hansaria, Advocate
For the Respondents	:	Mr. Ajay Kumar Rastogi, AAG-10

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE MADHURESH PRASAD)

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Date : 18-04-2023

1. Heard learned counsel for the appellants and learned counsel for the State.

2. By this intra court appeal, the appellants have approached this Court being aggrieved and dissatisfied with the judgment passed in the writ proceedings on 21.03.2022 by the Hon’ble Single Judge.

3. The petitioners were granted one increment while placing them in the higher pay scale of Rs. 9300-34800 with grade pay of Rs. 4800 as a financial up-gradation being the second progression, under the Time Bound Promotion/Modified Assured Carrier Progression (MACP) Scheme. The benefit was granted to Petitioner Nos. 1 to 6 with effect from 2011. Petitioner No. 7 was granted the benefit with effect from 2015.

4. Subsequently, the petitioner Nos. 1 to 6 were granted regular promotion on 20.11.2015, from the post of ‘Assistant Teacher’ to the post of ‘Lecturer’ carrying the same pay scale of Rs. 9300-34800 with grade pay of Rs. 4800. The same promotion was granted to Petitioner No. 7 with effect from 30.06.2016. While granting this regular promotion also, the petitioners were granted the benefit of one increment, applying Rule 22(1)(a)(1) of the Fundamental Rules.

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5. Claiming similar benefits, some other persons approached this Court and the State Government was directed to examine their claim for grant of benefit of increment twice, once at the time of grant of financial progression under the MACP Scheme; and the second when they were actually promoted to the higher post carrying the same pay scale with grade pay.

6. After examining the claim of others, the Department of Education concluded that one increment of 3 percent of pay cannot be granted twice, once while being placed in the higher pay scale due to financial upgradation under the Time Bound Promotion/MACP Scheme, and then again at the time of issuance of notification for regular promotion in the same scale with same grade pay.

7. The petitioners had been granted the benefit twice. The State Authorities were, therefore, of the opinion that their pay fixation was required to be done afresh maintaining only one increment, which was granted to the petitioners while they were placed in the pay scale of Rs. 9300-34800 with grade pay of Rs. 4800 due to financial progression under the MACP Scheme. Such re-fixation, obviously, resulted in a consequential decision to recover the amount paid in excess.

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8. After due consideration of the issue, the Hon'ble Single Judge considering the provisions contained in Rule 22(1)(a)(1) of the Fundamental Rules as well as provisions contained in the MACP Scheme did not find any infirmity in the decision of the State Authorities and dismissed the writ petition filed by the instant appellants.

9. The learned counsel for the appellants has submitted that it is clear from F.R.-22 that one increment is required to be granted during regular promotion while fixing initial pay in the pay scale of the higher post at the stage next above the initial pay arrived at by increasing his pay, by adding one increment.

10. It is also submitted that there is an explanation to Rule 22(1)(a)(1) of the Fundamental Rules. Based on this explanation, it is submitted that the benefit of one increment under F.R.-22 is applicable even during pay fixation at the time of grant of financial progression on account of stagnation under the Time Bound Promotion/MACP Scheme. Hon'ble Single Judge has, therefore, erred in concluding that such increment could be granted only once. The petitioners have rightly been granted one increment at the time of grant of financial progression; and again one increment at the time of regular

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promotion.

11. Since the appellants are placing reliance on F.R.-22, its explanation and relevant part of the MACP Scheme, this Court would consider it apposite to reproduce relevant extract of the three provisions, which reads as follows:-

F.R.-22:-

"***F.R. 22. (1) The initial pay of a Government servant who in appointed to a post on a time-scale of pay is egulated as follows:-***

(a) ***(1)*** *Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfillment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued of [rupees one hundred only] which ever is more......*"

Explanation of F.R.-22:-

"मौलिक नियमावली के नियम 22 के अधीन वेतन निर्धारण उन कर्मचारियों का किया जाता है जिनकी प्रोन्नति ऐसे पद पर हुई हो जिस पद पर प्रोन्नति होने पर उसके कर्त्तव्यों और दायित्वों में वृद्धि होती हो , प्रोन्नति होने पर उसके ओहदा में वृद्धि होती हो और प्रोन्नति जिस पद पर होती हो वह उसका संवर्गीय पद हो तथा जिस पर प्रोन्नति दिए जाने का प्रावधान हो । ए०सी०पी० स्कीम के अधीन वेतन उत्क्रमण दिए जाने पर भी इस नियम के अधीन वेतन उत्क्रमण दिए जाने पर भी इस नियम के अधीन वेतन निर्धारण किए जाने का विशेष प्रावधान किया गया है। "

Translated version of Explanation of F.R.-22:-

"Under Rule 22 of the Fundamental rules, pay is fixed for the employee who has been promoted to such a post, on which his duties and responsibilities increase, on promotion, his status increases and the promotional post held by him should be his cadre post on which there is a provision for such promotion. Inspite of

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pay upgradation granted under the ACP Scheme, there is special provision for pay fixation under this Rule."

Relevant part of MACP Scheme:-

"इस योजना के अधीन वितीय उन्नयन देते समय वेतन निर्धारण का वही लाभ दिया जाएगा जो नियमित प्रोन्नति के समय दिया जाता है। इसलिए , ऐसे उन्नयन के पूर्व वेतन बैंड और ग्रेड वेतन में मिलने वाले कुल वेतन में 3% की वृद्धि की जाएगी। किन्तु, यदि रूपान्तरित सुनिश्चित वृति उन्नयन योजना के अधीन स्वीकृत ग्रेड वेतन वहीं हो जो नियमित प्रोन्नति के समय का ग्रेड वेतन हो तो नियमित प्रोन्नति के समय कोई वेतन निर्धारण नहीं किया जाएगा। वास्वतिक प्रोन्नति के समय यदि यह उससे उच्चतर ग्रेड वेतन वाला पद हो जो रूपान्तरित सुनिश्चित वृति उन्नयन योजना के समय मिला था, तब भी कोई वेतन निर्धारण नहीं होगा और मात्र ग्रेड वेतन की अन्तर राशि जोड़ी जाएगी। उदाहरणार्थ, यदि कोई सरकारी सेवक वेतन बैंड-1 के ग्रेड वेतन 1900/-रू में सीधी भर्ती के माध्यम से योगदान करता है और उसे 10 वर्ष की सेवा पूरी करने तक कोई प्रोन्नति नहीं मिलता हो तो रूपान्तरित सुनिश्चित वृति उन्नयन योजना के अधीन उसे अगले उच्चतर ग्रेड वेतन 2000 /-रू० में वितीय उन्नयन प्रदान किया जाएगा एवं उसका वेतन निर्धारण एक वेतन वृद्धि के साथ-साथ ग्रेड पे के अंतर (अर्थात् 100 रू0) को जोड़कर निर्धारित किया जाएगा। रूपान्तरित सुनिश्चित वृति उन्नयन योजना के अधीन वितीय उन्नयन प्राप्त कर लेने के बाद यदि वह सरकारी सेवक अपने संवर्ग के उपरी पद सोपान में नियमित प्रोन्नति प्राप्त करता हो जिसका ग्रेड वेतन 2400 / रू हो तो, नियमित प्रोन्नति मिलने पर उसे मात्र ग्रेड वेतन 2400/-रू0 और 2000/-रू0 की अन्तर राशि ही प्रदान की जाएगी। इस प्रकम पर उसे कोई अतिरिक्त वेतन वृद्धि नहीं दी जाएगी।"

Translated version of MACP Scheme:-

" At the time of grant of financial upgradation under this Scheme, the same benefit of pay fixation, similar to regular promotion shall be given. Therefore, prior to such upgradation, 3 percent shall be increased in the total pay admissible including pay band and grade pay. But, if the grade pay sanctioned under the Modified Assured Career Progression Scheme is the same as the grade pay at the time of regular promotion, no pay fixation will be done at the time of regular promotion, received at the time of career progression scheme, there will be no fixation and only the difference amount of grade pay will be added for example, if a government servant is in Pay Band-1 with grade pay of 1900/- joins through direct recruitment and he does not get any promotion till he completes 10 years of service, then under the Modified Assured Career Progression Scheme, he will be given financial upgradation in the next higher grade pay of Rs.2000/- and his pay will be fixed with one increment by

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adding the difference of grade pay (i.e. Rs.100). After getting the financial upgradation done under the Modified Assured Career Progression Scheme, if that government servant gets regular promotion in the higher post of his cadre, whose grade pay is Rs. 2400/-, then on getting regular promotion, he will be given the difference of only grade pay of Rs. 2400/- and Rs. 2000/-. No additional increment will be given to him at this stage."

12. From perusal of the above stated provisions, it is clear that while fixing the pay on the higher post from a lower post as a result of regular promotion, an increment has to be added during pay fixation in the higher pay scale admissible to the higher post.

13. If for any reason the employee is not given regular promotion and is made to stagnate then under the MACP Scheme, he is granted the pay attached to the higher post as a financial progression. Explanation to F.R.-22 as well as above noted extract of the MACP Scheme both mandate application of F.R.-22(1)(a)(1) during pay fixation as a result of grant of financial progression under the MACP Scheme.

14. F.R.-22, its explanation and MACP Scheme, therefore, are clear in its intent that an increment is to be added, when fixation is on the next higher grade pay from the lower pay, whether as a result of financial progression or by virtue of regular promotion.

15. The provision/s, however, do not provide for grant

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of one increment twice, i.e., on both occasions, during pay fixation in the next higher grade pay by virtue of financial progression; and again during pay fixation by virtue of regular promotion. The financial progression is to be granted once only, when fixation in the next higher grade pay is from a lower grade pay, whether by virtue of financial progression or regular promotion. This fact has been clarified by way of illustration in the MACP Scheme, as extracted above. The conclusion of the Hon'ble Single Judge that it is the pay attached to the lower post which is to be taken into account for grant of one increment during pay fixation under F.R. 22(1)(a)(1) and not the higher pay already received by virtue of financial progression, is based on a correct interpretation and harmonious construction of F.R. 22(1)(a)(1), its explanation as also the MACP Scheme. We, therefore, confirm the conclusion of the Hon'ble Single Judge.

16. Thus, it is clear that second grant of one increment at the time of petitioners' pay fixation by virtue of regular promotion cannot be sustained, since they had already received the increment at the time of pay fixation in the promotional pay scale/grade pay under financial progression.

17. The Department, therefore, has rightly issued the order dated 03.02.2020 (Annexure-10 of the writ petition) to the

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effect that grant of such benefit of increment twice is inadmissible.

18. Learned counsel for the appellants has submitted that the recovery occasioned on account of grant of the higher pay fixation based on grant of one increment twice is onerous and causing hardship. Relying on the decision of the Hon'ble Apex Court in the case of ***State of Punjab and Others versus Rafiq Masih (White Washer) and Others*** reported in ***(2015) 4 SCC 334***, as also decision in the case of ***Thomas Daniel versus State of Kerala & Ors.*** reported in ***2022 SCC Online SC 536***. She has submitted that the excess payment made on account of wrong alleged fixation of pay was not on account of any misrepresentation or fraud by the petitioner. The petitioners, therefore, cannot be subjected to such recovery, which will cause hardship to the petitioners.

19. The judgments of the Hon'ble Apex Court relied upon by the petitioners are expression of indisputable law, which is binding on this Court. The same, however, applicable to the particular set of facts and circumstances, in which the decision was given by the Hon'ble Apex Court. Both the decisions relied upon by the learned counsel for the appellants were rendered keeping in view the hardship likely to be caused

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on account of such recovery in certain circumstances, which have illustratively been specified in the judgment in the case of ***Rafiq Masih*** (Supra).

20. In the case of ***Thomas Daniel*** (Supra) also, the right of the employer to make recovery of grant of undue benefits due to their own misinterpretation of the applicable rules or their own mistake has been considered. The Hon'ble Apex Court in this context has referred to earlier decision in the case of ***Rafiq Masih*** (Supra) also. Relevant extract of the Apex Court judgment in the case of ***Thomas Daniel*** (Supra) is, therefore, considered useful to reproduce here, which reads as follows:-

> *"**13.** In State of Punjab v. Rafiq Masih (White Washer)4 wherein this court examined the validity of an order passed by the State to recover the monetary gains wrongly extended to the beneficiary employees in excess of their entitlements without any fault or misrepresentation at the behest of the recipient. This Court considered situations of hardship caused to an employee, if recovery is directed to reimburse the employer and disallowed the same, exempting the beneficiary employees from such recovery. It was held thus:*
>
> *"**8.** As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.*

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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) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(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) 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."

***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.*

***15.** Having regard to the above, we are of the view that an attempt to recover the said increments after passage of ten years of his retirement is unjustified."*

21. We are of the considered opinion that petitioners' reliance on the judgment of the Hon'ble Apex Court in the case of ***Thomas Daniel*** (Supra) is misplaced in the facts and circumstances of the instant case. The petitioners herein are still in service. The grant of undue benefit admittedly has been given

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only for about a period of 5 years. Therefore, we are of the considered opinion that the claimed hardship is not covered by any of the illustrative circumstances warranting restrain of recovery in terms of decision in the case of ***Rafiq Masih*** (Supra), as also in the case of ***Thomas Daniel*** (Supra).

22. In view of the above noted facts, for balancing the equities and to minimize the effect of recovery on the petitioners, the Court would direct that recovery be made from the petitioners' salary in equal monthly installments, spread over the same period for which it was granted, i.e. 5 years. If any petitioner does not have 5 years length of service left then the recovery be made in equal monthly installments from the salary for the remaining period of his service.

23. With such limited modification with respect to the terms of recovery, judgment of the Hon'ble Single Judge is affirmed and appeal is dismissed.

(K. Vinod Chandran, CJ)

(Madhuresh Prasad, J)

shashank/-

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