IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.24639 of 2018

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1. Smt. Rupa Prasad and Ors wife of Sri Hari Moha, resident, Khoja Imali, Phulwari Sarif, P.S.-Phulwari Sharif, District-Patna.
2. Smt. Vibha Sinha, wife of Sri U.P. Sinha, resident of Lohiya Nagar, P.S.-Kankarbagh, District-Patna.
3. Smt Anita Jamuar wife of Dr. S.R.P. Sinha, resident of A/18 Shee Ram Path, Punaichak, P.S.- Shastri nagar, District-Patna.
4. Nutan Sahay wife of Sri Sunil Kumar, resident of 402 Maha Laxmio Appartment, Sur Sudha Lane, East Boarding Canal Road, P.S.- Budha Colony, District-Patna.
5. Smt Sheela Kumari wife of Sri Anjani Kumar, resident Saket Vihar, Mitra mandal Colony, P.S.-Anisabad, District-Patna.
6. Smt. Sarita Rohtagi wife of Sri Katik Babu Rohtagi resident of Beghampur, P.S.-Patna city, District-Patna.
7. Smt. Vijaylaxmi Sinha wife of Dr. Sudharkar Singh, resident of Laxami Niwas Budha Colony, East Boarding Canal Road, P.S.-Budha Colony, District-Patna.
8. Smt Aparajita Srivastava wife of Sri Shashi Bhushan Prasad resident of 501 Bestec Park view city-2 Sector-49, Sohna Road, District-Gurgawn, Haryana,
9. Rajia Bano wife of Irshbul Khairy, resident of Shashi Palce Appartment Kulharia Compound, Ashok Raj Path, P.S.-Pirbhore, District-Patna.
10. Smt. Indu Sinha wife of Late Bahadur Sinha, resident of Ajashwani Road, Khajapura, P.S.-Airport, District-Patna.
11. Dr. M.L. Verma son of Late Kanhaiya Prasad, (husband of Late Purnima Prasad) resident of E-136, Doctors Colony, Lohiya Nagar, P.S.-Kankarbagh, District-Patna.

... ... Petitioner/s

Versus

1. The State Of Bihar
2. The Principal Secretary, Education Department, Govt. of Bihar, Patna.
3. The Principal Secretary, Department of Finance, Government of Bihar, Patna.
4. The Special Secretary, Education Department, Govt. of Bihar, Patna.
5. The Director, Higher Education, Govt. of Bihar, Patna.
6. The Accountant General, Bihar

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Jitendra Singh, Senior Advocate
Mr. Harsh Singh, Advocate
Mr. Yash Singh, Advocate
Mr. Isshan Singh, Advocate
Mr. Shashi Bhushan Kumar, Advocate

For the A.G.	:	Ms. Nivedita Nirwikar, Sr. Advocate
For the State	:	Mr. Sarvesh Kumar Singh-Aag15
		Mr. Amrendra Kumar, AC to AAG-13

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CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH
ORAL JUDGMENT
Date : 27-07-2023

Heard Mr. Jitendra Singh, learned Senior Counsel appearing on behalf of petitioners, Ms. Nivedita Nirwikar, learned Senior Counsel appearing on behalf of Accountant General, Bihar and Mr. Sarvesh Kumar Singh, learned AAG-15 appearing for the State.

2. Petitioners who are total 11 in numbers have prayed, *interalia*, for following relief(s):

> *(i) For issuance of writ not to deduct any amount from the retirement benefit/pension of the petitioners.*
> *(ii) For issuance of writ of certiorari for quashing the Notification contained in Memo No. 1237 dated 10.10.2018 issued by the Education Department Govt. of Bihar whereby and where under;-*
> *i. Earlier issued notification no. 877 dated 01.07.2016 which was not approved by the Finance Department was annulled*
> *ii. Earlier Notification No. 697 dated 26.05.2016 was modified*
> *iii. and also direction was made that in lieu of the aforesaid modification if any excess payment was made to any working employee/ retired employee then that will be recovered from the salary/ pension in the monthly installments.*

3. The facts of the case in brief are that the petitioners are retired teachers from Government Girls College at Gardanibagh & Gulzarbagh at Patna. A list of petitioners with

their date of joining and retirement has been brought on record by way supplementary affidavit filed by the petitioners and same is reproduced in tabular form as under:

SI No.	Name of the petitioners	Dt of Joining	Date of retirement	Name of Institution.
1.	Rupa Prasad	04.12.1978	30.06.2014	Govt. girls Colleges Gardanibagh, Patna
2.	Vibha Sinha	18.04.1981	30.09.2014	do
3.	Anita Jamuar	14.04.1981	31.12.2014	do
4.	Nutan Sahay	21.04.1981	30.04.2016	do
5.	Sheela Kumari	27.11.1981	31.03.2016	do
6.	Sarita Rohtogi	02.01.1976	31.05.2011	Govt. girls Colleges Gulzarbagh, Patna
7.	Vijay Lakshmi Sinha	11.04.1981	30.07.2016	do
8.	Aprajita Srivasta	05.11.1973	30.06.2010	do
9.	Rajia Bano	14.01.1981	31.10.2012	do
10.	Indu Sinha	05.11.1973	31.10.2010	do
11.	Purnima Prasad died hence M.L.Verma made petitioner.	28.06.1974	2010	do

4. The writ petition is devoid of any statement regarding the post from which the petitioners have retired and the last pay scale drawn by them on the basis of which the pension of the petitioners were fixed. It has been admitted that the petitioners were granted financial benefits in terms of Memo No. 697 dated 26.05.2016 (Annexure-2) with retrospective date. Thereafter, vide notification no. 1237 dated 10.10.2018

(Annexure-4) after the lapse of more than two years recovery have been made from the pension of the petitioners. The reason being that financial benefits have been incorrectly given vide notification no. 697 dated 26.05.2016 and the correction/rectification has been made in light of Clause 4 of the Notification No. 697. The petitioners are aggrieved by the order of recovery contained in Memo no. 1237 dated 10.10.2018 contained in Annexure-4 to the writ petition.

5. Learned senior counsel appearing on behalf of the petitioners submitted that the notification contained in Memo No.697 dated 26.05.2016 was duly approved by the Cabinet and the Finance Department, Govt. of Bihar (Annexure 2) notified under the name of the Governor. The chart to the notification provides benefit as per tenure of service at S.No. 1 to 33 whereas serial no. 34 onwards gives ACP and MACP as per VIth Pay Rivision. Column 5 and 6 of Memo No. 697 deals with the upgradation in salary and accordingly pay scales has been granted in the year 1991 and 2005 respectively to the petitioners.

6. It is further submitted that the revised pay structure was approved by the Government of India by including merger of grades with a common grade pay and

concept of pay band with effect from 01.01.2006. The applicable grade pay was not displayed in Column No. 5 and 6 of the Memo No. 697 dated 26.05.2016. A clarification was sought by the Accountant General, Bihar with respect to non mentioning of AGP and the revised pay scale in Column 5 and 6.

7. Learned counsel further submitted that the claim of the respondents that due to non mentioning of AGP in Column No. 5 and 6 of Memo No.697 dated 26.05.2016 (Annexure 2), a similar clarification was sought by the Principals of both the colleges, despite of the fact that AGP was implemented only after the recommendation of VIth Pay Commission Revision in 2006.

8. Learned counsel further submitted that it needs to be clarified that before 2006 AGP was not admissible under the Vth Pay Revision, therefore, no AGP was mentioned in Colum 5 and 6 which is clearly mentioned in Letter No. 406 dated 07.06.2016, a communication made by the Accountant General to the Joint Secretary, Education Department which has been brought on record in the counter affidavit filed on behalf of respondent nos. 2, 4 and 5. In spite of the said admitted position, the Joint Secretary, Education, Bihar upon instruction vide

Memo No. 877 dated 01.07.2016 (Annexure 3), modified the Government notification contained in memo No. 697 dated 26.05.2016. The item 1 to 3 of Memo No. 877 dated 01.07.2016 related to pay scale and AGP of persons covered by VIth Pay Revision and not those who remained in service for 12/24 prior to VIth Pay Revision. Item Nos. 4 to 9 of the Memo No. 877 dated 01.07.2016 can be considered as an inadvertent errors and are not related to the pay scales and ACP benefits granted by Memo No.697 dated 26.05.2016.

9. Learned counsel further submitted that in spite of the admitted position, the Department rightly annulled the Memo No. 877 dated 01.07.2016 on the ground that the Memo No. 877 dated 01.07.2016 was not approved by the Finance Department as well as there was objection from the office of Accountant General, Bihar vide Letter No. 406 dated 07.06.2016 with respect to Memo No. 697 dated 26.05.2016 and consciously committed mistake by issuing another notification without jurisdiction contained in Memo No.1237 dated 10.10.2018, by which the respondents reduced the ACP and MACP and revised the pay from earlier pay scale of 37400-67000 (AGP 9000), admissible to the petitioners *ex parte* without giving any opportunity of hearing, by reducing in pay

scale of Rs. 15600-39100 (AGP 8000).

10. Learned senior counsel further submitted that vide Annexure 5 senior lecturer were granted pay scale as provide in serial no. 4A on completion of tenure of service of 27 years in scale of Rs. 37400-67000. The said pay scale was applicable to the petitioners, who were the senior lecturers vide memo no. 697 dated 26.05.2016 and pay scale which came into effect after granting benefit of the 2nd ACP, after prior approval of the Finance Department and the Cabinet. By Memo No. 877 dated 01.07.2016 pay scale for 2nd and 3rd ACP remained 37400-67000, but grade pay enhanced from 9000 to 10000. Petitioners were granted same pay scale in 3rd ACP as in the 2nd ACP i.e. 37400-67000, as a result of financial upgradation. The UGC guidelines and financial upgradation as a result of benefit were granted much before the Notification No. 1237 dated 10.10.2018. The grade pay was enhanced in 3rd ACP 9000 to 10000 as per UGC revised guidelines by resolution no. 2441 dated 06.08.2008, ACP guidelines 2003, MACP guidelines dated 13.07.2010 and ACP 01/2561 dated 23.03.2011 (Annexure 7 to supplementary affidavit).

11. The *ex parte* action of the respondents Vide Notification No. 1237 dated 10.10.2018 (Annexure 4 i.e.

"impugned order") by erroneously reducing the pay scale without valid reason in revising the pay scale and grade pay as a result of financial upgradation applicable after ACP from Rs.37400-67000 (AGP 9000) to the scale of Rs.15600-39100 (AGP 8000) is contrary to the notification contained in Memo No.697 dated 26.05.2016 which has sanction of Finance Department and also of the Cabinet of the Bihar Government issued and the same is in accordance with UGC guidelines under the authority of the Governor.

12. Learned counsel further submitted that, the petitioners have retired long back and some of them died before or during the pendency of the writ petition. The recovery from writ petition after much delay has caused hardship and the action being *ex parte* is also against the law laid down by the Hon'ble Apex court in the case of **State of Punjab Vs Rafiq Masih** reported in **(2015) 4 SCC 334** and **Thomas Daniel v. State of Kerala** reported in **AIR 2022 SC 2153.**

13. The Learned senior counsel further submitted that even otherwise also, the notification dated 26.05.2016 was issued pursuant to the decision of the Screening Committee, duly approved by the Finance Department and passed by Council of Minister, making the same a decision of the State

Government while the impugned notification dated 10.10.2018 which has modified the notification dated 26.05.2016 has been issued in the signature of the under Secretary of the Department, is without jurisdiction. The impugned notification dated 10.10.2018 is without approval of the Finance Department and is against Rule 12(1), (2) & 4 of the Rules of Executive Business, framed under Article 166(3) of the Constitution of India. In support of his contention the learned Senior Counsel has relied upon the judgment of the Apex Court reported in **(2010) 11 SCC 374 – MRF Limited vs Manohar Parrikar & Others** wherein the Hon'ble Supreme Court has held that rules of Business under Article 166(3) of the constitution are mandatory and have to be strictly complied with and decision in breach thereof is a nullity.

14. Learned senior counsel lastly submitted that the impugned notification dated 10.10.2018 has been passed relying upon the Govt. Resolution in Letter No.2374 dated 29.07.2010 which provided for revised pay scale admissible to readers/Associate Professors, which was already repealed by the subsequent Resolution of the State Government contained in Letter No.2441 dated 06.08.2010 and therefore the impugned notification contained in Memo No.1237 dated 10.10.2018

(Annexure- 4) has been mechanically issued without any approval of the Finance Department or the Council of Ministers and as such is fit to be quashed and set aside.

15. *Per Contra,* Learned counsel for the respondents submitted that the notification contained in Memo No. 697 dated 26.05.2016 was issued by Education Department, after getting approval from Finance Department and Cabinet, by which total 79 lecturers of the Government Women College, Gardanibagh/Gulzarbagh were granted 1^{st} ACP, 2^{nd} ACP & 3^{rd} MACP including the petitioners. Thereafter, Principal of both the colleges pointed out certain mistakes in Memo No. 697 dated 26.05.2016. The office of Accountant General vide Letter No. 07.06.2016 also pointed out some mistakes in Memo No. 697 dated 26.05.2016 in light of the suggestion sought the Department rectified in terms of the Column 4 of notification contained in Memo No. 697 which gives liberty to the respondents to make modifications. Pursuant to it modifications were made in Memo No. 697 and Memo No. 877 which resulted into recovery from the pension of the petitioners. It is the submission of the respondents that pay scale and AGP cannot be enhanced at same time in MACP.

16. Learned counsel further submitted that

notification contained in memo No. 877 dated 01.07.2016 was issued by Department whereby certain modification has been made after removing the defects pointed out by the Principles of the Colleges and the office of Accountant General against some employees in the earlier granted ACP and MACP issued vide Memo No.697 dated 26.05.2016. The said modification was made in light of notification in Column 4 of Memo No. 697 dated 26.05.2016, after correcting the typographical error and incorporating the correct grade pay. The Memo No.697 dated 26.05.2016 gives the liberty to the authority to cancel/modify the grant of benefit of ACP to the Lecturers in case any discrepancy/mistake is found in the future. In accordance with the Resolution No. 2374 dated 29.07.2010, petitioners were granted 2nd ACP in pay scale of Rs. 12000-18300, which was revised after 6th Pay scale to Rs. 15600-39100 (AGP 8000) and accordingly the petitioners were given AGP in Rs. 9000 instead of next pay scale i.e. Rs. 37400-67000.

17. Learned counsel further submitted that, the Hon’ble High Court has already stayed the operation of Memo No. 1237 dated 11.10.2018 vide order dated 04.01.2019.

18. Having heard the rival submissions made on behalf of the respective parties and the facts which have

emerged from the pleadings made in the writ petition and the counter affidavit and the records annexed therewith, it appears that the present petition is devoid of basic facts relating to the individual petitioners regarding their pay scale applicable at the time of their appointment and last pay scale drawn by them which would have rendered the writ petition not maintainable in want of pleadings, however, considering the fact that the respondents have not objected and the admitted fact that the petitioners have retired as the Government Teachers were granted financial benefit in terms of notification no.697 dated 26.05.2016 as contained in Annexure-2 and an order of recovery has been passed after allegedly rectifying the said notification in terms of Clause IV of notification no.697 dated 26.05.2016 an interference by this Court is justified to decide as to whether the recovery made pursuant to the Memo no. 1237 dated 10.10.2018 in accordance with law. The following issues are required to be considered considering the manner in which the recovery has been directed to be made from the pensionary benefit and the pension of the petitioners.

(i) Whether any unilateral recovery can be made after granting financial benefit after retirement?

(ii) Whether the circular issued by an officer of the State modifying the decision of the State Government taken in accordance with the requirement Article 162 read with Article 166 of the constitution binding on the Government/University and recovery can be made on the basis of the said decision of the officer?

19. Before answering the above two questions it would be apt to take notice of the fact that the State Government had adopted the UGC pay scale to the teachers vide notification dated 19.11.1981. In accordance with the UGC guidelines, the pay scale of the teaching staffs of the university was fixed and accordingly, the benefit of financial upgradation was granted to the employee as a consequence of 5^{th} and 6^{th} pay revision in accordance with the ACP guidelines of 2003 and 2006 and MACP guidelines of the year 2010. The petitioners were given their due pay scale along with appropriate grade pay to the lecturers in accordance with the resolution no. 1606 dated 24.08.2012 prescribing the UGC pay scale applicable to the lecturers.

20. The respondents have placed reliance on resolution no. 2374 dated 29.07.2010 to deny the benefit already granted to the petitioners in pay scale of Rs. 37,600-67,000/- . The Letter No. 2374 dated 29.07.2010 provided for the revised

pay scale admissible to the Readers/ Associate Professors was replaced by the subsequent resolution of the State Government contained in Letter No. 2441 dated 06.08.2010 (Annexure-5) by which the revised pay scale and grade pay for Associate Professors has been provided in the scale of Rs. 37,400-67,000/- (AGP 9000) from the earlier pay scale of Rs. 15,600-39,100/- (AGP 8000).

21. As a consequence of financial upgradation arising out of 2nd ACP and 3rd ACP, the grade pay was enhanced to Rs. 9000 to 10000/- as per the UGC guidelines vide resolution no. 2441 dated 06.08.2008 which is provided to the Senior Lecturers equivalent to the post of Associate Professors, contained in 'Annexure-5' to the rejoinder filed on behalf of the petitioners to counter affidavit on behalf of respondent nos. 2,4 and 5 which is reproduced hereinafter:

"3. इस हद तक इस संकल्प की कंडिका–2 की उपकंडिका VI एवं एपेन्डिक्स–2 की तालिका के क्रम संख्या– 4 एवं 5 को संशोधित समझा जाय। उक्त तालिका को कंडिका 4, 4A एवं 5 को निम्नरूप में स्वीकृत माना जाय :–

क्र0 सं0	पदनाम	वर्त्तमान वेतनमान	पुनरीक्षित वेतनमान		नया पदनाम
			पे बैंड	ए0जी0पी0	
4.	उपाचार्य /रीडर	12000 – 420 - 18300	15600 - 39100	8000	रीडर
4A	उपाचार्य	12000 – 420 - 18300	37400 - 67000	9000	एसोसिएट

	/रीडर				प्रोफेसर
5.	विश्व–विद्यालय प्राचार्य	16400 – 450 – 20900 – 500 - 22400	37400 – 67000	10000 / 12000	प्रोफेसर

22. The State Government, vide notification no. 697 dated 26.05.2016 (Annexure-2) had taken a decision after due approval of the Cabinet and Finance Department with respect to the teachers who were not promoted and were granted benefit of 1st ACP in pay scale of Rs. 15,600-39,100/- with effect from 09.08.1999 and after completion of 24 years of service were granted 2nd ACP in pay scale of Rs. 37,400-67000/- with effect from 04.12.2000. The petitioners were granted MACP with effect from 01.01.2009 in pay scale of Rs. 37,400-67000/- with AGP of Rs. 9000/- in terms of MACP Rules, 2010. Thereafter, introduction of grade pay and after issuance of notification no. 697 dated 26.05.2016, the principles of respective colleges namely, Gardanibagh and Gulzarbagh raised objection regarding non mentioning of AGP in column nos. 5 and 6 in the notification no. 697 dated 26.05.2016. The Accountant General, Bihar had also raised the same query and sought clarification from the Finance Department vide its Letter No. 406 dated 07.06.2016.

23. As a result of the query raised regarding Column 5 and 6 in the notification no.697 dated 26.05.2016, the

Department of Education instead of giving clarification had come out with a fresh Notification No. 877 dated 01.07.2016 (Annexure 3). The Notification No. 877 dated 01.07.2016 was later on annulled vide impugned notification contained in Memo No. 1237 dated 10.10.2018(Annexure-4) issued by the Education Department, Govt. of Bihar. The petitioners are aggrieved by the notification contained in Memo No.1237 dated 10.10.2018 by which the respondents have proceeded to recover *ex parte* allegedly the excess amount that had been paid to all the retired teachers including the petitioners, from their salary/ pension in the monthly installments. Being aggrieved by the action of respondents the petitioners have filed the present writ petition. I will not enter into the entitlement of the respective petitioners with respect to their eligibility for grant of financial upgradation in absence of any pleading made in the writ petition giving details regarding the effective dates from which they became entitled to receive pay scale of Rs. 37,400-67,000/- which is an admitted position.

24. Considering the fact that the parties have admitted the fact that petitioners were receiving pay scale of Rs. 37,400-67,000/- as a consequence of notification contained in Memo No. 697 dated 26.05.2016, this Court is required to judge

the action of the respondents, who have recovered from the pension of the petitioners by the issuance of Memo No. 1237 dated 10.10.2018.

25. The submission made on behalf of the petitioner is that law relating to recovery of excess payment made to an employee is no more *res integra* as on date. In this regard, it would be apt to take note of the several decisions of the Apex Court.

26. The Supreme Court in the case of ***Sahib Ram v. State of Haryana and Others*** reported in ***1999 Supp (1) SCC 18 has*** restrained recovery of payment which was given under the upgraded pay scale on account of wrong construction of relevant order by the authority concerned, without any misrepresentation on part of the employees by making following observations:

> *"5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation, the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant. The principle of equal pay for equal work would not apply to the scales prescribed by the University*

Grants Commission. The appeal is allowed partly without any order as to costs."

27. In ***Col. B.J. Akkara (Retd.) v. Government of India and Others*** reported in ***(2006) 11 SCC 709***, the Supreme Court held as under:

"27. The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the wrong interpretation/ understanding of the circular dated 7−6−1999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled (vide Sahib Ram v. State of Haryana [1995 Supp (1) SCC 18 : 1995 SCC (L&S) 248], Shyam Babu Verma v. Union of India [(1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121], Union of India v. M. Bhaskar [(1996) 4 SCC 416 : 1996 SCC (L&S) 967] and V.Gangaram v. Regional Jt. Director [(1997) 6 SCC 139 : 1997 SCC (L&S) 1652]): (a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee. (b) 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.

28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But *where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery.*

29. On the same principle, pensioners can also seek a direction that wrong payments should not be recovered, as pensioners are in a more disadvantageous position when compared to in−service employees. Any attempt to recover excess wrong payment would cause undue hardship to them. The petitioners are not guilty of any misrepresentation or fraud in regard to the excess payment. NPA was added to minimum pay, for purposes of stepping up, due to a wrong understanding by the implementing departments. We are therefore of the view that the respondents shall not recover any excess payments made towards pension in pursuance of thecircular dated 7−6−1999 till the issue of the clarificatory circular dated 11−9−2001. Insofar as any excess payment made after the circular dated 11−9−2001, obviously the Union of India will be entitled to recover the excess as the validity of the said circular has been upheld and as pensioners have been put on notice in regard to the wrong calculations earlier made."

28. In ***Syed Abdul Qadir and Others v. State of Bihar and Others*** reported in ***(2009) 3 SCC 475*** excess payment was sought to be recovered which was made to the appellants–teachers on account of mistake and wrong interpretation of prevailing Bihar Nationalised Secondary School (Service Conditions) Rules, 1983. The appellants therein contended that even if it were to be held that the appellants were

not entitled to the benefit of additional increment on promotion, the excess amount should not be recovered from them, it having been paid without any misrepresentation or fraud on their part. The Supreme Court held that the appellants cannot be held responsible in such a situation and recovery of the excess payment should not be ordered, especially when the employee has subsequently retired. The Court observed that in general parlance, recovery is prohibited by courts where there exists no misrepresentation or fraud on the part of the employee and when the excess payment has been made by applying a wrong interpretation/ understanding of a Rule or Order. It was held thus:

> *"59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter−affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no*

> *recovery of the amount that has been paid in excess to the appellant teachers should be made."*

29. In the decision in **State Of Punjab & Others Vs. Rafiq Masih (White Washer) and anr.** reported in **[(2015) 4 SCC 334]**, the Supreme Court has dealt which the issue of right of employer to recover the amount paid in excess to the employee without any fault of employee. The Supreme Court in paragraph no. 18 of its judgment has 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 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 employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).*
> *(ii) Recovery from the 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."*

30. The Hon'ble Supreme Court in the case of *Rafiq Masih (Supra)* has summarized some of the situation wherein the recovery by the employer would be impermissible in law. While enumerating the situations, the Apex Court has also mentioned in paragraph no.18 of the judgment that it is not possible to postulate all situations of hardships which would govern the employee on the issue of recovery where the payments have mistakenly been made by the employer in absence of their entitlement. There may be various other situation which may create hardship to the employee on the issue of recovery.

31. In such situation, the cases relating to any other cases where the Court finds the recovery impermissible can be judged in accordance with the observation made in the case of Rafiq Masih (Supra) in paragraph no. 8 which *inter alia* is reproduced hereinafter:-

> *"**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."*

32. It is worth noting that the ACP scheme was enforced on the recommendation of the 5th Central Pay Commission in context with teaching employees of the State Government and it provided monetary benefit on completion of 12 years and 24 years of regular service who were not able to get promotion. The scheme as such was anti-stagnation and envisaged mere replacement of the employee in the higher pay scale for grant of monetary benefit only without grant of actual promotion as held by the Apex Court " benefit of ACP as such is like granting non-functional in situ promotion". The object and purpose of ACP/MACP scheme is thus, merely to provide monetary benefit in the form of next higher grade subject to fulfillment of qualification eligibility criteria.

33. The Apex Court recently in the case of ***Amresh Kumar Sinha & Ors. v. The State of Bihar & Ors. SLP (C) Nos. 8219-8226 of 2016*** has held that grant of *in situ* promotion on the non-functional post or for extending the benefit of ACP

(Assured Career Progression), which is purely and simply in the nature of grant of monetary benefit without actually effectuating any promotion to any higher post. It would be apt to reproduce *inter alia* following paragraphs of the judgment:-

> *"14. The object and purpose of ACP/MACP Scheme has been reiterated by this Court in Union of India & Others Vs. C.R. Madhava Murthy & Anr. (2022) 6 SCC 183, as one to relieve the frustration on account of stagnation and it does not involve actual grant of promotional post but merely monetary benefits in the form of next higher grade subject to fulfilment of qualifications and eligibility criteria.*
>
> 15. In sum and substance, both ACP and MACP Schemes are schemes devised with the object of ensuring that the employees who are unable to avail of adequate promotional opportunities, get some relief in the form of financial benefits. Accordingly, the schemes provide for regular financial upgradation on completion of 12-24 years and 10-20-30 years of service without promotion. They are incentive schemes for the employees who complete a particular period of service but without getting promotion for lack of promotional avenues. The effect of the schemes must be judged keeping in view the object and the purport of the scheme.
>
> 16. In Union of India and Anr. Vs. G.Ranjanna and Ors. reported in (2008) 14 SCC 721, the three-Judges Bench of this Court held that in situ promotions are made to remove stagnation of grade C and grade D employees by giving them certain monetary benefits.
>
> 17. It was further observed that fulfilment of educational qualifications prescribed under the recruitment rules for the purposes of promotion are not necessary for non-functional in situ promotion. In other words, educational qualification required for the purposes of promotion is not necessary for the grant of in situ promotion, i.e., only for extending the monetary benefit where there are no promotional avenues and the employees are likely to be stagnated.
>
> 18. In the aforesaid case, the employees were working as malis (Gardeners) and had claimed promotion in the higher pay scale. The Central Administrative Tribunal seized of the original applications observed that the employees cannot claim the scale of the next higher post by way of in situ promotion. On the matter being taken to the High Court by way of a writ petition, the contention of the employees was accepted and it was observed that the object of in situ

promotion on non-functional posts, is to ensure that the group C and D employees are not stagnated in the same cadre/pay scale and that they should be provided with certain monetary benefits. Therefore, the rejection of the claim for such non- functional in situ promotion on the ground that the employees do not possess the necessary minimum qualification of matriculation as per the rules is not justified and renders the order erroneous in law. The view so taken by the Division Bench of the High Court was affirmed by this Court in the above referred Civil Appeals holding that the High Court has correctly analysed the object of the in situ promotion and fixation of pay scales to Group C and D employees to avoid stagnation.

19. In view of the aforesaid legal position coupled with the fact that the qualification of graduation prescribed is for the promotion to the post of Accounts Officer rather than for the grant of in situ promotion on the non-functional post or for extending the benefit of ACP which is purely and simply in the nature of grant of monetary benefit without actually effectuating any promotion to any higher post, we are of the opinion that the judgment and order of the Division Bench of the High Court impugned in the appeals cannot be sustained. It is accordingly hereby set aside and that the judgment of the writ court dated 28.11.2017 is restored. The appellants are extended the benefit of ACP, as directed by the writ court.

20. We have not considered it necessary to deal with the two cases on the basis of which the Single Judge has allowed the writ petitions and granted the benefit of the ACP to the appellants, as we have independently of those two decisions have considered and held that the appellants are entitled to financial upgradation under the ACP Scheme on completion of requisite regular service ignoring the higher qualification prescribed for the next higher post as grant of such benefit is not actually a promotion but only financial upgradation and if the higher qualification is insisted it would frustrate the purpose of the entire scheme.

21. The appeals are allowed in the above terms. There shall be no order as to costs."

34. The above mentioned Notification No. 1237 dated 10.10.2018 is also not sustainable considering the second issue involved in the present case in the light of settled principle of law laid down by the Apex Court.

35. With respect to second issue involved in the present writ petition and the question which has been raised by the petitioners it would be relevant to reproduce Article 162 and Article 166 of the Constitution of India:

> *"162. Extent of executive power of State Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof Council of Ministers*
>
> 166. Conduct of business of the Government of a State
>
> *(1) All executive action of the Government of a Stat(e shall be expressed to be taken in the name of the Governor*
>
> (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order on instruction which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor
>
> (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion"

36. The question that all executive action of the State Government is required to be expressed to be taken in the name of the governor and that order made in the name of the Governor shall be authenticated in such manner as specified in the rules to be made by the governor and the validity of the governor shall not be annulled by any officer of the State is also

no more *res integra*.

37. In order to appreciate the stand of both the parties it is useful to refer Rule 10 of the rules of Executive Business. Rule 10(2), which provides for prior consultation with the Finance Department and proposal to the Council of Ministers. The Cabinet alone would be competent to take a decision. In the present case, the notification contained in Memo No. 697 dated 26.05.2016 (Annexure-2) was duly approved by the Cabinet after prior consultation with the Finance Department and has been notified under the name of the Governor. The column no. 5 and 6 of Memo no. 697 deals with upgradation in salary and accordingly, the lecturers, upon completing 12 years of service were granted 1st ACP in the pay scale of Rs. 15,600-39,100 w.e.f 09.08.1999 and after completing 24 years of service were granted 2nd ACP in the pay scale of Rs. 37,400 – 67,000 w.e.f 04.12.2002. The petitioners were granted MACP w.e.f 01.01.2009 in the pay scale of Rs. 37,400 – 67,000 with AGP of Rs. 9,000/- in terms of MACP Rules, 2010. Clarification was sought by the principal of the two institutions and similar clarification was sought by the Accountant General with respect to the non mentioning of AGP and revised pay scale in column no. 5 and 6 of the notification.

Considering the fact that before 2006 AGP was not admissible under 5th Pay Revision , therefore, there was no requirement of mentioning AGP in column nos. 5 and 6.

38. The fact regarding classification sought would be clear from the perusal of letter no. 406 dated 07.06.2016, a communication made by the Accountant General to the Joint Secretary, Education Department.

39. Record reveals that Joint Secretary, Education Department, Bihar had modified the notification no. 697 dated 26.05.2016 vide memo no. 877 dated 01.07.2016 with respect to the pay scale and AGP to such teachers covered by 6th Pay Revision and not those who remained in 12/24 of service prior to 6th Pay Revision.

40. The Department realised that Memo No. 877 dated 01.07.2016 was not approved by the Finance Department also did not answer the query raised by the office of the Accountant General, Bihar which was sent vide letter no. 406 dated 07.06.2016. The Department annulled the Memo No. 877 dated 01.07.2016 and issued another notification contained in memo no. 1237 dated 10.03.2018 reducing ACP and MACP and revised the pay scale from earlier pay scale of Rs. 37,400-67,000/- (AGP 9,000/-) without informing about final

consequences and giving any opportunity to the petitioners had reduced in the scale of Rs. 15,600-39100/- (AGP 8000) without sending proposal to the Cabinet for its approval after prior consultation with the Finance Department. In light of Clause 4 of the Notification No. 697 dated 26.05.2016 action has been taken unilaterally by issuance of the notification under the signature of Special Secretary. The action as contained in Notification No. 1237 dated 10.10.2018 will amount to change of decision of the Government by an executive order, which the mandate of Article 166 does not provides for.

41. In similar circumstances, the Apex Court in case of ***Punit Rai v. Dinesh Choudhary*** reported in ***(2003) 8 SCC 204*** in paragraph no. 42 has made following observation:

> *"42. The said circular letter has not been issued by the State in excerise of its power under Article 162 of the Constitution of India. It is not stated therein that the decision has been taken by the Cabinet or any authority authorised in this behalf in terms of Article 166(3) of the Constitution of India. It is trite that a circular letter being an administrative instruction is not a law within the meaning of Article 13 of the Constitution of India."*

42. The Apex Court has further clarified in case of ***State of U.P. v. Neeraj Awasthi*** reported in ***(2006) 1 SCC 667*** which relates to such decision taken by an officer of the State without complying with the requirement of Article 162 read

with Article 166 of the Constitution of India cannot be taken as a decision of the State Government. Paragraph no. 41 of the judgment is inter alia reproduced hereinafter:

> *"41. Such a decision on the part of the State Government must be taken in terms of the constitutional scheme i.e. upon compliance with the requirement of Article 162 read with Article 166 of the Constitution. In the instant case, the directions were purported to have been issued by an officer of the State. Such directions were not shown to have been issued pursuant to any decision taken by a competent authority in terms of the Rules of Executive Business of the State framed under Article 166 of the Constitution."*

43. The above proposition has again been reiterated by the Apex Court in the case of ***Jaipur Development Authority v. Vijay Kumar Data*** reported in ***(2011) 12 SCC 94***. In paragraph no. 53 of the said judgment, following observation has been made:

> *"53.It is thus clear that unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order made on behalf of the Government. A reading of the Letter dated 6-12-2001 shows that it was neither expressed in the name of the Governor nor was it authenticated in the manner prescribed by the rules. That letter merely speaks of the discussion made by the Committee and the decision taken by it. By no stretch of imagination the same can be treated as a policy decision of the Government within the meaning of Article 166 of the Constitution."*

44. If the facts of the present case are examined in the light of the above decisions of the Hon'ble Supreme Court,

it would be apparent that notification no.697 dated 26.05.2016 was issued pursuant to the decision of the Screening Committee, duly approved by the Finance Department and passed by Council of Minister, in conformity with the provision of Article 166 of the Constitution of India expressing it in the name of the Governor, but the subsequent notification dated 10.10.2018, which has modified the notification dated 26.05.2016 and has been issued by the Secretary of the Department, *inter alia*, making order of recovery in monthly installments of the alleged excess payment made to the petitioners in lieu of the modification without being authenticated in the manner prescribed under Article 166 of the Constitution and is fit to be set aside and quashed.

45. The case of the petitioners also falls squarely covered by the proposition of law laid down in Rafiq Masih (Supra) that recovery by the employer would be impermissible in law if it 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.

46. On the basis of above facts and settled principle of law, I am of the opinion that the notification no. 1237 dated 10.10.2018 issued by the Special Secretary, Education

Department, Government of Bihar modifying the earlier notification no. 697 dated 20.05.2016 and notification no. 877 dated 01.07.2016 is without jurisdiction and action taken on the basis of the notification is unwarranted.

47. This Court having prima facie found that injustice have been caused to the petitioners had already stayed the operation of the Memo No. 1237 dated 11.10.2018 (Annexure-4) vide order dated 04.01.2019.

48. This Court finds that the benefit which the petitioners were granted vide notification no. 697 dated 26.05.2016 retrospectively by way of financial upgradation leading to the enhancement of their pay scale in scale of Rs. 37,400-67,000/- and they were continuously receiving their pension till the year 2018, cannot be taken away by executive order/ the notification contained in Memo no. 1237 (Annexure-4) dated 10.10.2018 directing recovery after 3-5 years of their retirement and same is fit to be set aside and quashed in light of the discussion made hereinabove.

49. The respondents, if so advised, may rectify the Notification No. 697 dated 26.05.2016 in accordance with law after giving proper opportunity to the individual petitioners of the present case. The petitioners may also file their detailed

representation in case they are so advised.

50. With the above observations and directions, the present writ petition is allowed.

51. There shall be no order as to costs.

(Purnendu Singh, J)

Niraj/-

AFR/NAFR	A.F.R.
CAV DATE	05.05.2023
Uploading Date	27.07.2023
Transmission Date	N/A