12.04.2023 **WPST 48 of 2023**

Court : **04**
Item : **02**
Matter : **WPST**
Status : **DO**
Bench Id : **266048**
Transcriber : **NANDY**

Chittaranjan Biswas
Vs.
The State of West Bengal & Ors.

Mr. Gangadhar Das, Advocate
Mr. Tanmoy Chattopadhyay, Advocate
……for the Petitioner
Ms. Chaitali Bhattacharya, Advocate
Mr. Kartik Chandra Kapas, Advocate
……for the State

Though the instant writ-petition has been filed assailing an order dated March 21, 2023 passed by the West Bengal Administrative Tribunal in OA 677 of 2022 by which the matter was listed for further hearing after a gap of six months but the writ-petitioner submits that there is a need for urgent interim relief to be granted in his favour and, therefore, by the impugned order, the Tribunal has impliedly refused to pass an interim order.

The matter pertains to determination of the effective date of promotion and recovery of excess amount paid to the petitioner on the basis of such promotion. The petitioner was promoted from the post of Group-D to Lower Division Clerk (LDC) by the respondent authorities, with effect from October 6, 2010. The petitioner was paid the salary admissible to the Lower Division Clerk from the aforesaid effective date. Suddenly a notice dated August 31, 2022 is issued by the Additional District Magistrate (General), Uttar Dinajpur indicating that the anomaly has been detected in respect of a promotion from Group-D post to a Lower Division Clerk post which was, in fact, reserved at 10% of actual staff strength. Though the language employed therein does not indicate with clarity as to what anomaly has actually occurred yet one can visualise the intention gathered therefrom that the authority intended to take a shelter that such promotion was restricted at 10% of the actual staff strength which exceeded the moment the promotion is given effect from October 6, 2010 and, therefore, by the said notice the effective date of promotion to the post of lower division clerk was given from December 1, 2012. Simultaneously, the said authority directed realization of the excess amount paid to the petitioner on such discrepancy from the future monthly salary bill.

The principal grievance of the petitioner before the Tribunal is that such permission was given by the employer with effect from October 6. 2007 and such benefit having been extended without any act of the writ-petitioner in relation to commission of fraud or misrepresentation cannot be taken away or realized from the future monthly salary slip. It is further contended that it is inconceivable that such mistake has been detected after a gap of 12 years and the recovery is sought after a considerable lapse of time.

In this regard the judgment of the Supreme Court rendered in case of ***State of Punjab & Ors. Vs. Rafiq Masih*** reported in ***(2015) 4 SCC 334*** is relied upon.

An interim order was sought so that no effect to the notice dated August 31, 2022 to be given pending the said tribunal application. We do not approve the manner in which the interim relief was sought before the Tribunal. The primary grievance relating to the interim protection is the recovery of the so-called excess amount from the monthly salary bill. If the entire notice is set aside at the initial stage, it would render the tribunal application virtually infructuous pending the final adjudication and, therefore, an exceptional and extraordinary case is required to be made out for such recourses. Whether the promotion to the post of Lower Division Clerk to take effect from October 6, 2010 or from December 1, 2012 is a matter to be decided finally in the tribunal application and, therefore, we feel that the interim order which the tribunal should have considered is in relation to the recovery of the alleged excess amount from the monthly salary bill of the petitioner. The only question arose before us as to whether the mistake which was detected after a lapse of 12 years, is capable of being rectified after such inordinate delay and the excess amount which the authority perceived can be recovered from the Government employee. The Apex Court in ***Rafiq Masih (supra)*** have indicated that ordinarily no recovery of an excess amount is permissible except when such benefit has been extended by practicing fraud or misrepresentation at the behest of the Government employee. It is further held that there is no bar in rectifying the mistake but if such mistake is detected within a period of 5 years, the recovery of an excess amount may be permissible. The obvious reason behind the aforesaid rational view is that the employee who is granted the benefit by the nodal employer of its own, the recovery would impact adversely on such Government employee who cannot be faulted for such act of the employer. There is no quarrel to the proposition that the mistake does not create an inchoate and inviable right and, therefore, is amenable to be rectified by an authority. It is totally different that in the garb of rectification of the mistake the benefit already extended to the employee sought to be recovered, that too, after such an inordinate delay. The relevant excerpts from ***Rafiq Masih (supra)*** is quoted as under:-

> *"It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements, and a variety of sundry expenses. Based on the above consideration, we are of the view, that if the mistake of making a wrongful payment is detected within*

five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee. In this context, reference may also be made to the decision rendered by this Court in Shyam Babu Verma v. Union of India (1994) 2 SCC 521, wherein this Court observed as under: "11. Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same."

(emphasis is ours) It is apparent, that in Shyam Babu Verma's case (supra), the higher pay- scale commenced to be paid erroneously in 1973. The same was sought to be recovered in 1984, i.e., after a period of 11 years. In the aforesaid circumstances, this Court felt that the recovery after several years of the implementation of the pay-scale would not be just and proper. We therefore hereby hold, recovery of excess payments discovered after five years would be iniquitous and arbitrary, and as such, violative of Article 14 of the Constitution of India"

In view of the law enunciated in the above report there is no hesitation in our mind that the recovery of the alleged excess amount is impermissible after more than five years of extending such benefits and we would have remitted the matter back to the Tribunal after passing an interim order to decide the tribunal application finally. But we feel that justice is paramount and if the record speaks of a particular relief to be extended to such litigant, it would be a mere formal exercise that the same should be granted by the Tribunal. Because of the peculiar problem prevalent in the West Bengal State Administrative Tribunal where only one Administrative Member is discharging the duties and functions of the three Benches, it would consume a considerable time to reach to its logical conclusion. The aforesaid observation receives further impetus from the tenet of the notice dated August 31, 2022 wherein the said authority invited reply from the petitioner within a stipulated time. Obviously, such reply is sought so that the authority would further visit the decision already taken after affording an opportunity of hearing to the petitioner and, therefore, the only relief which can be extended in the tribunal application would be to remit the matter to the authority to consider the reply, which in fact has been filed by the petitioner.

A vociferous submission is made on behalf of the State that the High Court should not finally dispose of the proceeding which is pending before the Tribunal as the party will lose a Forum. The aforesaid submission, in our opinion, is intended to give encouragement to a further litigation when the record is patent to the above aspect and it would be an idle formality to keep the cause of action alive which ultimately will achieve the same fate. Both the Tribunal and the Court owe their existence for dispensation of justice which should not be constraint with trifling of technicalities. The moment the technicality is pitted against the substantial justice, the latter must prevail.

We, therefore, do not countenance to the proposition of law advanced by the State-Respondent in this regard as being a nodal employer they have onerous duty to take the decision in accordance with law and to act within the precincts of the constitutional provision. We have already held that so far as the recovery of an excess amount is concerned having made after an inordinate delay of 12 years is impermissible.

We, therefore, quash and set aside the portion of the notice dated August 31, 2022 by which the recovery was intended from the monthly salary bill. We further made it clear that in the event the deduction has already been made the same would be recompensed by the State-Respondent in the next monthly salary bill.

So far as the effective date of promotion is concerned, since the authority has invited the reply from the petitioner, which in fact has already been given, it is expected that the competent authority would decide the same by following the principle of natural justice.

We, therefore, direct the appropriate authority to consider the reply as invited by the notice dated August 31, 2022 and take a decision after following the principles of natural justice within four weeks from the date of communication of this order.

Since the final relief has been granted by us in the writ-petition, the proceeding before the Tribunal is rendered infructuous and liberty is granted to the parties to approach the Tribunal for passing a formal order.

With these observations, the writ-petition being **WPST 48 of 2023** is **disposed of**.

Urgent Photostat Certified Copy of this order be given to the parties, if applied for, within three days of its application.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)