

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

LPA-2038-2019(O&M)
Reserved on 25.01.2023
Date of Decision:09.02.2023

Bhakra Beas Management Board and another

. . . . Appellants

Vs.

Jai Bhagwan

. . . . Respondent

CORAM: HON'BLE MR JUSTICE M.S. RAMACHANDRA RAO
HON'BLE MRS JUSTICE SUKHVINDER KAUR

Present: Mr.Rajesh Garg, Sr. Advocate, with
Mr.Pranav Chadha, Advocate, for the appellants.

Mr.A.D.S. Jattana, Advocate, for the respondent.

M.S. RAMACHANDRA RAO, J.

This Letters Patent Appeal is preferred against the judgment dt.16.10.2019 in CWP-5253-2016 passed by the learned Single Judge.

The said Writ Petition had been preferred by the respondent herein challenging an office order dt.24.08.2015 (P9) passed by the Secretary of Bhakra Beas Management Board (for short 'the Board') rejecting the respondent's representation dt.27.2.2015 to stop recovery of Rs.1,79,463/- on the ground that an excess increment was paid to him from 15.09.1995 when Second Time Bound Pay Scale was granted to him.

The respondent was initially selected as a Draftsman by the Subordinate Service Selection Board in the Haryana Irrigation Department on

15.09.1979. He was promoted as Divisional Head Draftsman in Drawing Branch of the Board in 1998 and later promoted as Sub Divisional Officer on 16.05.2013.

Thereafter, he was working as Assistant Design Engineer with the appellants. He retired from service on 31.07.2015 after attaining the age of superannuation.

He had been granted, while in service, his second time bound pay scale on 15.09.1995.

Just prior to his retirement in the year 2015, his service book was demanded for revising the pay fixation. Thereafter on 10.02.2015, his pay was fixed and an amount of ₹275/- was taken out on the ground that it had been paid incorrectly.

Thereafter an office order dt.10.02.2015 (P2) was issued stating that his pay on grant of 16 years Time Bound Pay Scale was refixed at ₹2550/- w.e.f. 15.09.1995 in the scale of ₹2000-3500 instead of what was already fixed at ₹2640/- w.e.f. the said date in the said scale, and it was mentioned therein that recovery would be effected from 15.09.1995 onwards.

But no prior show cause notice was issued to the respondent before passing order dt.10.02.2015 (P2) and no justification was mentioned therein as to why the Second Time Bound Pay Scale was being withdrawn from him and his pay was being refixed. There was no mention that there was any conduct attributable to the respondent on the basis of which the pay revision was done and recovery was sought to be made.

Thereafter, order dt.26.02.2015 (P3) was issued reiterating that recovery would be effected from 15.09.1995 and it was indicated that his pay was

refixed from 01.09.1998 upto 01.09.2005 with appropriate deductions at each stage. Thereafter, a new pay scale was fixed to the petitioner vide order dt.26.02.2015 (P4).

The Respondent contended that such recovery cannot be effected from his pay or retiral benefits as he had not represented or played fraud upon appellants to get the Second Time Bound Scale, and at the fag end of his service this cannot be done. The respondent submitted representation on 27.02.2015 (P5) opposing the recovery. There was no response to this representation and he later made other representations on 31.03.2015 and 01.04.2015.

The respondent also contends that on 17.04.2015 vide Annexure P6, the Director/Water Regulation of the appellant addressed a letter to the Chief Engineer, Bhakra Dam of the appellant referring to respondent's plan/representation opposing the recovery being made on the basis of the judgment of the Supreme Court in the *State of Punjab and others Vs. Rafiq Masih*¹ rendered on 18.12.2014, prohibiting any such recovery from employees who were due to retire within one year of the order of recovery.

When there was no response from the appellants, the respondent then filed CWP-14316-2015 which was allowed on 20.07.2015 and appellants were directed to decide the representations submitted by the respondent.

The order impugned in the Writ Petition

However, order was passed on 24.08.2015 (P9) rejecting respondent's representations and ordering recovery of an amount of ₹1,79,429/-.

¹ 2015(1) RSJ 177

CWP-5253-2016

This was challenged in CWP-5253-2016 by the respondent.

He contended in the said Writ Petition that the said order dt.24.08.2015 is contrary to the law declared by the Supreme Court in the above judgment, that the reasoning given therein is fallacious and recovery cannot be permitted to be made. Respondent also contended in the Writ Petition that the amount he was getting post retirement was inadequate as he had been living in a Government house for more than 36 years and he had to purchase a new home , that he had two children studying, one of them being a daughter and she also had to be married, and the amount which he would get after retirement is just 1/4th of the amount required to establish himself post retirement. He further claimed recovery of the amount of ₹1,79,429/- lakh with 18% interest.

The appellant filed a reply before the learned Single Judge opposing the claim made in the Writ Petition.

It contended that the decision of the Supreme Court cited by the respondent holds that employer's action seeking recovery of monetary benefit wrongly extended to employees can only be interfered with in cases where such recovery would result in a hardship; that the respondent on retirement from service as Assistant Design Engineer was going to receive ₹35.86 lakh being ₹8.04 lakh on account of unavailed leave, ₹9.81 lakh as DCRG and ₹18.01 lakh as GPF from his parent department as well as from the appellant on account of his retiral dues, and so there is no hardship caused to him if recovery of only ₹1,79,463/- is made which had in fact been wrongly drawn by him. It contended

that he intentionally chose not to inform the Department that he was receiving undue benefit of one excess increment without adjustment of proficiency step up, and that he continuously receive the said benefits upto his retirement. It also contended that the respondent was holding a Class-II post and the decision of the Supreme Court, if at all would apply only to employees belonging to Class III & IV services. Reliance was also placed on form of undertaking given on 02.12.2009 wherein the respondent is said to have said that any excess/wrong payment made to him can be recovered from him.

Reliance is also placed on certain decisions of the Supreme Court in reply.

It is contended that discrepancy came to notice only on the basis of a complaint/representation by one Azad Singh, an Assistant Design Engineer of the appellant/Board , who contended that he was getting a lower pay scale though he was senior, and his pay should have been stepped up or made equivalent to or more than that of respondent; that the case of the said employee was then taken up and it was decided that when the Second Time Bound Pay Scale w.e.f. 15.09.1995 was granted,two increments were granted to the respondent erroneously instead of one increment which he was entitled because the previous benefit of proficiency step up drawn on 15.09.1987 (which was erroneously fixed) was not adjusted. It is also contended that the submissions of the respondent were considered before passing impugned order dt.24.08.2015 (P9).

The Order of the Ld. Single Judge

Vide order dt.16.10.2019, the learned Single Judge allowed the Writ Petition.

The Ld. Single Judge held that though an employer can take action to correct an illegality in making payment to an employee by making recovery, the question to be considered is *whether there can be such recovery effected from the respondent after he had been drawing the same for more than 20 years and there was no fraud or misrepresentation on his part.*

The learned Single Judge held that the respondent was in no way associated with the fixation of his pay as such or that he had committed any fraud to obtain the increment in question benefit on which he was drawing for 20 long years. He held that at the fag end of the respondent's service career i.e. 5 months prior to his retirement on 10.02.2015, the appellants have woke up from their slumber to correct his pay and to recover the amount in question without giving him any notice.

He relied on the judgment of the Supreme Court in **Rafiq Masih** case (1 Supra) wherein the Supreme Court held that recovery of excess payments made from employees who had retired from service or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer; that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement; and that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. But his earnings have substantially dwindled on retirement and so it would be iniquitous and arbitrary to make a recovery after the date of retirement or soon before retirement.

The Supreme Court in **Rafiq Masih** case (1 Supra) held that *period of one year from the date of superannuation in its opinion should be accepted as the period during which the recovery should be treated as iniquitous*. The Supreme Court held that it would be impermissible to make recovery in the following cases:

- 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.*

The Ld. Single Judge held that the case of the respondent would fall within clause (ii) and (iii) referred to above.

He then considered the judgment of the Supreme Court in **High Court of Punjab & Haryana and others vs. Jagdev Singh**², cited by the counsel for the appellant before him and distinguished it on the ground that the undertaking given by the respondent in the instant case was given only on 02.12.2009 and not in 1995, when the increment was given allegedly by mistake of the employer. It was further observed that in the case of **Jagdev Singh** (2 Supra), a judicial officer had been given the benefit of revised pay scale in the selection grade on 07.01.2002 and he was to retire on 12.02.2003, and after retirement, on 18.02.2004, recovery was sought to be made from him; and the

² 2016(4) SCT 286

period of five years as stipulated in the decision of *Rafiq Masih* (1 Supra) had not happened, and so the recovery could be sustained.

The learned Single Judge had held that the respondent had earned his retiral dues by serving long years, that for a period of 20 years, the benefit of increment had been granted to him and recovery was sought to be effected practically at the fag end of service. He held that it would not be justified to say that ₹1,79,463/- is a small amount and no hardship would be caused to the respondent to pay the said amount. He also held that there was no reference to any undertaking given by the respondent in the impugned order and so the impugned order cannot be sustained on the basis of said undertaking in view of the decision of the Supreme Court in *Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others*³.

He therefore, quashed the order dt.24.08.2015 (Annexure P9) to the extent of recovery of ₹1,79,463/- from the respondent and directed the appellants to pay it back to him within two months from that day. He also held that if that amount is not paid within the said period, the appellants would also need to pay interest @8% per annum from the date the amount is recovered from the date of its repayment. He however upheld the order regarding reduction of pay of the respondent.

The LPA

Assailing the same, this Appeal is filed by the appellants.

Counsel for the appellants contended that the order of the learned Single Judge is erroneous; that the learned Single Judge ought not to have set aside the order of recovery of ₹1,79,463/- made vide order dt.24.08.2015 (P9); that the learned Single Judge ought to have relied on the decision in *Jagdev*

³ (1978) 1 SCC 405

Singh (2 Supra) instead of decision in **Rafiq Masih** (1 Supra); that the undertaking given by the respondent on 02.12.2009 estopped the respondent from the challenging the recovery; and therefore, the Appeal should be allowed.

Counsel for the respondent refuted the said contentions and supported the order passed by the learned Single Judge.

Admittedly, the respondent had joined the service of the Irrigation Department in 1979 and had been working as Assistant Design Engineer with the appellants/Board at the time of his retirement on 31.07.2015. Just prior to his retirement, on 10.2.2015, the appellants started an exercise to refix his pay by reducing certain amounts therefrom on the ground that an increment was wrongly paid to him on 15.09.1995.

Admittedly, the said excess payment was being made from 15.09.1995 for almost 20 years till 10.02.2015.

It is not alleged by appellants that there was any mistake or fraud on the part of the respondent because of which the excess payment was made to him. It is not even the case of the appellants that the respondent had any role in the sanction of increments or fixation of his pay.

Therefore, obviously the respondent is an innocent party though he had benefited from mistake committed by the appellants and had drawn ₹1,79,613/- in excess of what he was entitled.

As per the judgment in **Rafiq Masih** (1 Supra) relied upon by the learned Single Judge, it would be iniquitous and arbitrary if recoveries are sought to be made after the date of retirement or soon before the retirement and any such recovery would outweigh the monetary gains to the employer.

The Supreme Court had held that a retired employee or an employee about to retire is a class apart from those who have sufficient service to their credit before their retirement and that at retirement, an employee is past his youth and his needs are far in excess of what they were when he was younger. It laid down certain guidelines which are extracted above for such recovery. The Court had also relied upon its previous judgment in *Syed Abdul Qadir Vs. State of Bihar*⁴ wherein the Court had held that if there is any inaction, negligence and carelessness of the officials concerned of the employer, recovery ought not to be made.

In the case of *Rafiq Masih* (1 Supra), the Court had also referred to its previous decision in *Col. B.J. Akkara (Retd.) Vs. Govt. of India*⁵, that restraint on 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.

The decision in the case of *Rafiq Masih* (1 Supra) has been reiterated in other cases as well.

The decision in *Jagdev Singh* (2 Supra) cited by the appellants cannot come to their aid because in the said case, the recovery was effected within one year of its payment and also in the said case, the officer concerned had been put on notice that if any payment is found to be made in excess it would have to be refunded and he was given an undertaking to that effect.

The reliance by the appellants on the undertaking said to have been given by the respondent on 02.12.2009 will not be of any assistance to them since such undertaking was not given qua the pay fixation done in 1995, but had been

⁴ 2009(3) SCC 475

⁵ (2006) 11 SCC 709

given long afterwards without reference to it and the same had also not been relied upon by the appellants in the impugned order. As rightly held by the learned Single Judge, the order of recovery dt.24.08.2015 (P9) cannot be sustained on the basis of new reasons which are furnished in the Court and which do not form part of the said order.

Therefore, we do not find any error in the order passed by the learned Single Judge warranting interference by us in exercise of the Letters Patent jurisdiction.

Accordingly, the Appeal fails and is dismissed.

Pending application(s), if any, shall stand disposed of.

(M.S. RAMACHANDRA RAO)
JUDGE

(SUKHVINDER KAUR)
JUDGE

09.02.2023

Vivek

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| 1. Whether speaking/reasoned? | Yes |
| 2. Whether reportable? | Yes |