2024:DHC:1390-DB

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: February 13, 2024*

\+ W.P.(C) 6381/2019

(12) JAGDISH SINGH ..... Petitioner
Through: Mr. Ankur Chhibber, Advocate.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Bhagvan Swarup Shukla, CGSC for UOI with Mr. Saksham Sethi, Advocate

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE SAURABH BANERJEE

SAURABH BANERJEE, J. (ORAL)

1. As per facts, after his appointment as a Constable/GD in the Border Security Force[1], the petitioner completed around 40 years of service and retired as an Inspector on 31.07.2018. Thereafter, being aggrieved by the action of the respondents as regards his pay fixation and the recovery of gratuity benefits made post retirement, the petitioner filed the present petition under Article 226 of The Constitution of India, *inter alia*, seeking the following reliefs :

> "*(i) Issue a writ of certiorari for quashing of letter dated 21.12.2016 whereby the pay of the petitioner has been incorrectly fixed in accordance with the benefit granted under MACP scheme and for quashing of recovery notice dated 10.11.2017 whereby recovery of amount of Rs.7,94,571/- was ordered against the petitioner;*
> *(ii) Issue a writ of mandamus directing the respondents to release the*

[1] (hereinafter referred to as BSF)

amount of gratuity Rs.8,91,578/- illegally withheld from the petitioner;
(iii) Issue a writ of mandamus directing the respondents to fix the pay of the petitioner at Rs.10230/- plus grade pay of Rs.4200/- (being 5500x1.86) in pursuance to the grant of benefit of the second financial upgradation under the ACP scheme with all consequential benefits and grant the petitioner the same relief as granted in W.P.(C) No.332/2017 passed vide an order dated 12.01.2018"

2. In view of the aforesaid facts, learned counsel for the petitioner submits that the action of the respondents in making a recovery from the salary of the petitioner *who has since retired from service,* is not only unfair and arbitrary but is also in complete variance with the settled legal position qua making recoveries from the salaries of government employees/retired government employees, especially in view of the milestone pronouncement of the Hon'ble Supreme Court of India in ***State of Punjab & Others vs Rafiq Masih*** (2015) 4 SCC 334 wherein the law relating to recovery to be made from the salary of an employee/retired employee has been well summarized. In light thereof, he submits that since the petitioner herein is also a retired employee, recovery from his salary is impermissible in law. In fact, relying upon other judgments, he goes onto submit that the petitioner has a right to receive pension and gratuity as accrued benefits and they cannot be arbitrarily withheld by the respondents.

3. Therefore, as regards the grant of 2nd Assured Career Progression Scheme[2] benefits, learned counsel for the petitioner submits that the petitioner was not granted the benefit of 2nd financial upgradation under the ACP Scheme in a timely manner (i.e. on completion of *24* years in

[2](hereinafter referred to as ACP Scheme)

service) on the ground that he had not qualified the pre-promotional course(s), a mandatory condition for promotion to the next rank.

4. Learned counsel then submits that similarly situated personnel from other forces filed W.P.(C) No.4258/2013 titled ***Gaj Raj Singh & Ors. vs Union of India*** and W.P.(C) No.6550/2013 titled ***Suraj Bhan & Ors. vs Union of India*** before this Court, praying *inter alia,* that they could not be blamed for non-completion of the pre-promotional course(s) and it was due to the respondents fault that they had not been granted the 2nd financial upgradation under the ACP Scheme in a time bound manner. Finding merit in the plea taken by the petitioners therein, the prayers in the aforesaid petitions were granted vide judgments dated 06.09.2013 and 11.10.2013. In fact, consequent thereupon, the present petitioner was also *admittedly*, granted the benefit of 2nd financial upgradation under the ACP Scheme in the year 2014.

5. However, learned counsel submits that later on 21.12.2016, the respondents recalled the above grant of 2nd financial upgradation under the ACP Scheme and instead granted the financial benefits under the Modified Assured Career Progression Scheme[3] by granting both the 2nd and subsequently the 3rd financial upgradations under the MACP Scheme. As per learned counsel, it is this action of the respondents that has resulted in the petitioner drawing a lower pay than other similarly situated personnel because had the petitioner been granted the 2nd financial upgradation under the ACP Scheme in a time-bound manner, he would have prudently exercised his option of either continuing to draw

[3] (hereinafter referred to MACP Scheme)

his pay in the existing pay structure or opting to shift to the revised pay structure as per the Rules *5 & 6* of CCS (Revised Pension) Rules, 2008. Learned counsel submits that as this issue has also been squarely dealt by a Co-ordinate Bench of this Court in W.P.(C) 9359/2016 titled as ***SI/GD Shambhoo vs Union of India & Ors.*** and other connected cases vide judgment dated 11.10.2017 and since the case of the petitioner is also covered on similar lines, therefore, the petitioner ought to be extended/granted similar reliefs.

6. On the other hand, learned counsel for the respondents submits that the petitioner had been duly informed about the intended recovery against his salary vide Signal No.A/7058 dated 20.11.2017 whereby the petitioner was asked to deposit the amount to the tune of Rs.7,94,591/-, however, the petitioner chose not to adhere to the same. He submits that the said intended recovery against the retirement gratuity payable to the petitioner is in compliance with Rule 71 of the CCS (Pension Rules), 1972.

7. Learned counsel further submits that, in any event, since the petitioner failed to timely exercise his option of either continuing to draw his pay in the existing pay structure or opting to shift to the revised pay structure as per the Rules *5 & 6* of CCS (Revised Pension) Rules, 2008, therefore, his pay was rightly revised and fixed in line with the existing rules and norms. It is lastly submitted that on completion of *24* years in the service in the year 2003, the petitioner was not immediately granted the 2nd financial benefits under the ACP Scheme as he did not meet the requisite educational qualification and it was only in the year 2014, after the judgments dated 06.09.2013 and 11.10.2013 were passed in ***Gaj Raj***

Singh & Ors. (supra) and ***Suraj Bhan & Ors. (supra)*** respectively, that the petitioner was granted the requisite exemptions required to be granted the 2nd financial upgradation under the ACP Scheme.

8. This Court has heard the learned counsel for the parties and has also perused the documents on record as well as the relevant case laws cited by the parties coupled with the otherwise settled position of law.

9. In essence, qua the issue of withholding a part of the gratuity amount payable to the petitioner upon his retirement from service is concerned, the arguments addressed by the learned counsel for the petitioner are primarily hinging upon the milestone judgement of the Hon'ble Supreme Court of India in ***State of Punjab & Ors. (supra)*** wherein, after much deliberations and after taking note of the previous pronouncements by it in ***Chandi Prasad Uniyal vs State of Uttarakhand*** (2012) 8 SCC 417, ***Syed Abdul Qadir vs State of Bihar*** (2009) 3 SCC 475, ***Col. B.J. Akkara vs Government of India*** (2006) 11 SCC 709 and ***Sahib Ram Verma vs Union of India*** (1995) Supp. 1 SCC 18, the Hon'ble Supreme Court of India had postulated the applicable conditions as under:-

> *"12. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to 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."

10. In view thereof, since the petitioner herein had retired from service as an Inspector on 31.07.2018 and though the Signal No.A/7058 dated 20.11.2017 seeking deposit of excess amount as part of his salary was sent by the respondents to the petitioner almost a year before his retirement on 20.11.2017, however, *admittedly*, the order regarding recovery of his illegal pay arrears was communicated to him only after his retirement from service i.e. was communicated to him on 21.02.20219. The same in view of the settled legal proposition outlined under *paragraph 12(ii)* of ***State of Punjab and Ors. (supra)*** is not permissible in law.

11. Similarly, qua the issue of grant of benefit of the 2nd financial upgradation under the ACP Scheme with all consequential benefits, the petitioner is once again seeking parity with the other similarly situated personnel belonging to different forces, who were extended/granted similar reliefs in W.P.(C) 332/2017 titled as ***Jas Ram vs Union of India and Ors.*** and ***SI/GD Shambhoo (supra)***.

12. Finding that the petitioner herein is similarly situated as the petitioners in ***Jas Ram (supra) and SI/GD Shambhoo (supra)*** and in view of the pronouncements made by Co-ordinate Benches of this Court in those petitions, the petitioner in the present petition shall be entitled to

the benefit of clause (i) appended to Rule 7(1)(A) of the CCS (Revised Pension) Rules, 2008, wherever it is more beneficial.

13. Thus, the present petition is allowed and the respondents are directed to refund the complete amount of recovery being made by them from the gratuity amount payable to the petitioner within a period of six weeks and are further directed to grant the benefit of clause (i) appended to Rule 7(1)(A) of the CCS (Revised Pension) Rules, 2008, to the petitioner, wherever it is more beneficial failing which the respondents shall be liable to pay simple interest @ 6% per annum to the petitioner from the date of passing of this order till the payment is released.

14. Accordingly, the present petition, alongwith the pending applications, if any, is disposed of in the above terms.

SAURABH BANERJEE, J.

V. KAMESWAR RAO, J.

FEBRUARY 13, 2024/rr