



2024 :DHC:5830-DB



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of decision: August 1, 2024***+ **LPA 727/2023****CONVENT OF JESUS & MARY****.....Appellant**

Through: Ms. Ekta Mehta, Mr. Antarik
Chakrabarti and Ms. Zainab Khan,
Advocates

versus**AMAR JYOTI BRAHAMCHARI & ANR.****.....Respondents**

Through: Mr. Vinay Kr. Padam and Mr. Arkam
Pasha, Advocates.

Mrs. Avnish Ahlawat Standing
Counsel GNCTD with Mr. Nitesh
Kumar Singh, Ms. Laavanya
Kaushik, Ms. Aliza alam and Mr.
Mohnish Sehrawat, Advocates for R-
2/DOE through VC.

CORAM:**HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MR. JUSTICE GIRISH KATHPALIA****J U D G M E N T (oral)**

1. The present appeal has been filed by the appellant under Clause 10 of the Letters Patent seeking partial setting aside of impugned order dated 17.08.2023 passed by learned Single Judge in W.P.(C) 7558/2016 to the extent that no recovery be made from respondent No.1.

2. The appellant school is an unaided recognized Christian minority school imparting education upto class XII and is governed by the provisions of Delhi School Education Act & Rules, 1973 (hereinafter referred to as

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‘DSEAR Act, 1973’) and managed by the Jesus & Mary Delhi Educational Society. The respondent No.2 (‘respondent No.2/DoE’) is the Directorate of Education, Government National Capital of Territory of Delhi.

3. The respondent no.1/Teacher joined the appellant/school i.e. Convent of Jesus & Mary School (‘appellant/school’) as a temporary Tabla Teacher on 01.09.1981 and was later confirmed to the said post on 01.07.1983 as per the Service Book.

4. The respondent no.2/DoE vide circular dated 25.06.2008 directed the managing committee of all the unaided recognized schools to make payment of terminal benefits to their employees as per Section 10 (1) of DSEAR, Act 1973, wherein it is stated that the scales of pay and allowances, retiral benefits provided to an employee of a recognized private school shall not be less than those of employees of the corresponding status in schools run by the appropriate authority.

5. The respondent no.1 superannuated on 31.08.2015 from the post of Senior P.R.T/ PST in the scale of Rs. 9300-34,800/- plus Grade pay of Rs.4800/-.

6. The case of respondent no.1 is that appellant/school did not pay any retiral benefits like leave encashment dues or gratuity to the respondent no.1/Teacher. As per the leave record of the respondent no.1, he had 288 days’ earned leave on the date of his retirement and thus, was entitled to leave encashment.

7. Being aggrieved, the respondent no.1 filed W.P.(C) 7558/2016 before this Court seeking directions to the appellant to pay respondent no.1 his retiral dues with interest @12%.

8. This Court vide order dated 30.10.2023 has already taken note of the



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fact that the appellant/school has already effected payment towards all retiral dues to respondent no.1 in terms of order dated 24.03.2023 passed by learned Single Judge in W.P.(C) 7558/2016. The present appeal is pressed by appellant/school seeking refund in terms of order dated 28.08.2015 passed by respondent no.2/DoE to the tune of Rs.5,33,760/- from the respondent no.1/Teacher on account of additional amount drawn from the school. It was also submitted that respondent no.2/DoE vide order dated 28.08.2015 directed the appellant/school to recover an amount of Rs.5,33,760/- from the respondent no.1/Teacher on account of additional amount drawn from the school.

9. Today, learned counsel for petitioners has confined grounds of filing the present petition to grounds A,B,M and N which are reproduced as under:-

“A. For that the impugned order in directing not to recover any amount from the Respondent No.1 is beyond the scope of the petition.

B. For that the impugned order appears to have been passed without due application of mind in not noticing the earlier order dated 24.03.2023 vide which the retiral dues of gratuity and leave encashment were already paid to the Respondent No.1 and nothing further survived in the petition for adjudication.

M. For that the Hon’ble Single Judge failed to consider that the employer in the present case is not a State where the test of balancing equities has been applied by the Courts. The employer is a private unaided minority school that enjoys autonomy under Article 30 (1) of the Constitution of India and receives no aid or grant from the Government and functions out of its own funds. It runs on a no profit basis and where



inadvertently, excess amounts have been paid, the school ought to be entitled to recover the same.

N. For that it is not more iniquitous, unfair, wrongful, improper or unwarranted than the corresponding right of the school to recover the excess amounts.”

10. On 03.04.2024, learned counsel for appellant/school had sought time to obtain instructions in respect of recoveries to be effected which was disputed by learned counsel for respondent no.1 on the ground that purportedly excess payments of which recovery is sought to be made was made from 1996 onwards which could not be permitted after 27 years.

11. Upon hearing learned counsel representing both the sides and on perusal of impugned judgment and material placed on record, this court finds that since appellant/school is governed by *DSEAR Act, 1973 and Section 10(1) thereof provides that salary of employees of unaided private schools should not be less than their counter-parts working in government schools.*

12. The appellant/school cannot be heard to say that it is a minority institution and has a right to make the payments of its choice.

13. The learned Single Judge in the impugned order has relied upon decision Hon'ble Supreme Court in ***State of Punjab v. Rafiq Masih***, (2015) 4 SCC 334 has enunciated the as discussed above the position of law with regard to recovery of excess amount paid to an employee. The relevant portion is reproduced below:

“7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be



interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.

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."*

14. In our considered opinion, the learned Single Judge has rightly observed that any recovery of monetary benefits extended to respondent no.1 would be unfair.

15. This Court is of the view that if due to mistake of the appellant/school



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any excess payments have been made to respondent No.1 and that is almost one decade ago, it would be highly unfair to recover the same from him.

16. In view of above, we do not find any perversity or error in the impugned order passed by learned Single Judge. Finding no merit in the present appeal, the same is hereby dismissed.

17. Learned counsel for respondent No.1/Teacher has pointed out that the appellant/school has withheld amount of Rs.5,33,760/-. Accordingly, the appellant/school is directed to within two weeks pay if such amount is withheld, along with interest @ 6% per annum from due date till its realization.

(SURESH KUMAR KAIT)
JUDGE

(GIRISH KATHPALIA)
JUDGE

AUGUST 1, 2024
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