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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 362 OF 2024

Shri Bhalchandra P. Naik, Age-63, Indian National, Resident of House No. 264/25/A, Green Valley(Saulem), Porvorim, Bardez Goa. ... Petitioner.

Versus

1 The State of Goa, Represented through Chief Secretary, Provorim, Bardez Goa.

2. The Director, Directorate of Education, Alto-Porvorim, Bardez Goa.

3. The Director, Directorate of Accounts, Alto-Porvorim, Bardez Goa.

4. The Principal, The Government Hr. Secondary School, Pernem-Goa. .... Respondents.

Mr Vithal Naik, Advocate for the petitioner.
Mr Prashil Arolkar, Addl. Govt. Advocate for respondent nos. 1 to 3.

CORAM: BHARATI DANGRE & NIVEDITA P. MEHTA, JJ.

Date: 9th April, 2025.

JUDGMENT (PER Nivedita P. Mehta, J).

1. The petitioner states that his claim is restricted to the relief sought in prayer clause (a), which is reproduced hereunder:

> *"a) Issue writ of Mandamus or writ in the nature of the Mandamus directing the respondent no. 3 to forthwith withdraw the letter dated 30.03.2022 bearing Ref. No. DA/PA-I/PENS(8)2021-22/477 or in alternative for an appropriate order quashing and setting aside the Letter dated 30.03.2022 bearing Ref. No. DA/PA-I/PENS(8) 2021-22/477 to the extent it directs the respondent no. 04 to recover the excess payment made to the Petitioner and further direct the respondents herein to release the amount of Rs.1,83,712/- (Rupees one lakh eighty-three thousand seven hundred and twelve only) in favor of the petitioner."*

2. The relief as mentioned above has been sought on the ground that the petitioner was initially appointed by respondent no.2 to the post of Teacher Grade-I (Office Management) for the vocational stream in Government Higher Secondary School, Pernem, on an *ad-hoc* basis in 1993. After regularisation, the petitioner was granted the benefit of the Senior Scale on 22.12.2006, effective from 5.01.2005. The petitioner was due for retirement on 31.12.2022. Respondent no. 2, re-employed the petitioner in the same post and at the same institution from 01.01.2022 to 30.04.2022. After completion of 24 years of continuous service, respondent no. 2 extended the benefit of Selection Scale on 07.01.2022 with effect from 05.01.2017.

3. As the petitioner was due to retire on 30.04.2022, his pension papers were forwarded to respondent no.3. Respondent no.3 returned the pension papers and the principal of higher education was called upon to clarify whether *ad-hoc* services of the petitioner were counted for computation of continuous service in the post of Grade-I teacher. The decision was reviewed, and the petitioner was granted Senior Scale with effect from 01.12.2016 and the earlier Selection Scale granted to the petitioner was withdrawn vide order dated 07.01.2022 without notice. Respondent no.2 withdrew the benefit of Senior Scale and recovery of Rs.1,83,712/- (Rupees one lakh eighty-three thousand seven hundred and twelve only) was effected accordingly by respondent no.3 from the death-cum-retirement gratuity which was payable to the petitioner at the time of his retirement on the ground that the same has been wrongly paid. Aggrieved by such recovery, the petitioner has sought relief from this Court.

4. Respondent nos.1 and 2 contested the petition by filing their reply stating therein that the petitioner was wrongly granted the Senior Scale with effect from 05.01.2005 and the Selection Scale from 05.01.2017 by counting the *ad-hoc* service of the petitioner from 05.01.1993 till 01.12.2004. These errors were rectified by the respondent no. 2 vide order dated 01.06.2022, whereby it was made clear that the petitioner is entitled to Senior Scale from 01.12.2016 and the grant of Selection Scale was withdrawn. The petitioner's pay was fixed after the Government decision to extend the benefits of 6th and 7th pay to the employees in the State of Goa, respectively. The petitioner had submitted an undertakings dated 11.12.2012 and 07.12.2016 before extending the aforesaid benefits, and therefore any excess payment made as a result of incorrect fixation of pay has to be refunded by the petitioner.

5. The learned counsel, Mr. Naik, appearing for the petitioner, made the following submissions:

5.1. The action on the part of respondent nos.2 and 3 effecting recovery of an alleged excess payment made on account of erroneous pay fixation without any notice or opportunity of hearing at the time of retirement of the petitioner is arbitrary, unjust and unfair. The alleged excess payment claimed to have been made is on account of an erroneous fixation of payment by the concerned administrative body concerned, and the petitioner cannot be held responsible for such an erroneous pay fixation.

5.2. The respondent nos. 2, 3 and 4 have erred in withdrawing the benefit of Senior Scale and Selection Scale granted to the petitioner on incorrect assumptions. The respondents were completely misconceived in observing that the period of a*d-hoc* services was required to be excluded while counting 12 and 24 years of service in the post for the grant of Senior and Section Scale. It is the settled position of law that while counting the 12 and 24 years of service in the post, the date of initial appointment is required to be considered, and therefore the *ad-hoc* services of the petitioner ought to be counted for being eligible for the benefit of Senior and Selection Scale. The Senior and Selection Scale was introduced by the Government in the nature of financial upgradation granted to employees to mitigate the monetary loss caused on account of lack of promotional avenues. Hence, while counting period 12 and 24 years of service in the post, such differentiation between the employees based on their initial appointment cannot be sustained in law, particularly where the petitioner was regularized in the same post and on the same pay scale without a break in service.

5.3. The Central Government has issued an Office Memorandum dated 02.02.2016 following the law laid down in the case of *State of Punjab vs. Rafiq Masih (white washer) and others,*[1] of the hon'ble Supreme Court, which has been adopted by the Government of Goa by issuing an Office Memorandum dated 07.03.2017.

5.4. The recovery has caused extreme hardship and mental agony to the petitioner. The petitioner has gotten accustomed to a particular standard of living considering the pay which he draws from his post. The recovery effected at the time of retirement from the petitioner is in complete violation of the law laid down by the hon'ble Supreme Court. The petitioner has placed reliance on *Jogeswar Sahoo and others Vs. The District Judge, Cuttack and others,*[2] *State of Punjab*

1 *2015 4 SCC 334*

2 *SLP (C) No(s). 5918/2024*

vs. Rafiq Masih,[3] *Thomas Daniel Vs. State of Kerala and others,*[4] *and Shri Jotiba Ishwar Mali Vs. The State of Goa,*[5].

6. *Per contra*, opposing the contentions of the counsel for the petitioner, the learned Addl. Government Advocate, Mr. Arolkar, made the following submissions on behalf of the respondents:

6.1. The order of recovery is justified as the petitioner was not entitled to the benefits of the Senior and Selection Scale as it was made applicable wrongly with effect from 05.01.2005 vide order dated 22.12.2006 and order dated 07.01.2022 by counting *ad-hoc* service of the petitioner from 05.01.1993 till 01.12.2004. The said errors were rectified by respondent no. 2 by passing an order dated 01.06.2022, clarifying the entitlement of the petitioner for Senior Scale from 01.12.2016.

6.2. The excess payment to the petitioner was made at the time of fixation of 6th pay Part-B Scales (Fixation was done in Grade Pay of Rs. 5400 instead of Grade Pay of Rs.4800/-) and the same was arrived at by respondent no. 2 based on the undertaking of the petitioner dated 11.12.2012 and at the time of fixation of 7th pay scales the same was carried forward based on the undertaking 07.12.2016. Hence, in view of the undertakings given by the petitioner that any excess payment that

3 *AIR 2015 SC 696*

4 *2022 SCC Online SC 536*

5 *Writ Petition no. 285 of 2024*

may be found to have been made as a result of incorrect fixation of pay or excess payment detected in light of discrepancies noticed subsequently will be refunded to the Government either by adjustment against the further payment due to him or otherwise; the order of recovery does not call for interference. The respondent relied on the judgment of the High Court of *Punjab and Haryana and others vs. Jagdev Singh*[6] and contended that the petitioner has given an undertaking while revising his pay scale under the 6th and 7th Pay Commission and therefore, recovery of excess payment is just and proper.

7. Having heard the respective counsel appearing for the parties, the rival contentions now fall for our determination.

8. The main bone of contention, is whether recovery could be effected from the retirement benefits of the petitioner due to the wrong fixation of the Pay Scale. The petitioner was admittedly granted the Senior and Selection Scale by respondent no.2. Respondent no.3, during the finalization of the pension papers, raised a query regarding the wrong fixation of the pay scale by taking into consideration the period of *ad-hoc* service. Therefore, respondent no. 2 ordered recovery of Rs.1,83,712/- (Rupees one lakh eighty-three thousand seven hundred and twelve only) from the death-cum-retirement gratuity which was payable to the petitioner at the time of his retirement without

6 *2016(14) Supreme Court Cases 267*

complying with the principle of natural justice. The said benefit was granted without there being any fraud or misrepresentation by the petitioner.

9. The hon'ble Supreme Court in *Jogeswar Sahoo and others Vs. The District Judge, Cuttack and others,*[7] *in paragraphs 8 and 9,* has been observed thus:

> *"8. The law in this regard has been settled by this Court in catena of judgments rendered time and again; Sahib Ram vs. State of Haryana, Shyam Babu Verma vs. Union of India, Union of India Vs. Regional Jt. Director and in a recent decision in the matter of Thomas Daniel vs. State of Kerala & ors.*
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> *9. This Court has consistently taken the view that if the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee or if 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, such excess payments of emoluments or allowances are not recoverable. It is held that such relief against the recovery is not because of any right of the employee but in equity, exercising judicial discretion to provide relief to the employee from the hardship that will be caused if the recovery is ordered."*

7 *SLP (C) No(s). 5918/2024,*

10. The above-mentioned decision, relying on decisions rendered earlier by the hon'ble Supreme Court holds that where monetary benefits are given to employees in excess of their entitlement due to a mistake committed by the concerned authorities in determining the payable emoluments and where the employees are not guilty of furnishing any incorrect information, misrepresentation or fraud, no recoveries can be ordered from the retired employees or those employees who are due to retire within one year of the order of recovery. The decision relied upon by the respondents in the *State of Punjab and Haryana and others Vs. Jagdev Singh* (supra) has no applicability to the case of the petitioner in view of the observations made by the hon'ble Supreme Court in the case of *Jogeswar Sahoo*(supra).

11. In the instant case, the recovery has been sought to be made for the benefits of the Senior Scale extended to the petitioner on 22.11.2006 computing continuous service of 12 years from 01.02.1993. The date on which the initial benefits were extended i.e, 22.11.2006, there was no undertaking, and the grant of subsequent benefit followed in due course. The undertaking on which the State placed reliance is dated 11.12.2012 i.e. much after the benefit of Senior Scale was granted from the date of initial appointment, counting the service rendered by the petitioner as *ad-hoc.* The second benefit of Selection Scale was granted after the completion of 24 years, which is the natural course in service where the employee is granted Senior Scale after the completion of 12 years, which was accordingly paid to the petitioner and cannot be recovered on the basis of the undertaking.

12. Therefore, the ratio of judgment of High Court of *Punjab & Haryana vs. Jagdev Singh* (Supra) will not apply to the case of the petitioner. The ratio of judgment rendered in the case of *State of Punjab & others Vs. Rafiq Masih* (supra) would be applicable. To conclude, it is observed that the undertaking given by an employee cannot be used uniformly when the recovery of dues is done after his retirement, or otherwise, there cannot be a straight-jacket formula for such recovery. Rather, the execution of the undertaking, the time when it was executed, would be a relevant factor to evaluate whether the State can be allowed to act upon such an undertaking.

13. From the decisions referred above, it is crystal clear that there is no straight-jacket formula for recovery of dues from the employee during the time of his retirement or otherwise, and the time of execution of the undertaking will be the relevant factor. In the case of the petitioner, the proposed recovery is being sought to be done for the grant of benefits of Senior scale on 22.11.2006 after completion of 12 years from the date of appointment ion 01.02.1993 and the consequential benefits after completion of 24 years of Selection Scale was also extended, which was the course adopted for all the employees who do not have promotional avenues. The respondents are relying upon the undertaking given in the year 11.12.2012 and 07.12.2016, where the first benefit of Senior Scale was given on 22.11.2006, after completion of 12 years, and consequently the second benefit of Selection Scale was rightly given in continuation of the first benefit after completion of 24 years. Hence, at the time of the retirement of the employee to justify their action, relying on the undertaking is not permissible.

14. The decision to recover the amount of Rs. 1,83,712/- (Rupees one lakh eighty-three thousand seven hundred and twelve only) from the death-cum-retirement gratuity is not legal. The same is contrary to the above-mentioned decision of *Jogeswar Sahoo and others Vs. The District Court of Cuttack and others* (supra) and the office memorandum dated 07.03.2017 read with the office memorandum dated 02.03.2016.

15. For the reasons stated above, the respondents should refund the recovered amount of Rs. 1,83,712/- (Rupees one lakh eighty-three thousand seven hundred and twelve only) from the death-cum-retirement gratuity as expeditiously as possible and in any case not later than eight weeks from the date of the order. If the amount is not paid to the petitioner within eight weeks from the date of the order, it will carry interest at the rate of 6% per annum from the date of the order till the date of realization.

16. Rule is made absolute in the aforesaid terms. There shall be no order for costs.

NIVEDITA P. MEHTA, J. **BHARATI DANGRE, J.**