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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

S. ABDUL NAZEER; VIKRAM NATH; JJ.

CIVIL APPEAL NO. 7115 OF 2010; May 2, 2022

THOMAS DANIEL *Versus* **STATE OF KERALA & ORS.**

Service Law - If the excess amount was not paid on account of any misrepresentation or fraud 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 payment of emoluments or allowances are not recoverable. This relief against the recovery is granted not 6 because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered - if in a given case, it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may on the facts and circumstances of any particular case order for recovery of amount paid in excess. *[Referred to Sahib Ram v. State of Haryana and Others 1995 Supp (1) SCC 18, Syed Abdul Qadir and Others v. State of Bihar and Others (2009) 3 SCC 475, State of Punjab and Others v. Rafiq Masih (White Washer) and Others, (2015) 4 SCC 334 and Col. B.J. Akkara (Retd.) v. Government of India and Others (2006) 11 SCC 709] (Para 9)*

For Appellant(s) Mr. Raghenth Basant,Adv. Mr. Senthil Jagadeesan, AOR; For Respondent(s) Mr. Nishe Rajen Shonker, AOR Mrs.Anu K.Joy,Adv. Mr. Alim Anvar,Adv. Mr. Abraham C.Mathews,Adv. Ms. Bina Madhavan, AOR

J U D G M E N T

S. ABDUL NAZEER, J.

(1) This appeal raises an issue as to whether increments granted to the appellant, while he was in service, can be recovered from him almost 10 years after his retirement on the ground that the said increments were granted on account of an error?

(2) The brief facts of the case, in nutshell, are as under:

In the year 1966, the appellant herein joined services as a High School Assistant/Teacher at Craven High School, Kollam which is an aided school. During his tenure, he availed leave without allowance starting from 20.10.1972 to 31.03.1973 and again from 02.07.1973 to 28.03.1974, for pursuing post-graduation i.e., M.Sc. (Chemistry) Course. Thereafter on 1.06.1989, the appellant was promoted as Headmaster of the school and he was granted senior grade promotion and his pay scale was revised accordingly.

(3) In the year 1997, a notice dated 09.10.1997 accompanied with an audit report of the respondent no.5- Account General of Kerala was served on the appellant by the respondent no.4- District Educational Officer, Kollam with an objection that the period of leave obtained by the appellant for undergoing higher education should not be included while determining his total qualifying service. Therefore, the pay and subsequent increments granted to the appellant should be recovered from him. Meanwhile, the appellant had retired from service on 31.03.1999 and since then he was neither paid

pensionary benefits nor death-cum-retirement gratuity (D.C.R.G.). The appellant filed various representations but he received no response.

(4) Ultimately on 25.05.2000, the appellant challenged the proposal to initiate recovery proceedings against him by way of filing a complaint before the Public Redressal Complaint Cell, Chief Minister of Kerala, for recovering the increments granted to the appellant during the year 1989 and 1991. The respondent hereinState of Kerala rejected the said complaint by order dated 26.06.2000 stating that post-graduation degree-M.Sc. (Chemistry) was not useful as per the Rule 91A Part I of the Kerala Service Rules in any manner to the public service, therefore, leave without allowance cannot be counted for service benefits. In the meantime, on an application filed by the appellant under Rule 116, Part III of the Kerala Service Rules, the respondent no.3-Deputy Director Education, Kollam on 6.10.2000 sanctioned the release of 90% of the D.C.R.G. amount after withholding 10% of the said amount and subsequently on 15.01.2001 the amount was released to the appellant.

(5) Being aggrieved, the appellant filed a writ petition before the High Court. During the pendency of the writ petition, the remaining amount of D.C.R.G was also released to the appellant. However, the respondent- State of Kerala in their counter affidavit took a stand that the period during which the appellant was on leave without allowance for undertaking post-graduation cannot be counted for the purpose of grant of increments and, therefore, the demand for recovery made by them was justified. The learned Single Judge vide order dated 05.01.2006 upheld the reasoning given by the State of Kerala and dismissed the writ petition holding that the mistake committed by the department concerned while granting the service benefits can be rectified subsequently by way of proposed recovery to be effected from appellant's D.C.R.G. amount. Thereagainst, the appellant filed a writ appeal before the High Court. The Division Bench of the High Court vide impugned order dated 02.03.2009 dismissed the appeal, affirming the order of the learned Single Judge.

(6) Learned counsel for the appellant would contend that the excess payment made to the appellant was not on account of any misrepresentation or fraud on his part. The excess payment was made due to a mistake in interpreting the Kerala Service Rules. It is further submitted that the appellant has retired on 31.03.1999. The appellant had to undergo a bypass surgery and he is in huge debts. After repeated request, D.C.R.G. benefit was released in his favour. He prays for setting aside the impugned judgment and also the order dated 26.06.2000 passed by the Public Redressal Complaint Cell, Chief Minister of Kerala.

(7) On the other hand, learned counsel appearing for the respondents-State of Kerala has supported the impugned judgment of the High Court.

(8) We have carefully considered the submission made at the Bar by learned counsel for the parties and perused the materials placed on the record.

(9) This Court in a catena of decisions has consistently held that if the excess amount was not paid on account of any misrepresentation or fraud 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 payment of emoluments or allowances are not recoverable. This relief against the recovery is granted not because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered. This Court has further held that if in a given case, it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may on the facts and circumstances of any particular case order for recovery of amount paid in excess.

(10) In **Sahib Ram v. State of Haryana and Others**[1] this Court restrained recovery of payment which was given under the upgraded pay scale on account of wrong construction of relevant order by the authority concerned, without any misrepresentation on part of the employees. It was held thus :

"**5.** Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation, the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant. The principle of equal pay for equal work would not apply to the scales prescribed by the University Grants Commission. The appeal is allowed partly without any order as to costs."

(11) In **Col. B.J. Akkara (Retd.) v. Government of India and Others**[2] this Court considered an identical question as under:

"**27.** The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the wrong interpretation/understanding of the circular dated 7-61999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled (vide *Sahib Ram* v. *State of Haryana* [1995 Supp (1) SCC 18 : 1995 SCC (L&S) 248], *Shyam Babu Verma* v. *Union of India* [(1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121] , *Union of India* v. *M. Bhaskar* [(1996) 4 SCC 416 : 1996 SCC (L&S) 967] and *V. Gangaram* v. *Regional Jt. Director* [(1997) 6 SCC 139 : 1997 SCC (L&S) 1652]):

(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(b) 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.

28. Such relief, restraining back 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. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the

[1] 1995 Supp (1) SCC 18
[2] (2006) 11 SCC 709

payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery.

29. On the same principle, pensioners can also seek a direction that wrong payments should not be recovered, as pensioners are in a more disadvantageous position when compared to in-service employees. Any attempt to recover excess wrong payment would cause undue hardship to them. The petitioners are not guilty of any misrepresentation or fraud in regard to the excess payment. NPA was added to minimum pay, for purposes of stepping up, due to a wrong understanding by the implementing departments. We are therefore of the view that the respondents shall not recover any excess payments made towards pension in pursuance of the circular dated 7-6-1999 till the issue of the clarificatory circular dated 11-9-2001. Insofar as any excess payment made after the circular dated 11-9-2001, obviously the Union of India will be entitled to recover the excess as the validity of the said circular has been upheld and as pensioners have been put on notice in regard to the wrong calculations earlier made."

(12) In **Syed Abdul Qadir and Others v. State of Bihar and Others**[3] excess payment was sought to be recovered which was made to the appellants-teachers on account of mistake and wrong interpretation of prevailing Bihar Nationalised Secondary School (Service Conditions) Rules, 1983. The appellants therein contended that even if it were to be held that the appellants were not entitled to the benefit of additional increment on promotion, the excess amount should not be recovered from them, it having been paid without any misrepresentation or fraud on their part. The Court held that the appellants cannot be held responsible in such a situation and recovery of the excess payment should not be ordered, especially when the employee has subsequently retired. The court observed that in general parlance, recovery is prohibited by courts where there exists no misrepresentation or fraud on the part of the employee and when the excess payment has been made by applying a wrong interpretation/ understanding of a Rule or Order. It was held thus:

"**59.** Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."

(13) In **State of Punjab and Others v. Rafiq Masih (White Washer) and Others**[4] wherein this court examined the validity of an order passed by the State to recover the monetary gains wrongly extended to the beneficiary employees in excess of their entitlements without any fault or misrepresentation at the behest of the recipient. This Court considered situations of hardship caused to an employee, if recovery is directed to

[3] (2009) 3 SCC 475
[4] (2015) 4 SCC 334

reimburse the employer and disallowed the same, exempting the beneficiary employees from such recovery. It was held thus:

"**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.

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18. 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."

(14) Coming to the facts of the present case, it is not contended before us that on account of the misrepresentation or fraud played by the appellant, the excess amounts have been paid. The appellant has retired on 31.03.1999. In fact, the case of the respondents is that excess payment was made due to a mistake in interpreting Kerala Service Rules which was subsequently pointed out by the Accountant General.

(15) Having regard to the above, we are of the view that an attempt to recover the said increments after passage of ten years of his retirement is unjustified.

(16) In the result, the appeal succeeds and is accordingly allowed. The Judgment and order of the Division Bench dated 02.03.2009 and also of the learned Single Judge of the High Court dated 05.01.2006 impugned herein, and the order dated 26.06.2000 passed by the Public Redressal Complaint Cell of the Chief Minister of Kerala and the recovery Notice dated 09.10.1997 are hereby set aside. There shall be no order as to costs.