

Neutral Citation No. - 2023:AHC:210748-DB

AFR

Reserved on 17.10.2023

Delivered on 03.11.2023

Court No. - 32

Case :- SPECIAL APPEAL No. - 717 of 2023

Appellant :- State Of U.P. And 3 Others

Respondent :- Suresh Chandra Asthana, S/O, S. N. Lal Asthana

Counsel for Appellant :- C.S.C., C.S.C.

Counsel for Respondent :- Lal Babu Lal

Hon'ble Salil Kumar Rai, J.

Hon'ble Surendra Singh-I, J.

(Per: Surendra Singh-I, J.)

1. This special appeal has been instituted against the order dated 26.4.2023 passed by learned Single Judge in Writ-A No. 33297 of 2013 (Suresh Chandra Asthana, S/O, S. N. Lal Asthana Vs. State Of U.P. And 3 Others). Vide impugned order, the learned Single Judge has directed the appellant no.2, Commissioner, Rural Development to refund the amount deducted from gratuity dues to the respondent-petitioners.

2. The writ petition was filed by the respondent-petitioner for quashing the order dated 31.10.019 passed by the respondent no.2 Project Director, District Rural Development Authority, Chandauli (hereinafter referred as 'DRDA'). By the aforesaid order, Project Director passed an order for recovery of excess arrears of salary paid to the respondent-petitioner.

3. The writ petition was filed by the petitioner Surendra Chandra Asthana with the following prayer :-

"I. Issue a writ, order or direction in the nature of certiorari quashing the order dated 15.11.2011 passed by Commissioner Rural Development U.P. Lucknow respondent no. 2 and its consequential order dated 30.05.2013 Annexure no. 3 to this writ petition to the extent it relates to the recovery of amount of arrears paid to the petitioner in terms of the recommendation of the VI pay Commission.

ii. issue a writ, order or direction in the nature of certiorari calling for the records and quashing the impugned orders dated 15.11.2011, 19.06.2013 (so far as it relates to petitioner) and 31.10.2019 passed by the respondent nos. 2 and 3 respectively (Annexure Nos. 4,5 and 6 to the writ petition)"

4. The averments made by the petitioner-respondents in the affidavit filed in support of the writ petition that the petitioner was posted in the Pay-scale of Rs. 8000-13500 (pre revised) as Assistant Engineer DRDA Chandauli in terms of the order dated 7.4.2000 issued by the Government of U.P. Rural Development, Lucknow (Annexure no.1). The petitioner by virtue of his services rendered to the Government was granted revised pay-scale in terms of the recommendation of 6th Pay Commission. The amount of aforesaid arrears of pay was paid to the petitioner in terms of the relevant rules admissible for implementation of recommendation of 6th Pay Commission. No misrepresentation or fraud was played by the petitioner to get the arrears of amount of 6th Pay Commission.

5. It has been averred that the Commissioner Rural Development, U.P. sent a proposal for grant of Rs. 44,56,620/- to the State Government vide its letter dated 13.11.2011 for payment of arrears of salary to the employees of DRDA on the implementation of the recommendation of 6th Pay Commission. On rejection of this proposal granted by the Government, a direction was issued by the Commissioner, Rural Development to the

Project Director, District Rural Development Agencies to make recovery of arrears which has already been paid to the employees. The Commissioner Rural Development, Government of U.P. has issued a letter dated 15.11.2011 to all the Chief Development Officer/Executive Director, Project Director, District Development Agencies , U.P. to make recovery of the arrears paid to the employees on the recommendation of 6th Pay Commission. The above order passed by the Commissioner Rural Development dated 15.11.2011 was stayed by this Court vide orders dated 16.3.2012, 27.2.2012, 28.5.2012 and 27.3.2012 passed in Service Single No. 1339 of 2012 (Akhilesh Chandra & 2 Ors. Vs. State of U.P. Through Prin. Secy. Rural Development Lko.& Ors.), Service Single No. 1064 of 2012 (Raghupal Singh & 3 Ors. Vs. State of U.P. Through Prin. Secy. Rural Development Lko.& Ors.), Service Single 1109 of 2012 (Virendra Kumar Verma & 22 Ors Vs. State of U.P. Through Prin. Secy. Rural Development) and Writ- A No. 15064 of 2012 (D.D. Gupta & Ors Vs. State of U.P. & Ors.) respectively (Annexure No. 2 to the writ petition).

6. The Authorities of DRDA did not recover the amount of arrears paid to their employees in view of the order passed by this Court in the aforesaid writ petitions. Notwithstanding the aforesaid stay orders of this Court, the Commissioner,Rural Development U.P. sent letter dated 30.5.2013 to the Project Director DRDA , Chandauli to recover the amount from the petitioner (annexure no.3), in pursuance of the orders dated 15.11.2011 & 30.5.2013 of the Commissioner Rural Development, the Project Director Chandauli has issued impugned notice dated 19.6.2013 after more than five

years (annexure no.5) whereby the amount of Rs. 2,86,851/- has been directed to be recovered from the petitioner.

7. It has also been averred by the petitioner that the impugned order dated 15.11.2011, 30.5.2013 and recovery notice dated 19.6.2013 has been passed by the respondent in violation of principle of natural justice as much as no notice and opportunity of hearing has been given to him before the passing the same. By office order dated 31.10.2019 passed by the Project Director, DRDA, Chandauli alleged excess amount of Rs. 2,86,851/- determined by the impugned order dated 19.6.2013 has been recovered from the gratuity amount of Rs 10,00,000/- payable to the petitioner. The petitioner functioning as Assistant Engineer in DRDA, Chandauli has retired on 31.10.2019 on attaining the age of superannuation . It has also been submitted that there is no provision under which the amount of gratuity payable under the Payment of Gratuity Act 1972 could be deducted against the alleged excess amount paid to him . In absence of any such provision, it is incumbent upon the respondents to pay full amount of gratuity payable to the petitioner.

8. In the Counter affidavit filed in Writ-A No. 33297 of 2013 (Suresh Chandra Asthana, S/O, S. N. Lal Asthana Vs. State Of U.P. And 3 Others), averments have been made that in compliance of Government Order dated 8th December 2008 payment of arrears of salary as per the recommendation of 6th Pay Commission has been disbursed to the employees of DRDA.

9. It has also been stated that as per the Government order dated 8th December, 2008 the payment of arrears of salary to the employees working in DRDA, Chandauli has been done on 9.1.2009. It has also been stated that since the Government order dated 29.7.2010, Government had decided to make payment of arrears to the employees of DRDA from 29.7.2010 whereas the petitioner was paid arrears of salary from 1.1.2006 to 29.7.2010 which was without any Government Order, hence the excess salary amount has rightly been recovered from the petitioner.

10. The learned Single of this Court vide order dated 26.4.2023 quashed the order dated dated 31.10.2019 passed by the Project Director, DRDA Chandauli for recovery of excess payment of arrears of 6th Pay Commission on the grounds mentioned in paragraph no.5 of the judgment which is follows as under:-

“5. By bare perusal of the above judgments, it is crystal clear that no recovery of excess payment can be fastened against the retired Government employee especially in case of class 3 and class 4 and ratio of judgment says that if excess amount was not paid on account of any misrepresentation or fraud of employee or if such excess payment was made by employer by applying a wrong principle for calculating pay/allowances 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 and as such the relief against recovery is granted not because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from hardship that will be caused if recovery is ordered. The Apex Court has further held that if in a given case, it is proved that employee had knowledge that 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 realm of judicial discretion,

Court may on facts and circumstances of any particular case order for recovery of amount paid in excess. And as such it has been held that no administrative authority is empowered to fasten the recovery against any retired employee without holding due process of law.”

11. The learned Single Judge has relied upon the judgment of Hon'ble Apex Court in State of **Punjab and others Vs. Rafiq Masih (Whitewasher) and others 2015 (4) SCC 334** .

12. It has been argued by learned Standing Counsel for the State that although the State Government vide G.O. dated 8.12.2008 had directed the payment of the arrears of 6th Pay Commission to the employees of State Government vide letter dated 29.7.2010 the Commissioner, Rural Development U.P. directed the payment of arrears of 6th Pay Commission to the employees of DRDA. It was made clear vide order dated 15.11.2011 of Commissioner, Rural Development, U.P. that employees of DRDA are not entitled to get arrears of 6th Pay Commission therefore, the order dated 30.5.2013 passed by the Commissioner Rural Development, U.P. Lucknow directed the recovery of amount of arrears wrongly paid to the employees of DRDA thus, as per the Government order, the aforesaid amount has rightly been recovered from the gratuity amount of respondent-petitioner. It has been further argued that recovery against the respondent-petitioner has been initiated during his service period i.e. in the year 2013 whereas he retired on 31.10.2019 . Lastly, it has been argued that in its judgment dated 29.7.2016 passed in **Civil Appeal No. 3500 of 2016 decided in 29.7.2016** by the Hon'ble Apex Court in the case of **High Court of Punjab & Haryana & Ors. Vs. Jagdev Singh**, the Hon'ble Apex Court has held that in case an

undertaking has been given by the employee to the effect that if amount paid is found excess in future it may be recovered from him even after his retirement therefore, recovery has rightly been made from the respondent-petitioner.

13. Per contra learned counsel for the respondent-petitioner has argued that the arrears of 6th Pay Commission was paid to the respondent petitioner without any misrepresentation or fraud practised by him. Therefore, it cannot be recovered from him. It has also been argued that no undertaking was executed nor any such affidavit has been given by the respondent-petitioner that the excess amount may be recovered if the payment is found excess in future. The payment was made entirely at the behest by the appellants in which respondent-petitioner had no role at all. It has also been submitted that the recovery of arrears of 6th Pay Commission was made on 31.10.2019, on the date of superannuation of respondent-petitioner on 31.10.2019. The Project Director, DRDA Chandauli deducted the amount of aforesaid arrears from the gratuity amount payable to the respondent-petitioner, which is not permissible under the law. It is also been submitted that the aforesaid recovery was made after more than five years of its payment on the date of his retirement against the judgment of Hon'ble Supreme Court in *Rafiq Masih(whitewasher) case (supra)*. It has also been argued that as respondent -petitioner does not receive any pension. Therefore, the recovery of the arrears of 6th Pay Commission, which was repaid to him after the judgment and order dated 26.4.2023 passed in Writ A No.33297/2013 will be against the equitable consideration.

14. We have heard the rival submissions advanced by learned counsel for the parties and perused the material on record.

15. There is no statutory law regarding recovery of excess payment made by the employer to the employee. The recovery of excess payment is based on equitable consideration, which has been settled by the Judgment of Hon'ble Apex Court In **Sayed Abdul Qadir Vs. State of Bihar reported in (2009) 3 SCC 475**. In this case, the Hon'ble Apex Court quashed the order directing the recovery of excess payment made to the teachers for their no fault after ten years. The Hon'ble Apex Court observed as under:

"58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess....."

"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.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."

16. In case of **Shyam Babu Verma Vs. Union of India** reported in (1994) 2SCC 521, the Hon'ble Apex Court observed as under:-

“11. Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. 1-1-1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from 1-1-1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same.”

(emphasis supplied)

17. After considering several judgments of the Hon'ble Apex Court in **Punjab and others Vs. Rafiq Masih (Whitewasher) and others**, 2015 (4) SCC 334 as ready reference, the Hon'ble Apex Court has summarized the following few situations, wherein recoveries by the employer would be impermissible in law:-

(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 the 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.

18. In **High Court of Punjab & Haryana Vs. Jagdev Singh, MANU/SC/0831/2016**, while opting for the revised pay-scale, the respondent had given an undertaking to refund any excess payment if it was so detected and demanded subsequently. The revised pay-scale in the selection grade was allowed to the respondent on 7.1.2000 and eventually, he was compulsorily retired from service on 12.2.2003 . On 18.2.2004, a letter for recovery of an amount as Rs. 1,22,003/- was served upon the respondents pursuant to the direction of the Registrar of the High Court. The Hon'ble Apex Court held that since in the present case an undertaking was specifically furnished by the respondent officer at the time of his accepting revised pay-scale, to the effect that any payment found to have been made in excess would be liable to be adjusted, while putting for the benefit of the revised pay-scale, respondent was clearly on notice of the fact that in future any payment found excess shall be refunded and adjusted the petitioner was entitled to refund/adjust the excess payment made. The principle enunciated in *Jagdev Singh case (supra)* cannot apply in the present case, in that case the officer to whom payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would require to be refunded. The Officer furnished an undertaking while opting for the revised pay-scale. He was bound by the undertaking. The respondent was directed to refund the excess amount in monthly instalments spread over a period of two years. In the present present case no

such undertaking was furnished by the respondent-petitioner regarding the money paid to him.

19. In **Thomas Daniel Vs. State of Kerala, MANU/SC/0569/22** where the excess amount was not paid to the employee on the account of any misrepresentation or fraud of the employee but due to mistake in interpreting Kerala Service Rules, which was attempted to be recovered after passage of 10 years of the retirement of the employee, the Hon'ble Apex Court held that the said recovery cannot be made as it will be iniquitous and arbitrary.

20. The facts of the present case is that the respondent-petitioner was working on the post of Assistant Engineer in DRDA, Chandauli in the pay-scale of 8000-13500 (pre revised) from 4.7.2000, he was paid arrears of 6th Pay Commission in compliance of the order dated 29.7.2010. Vide notice dated 19.6.2013 issued by the Project Director, DRDA, Chandauli directed the respondent-petitioner to deposit of Rs. 2,86,851/- as irregular payment of arrears of 6th Pay Commission received by him. This notice was in pursuance of the letter dated 15.11.2011 &* 14.6.2013 issued by the Commissioner Rural Development, U.P. to the Project Director DRDA, Chandauli. The aforesaid arrears of 6th Pay Commission was not recovered from the respondent-petitioner while he was in service. The aforesaid amount of arrears of 6th Pay Commission was deducted from his gratuity amount of Rs. 10,00,000/-, payable to the respondent-petitioner on the date of his retirement i.e. on 31.10.2019.

21. From the aforesaid discussion, it is clear that respondent was paid Rs. 2,86,851/- as arrears of 6th Pay Commission in pursuance of the Government Order dated 29.7.2010 and the aforesaid amount was deducted from his gratuity in compliance of the letter dated 15.11.2011 and 14.6.2013 issued by the Commissioner Rural Development, U.P. and notice dated 19.6.2013 issued by Project Director, DRDA Chandauli, the excess payment was not done due to any misrepresentation or fraud committed on the part of the respondent petitioner. The recovery of the aforesaid amount of arrears of 6th Pay Commission was done after more than 08 years on 31.10.2019 on the date of his retirement. Since the aforesaid recovery of arrears of 6th Pay Commission was done on the date of retirement of the respondent-petitioner and his case is covered under Clause(ii) of para-18 stipulated by the Hon'ble Apex Court in *Rafiq Masih (Whitewasher) case (supra)*, recovery of such amount is illegal.

22. Apart from the above mentioned judgments of the Hon'ble Apex Court **Section 13 of the Payment of Gratuity Act, 1972** prohibits attachment of any gratuity payable under aforesaid Act in execution of any decree or order of any Civil, Revenue & Criminal Court. Section 13 of the Payment of Gratuity Act, 1972 is as follows:

“13. Protection of gratuity.—No gratuity payable under this Act [and no gratuity payable to an employee employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop exempted under section 5] shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court.”

23. In **Calcutta Dock Labour Board & Anr. Vs. Smt. Shandhya Mitra & Ors. (1985) 1985 SCR (2) 826**, the Hon'ble Apex Court held that Section 13 of the Payment of Gratuity Act gives total immunity to gratuity from attachment. Thus, the deduction of the amount of arrears of 6th Pay Commission of Rs. 2,86,851/- from gratuity money payable to him is illegal and was rightly directed to be refunded to the respondent-petitioner vide impugned order dated 26.4.2023 passed by the learned Single Judge in Writ-A No. 33297 of 2013.

24. The amount of Rs. 2,86,851/- which was deducted from the gratuity amount of the respondents on 31.10.2019 has been refunded to the respondent-petitioner in compliance of the order dated 24.6.2023 passed by the learned Single Judge in Writ-A No. 33297 of 2013 (Suresh Chandra Asthana, S/O, S. N. Lal Asthana Vs. State Of U.P. And 3 Others).

25. In the facts and circumstances of the case, the recovery of payment of arrears of 6th Pay Commission would be iniquitous and arbitrary and cannot be permitted.

26. It is our considered opinion that there is no illegality or infirmity in the impugned judgment and order dated 24.6.2023 passed by learned Single Judge of this Court, there is no merit in the special appeal and is liable to be dismissed.

27. The appeal is dismissed accordingly.

Order Date:- 03.11 2023/Akbar

(Surendra Singh-I,J.) (Salil Kumar Rai,J.)