Serial No. 1

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

SWP No. 2237/2014

Reserved on: 28.03.2024

Pronounced on:14.05.2024

1. Mst. Raja,
   Widow of Mohammad Ramzan Tantray
2. Hilal Ahmad,
   S/O Mohammad Ramzan Tantray
3. Jehangir Ahmad,
   S/O Mohammad Ramzan Tantray
4. Ajaz Ahmad,
   S/O Mohammad Ramzan Tantray
5. Masrat, D/O Mohammad Ramzan Tantray
6. Sakeena, D/o Mohammad Ramzan Tantray
   All residents of Rawalpora, Srinagar

….. Petitioners

Through: Mr. Mohammad Ashraf Bhat, Advocate.

V/s

1. State of Jammu and Kashmir through
   Commissioner-cum-Secretary to Government,
   Housing and Urban Development Department,
   Civil Secretariat,
   Jammu/Srinagar.
2. Vice Chairman,
   Srinagar Development Authority,
   Srinagar.
3. Financial Advisor/CAO,
   Srinagar Development Authority,
   Srinagar.
4. Examine/CAO,
   Local Fund Audit and Pensions,
   Srinagar.

…..Respondent(s)

Through: Mr. Rais-u-din Ganai, Dy. AG.
Mr. Syed Musaib, Dy AG

CORAM: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

1. The petitioner- Mohammad Ramzan Tantray, through the medium of the instant petition, seeks quashment of impugned letter bearing no. FD/ELFAP/1091 dated 15.10.2014 passed by respondent no.4, whereby the respondent no.4 has recommended the respondent no.3 to effect the recovery on account of up gradation w.e.f 01.05.1994 till the date of superannuation of the petitioners. The petitioner has also sought a writ of mandamus,

commanding the respondents to release all the pensionary benefits of the petitioner as pump operator, who attained the age of the superannuation on 31.03.2014 and release all monetary benefits with interest on account of superannuation of the petitioner as pump operator along with all consequential benefits.

Brief Facts of the Case:

2. Before proceeding further, this court deems it proper to take note of few facts shorn of unnecessary details, which are material to the determination of the issue involved in the instant case. The petitioner was appointed as daily wager to work as orderly in the respondent department in the year 1976 vide order no. 0-1/713-16 dated 02.06.1976, and in the year 1981, the respondent No.2, in the interests of administration, vide order No. SDA/VC of 1981 dated 27.04.1981, temporarily appointed the petitioner, who figured at Serial No.2 in the aforesaid order, as Chowkidar against an available temporary vacancy and also sanctioned the grade and other allowances as admissible under rules.

3. Further, vide another order bearing no. SDA/VC/503 of 1993 dated 18.09.1993, sanction was accorded for the change of designation of the petitioner from Chowkidar-cum-Orderly to Pump Operator, in his own pay and grade, in view of his having technical skill in operating pumps. Thereafter, vide order no. SDA/VC/113 of 1994 dated 25.06.1994, sanction was granted to six posts of pump operators/assistant operators from the grade of 750-940 to the grade of 940-1400, including the petitioner w.e.f. 01.05.1995.

4. The petitioner had been discharging his duties as pump operator and was receiving the salary as attached to the post. Nearing his retirement, a

notification was issued under Order No. SDA/VC-4996-5008 dated 04.12.2013, wherein all the controlling heads were advised to issue NOCs in favour of the employees, including the petitioner, who had to retire in the time frame stipulated in the notification, and in pursuance thereof, petitioner approached various departments for issuance of NOCs and procured the same as there was nothing outstanding against the petitioner.

5. Finally, the case of the petitioner was processed for pensionary benefits, and the petitioner was very optimistic about it, but much to the chagrin of the petitioner, in the year 2014, he received a letter written by the respondent no. 4 vide no. FD/ELFAP/1091 dated 15.10.2014, wherein the respondent No.4 has mentioned that the petitioner stands upgraded from pay scale of Rs. 750-940 to the pay scale of Rs. 940-1400 against the rules in vogue and has, accordingly, requested the respondent no. 3 to effect the recovery on account of up-gradation w.e.f. 01.05.1994 till the date of superannuation and the excess payment drawn. Feeling aggrieved of the same, the petitioner has, inter alia, sought the quashing of the impugned letter dated 15.10.2014 by way of filing the instant writ petition and also sought a direction to the respondents to release all the pensionary benefits in favour of the petitioner.

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ARGUMENT ON BEHALF OF THE PETITIONER:

6. Mr. Mohammad Ashraf Bhat, learned counsel appearing on behalf of the petitioner, has vehemently argued that the impugned order has been passed in a hot haste manner, without applying the rules and regulations on the subject, therefore, the impugned order cannot sustain the test of law and is therefore illegal, unlawful and unconstitutional, as such, deserves to be quashed.

7. The learned counsel for the petitioner has further argued that the respondents have not given any opportunity to the petitioner for projecting his case before passing the impugned order. Since, the respondents were under legal duty to give opportunity of being heard to the petitioner before contemplating any recovery from the petitioner, and have not followed the rules and regulations on the subject, therefore, on this count alone, the impugned order dated 15.10.2024 may be quashed.

8. The learned counsel for the petitioner has further argued that the respondents have not applied their mind properly while passing the impugned order and have passed the impugned order, affecting the rights of the petitioner and which has resulted in pecuniary loss to the petitioner, who have submitted his long 33 years to the department, and in case the impugned action is allowed to operate, great prejudice will be caused to the petitioner, which would also include monetary loss. Therefore, the action of the respondents is bad in the eyes of law and deserves to be quashed.

9. The learned counsel for the petitioner has further argued that the respondents were under legal obligation to treat the petitioner as pump operator w.e.f. 01.05.1995 and release all the pensionary benefits with interest notwithstanding the impugned communication dated 15.10.2014. Lastly, it is prayed that the impugned order be quashed and the petitioner be given all pensionary benefits as prayed for.

10. Learned counsel appearing on behalf of the petitioner, in support of his arguments, has placed reliance on the pronouncements of the Hon'ble Supreme Court in the case of **Thomas Daniel v. State of Kerala & Ors.** reported in *2022 LiveLaw (SC) 438* and **State of Punjab and others v. Rafiq Masih (White Washer)**, reported in *AIR 2015 SC 696*; and the

judgment passed by this court in *SWP No. 340/2012* titled **O.P. Abrol v. State** and others decided on 18.02.2014.

ARGUMENTS ON BEHALF OF RESPONDENTS:-

11. Per contra, learned counsel appearing on behalf of the respondents argued that the pension case of the petitioner, after his retirement, was forwarded to respondent no. 4 i.e. Examiner/CAO, Local Fund Audit and Pension, who is an authorizing agency for final pension payments. The pension case of the petitioner was received by the respondents 2 and 3, vide No. SDA/Accts/392 dated 14.07.2014 and, after examining the pension case of the petitioner, it has been observed that the petitioner was illegally upgraded from pay scale of Rs.750-940 to Rs.950-1400 (pre-revised). The same was brought to the notice of Srinagar Development Authority and the pension case of the petitioner was returned to the SDA for re-examination/ further verification before authorisation of pension and other retirement benefits. The SDA, after re-examination of the pension case of petitioner, communicated to the answering respondent vide letter No. SDA/Acctts/Pension/2015/976-77 dated 12-03-2015 that an amount of Rs 6,08,022/- on account of excess pay drawn by the petitioner may be recovered from petitioner while authorising the pension.

12. Learned Counsel for the respondents would contend that the SDA is not a competent authority to re-designate any of its post, the powers vest with the administrative department only. The sanction granted in petitioner's case for change in designation from chowkidar-cum-orderly to pump operator in his own pay and grade is issued by the Vice Chairman SDA of its own without seeking approval from Administrative Department.

13. It is further submitted by the learned counsel appearing on behalf of the respondents that the SDA has issued another order vide its order dated

25-06-1994 granting another sanction to six posts of pump operator /assistant operators from the grade of 750-940 to the grade of 940-1400, and, as per the rules, the up gradation of pay of any post from one scale to another scale can be made by the Government after getting concurrence from the Finance Department and, in the case of petitioner, no such approval or concurrence was ever sought from the Administrative Department or from the Finance Department. Hence, in the present case there is no violation of principles of natural justice and the impugned communication issued by the respondents is passed completely in accordance with law and only after proper application of mind. Lastly, it is argued that the writ petition filed by the writ petitioner may kindly be dismissed.

Legal Analysis:

14. The controversy, involved in this petition, is with regard to the legality of the impugned communication dated 15.10.2014, whereby, the respondent No. 2 has observed that upgradation of the petitioner from pay scale of 750-940 to pay scale of 950-1400 is against the rules, which were in vogue. It is to be noted here that the petitioner retired from service on reaching the age of superannuation on 31.03.2014, and, during the period of his service, respondents have never questioned his upgradation, as being against rules. Moreover, there is no enquiry conducted in the matter during his service tenure and question of holding any enquiry after retirement does not arise at this belated stage.

15. It is pertinent to mention here that the order with reference to recovery was stayed by this Court on 03.12.2014 in MP no. 3537/2014 in the instant petition. Also, in terms of order dated 12/06/2015 this Court directed respondents 2 to 4, to process the case of applicant-petitioner

for release of provisional pension as also other retiral benefits.

16. It is to be noted that in terms of order dated 17.09.2021, this Court in the instant petition observed that the parent Department i.e, respondents No. 1 and 2 had filed cryptic reply without explaining as to how the upgradation of the petitioner is contrary to the rules and, if so, against which rules and in these circumstances, respondents were directed to file affidavit indicating the exact reason and specific rules on the basis of which it is claimed that upgradation of the petitioner was not in accordance with law. The respondents, in terms of the said order, have not filed any affidavit.

17. The petitioner has retired on attaining the age of superannuation on 31.03.2014 and the impugned order was passed on 15.10.2014 i.e. after the retirement of the petitioner in which recovery on account of uupgradation w.e.f. 01.05.1994 till the date of superannuation was directed to be effected from the petitioner.

18. The respondents have failed to explain as to how the upgradation of the petitioner is contrary to the rules and, if so, against which rules. In absence of any specific stand by the respondents with regard to the upgradation of the petitioner, the impugned letter dated 15.10.2014 cannot sustain in the eyes of law.\

19. The issue with regard to recovery of excess amount from an employee made due to mistake or wrong interpretation of rules is no longer res integra.

20. The Hon'ble Supreme Court in the case of **Syed Abdul Qadir v. State of Bihar,** reported in ***(2009) 3 SCC 475*** had held that the recovery of the excess amount made to the employee due to mistake or wrong interpretation of rules cannot be made. Relevant

paras of the aforesaid judgment are reproduced for the facility of reference:

> ***"57. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee, and (b) 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.***
>
> ***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 bonafide 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 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 , we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."***

21. The Hon'ble Supreme Court in **Thomas Daniel v. State of Kerala & ors**. reported as *2022 AIR (SC) 2153,* has observed as follows.

> ***"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."

22. This court in case tilted **Mohammad Rafiq v. State of J&K & Ors, [SWP No. 810/2012)** decided on 18.02.2014, on the issue of effecting recovery form an employee, who ceased to be an employee, has held as under:

"An order for effecting recovery from pay of an employee is a major penalty in terms of regulation 144 (ii) Jammu and Kashmir Road Transport Corporation Employees Service Regulations, 1979 and procedure is prescribed for imposing the major penalty. Where neither procedure had been followed, nor order of penalty imposed on the petitioner, the petitioner after his retirement, cannot be subjected to any disciplinary proceedings as he has ceased to be an employee."

23. This Court in SWP No.340/2012 titled **O.P. Abrol v. State & Ors** decided on 18.02.2014 has held that correctness of an order of pay fixation can be looked into for a maximum period of 24 months preceding the date of retirement and cannot be looked into when the petitioner retired on superannuation. Para 7 of the said judgment is reproduced hereinbelow:

"7. The issue of fixation of pay in terms of order dated 14.03.1989 also cannot be looked into by the respondent NO.3 in view of the clear cut mandate contained in first Government instruction appended to Article 242 of the Civil

Service Regulation. The Government instruction has been inserted by Finance Department Notification No. SRO 45 dated 25th of January, 1980. This statutory instruction has to be followed by all concerned. Respondent No.3 in the fact of the language employed in the said Government instruction can only look into the correctness of the order for a maximum period of 24 months preceding the date of retirement. He is not authorized to look into the correctness of the fixation of the pay in the year 1989 when the petitioner retired on superannuation in 2000."

24. The Hon'ble Supreme Court in the case of **'State of Punjab and others v. Rafiq Masih (White Washer)** reported in *AIR 2015 SC 693* has categorically held that recovery from employee of lower rung i.e. Class-III and Class-IV, after his retirement cannot be made. Relevant paragraphs of the aforesaid judgment are reproduced hereinbelow:

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 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 concerned employee. If the effect of the recovery from the concerned employee 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.

10. In view of the afore-stated constitutional mandate, equity and good conscience, in the matter of livelihood of the people of this country, has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent, that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India.

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 herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, 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 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."***

25. It is settled proposition of law that the benefit of promotion

and consequential monetary benefits cannot be taken away in an arbitrary and whimsical manner without providing an opportunity of being heard to the effected person. In the present case, no enquiry, whatsoever has been conducted by the respondents in this regard.

26. Admittedly, in the present case, there is no such allegation about misrepresentation on the part of the petitioner, thus by no stretch of imagination, consequential benefits can be taken at this belated stage after retirement of the petitioner.

27. This court is not inclined to allow the respondents to proceed further with the impugned letter, as much water has flown since then. The respondents are under legal obligation to treat the petitioner as retired as pump operator w.e.f. 01.05.1995 and release all the pensionary benefits with interest notwithstanding the impugned communication dated 15.10.2014.

Conclusion:

28. For the foregoing reasons, and what has been discussed hereinabove coupled with settled legal position, this writ petition is disposed of in the following manner:

(i) The impugned letter dated 15.10.2014, issued by the respondent no.4 recommending the respondent no.3 to effect the recovery on account of up-gradation w.e.f. 01.05.1994 till the date of superannuation, is quashed.

(ii) The respondents are directed to release all the pensionary benefits of the petitioner as pump operator w.e.f. the date of superannuation of the petitioner i.e. 31.03.2014.

(iii) The respondent no.4 is directed to release the amount of Rs.3,26,982/- in favour of the petitioner (mention of which

is made in para no.1 of the objections filed on behalf of respondents 2 and 3), which was withheld from the petitioner's gratuity amount.

(iv) In case, the above directions are not complied within a period of eight weeks from the passing of this order, in that eventuality, the writ petitioner shall be entitled to the interest @9 % per annum from the date the aforesaid benefits were due to the petitioner and denied by the respondents. It is made clear that the interest component will be payable by the officer/respondent on whose count delay occurs.

29. The writ petition is allowed in the manner indicated hereinabove.

(Wasim Sadiq Nargal)
Judge

Jammu:
14.05.2024
Raj Kumar

HIGH COURT
JAMMU & KASHMIR AND LADAKH

Whether the judgment is speaking? : Yes/No.
Whether the judgment is reportable? : Yes/No.