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Court : Karnataka

Decided On : Nov-05-2016

Judge : Jayant Patel &Amp; Aravind Kumar

Appeal No. : Writ Petition Nos. 35353-35354 of 2015 (S-KAT)

Appellant : K.A Damayanthi and Another

Respondent : The State of Karnataka and Others

Judgement :

(Prayer: These writ petitions are filed under Articles 226 and 227 of the constitution of India praying to set aside the order dated 17.9.2013 passed by the Karnataka Administrative Tribunal at Bangalore in application No.6699 to 6707/2011 vide Ann-G in so far as relates to the petitioners at Sl.No.6 and 8 of the Application and consequently allow the Application filed by the petitioners before the Karnataka administrative Tribunal at Bangalore.)

1. Rule.

2. Mr. H.T. Narendra Prasad, learned AGA appears for respondents and waives notice of Rule.

3. With the consent of learned Advocates appearing for both the sides, the petitions are finally heard.

4. The petitions are directed against the common judgment and the order dated 17.09.2013 passed by the Karnataka Administrative Tribunal (hereinafter referred to as the Tribunal for the sake of brevity), whereby the Tribunal for the reasons recorded in the order has dismissed the petitions.

5. The relevant facts are that on 01.07.2006 the respondents had fixed the notional pay of the petitioners with effect from 01.09.1991 and accordingly the salary was being paid to the petitioners. However, it appears that thereafter in the month of August/September a show cause notice was issued to the petitioners on the premise that the pay scale was earlier fixed by mistake and it should be from the date of regularization i.e., 01.03.1994 and not from 01.09.1991. It appears that thereafter the order came to be passed for recovery. The petitioners being aggrieved by the decision for recovery of the amount of difference, preferred applications before the Tribunal. The Tribunal found that the recovery was permissible since the affidavits were filed at the time when the pay was fixed. Under the circumstances, the Tribunal dismissed the applications. Hence, the petitions before this Court.

6. We have heard Mr.S.B. Mukkannappa, learned Counsel appearing for the petitioners and Mr.H.T.Narendra Prasad, learned AGA appearing for respondent Nos.1, 2 and 4.

7. Upon hearing the learned Counsel appearing for both the sides, it appears to us that the issues which are required to be considered in the present matter are already covered by the decision of this Court in W.P.Nos.36263-36312/2016 decided on 13.07.2016.

8. We may record that this Court in the above referred decision observed thus:

3. All petitions are directed against the common order dated 08.06.2016 passed by the Karnataka State Administrative Tribunal (hereinafter referred to as the Tribunal for short), whereby the Tribunal for the reasons recorded in the order has not interfered with the order passed by the authority for lowering down of the reduction of the pay scale and for recovery of the amount. Hence, the Tribunal has dismissed the applications.

4. The short facts of the case appears to be that all the petitioners were working as Craft Teachers in the respective School. As per the petitioners, they were not given appropriate pay scale and therefore they had made representation. Ultimately, the concerned authority was pleased to extend the payscale applicable to Craft Teachers Grade-I to Craft Teachers Grade-II. It appears that thereafter as per the petitioners, the aforesaid pay-scales were being paid. However on 17.02.2016, the Official Memorandum came to be issued by the Deputy Director, Department of Public Instruction, whereby the pay fixation made earlier is withdrawn and the payscale was fixed at a lower scale and the difference of the amount was also ordered to be recovered. The petitioners being aggrieved by the aforesaid orders approached before the Tribunal. The Tribunal after hearing both the sides, found that earlier their scale was revised for higher grade on the representation of the petitioners and the petitioners had participated in the proceedings for fixation of higher payscale. The case of the petitioners would fall in exceptional category as observed by the Apex Court in its decision in case of State of Punjab and Others Vs. Rafiq Masih (White Washer) reported at 2015 (4) SCC *334, and therefore the Tribunal did not interfere with the impugned decision of the authority for reduction of the payscale of the petitioners and all applications were dismissed by the Tribunal. Under the circumstances, the petitions before this Court.

5. We have heard Mr. M.S. Bhagwat, learned Counsel appearing for the petitioners and Mr.H.T.Narendra Prasad, learned AGA for the respondents. *

Corrected vide Court order dated 05.08.2016

6. On behalf of the petitioners, it was contended that the finding of the Tribunal that the case would fall in the exceptional category and therefore, the petitioners would not be entitled to the benefit of the decision of the Apex Court in the case of State of Punjab (supra) is ex-facie erroneous. As per the petitioners, merely because representation was made or some documents were produced with the representation is no ground to contend that it was a misrepresentation by the petitioners.

7. As per the learned Counsel, it was required for the authority to verify all the relevant aspects and the legal position but the fact remains that the competent authority had taken a decision to pay higher payscale to the petitioners. Not only that but the said decision was acted upon for a considerable time and thereafter even if the authority finds that there was mistake in fixation of the pay scale, in any case, recovery cannot be effected.

8. It was alternatively submitted by the learned Counsel for the petitioners that as such the petitioners were entitled to the higher payscale and not only that but the Commissioner of the concerned Department has found that the petitioners are entitled to the higher payscale and the recommendation as per the communication dated 25.02.2015 and another communication dated 04.08.2015 (copies whereof are produced at Annexures A10 and A11) are also made to the competent authority to sanction higher payscale and as per the learned Counsel for the petitioners, the same is approved by the Finance Department. Therefore, it would not lie in the mouth of the respondents to contend that the petitioners are not entitled to higher payscale. It was submitted that therefore the impugned order before the Tribunal deserves to be quashed and the petitions may be allowed.

9. Whereas the learned AGA submitted that as per the respondents, the petitioners had misrepresented before the authority by producing the documents and the resolutions of the Government which were subsequently withdrawn. Therefore, as per him, it was a case of fraud and misrepresentation on the part of the petitioners. He submitted that if the higher payscale was granted on account of any fraud or misrepresentation which can be attributed to the employee concerned, but subsequently when detected and when the higher pay scale is withdrawn, the recovery can be effected. He submitted that as per the competent authority, the petitioners are not entitled for higher payscale. He also submitted that even if it is considered for the sake of examination that any recommendation is made by the Commissioner or the Director for higher payscale to be granted to the petitioners, then also it will have prospective effect and it cannot be effected retrospectively. In his submission, the Tribunal has rightly found that the case of the petitioners would fall in the exceptional category and the recovery of the difference in the pay scale can be made. Hence this Court may not interfere with

the order passed by the Tribunal.

10. We may record that the Apex Court in the case of State of Punjab (supra), after considering its earlier decision at para-18 has observed which for ready reference is reproduced as under:

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 services).

(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 case 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.

11. The consideration of the earlier decision of the Apex Court in the case of Sahib Ram Vs. Union of India reported at 1995 SCC Supp (1) 18 shows that the cases should be such that by making any misrepresentation the employee concerned ought not to have taken any benefit.

12. Even if the contention of the learned AGA is considered for the sake of examination, that it was a case of fraud or misrepresentation on the part of the petitioners, then also whether there was fraud or misrepresentation played can be concluded only after an inquiry is undertaken and at such inquiry, the opportunity should also be given to the employee concerned to satisfy that there was no misrepresentation or fraud. It is only after the enquiry is held and the conclusion is recorded, the decision can be taken as to whether the recovery of the amount already paid of the higher payscale could be made or not. It is an admitted position that in the present case, no such inquiry is made by the competent authority by giving opportunity of hearing to the employee concerned either individually or in representative capacity. Therefore, on mere ipse dixit of the respondent it cannot be accepted that it was a case of fraud or misrepresentation but the respondent can be said as justified in holding inquiry after giving opportunity of hearing to the petitioners for such purpose.

13. At the same time, if as per the petitioners they were entitled or they are entitled to higher pay scale, they should be permitted to make such representation before the competent authority and the competent authority thereafter may examine as to whether petitioners are entitled to higher payscale or not. It is only thereafter the question of consequential payment or recovery should be finalized.

14. As neither has happened in the present case namely of holding inquiry or for consideration of entitlement of the higher pay scale, we find that the appropriate direction deserves to be given.

15. As per the interim order passed by this Court, the recovery has been stayed but the prospective effect of the impugned order for lowering down of the pay scale was permitted. Considering the facts and circumstances, we find that such interim order can be permitted to continue until the inquiry is held and the question of entitlement of the higher payscale by the petitioners is examined and decided by the competent authority. It also appears that since the order has been passed by the lower authority and the matter pertains to the examination of misrepresentation or fraud and also for entitlement of higher payscale by the petitioners as Craft Teachers, it would be appropriate that such inquiry or

examination is made by the Officer of the rank of the Secretary to the Education Department.

16. In view of the aforesaid observation and discussion, we pass the following:

ORDER

1. The impugned order passed by the Tribunal is set aside.

2. It is directed that the respondent No.1-Secretary, Department of Education, of the State Government shall examine the matter as to whether the petitioners had played any misrepresentation or fraud when they were earlier granted higher payscale.

3. The Secretary of the Education Department shall also examine as to whether the petitioners are entitled to the higher payscale or not and if yes, from which date.

4. The said Officer shall complete the inquiry after giving opportunity to the petitioners in representative capacity through their Advocate in representative capacity and an attempt shall be made to complete the inquiry and to pass appropriate order preferably within a period of four months from the date of receipt of a copy of this order.

5. It is observed that if it is found by the Secretary of the State Government that there was no fraud or misrepresentation and or the petitioners are entitled to higher payscale, further consequential order shall be passed for disbursement of the higher payscale. However, if it is found by the Secretary of the State Government that there was misrepresentation or fraud, he shall be at the liberty to pass appropriate order. It is also observed that in the event the petitioners are aggrieved by the order which may be passed by the secretary of the Education Department, they shall be at the liberty to take recourse to law and at that stage, the rights and contentions of both the sides shall remain open.

All petitions are allowed to the aforesaid extent.

Rule made absolute accordingly. No order as to costs.

9. As the fact situations are more or less similar, the learned Counsel appearing for the both the sides pray that similar direction may be issued.

10. In our view, the principle remains the same that if the excess payment was paid on account of the mistake of the authority, the amount will not be recoverable as per the decision of the Apex Court in case of State of Punjab and Others Vs. Rafiq Masih (White Washer) reported at 2015 (4) SCC 334 which has been referred to in the above referred judgment. But if there was misrepresentation or fraud which can be attributed to the employee concerned, he would not be entitled to contend that the recovery cannot be effected. Since the aforesaid view is already considered by us in the above referred judgment, no further discussion would be required.

11. In view of the aforesaid, we pass the following:

ORDER

(i) The impugned order for recovery of the amount of the difference of the salary on account of the pay fixation so far as the petitioners herein are concerned, is quashed and set aside.

(ii) It is further directed that the respondent No.1-Secretary, Department of Revenue, of the State Government shall examine the matter as to whether the petitioners had played any misrepresentation or fraud when they were earlier granted higher payscale.

(iii) The Secretary of the Revenue Department shall also examine as to whether the petitioners are entitled to the higher payscale or not and if yes, from which date.

(iv) The said Officer shall complete the inquiry after giving opportunity to the petitioners in representative capacity through their Advocate in representative capacity and an attempt shall be made to complete the inquiry and to pass appropriate order preferably within a period of four months from the date of receipt

of a copy of this order.

(v) It is observed that if it is found by the Secretary of the State Government that there was no fraud or misrepresentation and or the petitioners are entitled to higher payscale, further consequential order shall be passed for disbursement of the higher payscale. However, if it is found by the Secretary of the State Government that there was misrepresentation or fraud, he shall be at the liberty to pass appropriate order. It is also observed that in the event the petitioners are aggrieved by the order which may be passed by the Secretary of the Revenue Department, they shall be at the liberty to take recourse to law and at that stage, the rights and contentions of both the sides shall remain open.

13. Both petitions are allowed to the aforesaid extent. Rule made absolute accordingly. No order as to cost.

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