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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

JODHPUR BENCH,JODHPUR

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Date of Order : 7/1/2003

O.A.NO. 125/2002

A.W. Khan S/o Shri A.H. Khan, Senior Loco Inspector, Office of the Divisional Railway Manager, Mechanical Branch, Northern Railway, Jodhpur (Retired), Resident of Plot No. 138/139, Sector 'C' Rameshwar Nagar, Basni III Phase, Jodhpur.

.....Applicant

versus

1. Union of India through the General Manager, Northern Railway, Baroda House, New Delhi.

2. The Railway Board, Through the Executive Director (MPP), and Training Railway Board, Rail Bhawan, New Delhi.

3. The Divisional Personnel Officer, Northern Railway, Jodhpur.

.....Respondents.

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Mr. H.K. Purohit, counsel for the applicant.

Mr. Salil Trivedi, counsel for the respondents.

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C O R A M :

Hon'ble Mr. Justice G.L. Gupta, Vice Chairman

Hon'ble Mr. A.P. Nagrath, Administrative Member

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ORDER

PER MR. A.P.NAGRATH :

The relevant facts to decide the controversy in this O.A. are that the applicant, while working as Chief Power Controller in the scale of Rs. 2000-3200 came to be posted as Chief Instructor in the Diesel Training Centre, Bhagat-Ki-Kothi,Jodhpur, vide order dated 1.1.1990. This order inter alia stated that he will be paid instruction allowance as per the rules. The applicant received the instruction allowance at the rate of 30% of basic pay for the period from 1.1.1990 to 9.9.1993, that is the period for which he worked as Chief Instructor. He retired on superannuation on 31.10.1995 by order dated 28.9.1995. The respondents ordered recovery of teaching allowance paid to the applicant which was assailed by him by way of filing an Original Application No. 498/1995. The order impugned in that O.A. dated 28.9.1995 was quashed by this Tribunal vide order dated 3.5.2000 for the reason that no show cause notice had been given before ordering recovery. The respondents, however, were given a liberty to take a decision in the matter after giving a show cause notice and considering the representation of the applicant. Consequently, in pursuance of the said order, a show cause notice was served on the applicant on 2.4.2002 and after considering his representation, the order dated 29.4.2002, impugned in this O.A. was passed. While assiling this order, the applicant has prayed that the said order be quashed and set aside. The applicant has also sought declaration that he was entitled to draw instruction allowance at the rate of 30% for performing the duties of Chief Instructor for the period from 1.1.9.1990 to 9.9.1993.

2. The claim of the applicant has been resisted by the respondents and they have stated in the reply that such payment was made

erroneously and against the rules. According to the respondents, the teaching allowance was introduced only with effect from 1.8.1995 and that too at the rate of 15% of the basic pay. Since the payment was made wrongly, the respondents contend that they are very much within their rights to recover a sum of Rs. 36,718/50 which had been paid to the applicant for the period from 1.1.1990 to 9.3.1993 though the same was not due to him. Respondents' plea is that they had duly followed the directions of this Tribunal in the earlier O.A. filed by the applicant and have passed the impugned order after giving a due show cause notice and taking into account applicant's representation thereon.

3. We have heard the learned counsel for the parties.

4. The learned counsel for the applicant in support of the case of the applicant, placed reliance on a judgement of this Tribunal in O.A. No. 40/2001 - Kishan Gopal versus Union of India and others , decided on 27.3.2002. While referring to this order, the learned counsel stated that this was in line with the ratio laid down by Hon'ble the Supreme Court in the case of Union of India and another versus R. Sarangpani - reported in AIR 2000 SC 2163. He strongly urged that while receiving the payment of the instruction allowance, there was no mis-representation on the part of the applicant and in such a situation, no recovery can be made even if it was realised later that the payment was not as per rules.

5. On the other hand, the learned counsel for the respondents relying on the same judgement, as referred to by the opposite side, contended that the law laid down by the Apex Court was that, the erroneous payments made could be recovered. He has argued that an exception was made in respect of such of the employees who had retired by the time the error had been noticed. In those cases, the

Apex Court made an exception and ordered that, no recovery be made from the retiral benefits. The learned counsel submitted that it is not the case of the applicant that he had retired before the error came to notice. The records clearly shows that this mistake was detected in the month of September 1995 while the applicant retired on 31.10.1995. In that view, he emphasised that the case relied upon by the applicant will not help him at all.

6. Having considered the rival contentions and documents placed on record, we find that the instruction allowance in fact was not payable to the applicant at the time when he held the post of Chief Instructor. It is a different matter that later w.e.f. 1.8.95 this teaching allowance had been sanctioned but at the rate of 15% of the basic pay. The applicant had drawn this allowance at the rate of 30% of his basic pay. Clearly, at the relevant time, the applicant was not entitled to receive the teaching allowance and that too at the rate of 30%. Now, what comes up for our consideration is, whether the respondents are within their rights to recover the said amount.

7. The learned counsel for the respondents had very straneously urged that this matter was no more open for our scrutiny as this had been considered in the earlier O.A. when the Tribunal directed the department to take a decision in the matter after serving a show cause notice on the applicant. Since that process has been duly complied with, the learned counsel was of the view that the recovery was merely a follow up action and is not an issue which remains open for adjudication in this application. We are not pursuaded by this stand of the respondents for the reason that in matters of over payments made to the employees, where, there is no mis-repreentation on their part, the legal position is well settled and has been reiterated by

the Apex Court in a catena of judgements. In this particular case, in fact, the very appointment letter to the post of Chief Instructor, indicated that the applicant was entitled to receive the teaching allowance as per rules. Obviously, a promise was held-out to him and after five years, the applicant was told that it had been a mistake on their part. It is very surprising that the department having a system of pre-audit in the matters of pay fixations and payment of allowances, has permitted this kind of mistake to be committed at the first instance and then let it perpetuate for more than three years. In the entire reply of the department, there is not even a semblance of suggestion that they ever contemplated any action against their officers or the dealing staff who failed in their duties. There is no doubt that applicants citing the judgement in the case of Kishan Gopal (OA 40/2001) to support his claim is of absolutely no help to him. In that case, reliance had been placed on the judgement of the Apex Court in the case of Union of India and another versus R. Sarangpani and others . In that case, an extra increment had been given pursuant to the judgement of the Tribunal which was later set aside. Under such a situation, the Apex Court in fact had permitted recovery. In fact, that judgement if at all goes against the applicant. But, the instant case is not the one, where wrong payment has been made consequent to any orders of any Court or the Tribunal. The departmental functionaries have allowed this payment with open eyes and without any mis-representation or connivance of the applicant.

8. The legal position which stands even today and which emanates from the decision of Hon'ble the Supreme Court in the case of Shyam Babu Verma and others versus Union of India and others reported in (1994) 27 ATC 121. The relevant para reads as follows :-

"11. Although we have held that the petitioners were entitled

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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."

9. In the case of Sahib Ram versus State of Haryana (reported in 1995 (2) RSJ 139, it was held by the Apex Court that it was not on account of any mis-representation made by Sahib Ram that the benefit of higher pay scale was given to him. It was only on account of wrong construction made by the Principal and the inidividual was not at any fault. Under the circumstances, Hon'ble the Supreme Court held that the amount paid till date, may not be recovered from the appellant. There is an another decision of Apex Court in the case of Gabriel Saver Fernandes and others versus State of Karnataka and others reported in 1994 (5) SLR 625, wherein, their Lordships of the Supreme Court directed that it would be appropriate that the Court m ay not recover from the employees the salary which they had already received though they were not eligible to the pay scale of Rs. 90-200.

10. In a recent decision of the Apex Court rendered by a Bench of three Hon'ble Judges in the case of P.H. Reddy versus National Institute of Rural Development and others - reported in 2002 (2) ATC 208, it was directed that the employees/appellants, who had been in receipt of a higher amount on account of erroneous fixation by the authority should not be asked to repay the excess pay drawn, and therefore, that part of directions of the appropriate authority requiring reimbursement of the excess amount is annulled.

11. The learned counsel for the respondents, however, strenuously urged that if any excess payment has been ~~paid~~ made because of a bonafide mistake, the recovery is permissible. In support of his argument, he referred to the judgements in (i) State of Haryana and another and a batch versus O.P.

Sharma reported in 1993 SC 1903 (ii) Kanhiya Lal versus State of Rajasthan and another reported in 1997 (1) WLC 611 (iii) V. Gangaram versus Regional Joint Director and others (1997) 6 S.C.C. 139. We have perused the judgements of the Apex Court and the Rajasthan High Court in these cases.

In the case of State of Haryana and another and a batch versus O.P.Sharma , some interim ad hoc relief was paid to the employees which was not required to be paid. Such payment was made pending fixation of additional D.A. and no formula with reference to cost of living had been adopted. In peculiar circumstances of this case, the Apex Court permitted recovery in easy instalments.

In the case of Kanhiya Lal versus State of Rajasthan and another, Hon'ble the Rajasthan High Court observed that the increment during the suspension period had been paid because of the prevailing view of the High Court which was later on reversed by Hon'ble the Supreme Court. Since the payments had arisen because of the view taken by the High Court, the over-payments thus made, were permitted to be recovered.

In V. Gangaram versus Regional Joint Director and others, Hon'ble the Supreme Court had permitted recovery for the reason that the appellant had obtained undeserved additional increments by claiming the same from the department after acquiring higher qualifications each time. In that case, the appellant was actually entitled to two additional increments while he managed to obtain four. In such circumstances, the Department was permitted to recover the amount of excess increments sanctioned to the appellant. These cases are totally distinguishable in the facts and circumstances and it cannot be stated that they are at par with the matter where the excess payments got made because of erroneous construction of rules by the

department and no mis-representation from the employee.

12. As we have discussed in the earlier paragraphs, in such circumstances, the legal position is well settled and reiterated recently in the case of P.H. Reddy and others versus National Institute of Rural Development and others (supra).

13. We, therefore, allow this Original Application to the extent that payment of a sum of Rs. 36,718/50 paid as teaching allowance to the applicant for the period from 1.1.1990 to 9.3.1993, shall not be recovered. The stay order granted by this Tribunal on 9.5.2002 is made absolute. No orders as to cost.

(A.P.Nagrath)
Adm.Member

(G.L.Gupta)
Vice Chairman

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