

Central Administrative Tribunal, Lucknow Bench, Lucknow

Original Application No. 66/2009

This the 22 day of July, 2010

Hon'ble Dr. A.K. Mishra, Member-A)

Ashok Kumar Siddhu, Aged about 56 years, S/o late Jagat Ram Siddhu, R/o H/No. Type III/20 Akansha Parisar, Jankipuram, Lucknow.

.....Applicant.

By Advocate: Sri A. Moin.

Versus

1. Union of India through Secretary, Ministry of Youth Affairs and Sports, Shastri Bhawan, New Delhi.
2. Under Secretary, Ministry of Youth Affairs and Sports, Shastri Bhawan, New Delhi.
3. Finance Officer, Pay & Accounts Officer (Sports), Shastri Bhawan, New Delhi.
4. Assistant Programme Advisor, Department of Youth Affairs and Sports, Kendriya Bhawan, New Delhi.
5. Drawing & Disbursing Officer, Department of Youth Affairs and Sports, Kendriya Bhawan, Aliganj, Lucknow.

.....Respondents

By Advocate: Sri K.K. Shukla

ORDER

This is an application against the order dated 29.1.2009 of respondent no.2 directing recovery of excess amount paid to the applicant on account of an earlier erroneous order granting promotion retrospectively. The prayer of the applicant is to quash the impugned order as contained in Annexure no.1 and also to direct the respondents to refund the recovered amount with interest @ 18% per annum.

2. The applicant was promoted in the order dated 18.3.1987 to the post of Youth Assistant Gr.I w.e.f. 24.4.1984 and was given arrears of salary in the promoted post with retrospective effect. Subsequently it was discovered by the Ministry of Youth Affairs and Sports that grant of promotion with retrospective effect and payment of salary attached to the higher post retrospectively was not in consonance with FR (1) which says that a government employee will begin to draw pay and allowances attached to the tenure of his post w.e.f. the date he assumes the duties of

that post. In that view of the matter, it was decided to give the pay scale attached to the higher post only from the date he discharged the higher responsibilities and to recover the excess payment made to him in 12 installments.

3. The applicant claims that he was due for promotion w.e.f. 24.4.1984 immediately after completing five years of service in the department, but due to administrative laches, holding of DPC got delayed by almost three years and the actual promotion took place on 18.3.1987. According to him, there was nothing irregular in the recommendations of DPC and subsequent order of the government in granting promotion with back wages giving retrospective effect. Against recovery order dated 24.1.2006, the applicant filed O.A. no. 55 of 2006 before this Tribunal which was decided on 9.8.2009 by quashing the order and giving liberty to the respondents to take "any action for rectification of date of promotion of applicant and also recovery of excess payment if any made to him as per Rules, after giving an opportunity and notice to the applicant." Accordingly, the recovery made was refunded and a show cause notice was given to the applicant. After considering the reply of the applicant, present impugned order has been passed which says that the competent authority has decided to initiate appropriate recovery in the matter. At the same time, it however, provided that the recovery should be made in easy installments so that the applicant is not put to undue financial hardship.

4. At the time of hearing, the learned counsel for the applicant reiterated the arguments canvassed by him and recorded in my order dated 25.2.2009. Primarily, he is relying on the decision of Supreme Court in Shyam Babu Verma Vs. Union of India & Others reported in 1994 (27) ATC 121, according to which, if any excess payment is made to an employee due to no fault of his, nor on account of any misrepresentation on his part, the respondents should not initiate recovery action later on. He also relied on the decisions of the Supreme Court in Sahib Ram Vs. State of Haryana reported in 1995 (1) SCC 18 and P.H. Reddy Vs. National Institute of Rural Development & Others reported in 2000 (2) SC 208. In the latter case, three Member Bench of Supreme although upheld the action of the competent authority to refix the pay of an employee, who was in receipt of higher salary on account of erroneous promotion made earlier, yet did not uphold the action relating to recovery of excess amount paid. In the former case, an employee was not entitled to relaxation; but



consequential higher salary to which he was not eligible was paid. The Supreme Court held that higher pay scale was granted on account of wrong interpretation made by the Principal of the Institute, for which the employee could not be faulted; therefore, the competent authorities were directed not to recover the excess amount from him.

5. As against these citations, the learned counsel for the respondents relies on the following decisions:

(i) 2000 (9) SCC 187 in which the Supreme Court took the view that the employer (in that case CAG) was within its rights to re-fix the salary of an employee which was earlier erroneously fixed at a higher level and order for recovery of excess amount in easy installments.

(ii) 2004(1) ESC 455 Union of India & others Vs. Rakesh Chandra Sharma & Others in which full gamut of case laws on the subject was discussed by the Allahabad High Court and it was concluded that there was no law of universal application restraining the employer to recover the extra amount paid to an employee beyond his entitlement. It was observed that the rectification of mistake was not only permissible, but desirable, otherwise the system/ requirement of auditing of accounts would be rendered nugatory; it would result in windfall gains to the employees and would amount to unjust enrichment.

Allahabad High Court further observed that whenever the court had passed the restraint order, not permitting the employer to make recovery of extra amount, it was done in order to do substantial justice. Therefore, each case required to be decided on its own facts. Incase Court felt that there had been no misrepresentation/fraud on the part of the employee and excess amount had been paid to him, without any fault of him, which he might have spent considering his own money and recovery if permitted would cause great hardships to him and his family, it may restrain the employer to recover the same or direct to recover in suitable installments.

Before coming to the aforesaid conclusions the High Court discussed the following cases:

- (i) Sahib Ram Vs. State of Haryana (supra).
- (ii) Shyam Babu Verma Vs. Union of India & Others (supra).
- (iii) Union of India & Others Vs. Ram Gopal Agarwal 1998 (2) SCC 589

In all these cases, the Supreme Court was against recovery of excess amount paid if there was no fault of the employee.



As against this, the cases in which Supreme Court held that the employer is entitled to recovery, but in suitable installments are indicated below:

- (i) State of Haryana & Ors. Vs. O.P. Sharma. AIR 1993 SC 1903.
- (ii) State of Haryana & Another Vs. Kamal Singh Saharwat & Others 199 (8) SCC 44.
- (iii) Union of India & Others Vs. Sujatha Vedchalam (supra)
- (iv) V. Ganga Ram Vs. Regional Director & Ors. AIR 1997 SC 2776.
- (v) Allam Ali Vs. State of Rajasthan 2000 Lab 17 862.
- (vi) State of Karnataka Vs. Mangalore University Non-Teaching Employees' Association AIR 2002 SC 122.
- (vii) Union Territory Chandigarh Administration and Others Vs. Managing Society GDSDC 1998 (7) SCC 665.
- (viii) K.S. Satyanarayan Vs. V.R. Narayan Rao 1999 (6) SCC 104.

In the last case, it was held that the juristic basis for an order of recovery was that of restitution.

6. Learned counsel for the respondents submits that the respondents themselves had initiated the recovery action not only against the applicant, but five others similarly placed who were given retrospective promotion which could not be justified according to Rules. As per the averments made in the Supplementary Counter Reply, it is stated that the recovery action had already been initiated, or was being processed against all of them. In the second Supplementary Counter Reply, the factors responsible for recovery of excess amount against the applicant as compared to another officer Sri S.S. Kain have been explained. It also states that recoveries have been completed in respect of four officers and about to be completed for one more officer. In the Counter Reply, reliance has been placed on the decision of Supreme Court in the case of Union of India & Others Vs. M. Jangammaya reported at AIR 1977 SC 757 which says that no employee has a right to claim that the vacancy in a higher post should be filled up as soon as it occurs. It further states that there is no law under which a promotion is to be made effective from the date of creation/availability of vacancy on the promotional post and the Government had the right to keep the vacancy unfilled as long as it chooses. Promotions are to be given prospectively on the basis of recommendations of DPC, not retrospectively (Paragraph 58 of the judgment). If any other principle is accepted it will give rise to large

number of litigations. The respondent authorities themselves fear such claims/litigations if erroneous retrospective promotion granted to the applicant is upheld and the recovery order is set-aside.

7. Learned counsel for the applicant submits that in the case of P.S. Reddy (supra) it was a three Member Bench which did not allow recovery of excess amount paid. According to him, this judgment lays-down the law and has to be followed until it is overturned by atleast a three Member Bench. On going through the judgment, I find that it was primarily dealing with the inconsistent views of Supreme Court in respect of circulars issued by Government of India on the subject of salary to be given to an Ex-serviceman, who was re-employed in a civilian post after his retirement. It was not specifically dealing with the case laws on the subject of recovery of excess amount paid; therefore, the direction of Supreme Court in that case relating to recovery of excess amount is to be considered as a direction *in personem* confined to the facts of that case.

8. As has been analyzed by Allahabad High Court in the case of Rakesh Chandra Sharma (supra) there is no law laid down which is of universal application restraining the employer to recover the excess amount paid to an employee beyond his entitlement. Each case has to be decided on consideration of its own facts. In the present case, the applicant was given promotion on retrospective basis neither in compliance of Court's directions, nor in pursuance of any provisions of law. It is not the case of the applicant that someone junior to him was given promotion ignoring his case. On the other hand, as admitted by the respondents a mistake was committed and not only the applicant, but five others were also given promotion with retrospective effect with full back wages. It is also true that the payment of higher salary to an employee who did not discharge the higher responsibilities is in flagrant violation of the provisions of FR(1). Further, the Supreme Court in the case of M. Jangammaya (supra) has clearly said that no employee has a right to claim promotion from the date the vacancy in the higher post occurs. Therefore, the respondent-authorities had to initiate corrective action and rectify the mistake by confining the promotion given to the applicant and five others prospectively from the date of promotion. In the earlier O.A.No.55 of 2006 filed by the applicant the Tribunal had given liberty to the respondents to rectify the mistake about the date of promotion of the applicant and initiate recovery action after giving an opportunity to the applicant to

show cause. Accordingly the recovered amount was refunded to the applicant and a show cause notice was issued to him. After considering his representation the impugned order to initiate recoveries in suitable installments was passed. In these circumstances, it is held that the action of respondent-authorities to rectify the mistake was bonafide and proper and there was justification to recover the excess amount paid. It is also seen that the recoveries have already been made from most of other officers except the applicant. Since the respondent authority has taken care to order recovery of the excess amount in easy installments there is no justification to interfere with this order.

9. In the result, the O.A. fails and is accordingly dismissed. The respondents may ensure that the installments are in fact, reasonable so as not to cause any under hardship to the applicant. No costs.



**(Dr. A.K. Mishra)
Member-A**

Girish/-