

**Central Administrative Tribunal
Principal Bench, New Delhi.**

OA-3078/2017

Reserved on : 09.10.2018.

Pronounced on : 19.12.2018.

Hon'ble Ms. Praveen Mahajan, Member (A)

Dr. Yogendra Prakash,
Aged about 60 years,
S/o Late Sh. Brij Mohan Lal,
R/o B-150, Amar Colony,
Lajpat Nagar-4, New Delhi.

.... Applicant

(through Sh. Amit Anand, Advocate)

Versus

1. Commissioner,
North Delhi Municipal Corporation,
Civic Centre, Minto Road,
New Delhi.

2. Medical Supdt.,
Girdhari Lal Maternity Hospital,
Ajmeri Gate,
New Delhi.

.... Respondents

(through Sh. D.S. Mahendru, Advocate)

ORDER

The facts germane for adjudication of the OA are that the applicant joined the respondent organisation as a General Duty Medical Officer-II on 14.09.1989 through UPSC. He got ad hoc promotion to the Super Time Grade-I on 14.09.1999 in the pay scale of Rs.12000-375-16500. Thereafter, the applicant was selected by

UPSC as a Specialist Radiologist Grade-II in the pay scale of Rs.10000-325-15200 and joined the same organisation on 14.06.2000.

2. The applicant submits that since the post of Specialist carries higher responsibility, hence the pay of the applicant was protected and re-fixed as per Rule-22a(1) in the pay scale of Rs.10000-325-15200 by granting a notional increment of Rs.375 in the pay scale of ad hoc CMO (Supertime Gr.I) Rs.12000-375-16500 and placing to the next state of Rs.12600 in the pay scale of Rs.1000-325-15200.

3. The applicant came to know that his pay is being reduced and the respondents have already recovered some amount without giving any notice to him. Hence, he gave a representation dated 24.05.2016 to the respondents (Annexure A-4). In pursuance to the said representation, the respondents issued orders dated 29.06.2016 and 23.12.2016, which have been impugned in the OA.

4. The applicant submits that the respondents have ordered recovery of Rs. 4,06,649/- from his salary due to an alleged wrong fixation of pay which took place 15 years ago. The same it is averred, is not permissible as per Para-4(iii) of DoP&T O.M. No. 18/03/2015-Estt.(Pay-I) dated 02.03.2016, which stipulates that:-

"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."

5. The applicant sought information from the respondents under RTI seeking copies of notings/documents consulted for waiving of recoveries (Annexure A-7). He was informed that the DoP&T order regarding waiving of the recoveries was discussed verbally with the Accounts Officer and decision was taken thereafter. The applicant states that this reply tantamounts to contempt of court since the respondents' action is contrary to the directions of DoP&T issued in pursuance to the decision of the Apex Court in the case of **State of Punjab & Ors. Vs. Rafiq Masih & Ors.**, 2014(8)SCALE 613.

6. Aggrieved, the applicant has filed the current O.A. seeking the following reliefs:-

- “(i) Quash and set aside the recovery Order dated 23.12.2016 of the Respondents which is arbitrary and illegal and to pay salary to the Applicant, wherein fixation was done correctly as per order dated 23.07.2008.
- (ii) To direct the Respondents to pay the recovered amount with interest to the Applicant.
- (iii) To grant exemplary cost in favour of the Applicant.
- (iv) Because the rules of the Central Government are mutatis mutandis applicable to the MCD also.”

7. In their counter affidavit, the respondents submit that after his appointment as Specialist Grade-II, the applicant's pay was fixed at Rs.12275/- in the pay scale of Rs.10000-15200 w.e.f. 14.06.2000 and Rs.13500/- in the pay scale of Rs.12000-16500 w.e.f. 14.06.2002 upon his promotion as Specialist Grade-I. Vide order dated 23.07.2008

issued by respondent No.2, the pay of the applicant was wrongly fixed at Rs.12600/- w.e.f. 14.06.2000 instead of Rs.12275/- and to Rs.13875/- w.e.f. 14.06.2002 instead of Rs.13500/-. However, it was clearly mentioned in the order dated 25.04.2005 (Annexure R-2) and order dated 23.07.2008 (Annexure A-1) that the said fixation is subject to final acceptance by the audit, and over payment, if any, will be recoverable.

8. During the audit inspection of the accounts of respondent No.2 for the year 2009-2010, the incorrect pay fixation of the applicant was duly pointed out in the audit report, holding that it had resulted in over payment of pay and allowances to the applicant (Annexure R-3).

8.1 In reply to the audit objection (audit para No.3) the respondents on 11.04.2013 explained the enhanced fixation of pay vide their letter dated 11.04.2013 (Annexure R-4). However, the audit vide their response dated 30.04.2015 (Annexure R-5) held that the appointment of the applicant through UPSC was in the lower scale, and the recovery order was reiterated had been duly accepted by the applicant himself. Accordingly, the pay of the applicant was re-fixed and an amount of Rs. 4,06,649/- was found to be recoverable from the applicant for the period from 14.06.2000 to 30.11.2015.

9. Vide note dated 18.12.2015, the applicant was duly informed about the re-fixation of his pay and the amount of recovery to be made from him. He was also asked to indicate convenient installments in which the payment could be recovered. In his reply dated 22.12.2015, the applicant requested the respondent No.2 to adjust his OPR amount after fixing his pay in the promoted Senior Administrative Grade in G.P. Rs.10,000/- so that the amount of OPR is reduced substantially. Accordingly, an amount of Rs. 1,24,070/- was adjusted in the arrears of promotion of SAG Grade of the applicant and the balance amount of Rs.2,82,579/- remained due for recovery. The applicant was also requested vide note dated 05.11.2016 to intimate the installment amount to be deducted from the salary for the month of October, 2016. In the absence of any reply from the applicant, it was decided to recover the OPR amount by way of installment of Rs.14,000/- p.m. from the salary of the applicant.

9.1 The respondents contend that the reliance placed by the applicant on the judgment of Hon'ble Supreme Court in the case of **Rafiq Masih** (supra) is not applicable since he is a Group-A Officer.

10. During the course of hearing, the learned counsel for the applicant Sh. Amit Anand forcefully argued that respondents have been extremely unfair in recovering the alleged excess amount from

the applicant since his case is squarely covered by the protection provided by the Hon'ble Supreme Court in the case of **Rafiq Masih** (supra). He tried to drive home the point that the Hon'ble Supreme Court has culled out situations where recoveries become impermissible in law. Citing Para-18 of the aforementioned judgment, Sh. Anand emphasized that the case of the applicant is covered by the situation (iii) & (v) of **Rafiq Masih** laying down that recovery from employees is impermissible if the excess payment has been made for a period in excess of five years before the order of recovery is issued and, also where the Court arrives at the conclusion that recovery made from the employee would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh equitable balance of employer's right to recover.

11. To strengthen his stand, Sh. Anand relied upon a catena of judgments listed below:-

- (i) **State of Punjab and Ors. Vs. Rafiq Masih (White Washer) and Ors.**, (2015) 4 SCC 334.
- (ii) **Bengal Iron Corporation and Another Vs. Commercial Tax Officer and Ors.**, 1994 Supp(1)SCC 310.
- (iii) **State of M.P. and Ors. Vs. Sanjay Nagayach and Ors.**, 2013(7) SCALE 354.
- (iv) **M/s D. Navinchandra and Co., Bombay and Ors. Vs. UOI & Ors.**, (1987) 3 SCC 66.
- (v) **Ashwani Rana & Ors. Vs. GNCTD & Ors.**, (OA-2162/2016) decided by Principal Bench, CAT, New Delhi on 22.09.2017.

- (vi) **Shalik Ram Sahu Vs. The State of Madhya Pradesh** (WP-16488-2016) decided on 13.09.2017.
- (vii) **Chief General Manager & Ors. Vs. U.R. Rajagopalan & Ors.** (WP No. 36588 of 2016) decided on 20.10.2016 by Hon'ble High Court of Judicature at Madras.
- (viii) **Renu Gupta Vs. University of Delhi & Anr.** [WP(C)-277/2015] decided on 07.12.2015 by Hon'ble High Court of Delhi.
- (ix) **The Kasaragod District Co-operative Bank Ltd. & ors. Vs. Radha K.A. & ors.** [WP(C)-26585/2005] decided on 09.10.2015 by Hon'ble Kerala High Court.
- (x) **Asha Sethi Vs. UOI & Ors.** [WP(C)-4333/2015] decided on 02.08.2017 by Hon'ble High Court of Delhi.

The learned counsel urged that the respondents should be restrained from effecting further recovery, with directions to refund the recovered amount with interest, to the applicant.

11.1 Per contra, the learned counsel for the respondents Sh. D.S. Mahendru argued that the ratio of the judgment of the Hon'ble Supreme Court in the case of **Rafiq Masih** (supra) is not applicable to the facts of the present case. Sh. Mahendru submitted that the situations mentioned in **Rafiq Masih** case are only for employees belonging to Class-III & Class-IV Service, whereas the applicant was a Class-I employee. The learned counsel submitted that the applicant himself was the DDO of the hospital and knowingly continued to make over payments to himself. Sh. Mahendru further informed the Bench that initial fixation of pay of the applicant was in any case subjective and was subject to acceptance of the same by

audit (Annexure R-2). On 22.12.2015, the applicant himself had requested the respondents to recalculate his OPR amount and agreed for repayment of the excess amount paid to him.

12. I have gone through the facts of the case carefully and considered the rival submissions.

12.1 The thrust of the arguments advanced by the learned counsel for the applicant is two-fold. First one being that the pay of the applicant in the pay scale of Rs. 10000-325-15200 as a Specialist Radiologist was correctly fixed. It was urged that FR-22(a)(1) (Annexure A-2) stipulates that:-

"F.R.22.(I) The initial pay of a Government servant who is appointed to a post on a time-scale of pay is regulated as follows:-

(a)(1) Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfillment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or [rupees one hundred only], whichever is more."

Consequently, the recovery amounting to Rs.4,06,649/- is arbitrary and bad in law.

12.2 This point has been (correctly) refuted by the audit on 30.04.2015 stating that:-

"Subject:- Audit Inspection Report on the accounts of M.S,

Girdhari Lal Maternity Hospital, New Delhi for the year 2009-10.

Para No.3 Incorrect fixation of Pay of Spl. Radiologist.

Please refer to your office letter No.Dy/Des.D/158 dated 23.4.2015 on the subject cited above. In this connection the further Audit comments is under:-

In the matter of Dr. Yogendra Prakash H.O.D./Radiology/GLMH was appointed through UPSC in the lower scale and the incumbent accepted it. Hence the Department action regarding pay fixation is not in order. It is stated that the reply furnished by the department is not tenable in Audit.

Copy of the detailed calculation of O.P.R for the period w.e.f. 14.6.2000 to till date may also please be furnished alongwith the latest status of recovery effected so far."

13. Secondly, the applicant has tried to seek shelter under the protection provided by the Hon'ble Supreme Court in the case of **Rafiq Masih** (supra) and averred that in his case, the recovery ordered is in excess of five years before the order of recovery was issued, making it impermissible in law. In my view, the facts of the present case are clearly distinguishable from **Rafiq Masih**. Here the applicant's appointment itself was subjective and he was aware that his pay fixation etc. is subject to confirmation by audit. It was also made clear that over payment, if any, would also be payable in case of any difference of opinion. The pay fixation order dated 25.04.2005 (Annexure R-2) of the applicant reads as follows:-

"Consequent upon appointment of Dr. Yogender Prakash, Supertime Gr-II to the post of Spl. Gr-II (Radiology) in the pay scale of Rs. 10000-15200/- vide office order No. F.19(19)/CED(M)/2000/75/17395 dated 14.06.2000 and further promotion/placement to the post of Spl. Gr-II (Sr. Scale) in the pay scale of Rs.12000-16500/- on adhoc basis w.e.f. 14.06.02 vide office order No. F.19(95)/CED(M)/2003/192/26608 dated 06.10.03, his pay is

fixed @Rs.12,275/- in the pay scale of Rs.10000-15200/- w.e.f. 14.06.2000 with DNI 01.06.01 and @Rs.13,500/- in the pay scale of Rs.12000-16500/- w.e.f. 14.06.02 with DNI 01.06.03, if otherwise not disturbed and **subject to final acceptance by the audit. Overpayment, if any, will be recoverable.**

This issues with the concurrence of the Finance Department and approval of the competent authority."

Similarly, Office Order dated 23.07.2008 reads that:-

"Consequent upon appointment of Dr Yogender Prakash, to the post of Splist Radiologist Grade II in the pay scale of 10000-15200 vide office order no. F 19(19)CED(M)/2000/75/17395 dated 14/06/2000 and his pay is protected and fixed Rs 12600/- w e f 14/06/2000 on adhoc basis with DNI 1/06/2001 and further promotion/placement to the post of Senior Splist vide office order no. F19(95)CED(M)2003/192/26608 dated 06/10/2003 in the pay scale of 12000-375-16500 and his pay is fixed Rs 13875/- w e f 14/06/2002 with DNI 1/06/2003. He was again promoted to the post of Senior Splist Grade I in the pay scale of 14300-18300 w e f 14/06/2006 vide Office order No. F14 CED (M)/2007(76)/9061-100 dated 17/04/2007 and pay is fixed Rs 15900/ w e f 14/06/2006 with DNI 1/06/2007, if otherwise not disturbed and **subject to final acceptance by the audit. Overpayment, if any will be recoverable.**

This issues with the concurrence of the competent authority and approval of Dy Chief Accountant/City Zone."

13.1 Both the aforesaid orders, clearly state that such fixation of pay was subject to final acceptance by the audit, and that over payment, if any, will be recoverable. A copy of the orders was duly endorsed to the applicant and both the parties were aware of the conditionality of fixation of pay of the applicant. The applicant categorically accepted the terms and conditions of his appointment, which were subject to concurrence of audit. In view of the aforementioned facts and circumstances of the case, the applicant's case is totally distinguishable from that of **Rafiq** Masih

(supra). The applicant gets out of the protection provided under **Rafiq Masih** being constantly aware of the subjectivity of his pay fixation wherein the factor of overpayment (if any) had also been agreed to by him at the time of his pay fixation (Annexure R-2 & A-1).

14. Though the respondents, vide their letter dated 11.04.2013 did try to justify the higher fixation of pay of the applicant, the same was not agreed to by the audit vide their order dated 30.04.2015 and recovery was ordered (Annexure R-5).

15. The respondents, in my view, have correctly initiated the recovery proceedings against the applicant. The respondents have been gracious enough to show him the consideration of asking his convenience about the amount of installments, to complete the process of recovery. The action of the respondents for initiating and recovering excess amount from the applicant cannot be faulted. O.A. is devoid of merit and is accordingly dismissed. No costs.

(Praveen Mahajan)
Member (A)

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