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(2015) 04 KAR CK 0219

In the Karnataka High Court

Case No : Writ Appeal No. 100963/2014 (S-RES)

Abdulkhadar APPELLANT

Vs

Director, Directorate of Municipal Administration and Others RESPONDENT

Date of Decision : 25-04-2015

Acts Referred:

Citation : (2015) 04 KAR CK 0219

Hon'ble Judges : B.S. Patil, J;P.S. Dinesh Kumar, J

Bench : Division Bench

Advocate : S.B. Hebballi, for the Appellant; C.S. Patil, AGA, Advocates for the Respondent

Final Decision : Allowed

Judgement

P.S. Dinesh Kumar, J.—The appellant-writ petitioner is challenging order of the learned Single Judge holding that the appellant is not entitled for two advance increments paid to him after acquiring B.A., Degree qualification.

2. Briefly stated the facts of the case are that the appellant was appointed as an octroi clerk on 13.7.1977 with the third respondent. He acquired B.A., degree on 29.6.1977. In accordance with the extant rules at that relevant point of time, he was entitled for two advance increments and the benefit of the same was extended to him. Subsequent to abolition of collection of octroi, appellant and similarly situated clerks were posted to other Government Departments and the appellant was posted as Second Division Assistant in the Commercial Tax Department, Hubli and he reported for duty on 22.8.1983. On attaining the age of superannuation, appellant retired on 31.5.2011 and submitted his papers for sanction of pension and other terminal benefits.

3. The third respondent vide communication dated 26.5.2012 - Annexure ''A'' conveyed to the appellant that he is not entitled for two advance increments and therefore a proposal was submitted for sanctioning the pension to the Deputy Controller of Accounts, Dharwad Division and the pension was sanctioned

accordingly. Appellant being aggrieved by communication Annexure ''A'' preferred a writ petition and upon its dismissal, is in this appeal.

4. We have heard Sri S.B. Hebballi, learned Counsel for the appellant; Sri C.S. Patil, learned AGA for Respondents No. 1 and 2 and Sri Sachin S. Magadum, learned Counsel for Respondent No. 3.

5. The main contention urged by the learned Counsel for the appellant is that respondent No. 3 along with the statement of objections has filed a letter dated 15.10.2003 (Annexure ''R8''), wherein, the appellant has been called upon to refund a sum of Rs. 1,51,847/- within 15 days therefrom, failing which, amount is sought to be deducted from the DCRG and commutation of pension payable to the appellant. He submits that annexure-R8 is passed after filing the writ petition.

6. Learned Counsel for the appellant further contends that he has joined as a Naka clerk on 13.7.1977 and after obtaining B.A., degree, he has been given two advance increments as recorded in the Service Register an extract of which is produced as Annexure E-2. He submits that the plea of the respondents that the appellant is not entitled for benefit of advance increments is not sustainable in law because the respondents have initially sanctioned and continued to pay advance increments throughout his service. He submits that since there was no misrepresentation on his part, the respondents are estopped from making any claim in respect of the advance increments sanctioned and disbursed during the period of his service. He submits that the Government Order dated 25.04.1981 upon which the respondents have placed reliance is untenable in law and therefore, respondents are not only duty bound to retrace their stand but also liable to settle the terminal benefits on the basis of last pay drawn inclusive of advance increments.

7. To fortify his contention, he places reliance on the Judgment of the Supreme Court in the case of State of Punjab Vs. Rafiq Masih, (2014) 10 SCJ 700 . He draws our attention to paragraph - 12 of the said Judgment, which reads thus:-

"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 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 employees belonging to Class-Ill 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.

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(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."

(underlining is ours)

8. Per contra, learned Counsel appearing for the respondents support the order of the learned Single Judge and submit that the Government Order dated 25.4.1981 makes it clear that the incentives in the form of advance increment to Municipal employees who acquired graduate degree is discontinued with effect from 01/01/1977. Consequently, appellant is bound to refund the amount of ''additional increments'' drawn by him during service. On this premise, respondents seek to justify communication dated 15.10.2013 as per Annexure R-8. They submit that in view of admitted positions of facts and the Government Order dated 25.4.1981 which continues to be in force as on date, there is no merit in the appeal and pray for dismissal of the same.

9. We have given our anxious consideration to the submissions made at the bar and perused the records.

10. The incontrovertible facts are that appellant was appointed on 13.7.1977. He acquired B.A., degree in the examination held in April-May 1977 as per marks card issued by the University (Annexure-R1).

11. The respondents have sanctioned the advance increments to the appellant and continued to pay the same till he attained the age of superannuation. It is for the first time by communication as per Annexure ''A'' dated 26.5.2012 that the third respondent has objected to the appellant''s entitlement for the advance increments and conveyed that request of the appellant to add two advance increments to the pensionary benefits was contrary to the law. The writ petition is filed on 10.9.2012. The third respondent by a communication dated 15.10.2013 more than one year after presentation of the writ petition has called upon the appellant to refund a sum of Rs. 1,51,847/- and also threatened him to recover the same from out of the DCRG and commutation of pension, if appellant failed to comply with the demand for refund. The responders have relied upon the Government Order dated 25.04.1981 extracted hereunder in support of their state:

GOVERNMENT OF KARNATAKA

Subject:- Advance increments for acquiring or possessing Graduate qualification-Discontinuance of

READ:- 1) Govt. Order No. HMA 26 MLR 76 dated 29.11.1976

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2) Govt. Order No. FD 14 SRP(1) dated 24.5.1977

3) Govt. Order No. FD 3 SRP 79 dated 26.10.1979

PREAMBLE:

In the Government Order dated 29.11.1976 read at [1] above the benefit of advance increments for acquiring or possessing graduate qualification have been extended to Municipal employees. The rates of three increments have been revised with effect from 1-1-1977 in Govt. Order dated 24-5.1977 read at [2] above in respect of Government Servants. This system has been discontinued with effect from 1-10-1979 in respect of Government Servants vide Government Order dated 26-10-1979 read at [3] above.

The question of discontinuing this system in respect of municipal employees have been examined by Government.

Order No. HUD 369 MLR 78, Bangalore Dated 25th April 1981

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In supersession of all provisions orders, Government direct that the System of grant of incentives in the form of Advance Increments to Municipal employees possessing/acquiring Graduate Qualification shall be discontinued with effect from 1-1-1977 the Government Order No. HMA 26 MLR 76 dated 129-11-1976 shall be applicable only upto 31-12-1976."

12. In the given set of facts, the questions that fall for our consideration is:-

"As to whether the action of the respondents in firstly rejecting the prayer of the appellant to include the advance increments while computing the pension and secondly in calling upon the petitioner/appellant to refund the advance increments drawn by him during his service is legal and justified?"

13. Admittedly, appellant was sanctioned and continued to be paid advance increments till his retirement even though Government order referred to supra was passed on 25.4.1981, whereunder incentive in the form of advance increments was discontinued. There is no communication between the appellant and the respondents prior to 26.5.2012. It is for the first time on the said date the third respondent has rejected the request of the appellant to include the advance increments while computing the pension, which apparently prompted the appellant to challenge the same in the writ petition. It appears presentation of the writ petition by the appellant must have prompted the third respondent to call upon the appellant to refund a sum of Rs. 1,51,847/- by communication dated 15.10.2013 (Annexure ''R8''). Thus, we hold that the respondents have sanctioned, disbursed and continued to pay the advance increments to the appellant on their own accord without there being any misrepresentation on the part of the appellant.

14. Adverting to the issue with regard to the demand by the third respondent for

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refund of the amount received by the appellant in the form of advance increments by communication as per Annexure ''R8'', we are of the considered view that the said communication is unsustainable in law. We respectfully follow the Judgment of the Hon''ble Supreme Court in the case of Rafiq Masih (supra) and hold that the recovery from employees when excess payment has been made for a period in excess of 5 years before the order of recovery is unsustainable in law. However, in view of the policy of the Government vide G.O. dated 25.04.1981, we hold that appellant shall not be entitled to receive any prospective benefit. At the same time respondents shall not be entitled to recover any amount already received by the appellant.

15. It is stated at the bar by the counsel for appellant that pension has been calculated and authorized by excluding the advance increments. However, the respondents are deducting a portion of pension towards recovery. While computing pension, advance increment shall not be taken into account. If any deduction has been made as complained by the appellant, the respondents shall refund the same forthwith.

16. In the result, the appellant is entitled to succeed and we proceed to pass the following:-

ORDER

The appeal is allowed. The order of the learned Single Judge dated 1.4.2014 in W.P. No. 68980/2012 (S-R), is set aside. The respondents shall be restrained from demanding any refund of the benefit of advance increments given during the period of his service.

No costs.

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