
(2016) 01 KL CK 0025
In the High Court Of Kerala
Case No : W.A. No. 2686 of 2015

Kasaragod District Co-operative Bank Ltd.	APPELLANT
Vs	
Radha K.A. and Others	RESPONDENT

Date of Decision : 08-01-2016

Acts Referred:

Citation : (2016) 1 KHC 260 : (2016) 1 KLT 93

Hon'ble Judges : Ashok Bhushan, C.J. and A.M. Shaffique, J.

Bench : Division Bench

Advocate : Jawahar Jose, Standing Counsel, for the Appellant; C.R. Syamkumar, Government Pleader and N. Unnikrishnan, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Ashok Bhushan, C.J.

1. Heard both the sides. This writ appeal has been filed against the judgment dated 09/10/2015 in WP (C) No. 26585 of 2005. The first respondent to the writ petition is in appeal challenging the judgment of learned Single Judge by which judgment the learned Single Judge has set aside Exts. P. 4, P. 9 and P. 11. The brief facts for deciding the appeal are as follows:

The petitioner joined the Bank as a Steno-cum-Typist and later her services were regularised with effect from 13/05/1990. Petitioner made an application for giving her grade promotion. An order was passed on 31/01/1998 giving grade promotion to the petitioner with retrospective effect from 13/05/1990. Petitioner's pay was fixed and accordingly payment was made. While so, the Bank has issued memo dated 01/10/2004 directing the petitioner to refund an amount of Rs. 33,570/-. Proceedings dated 29/03/2005 was issued by the General Manager directing for recovery of the amount within one month. The Revision Petition filed by the petitioner was also dismissed by Ext. P. 11. Challenging the aforesaid, the writ petition was filed praying for the following reliefs:

- "i. Call for the records leading to the issuance of Exts. P. 4, P. 9 and P. 17.
- ii. Declare that Exts. P. 4, P. 9 and P. 17 are unsustainable in the eyes of law;
- iii. Issue a writ of certiorari or appropriate writ or order or direction quashing Exts. P. 4, P. 9 and P. 17;
- iv. Issue a writ of mandamus or appropriate writ or order or direction to the respondents to refund the recovered amount to the petitioner within a reasonable time; and
- v. Issue such other or further appropriate writ or order or direction as this Hon"ble Court may deem just and necessary in the circumstances of the case including the cost of this Writ Petition (Civil)."

2. The learned Single Judge has framed three issues for decision which were to the following effect:

"(1) Whether there is any difference between time bound higher grade promotion and 1:1 ratio grade promotion?

(2) Whether the petitioner is entitled to any grade promotion?

(3) Whether the first respondent Bank is justified in seeking to recover after a lapse of six years the excess pay paid to the petitioner?"

3. Issue Nos. 1 and 2 were decided in favour of the Management and however, while deciding issue No. 3 the learned Single Judge relying on the judgment of Apex Court reported in State of Punjab and Others v. Rafiq Masih (While Washer) and Others , 2014 KHC 4818 : (2015) 4 SCC 334 : AIR 2015 SC 696 : 2015 (1) KLT 429 had held that the recovery could not have been effected from the petitioner. Learned Single Judge decided the third issue in favour of the petitioner and set aside the order.

4. Learned counsel for the appellant challenging the judgment of learned Single Judge contends that excess payment was made to the writ petitioner on her own application. Reliance on the ratio as laid down by the Apex Court in Rafiq Masih's case (supra) is not applicable. It is submitted that it was on the misrepresentation of the petitioner that higher grade was sanctioned, whereas the petitioner was granted promotion within 5 years. He again submitted that learned Single Judge ought to have permitted recovery of the excess payment made.

5. Learned counsel for the writ petitioner opposing the prayer of appellant submits that the Bank fixed the salary of the petitioner by Ext. P. 3 on the basis of the order of Government dated 11/01/1995. It was the Bank's decision to fix the salary in the higher grade in which it cannot be said to be passed on misrepresentation on behalf of the writ petitioner. Ext. P. 3 refers to a decision of the Board of Directors as well as the Government Order for taking the decision. Ext. P. 3 proceedings even does not refer to any application or facts submitted by

the petitioner.

6. Learned Single Judge in the above facts relies on the ratio of Apex Court in Rafiq Masih's case (*supra*) held in paragraphs 16 and 18 as follows:

"This Court in *Syed Abdul Qadir v. State of Bihar* held as follows:

"59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. The learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."

Premised on the legal proposition considered above, namely, whether on the touchstone of equity and arbitrariness, the extract of the judgment reproduced above, culls out yet another consideration, which would make the process of recovery iniquitous and arbitrary. It is apparent from the conclusions drawn in *Syed Abdul Qadir Case*, that recovery of excess payments, made from the employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year from the date of his retirement on superannuation.

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 service).
- (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 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."

7. The present case cannot be said to be a case in which fixation of salary of the petitioner can be imputed on the basis of any threat or misrepresentation by the petitioner. The Apex Court held that no recovery can be made if the excess pay is sought to be recovered after five years. Hence we are of the view that the learned Single Judge did not commit any error in relying on the ratio of the Apex Court in Rafiq Masih's case (supra). Learned counsel for the appellant also placed reliance on another judgment reported in Chandi Prasad Uniyal and Others v. State of Uttarakhand and Others , 2012 KHC 4438 : 2012 (3) KLTSN 126 : (2012) 8 SCC 417 : AIR 2012 SC 2951. Even in Rafiq Masih's case (supra) the recovery has been made permissible if it is made within 5 years and the only differentiation that has been drawn for recovery is, when it is beyond 5 years. The judgment of Apex Court reported in Chandi Prasad Uniyal's case (supra) has already been noticed and considered in the subsequent judgment of Supreme Court in Rafiq Masih's case (supra) and the ratio was laid down after taking note of the said judgment.

In the above view of the matter we do not find any error in the judgment of learned Single Judge. The Writ Appeal is dismissed.