(2018) 01 CAT CK 0054

In the Central Administrative Tribunal

Case No : Original Application 1643 Of 2017

Rajinder Kumar Batra APPELLANT

Vs

Secretary And Others RESPONDENT

Date of Decision : 16-01-2018

Acts Referred:

Citation : (2018) 01 CAT CK 0054

Hon'ble Judges : Praveen Mahajan, Member (A)

Bench : Single Bench

Advocate : K.S. Dhingra, Amit Anand

Final Decision : Dismissed

Judgement

Praveen Mahajan, Member (A)

1. Briefly stated, the facts of the case are that on 01.07.1980, the applicant was appointed as Pharmacist (Group-C) with the respondents in the pay scale of Rs.330-560, which was revised to Rs.4500-7000 w.e.f. 01.01.1996, consequent to implementation of the recommendations of the Fifth Central Pay Commission. On 09.08.1999, he was allowed the first financial upgradation on completion of more than 12 years? service under the ACP Scheme. On 01.07.2004, he was allowed the second financial upgradation on completion of 24 years? service. The Sixth Central Pay Commission recommended the Modified Assured Career Progression Scheme (MACPS) to replace the ACPS, which was implemented vide Ministry of Finance O.M. No. 19.05.2009. Ministry of Finance issued another O.M. dated 18.11.2009 modifying the MACPS introduced vide O.M. dated 19.05.2009, vide which the post of Pharmacist in the entry grade was placed in PB-1 with Grade Pay of Rs. 2800/- with the stipulation that the incumbent would be placed in PB-2 (Rs. 9300-34800) with non-functional Grade Pay of Rs. 4200/-. By the Office Order issued under No. F7/33/2003/ACP/Pt File - 785-789 dated 14.06.2011, the applicant was granted the benefit of third financial upgradation w.e.f. 01.07.2010 on completion of 30 years? service in the grade of Pharmacist.

2. Consequent to the third financial upgradation under MACPS under the Office Order dated 14.06.2011, his pay was fixed in PB-2 (Rs.9300-34800) as under:-

S.No.	Date	Basic Pay (Rs.)	Grade Pay (Rs.)
1.	1.1.2006	13490	4800
2.	1.7.2006	14040	4800
3.	1.7.2007	14610	4800
4.	1.7.2008	15200	4800
5.	1.7.2009	15800	4800
6.	1.7.2010	17060	5400

3. The applicant states that the respondents, suddenly and without any notice, issued Office Order 178 under No. F.7/1/Misc/MACP/DHS/SHS/1566 dated 16.06.2014 re-fixing his pay w.e.f. 01.01.2006 as under:-

S.No.

Date

Basic Pay (Rs.)

Grade Pay (Rs.)

1.

1.1.2006

13490

4200

2.

1.7.2006

14020

4200

3.

1.7.2007

14570

4200

4.

1.7.2008

15140

4200

5.

1.9.2008 (After Grant of second financial upgradation under ACPS)

15720

4600

6.

1.9.2008 (After Grant of third financial upgradation under MACPS)

16330

4800

7.

1.7.2009

16970

4800

8.

1.7.2010

17630

4800

9.

1.7.2011

18310

4800

10.

1.7.2012

19010

4800

11.

1.7.2013

19730

4800

In the aforesaid Office Order, it was also mentioned that the excess payment made, if any, would be recovered without notice.

4. The applicant submitted a representation dated 09.09.2014 against re-fixation of his pay, which was rejected. His pay, re-fixed w.e.f. 01.01.2006, was however, implemented prospectively w.e.f. November, 2014 and no recovery on account of alleged excess payment was ordered at that stage. The respondents, however, issued a notice dated 31.01.2017 to the applicant intimating their intention to recover the alleged excess payment consequent to re-fixation of his pay, vide Office Order dated 16.06.2014. They also called upon the applicant to indicate names of other employee(s)/Pharmacists in Directorate of Health and Family Welfare where recovery had not been made from similarly situated employees.

5. In response, the applicant submitted a representation dated 02.02.2017 in

which he relied upon this Tribunal?s judgment dated 31.01.2014 in OA-3441/2012 as well as the instructions contained in DoP&T O.M. dated 02.03.2016 ibid. The respondents, rejected his representation vide the impugned order dated 26.04.2017 and directed him to deposit Rs. 1,15,382/- within 10 days, failing which the amount was to be recovered from his salary in 10 instalments, or, in any other manner as deemed fit. Aggrieved by the said action of the respondents, the applicant has filed the current O.A. seeking the following reliefs:-

"(a) set aside and quash the impugned order dated 26.04.2017 (Annexure A 1).

(b) direct the respondents to not recover from the applicant?s salary the amount of Rs.1,15,382/- on account of the alleged overpayments.

(c) award cost of the present proceedings, and

(d) pass such other order or orders as this Hon?ble Tribunal considers appropriate in the facts and circumstances of the case."

Apart from the judgments cited above, the applicant has also relied upon the decisions of this Bench of CAT in OA-98/2015 (Som Prakash Vs. GNCTD & Ors.) dated 26.11.2015 and in OA-2083/2015 (Jai Singh Jain Vs. GNCTD & Ors.) dated 20.08.2016. The applicant has relied upon the judgment of Hon?ble Supreme Court in the case of State of Punjab and Ors. Vs. Rafiq Masih (Whitewasher) and Ors., AIR 2015 SC 696 where detailed guidelines have been laid down regarding some of the situations, where recovery of excess payments mistakenly made to the employees, cannot be recover. In view of the aforesaid guidelines, he states that the order of recovery is bad in law. Reference has also been invited to O.M. dated 02.03.2016 of Department of Personnel, issued after the judgment of Rafiq Masih (supra), advising Government departments to deal with the issue of wrongful/excess payments made to Government Servants.

6. Opposing the averments made in the OA, the respondents state that vide O.M. dated 18.11.2009, Ministry of Finance, revised the pay structure of common category of Pharmacist cadre by implementing the recommendations of Fast Track Committee, which recommended that the Pharmacist Cadre should be retained in the Grade Pay of Rs. 2800/- in PB-1, and, on completion of 02 years service, they should be granted non-functional up-gradation to the next higher grade, having grade pay of Rs.4200/- in PB-2. The said O.M. was issued as a modification to the recommendations of 6th CPC.

7. The respondents further contend that the applicant?s pay was revised w.e.f. 01.01.2006, therefore, the revision cannot be effective prospectively. Wherever a pay is revised from a back date, the arrear towards lack of pay, or, recovery towards excess payment, is to be calculated from the date of revision of pay. They further aver that the relied upon O.M. dated 02.03.2016 merely states that "the waiver of recovery may be allowed with the express approval of the Department of Expenditure in terms of O.M. dated 06.02.2014. Para-3 of the said

O.M. (06.02.2014) reads as under:-

" In view of the law declared by Courts and recently reiterated by the Hon?ble Supreme Court in the case of Chandi Prasad Uniyal and Ors. Vs. State of Uttarakhan and Ors., 2012 AIR SCW 4742, the Ministries/Departments are advised to deal with the issue of wrongful/excess payments as follows:-

i. In all cases where the excess payments on account of wrong pay fixation, grant of scale without due approvals, promotions without following the procedure, or in excess of entitlements etc come to notice, immediate corrective action must be taken.

ii. In a case like this where the authorities decide to rectify an incorrect order, a show-cause notice may be issued to the concerned employee informing him of the decision to rectify the order which has resulted in the overpayment, and intention to recover such excess payments. Reasons for the decision should be clearly conveyed to enable the employee to represent against the same. Speaking orders may thereafter be passed after consideration of the representations, if any, made by the employee.

iii. Whenever any excess payment has been made on account of fraud, misrepresentation, collusion, favouritism, negligence or, carelessness, etc., roles of those responsible for overpayments in such cases, and the employees who benefitted from such actions should be identified, and departmental/criminal action should be considered in appropriate cases.

iv. Recovery should be made in all cases of overpayment barring few exceptions of extreme hardships. No waiver of recovery may be allowed without the approval of Department of Expenditure.

v. While ordering recovery, all the circumstances of the case should be taken into account. In appropriate cases, the concerned employee may be allowed to refund the money in suitable installments with the approval of Secretary in the Ministry, in consultation with the FA.

vi. Wherever the relevant rules provide for payment of interest on amounts retained by the employee beyond the stipulated period etc as in the case of TA, interest would continue to be recovered from the employee as heretofore."

8. The applicant?s representation dated 09.09.2014 was considered, and rejected by the Competent Authority vide order dated 21.10.2014. However, after rejection of the representation, the matter of recovery of excess payment from the applicant was overlooked in the concerned branch and could not be finalized in a time bound manner. The respondents state that excess amounts paid to all other similarly placed Pharmacists have been recovered except those who were left out due to oversight. The Competent Authority issued directions vide email dated 16.11.2016 to find out such type of pending cases, and the case of the applicant came to light, when it was processed and finalized by order dated 26.04.2017.

9. It is further averred that the decisions relied upon by the applicant in OA-500/2017 and in OA-2083/2015 are in respect of those employees who were due to retire shortly before the recovery was made. The decision of this Tribunal in OA-3441/2012 dated 31.01.2014 was challenged before the Hon?ble High Court vide WP(C)-8515/2014, which was decided vide order dated 09.11.2016, relevant portion of which is reproduced below:-

"17. Learned counsel for the respondents, during the course of hearing, had submitted that paragraph 1 of the MACP Scheme requires that the employees would be entitled to three financial upgradations after the employee had stagnated at a particular pay scale/grade pay of ten years continuously. This is correct, but this would not help and assist the respondents. The Scheme envisages three financial upgradations at the end of 10, 20 and 30 years of service. The Pharmacist (Entry Grade) were/are entitled to financial upgradation after two years. Paragraph 1 does not state or stipulate that the said financial upgradation has to be ignored and not taken into account for the purpose of MACP Scheme. If a Pharmacist (Entry Grade) has remained at the said post for ten years in the grade pay of Rs.4200, he would be entitled to benefit of financial upgradation to the grade pay of Rs.4600 and then after ten years to another financial upgradation in the grade pay of Rs.4800. The argument would not lead us to the conclusion that the financial upgradation of Pharmacist (Entry Grade) at the first stage after two years of service in grade pay of Rs. 2800 to Rs. 4200 would be clubbed and accordingly, the first financial upgradation would be to grade pay of Rs.4600 and then to grade pay of Rs.4800 and thereafter to grade pay of Rs.5400. The argument of the W.P. (C) 8515/2014 Page 19 of 19 respondent, in fact, ignores the first financial upgradation from Rs. 2800 to the grade pay of Rs.4200 and is, therefore, not acceptable.

18. Another issue, which may arise for consideration, is with regard to recovery of arrears. We would not like to comment and deal with the question of arrears as the decision on the said aspect has to be specific to the facts and the case. Different issues and considerations would apply to individuals, as has been held in the case of State of Punjab v. Rafiq Masih, (2015) 4 SCC 334. It may be advisable for the petitioners to first issue show cause notice before they take steps for recovery as there may be extenuating circumstances, which may warrant non-recovery. We clarify that we do not express any opinion on the said aspect."

The respondents submit that the case of the applicant was decided by the department in accordance with the principles discussed in the aforementioned citations, as well as relevant Instructions issued by various OMs/Circulars on the subject.

10. I have gone through the facts of the case and perused the records available on file. The applicant, placing reliance on the judgment of the Hon?ble Supreme Court in the case of Rafiq Masih (Whitewasher) and Ors. (supra) has tried to make out a case that recovery of excess payment made to him cannot be

recovered. The applicant has also placed reliance on the Instructions contained in DoP&T O.M. dated 02.03.2016, which were issued after the aforesaid judgment was delivered. At this point of time, it would be relevant to reproduce the relevant excerpt from Rafiq Masih (supra) judgment wherein the Hon?ble Supreme Court held that :-

"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 herein above, 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-III 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.

(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."

In my view, the judgment and the O.M. cited by the applicant do not really come to his rescue. Hon?ble Supreme Court has held that recovery from employees, who are due to retire within one year or have already retired, would be impermissible in law, which is not the case in the present O.A. The DoP&T O.M. dated 02.03.2016 relied upon by the applicant merely states that waiver of excess payment should not be allowed without concurrence with Ministry of Expenditure. There is no stipulation whatsoever of any automatic waiver of excess payment made to Government officers, as is being wrongly inferred by the applicant. On the contrary, in the case of Chandi Prasad Uniyal and Ors. (supra), the Hon?ble Supreme Court has held that wherever excess payment on account of wrong pay fixation or due to any other reasons has been made, the authorities are well within their right to rectify the order, which resulted in over payment and take corrective action. The impugned orders have been issued by the respondents in accordance with the clarifications received from the competent authorities from time to time.

11. When the case of the excess payment to the applicant was noticed, the respondents informed him (on 31.01.2017) intimating their intention to recover

the alleged payment, consequent to refixation of pay on 16.06.2014 and proceeded accordingly.

12. It is well settled principle of law that employees cannot be allowed to take benefit of an erroneous, though inadvertent, action of the respondents. The power of the employer to recover the erroneously paid sum to the employee is undisputed, subject of course to the necessary riders laid down in the judgment (supra) as well as the O.M. dated 02.03.2016. In view of the above mentioned discussions, I cannot fault the decision of the respondents, which needs no interference from the Tribunal. The O.A. is accordingly dismissed. No costs.