(2023) 05 GUJ CK 0026

In the Gujarat High Court

Case No : R/Special Civil Application No. 10521 Of 2011

S R Tadvi APPELLANT

Vs

State Of Gujarat & 2 Other(S) RESPONDENT

Date of Decision : 05-05-2023

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2023) 05 GUJ CK 0026

Hon'ble Judges : Hasmukh D. Suthar, J

Bench : Single Bench

Advocate : Radhesh Y.Vyas, Shivam Dixit

Final Decision : Allowed

Judgement

Hasmukh D. Suthar, J

1. By way of this petition preferred under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs :

"...this Hon'ble Court may be pleased to issue a writ of mandamus or any other writ, direction or order :

(A) Quashing and setting aside the orders dt. 8.9.2008, 1.9.2010 and Letter dt. 7.5.2011 and further directing the Respondents not to recover any amount and if recovered to refund the same to the petitioner at the rate of 8% interest;

(B) During the pendency and final disposal of this petition, the Respondent No.2 may be restrained from affecting any further recovery from the petitioner pursuant to the aforesaid orders dt. 8.9.2008, 1.9.2010 and letter dt. 7.5.2011."

FACTUAL MATRIX :

2. The facts giving rise to the present petition may be summarised as under :

2.1. It is the case of the petitioner that he was appointed as a Junior Clerk vide order dated 26.12.1990. The respondent no.3, vide letter dated 27.11.2007, informed the petitioner to deposit Rs.2,57,820=00 in the Government Treasury Office towards the increments amount which was wrongly paid to him since he had not passed the Hindi examination. Subsequently, the petitioner passed the new S.S.C. examination with Hindi language in the year 2007 in addition to passing the Hindi examination conducted by the 'Rashtriya Bhasa Prachar Samiti', Vardha. Therefore, vide letter dated 18.12.2007, he requested the Deputy Commissioner of Commercial Tax, Division-11, Vadodara, that since he has cleared the Hindi examination, no recovery be made pursuant to the letter dated 27.11.2007. The respondent no.3, vide order dated 8.9.2008, directed recovery of increments paid to the petitioner for the period from 16.12.1992 upto March 2007. It is stated in the said order that the increments are wrongly paid to the petitioner due to mistake.

2.2. Being aggrieved and dissatisfied with the said order passed by the respondent no.3, the petitioner along with other employees preferred representation before the respondent no.2 vide letter dated 6.10.2008 and requested not to make any recovery since there was no fault on their part and it was paid because of mistake committed by the department itself. The Assistant Commissioner of Commercial Tax, Unit-2, vide letter dated 29.7.2010, ordered recovery from the salary of the petitioner by installments of Rs.5,000=00 each and an installment of Rs.7,820=00.

2.3. It is the case of the petitioner that thereafter a revised order dated 1.9.2010 came to be passed, whereby a recovery of Rs.2,57,820=00 for the period from 16.12.1992 upto March 2007 was ordered and pursuant to the said order, a sum of Rs.5,000=00 is being deducted per month from the salary of the petitioner.

2.4 Being aggrieved and dissatisfied with the said order, the petitioner, thereafter, filed a Special Civil Application No.13833 of 2010 and challenged the aforesaid action of the respondent authorities. The said petition was withdrawn on 18.10.2010 with a view to make a representation and produce the copy of the certificate before the authorities. Pursuant to the said order, the petitioner made a representation on 26.10.2010 before the respondent authorities. However, since no order was passed by the respondent authorities, the petitioner was compelled to file another Special Civil Application No.3575 of 2011 and prayed that the respondents be directed to decide the representation dated 26.10.2010. This Hon'ble Court, vide order dated 18.3.2011, directed the respondents to decide the representation of the petitioner within a period of six weeks. The said representation came to be rejected by the respondent no.2 on 7.5.2011.

3. In the backdrop of the aforesaid facts, the petitioner is here before this Court with the present petition praying for quashing and setting aside the orders dated 8.9.2008, 1.9.2010 and the letter dated 7.5.2011 and further praying for a direction to the respondents not to recover any amount from the petitioner.

SUBMISSIONS ON BEHALF OF THE PETITIONER :

4. Learned advocate for the petitioner Mr.Radhesh Vyas has vehemently

submitted that the petitioner has not played any fraud or has not misrepresented in getting the increments released by the respondents and thereby obtained the amount, therefore, the same cannot be recovered from the petitioner. The petitioner passed the new S.S.C. examination with Hindi language in the year 2007. In addition to that, he also passed the Hindi examination conducted by the 'Rashtriya Bhasa Prachar Samiti, Vardha'. Learned advocate further submitted that if there is no any fraud or misrepresentation on the part of the petitioner, the respondent authority ought not to have passed the order of recovery from the petitioner. Even for the mandatory requirement of passing the Hindi examination, no any rules was brought to the notice of the petitioner, therefore, there was no fault on the part of the petitioner. As soon as the said issue was brought to the notice of the petitioner, the petitioner has immediately cleared the said examination in the year 2007. Hence, learned advocate has prayed that the order of recovery passed by the authority is not sustainable. To substantiate his argument, he has relied upon the decision rendered by the Supreme Court in the case of State of Punjab and others vs. Rafiq Masih (White Washer) and others, reported in (2015) 4 SCC 334. Lastly, learned advocate has prayed before this Court to allow the petition.

SUBMISSIONS ON BEHALF OF THE RESPONDENT - STATE:

5. Per contra, learned AGP Mr.Shivam Dixit appearing for the respondent – State has vehemently submitted that there is no malafide intention on the part of the respondent authority as the petitioner was paid the increments as per the pay-scale of the Junior Clerk but during the audit it came to the knowledge of the deponent respondent that the petitioner has been wrongly paid the increments. Therefore, the respondent no.4, vide letter dated 27.11.2007, informed the petitioner to deposit the wrongly paid amount towards the increments in the Government treasury. The petitioner has cleared the Hindi examination in the year 2007, i.e. after 15 years of appointment. As per the condition of the appointment, the petitioner ought to have cleared the examination of Hindi language within 3 years from the date of the appointment order, i.e. 26.12.1990. Further, he has submitted that as per the Government Resolution dated 20.8.1967, the examination for language has to be cleared within a period of 3 years of the date of the appointment. As per the Government Resolution dated 20.8.1967, the petitioner has not cleared the Hindi examination within a period of 3 years but has cleared in March 2007, therefore, the order of recovery has been passed by the respondent, which is just and proper and in accordance with the policy decision of the State Government. Hence, he requested to dismiss the petition.

6. I have given my thoughtful consideration qua the argument canvassed by the learned advocates for the parties. It is an admitted and undisputed fact that the petitioner was working with the respondents nos.2 and 3 and he was appointed on 26.12.1990. It is an admitted fact that the petitioner cleared the Hindi examination in March 2007. Further, it is also an admitted fact that the petitioner

had also cleared the Hindi examination conducted by the Rashtriya Bhasa Prachar Samiti, Vardha. It is the case of the respondent that the Government Resolution dated 20.8.1967 lays down a condition that the examination for language has to be cleared within a period of 3 years from the date of appointment. The said resolution is produced at Annexure-R to the petition. I have gone through the said resolution, wherein a classification of different categories of employees who are required to compulsorily pass which examination in Hindi language has been provided, viz. Gazetted Officers, officers who are working in the Sachivalaya as well as the Stenographers working in the Sachivalaya are required to pass the higher level examination; whereas, Section Officers, Typists and subordinate employees are required to pass the lower level examination; whereas, spoken language examination is prescribed for the Class-IV employees. Moreover, exemption from passing the Hindi examination is also provided for five different categories of employees, which includes the examination taken by different organizations/institutions, viz. 'Rashtriya Bhasa Prachar Samiti, Vardha', 'Kovid', 'Parichaya' and 'Pravesh'.

7. On duly complying with the aforesaid resolution, the petitioner did pass the Hindi examination conducted by the Rashtriya Bhasa Prachar Samiti, Vardha, in the year 1983. The possibility of misconception cannot be ruled out. However, if we keep aside the aforesaid fact, it is required to be noted that when any resolution is passed by the authority, it is the duty of the authority to issue administrative instructions in that regard to bring it to the notice of the employees and the benefit flowing out of the said resolution cannot be denied or curtailed to the employees. Here, nothing is on record which indicates that the said resolution was brought to the notice of the petitioner by the respondent authority. If any administrative instruction or resolution, if any, is passed, ordinarily the same is required to be published so as to bring it to the notice of the persons concerned who are going to be affected by the same. In this regard, reference can be made to the case of S.D.M. Basha vs. Deputy Inspector of Police, Wireless Communication, Gujarat State and others, reported in (1993) 1 GLR 878.

8. Further, the benefit of increment was extended by the department itself and there was no any fraud or misrepresentation on the part of the petitioner in getting the said benefit of increment. Even, as and when it came to the notice during the audit by the department, a query was raised in the year 2007 and the petitioner passed the Hindi examination as an ex-student in the year 2007 itself. The case of the petitioner is that he was not aware of the fact that the examination conducted by the Rashtriya Bhasa Prachar Samiti, Vardha, is not equivalent to the Hindi examination as contemplated by the Government Resolution. There was no any malafide intention on the part of the petitioner. Even, subsequently, the respondent department has also, vide order dated 29.6.2007, given exemption to the petitioner.

9. In view of the above, it appears that there is no fault on the part of the

petitioner and he has not taken any undue advantage or benefit. The mistake has been committed by the respondent authority. Hence, the order of recovery passed by the respondent authority is not sustainable in the eye of law as the petitioner was not responsible for any wrong fixation of the pay-scale. The petitioner came to be paid the salary as per the pay-scale fixed by the respondent department. The fixation for the period from 16.12.1992 upto March 2007 was required to be corrected at the relevant point of time. Here, after a lapse of 15 years the order of recovery has been passed by the respondent authority even though the petitioner was not at fault. So, the order passed by the respondent authority to recover the amount wrongly granted to the petitioner is not just and proper. In this regard, reference can be made to the case of Shyam Babu Verma and others vs. Union of India and others, reported in (1994) 2 SCC 521, more particularly para-11, which is reproduced as under :

"11. Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to 1 (1993) 1 SCC 539: 1993 SCC (L&S) 221: (1993) 23 ATC 657 the fault of the respondents, the petitioners being in no way responsible for the same."

10. Thus, it is abundantly clear that the erroneous fixation of pay-scale in the year 1990 has been sought to be recovered in the year 2007, i.e. after a period of 17 years. In the aforesaid circumstances, the Hon'ble Supreme Court has held that the recovery after several years would not be just and proper. Even, the law laid down by the Hon'ble Supreme Court in the case of Rafiq Masih (White Washer) (supra) that recovery of amount paid in excess without fault of recipient is impermissible from the employees belonging to Class-III and IV service, the retired employees or the employees who are due to retire within a period of one year of the order of recovery and 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.

11. Even, in the case of State of Gujarat vs. Ravjibhai Khimjibhai Ninama (Letters Patent Appeal No.623 of 2023, decided on 1.5.2023), a Division Bench of this Court has decided that due to lapse of long time the amount of higher grade pay or any mistake crept in calculating or fixing the pay and non passing of the departmental examination after a lapse of long time of higher grade pay no recovery can be made. In view of the above, I am of the considered view that the order passed by the respondent authority pursuant to the orders dated 8. 9.2008, 1.9.2010 and Letter dated 7.5.2011 is required to be and is hereby

quashed and set-aside.

12. Petition is allowed. Rule made absolute. No order as to costs.

