

(2019) 09 BOM CK 0126
In the Bombay High Court
Case No : Writ Petition No. 5226 Of 2012

Sanjay And Ors

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 19-09-2019

Acts Referred:

Citation : (2019) 09 BOM CK 0126

Hon'ble Judges : Sunil B. Shukre, J; Milind N. Jadhav, J

Bench : Division Bench

Advocate : B.G. Kulkarni, Kalyani Deshpande, Aarti Singh, P.D. Meghe

Final Decision : Partly Allowed

Judgement

Sunil B. Shukre, J

1. Heard.

2. The order directing recovery of excess payment made to the petitioners, who are employees of respondent nos.4 and 5, on account of house rent allowance is under challenge in the present petition.

3. Respondent nos.4 and 5 -Institutions have had their offices in Nagpur till June-1993 and it was sometime in July-1993 that their offices were shifted to Wanadongri. As the offices of respondent nos.4 and 5 were situated in Nagpur city, all the petitioners also chose to have their residences in Nagpur city. Even otherwise according to the petitioners, Wanadongri was a rural area where accommodation was not available and it was not available even after shifting of offices of respondent nos.4 and 5 in July-1993 to Wanadongri.

4. The petitioners having their residences in Nagpur city were paid House Rent Allowance (in short 'HRA') at the rate applicable to Nagpur city and even after shifting of respondent nos.4 and 5 - Institutions to Wanadongri, there was no change in the rate at which HRA was paid to them. Sometime in March-1999 it was found by respondent nos.1 and 2 that as the place of duty of all the

petitioners was at Wanadongri and Wanadongri was the notified taluka place for which different rate of HRA was prescribed, the petitioners could not have been paid HRA at the rate applicable to Nagpur city and so it was decided to pay HRA at the rate applicable to Wanadongri. It appear to us that the Management of respondent nos.4 and 5 had made a request to respondent nos.1 and 2 to reconsider their decision and it was rejected. However, once again another proposal was sent by respondent nos.4 and 5 for seeking permission to grant HRA to the petitioners at the rate applicable to Nagpur city. In response to this proposal, a communication dated 25.05.1999 was received by respondent nos.4 and 5 from the Deputy Director (Technical Education), State of Maharashtra, Mumbai, informing respondent nos.4 and 5 that the dispute as regards the rate at which HRA to be paid to the petitioners was under consideration of the Government and till it was settled, the respondents shall continue to pay HRA to the petitioners at the present rate.

5. Following communication dated 25.05.1999, respondent nos.4 and 5 obtained an undertaking from each of the petitioners and other employees regarding their willingness to refund whatever amount that would be declared as excess payment, upon rejection of the proposal sent by respondent nos.4 and 5 to the Government.

6. Shri Kulkarni, learned counsel for the petitioners has placed his reliance upon Government Resolution dated 15.02.1963 in support of his argument that Nagpur city is in close proximity of Wanadongri and the petitioners are residing within Nagpur city as of necessity due to unavailability of accommodation at Wanadongri and therefore, the petitioners are entitled to receive HRA at the rate applicable to Nagpur city. Smt. Deshpande, learned A.G.P. for respondent nos.1 and 2 submits that this Government Resolution is not applicable to the case of the petitioners for the simple reason that Wanadongri was not a place mentioned in the schedule annexed to the Government Resolution dated 15.02.1963.

7. On going through the Government Resolution dated 15.02.1963 in its entirety, we find substance in the argument of the learned A.G.P. appearing for respondent nos.1 and 2. In order to have application of this Government Resolution, it is necessary that a place like Wanadongri is named in the schedule annexed to Government Resolution dated 15.02.1963. This would be clear from the provision made in Government Resolution in paragraph no. 3. But, Wanadongri in the year 1963 being a very small village did not find its place in the notified area or under any other notification issued by the Government later on in relation to 1963 Government Resolution. No doubt, the principle stated in the Government Resolution dated 15.02.1963 has been used and even explained in later Government Resolution dated 11.08.1978. In that Government Resolution, an instance of Civil and Rural Engineering Polytechnic College, Pipri, District Wardha has been used to elaborate the concept of Government Resolution dated 15.02.1963. But, we find that it was only by way of an illustration and not as a matter of rule of binding nature and so it would be of no

use to the petitioners. The argument of learned counsel for the petitioners is, therefore, rejected.

8. However, there is another angle involved in this matter. The point is that recovery has been directed to be effected after a long period of time and in the circumstances which do not place any blame upon the petitioners. It is nobody's case, that it was at the request of the petitioners that HRA at the higher rate was paid to them. It is also nobody's case that the petitioners had made any misrepresentation or played any fraud while securing such a benefit. This is a case and admittedly so, of a payment wrongly and mistakenly made by the employer and nothing more. Such a case, therefore, has to be examined in the light of the principle of law laid down by Hon'ble Apex Court in case of State of Punjab and others Vs. Rafiq Masih (White Washer), reported in (2015) 4 SCC 334.

9. In paragraph no.7 of Rafiq Masih's case (cited supra), it has been observed that the order passed by the employer seeking recovery of monetary benefits wrongly extended to an employee can only be interfered with in cases where recovery would result in hardship of a nature which would far outweigh the equitable balance of the employer's right to recover. In other words, it is stated that the recovery could be stopped where it is found that it would be iniquitous to recover the payment made. The Hon'ble Apex Court further observed that as between two parties, if a determination is rendered in favour of one party which is weaker of the two, and which would not cause any serious detriment to the other, the issue so resolved would amount to adding a feather to the glorious cap of concept of justice known to law and which has been highlighted in the idea of Welfare State put forward in the Directive Principles of the State policy. It has been asserted by the Hon'ble Supreme Court that an action of State ordering recovery from an employee would be in order only when it is not rendered iniquitous in the sense that it is not more unfair, not more wrongful, not more improper and not more unwarranted than the corresponding right of the employer to recover the amount. The Hon'ble Apex Court then has laid down the parameters in which the recovery would be impermissible in law.

They are stated in paragraph no. 18 which reads thus :-

"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."

10. The aforesaid parameters, in our considered view, would be applicable according to the class to which each of the petitioners belong and the fact-situation of each of the petitioners. This petition has been filed by assorted categories of employees, some being teachers and some being non-teaching staff of different classes. Taking up first the case of those petitioners who are teachers, we find that parameter no. 3 would be applicable to them and we would give the reason shortly in subsequent paragraph. For this category of petitioners, date when the dispute came to an end finally is material. It is the date of 19.07.2012. Therefore, in terms of parameter no. 3, whatever recovery that would be permissible from those petitioners who are Teachers could not be in excess of five years before the final order of recovery is passed. There are also petitioners, as informed by the learned counsel for the petitioners, who belong to Class-III and Class-IV groups of employees. So far as these classes of employees are concerned, the entire recovery is impermissible in law in terms of parameter no. 1. Some of the petitioners, as informed by the learned counsel for the petitioners, have retired and four of them have also died. The employees falling in these categories as well would not be liable to refund the excess payment as they would be covered by parameter no. 2 in the case of Rafiq Masih'(cited supra).

11. Now, advertent to the reason for permitting recovery only to the extent of five years in case of that class of the employees which comprises Teachers, is that there has been an undertaking given by each of them in September-1999 about refund of excess payment, if any and from that time onwards these employees knew that situation might arise when they would be required to refund the excess amount. That situation did arise but, it was after a very long period of time after giving of an undertaking by them. If any delay has occurred in taking a final decision, no blame for that can be placed on the shoulders of these employees and, therefore, in their case, the recovery can be made only in terms of parameter no.3 of Rafiq Masih's case (cited supra). For taking such a view, we also draw support from the view taken by Hon'ble Apex Court in case of High Court of Punjab and Haryana and ors. Vs Jagdev Singh, reported in (2016) 14 SCC 267. In this case, undertaking had been given by the respondent therein at the time of revision of pay-scale and before he received payment as per the revised pay-scale. The facts of the present case are somewhat different. In the

instant case, at the time of payment of HRA at higher rate, no undertaking was obtained and it was obtained about six years later from the date of first payment and that was also at the time when dispute regarding excess payment of HRA had started. This dispute came to be settled finally on 19.07.2012 and since there was an undertaking given in September-1999, we have found as mentioned earlier, that liability of the Teachers to refund would be as per the parameter no.3 of Rafiq Masih's case (cited supra).

12. In view of the above facts and circumstances of the case, petition is partly allowed and impugned order dated 19.07.2012 is quashed and set aside to the extent it directs recovery of excess payment of HRA to those petitioners who belong to Class-III and Class-IV groups and also those who have retired or who have expired on or before 19.07.2012. The impugned order dated 19.07.2012 as regards the employees falling in the category of Teacher is also quashed and set aside to the extent it directs recovery of excess payment towards HRA before July-2012. Pending Civil Applications, if any, are disposed of accordingly.

13. Rule is made absolute in these terms. No costs.