(2019) 03 MP CK 0086

In the Madhya Pradesh High Court

Case No : Writ Appeal No. 478 Of 2019

State Of Madhya Pradesh And Others — APPELLANT

Vs

Surendra Singh Sengar — RESPONDENT

Date of Decision : 19-03-2019

Acts Referred:

M.P Civil Services Pension Rules, 1976 — Rule 65, 65(2), 65(2)(a)
Madhya Pradesh Uchcha Nayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 — Section 2(1)
Income Tax Act, 1995 — Section 65

Citation : (2019) 03 MP CK 0086

Hon'ble Judges : Sanjay Yadav, J;Vivek Agarwal, J

Bench : Division Bench

Advocate : Pratip Visoriya

Final Decision : Dismissed

Judgement

There is a delay of 835 days in filing this appeal under Section 2(1) of Madhya Pradesh Uchcha Nayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005, condonation whereof is being sought vide I.A.No.1222/19.

Taking into consideration the circumstances which prevented the appellants from filing the appeal within the period of limitation, sufficient cause is made out. Consequently, delay stands condoned. I.A.No.1222/19 is disposed of.

The appeal is directed against the order dated 30.08.2016 passed in Writ Petition No.4076/2016 which was directed against the order of recovery from the retiral dues towards excess payment due to wrong fixation of salary from the year 1984 to 31.08.2013.

Learned Single Judge on the anvil of the judgment rendered by the Hon'ble Apex Court in the case of "State of Punjab and others Vs. Rafiq Masih (White Washer) etc. [2015 (1) MPHT 130 (SC)]" quashed the order dated 30.12.2015 by which it was directed that the sum of Rs.3,77,610/- be recovered from the petitioner.

At the outset, learned Government Advocate submits that an issue as the present one as to whether recovery can be effected in case of excess payment since has been referred to Larger Bench by order dated 11.04.2018 in WA.No.815/2017; it is submitted that hearing of present case be deferred.

The order dated 11.04.2018 passed in WA.815/2017 reflects following questions of law referred to Larger Bench:

"1. Whether the recovery can be ordered to be affected from the pensionary benefits or from the salary in view of an undertaking or Indemnity Bond taken by the employer before the grant of benefit of pay refixation.

2. Whether the recovery on account of excess payment to an employee can be made in exercise of power conferred under Rule 65 of M.P Civil Services Pension Rules, 1976.

3. Whether the undertaking sought at the time of grant of financial benefits on account of refixation of pay is a forced undertaking and thus not enforceable in light of judgment of Supreme Court in (1986) 3 SCC 136 (Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another).

4. Any other question which is raised for decision before the Larger Bench or which the Larger Bench considers arising out of the issues canvased."

The facts of the present case reveal that neither any undertaking at the time of fixation was given/taken from the employee nor is there any material on record to establish that the employee has been forced to give an undertaking. As such, issues No.1 and 3 referred to Larger Bench are not attracted in the present case.

As regard to second question referred to Larger Bench as to "whether the recovery on account of excess payment to an employee can be made in exercise of power conferred under Rule 65 of M.P Civil Services (Pension) Rules, 1976, we are apprised of the judgment of this Court in "H.S. Nanjundiah Vs. State of M.P. and others [(1986) II LLJ 76 MP]" wherein learned Single Judge held:

"3. Assuming that there is a recovery of an amount of Rs. 8,632-50 as contended by the respondents, the only justification sought to be advanced for withholding pension, gratuity and provident fund, Rule 65 of the M.P. Civil Services Pension Rules, 1976 which according to the respondents empowers them to withhold such payments unless the retiring government servant clears all government dues as are ascertainable. Rule 65 reads as follows:

Recovery and adjustment of Government dues. - (1) It shall be the duty of every retiring government servant to clear all Government dues before the date of his retirement.

(2) Where a retiring Government servant does not clear the Government dues and such dues are ascertainable-

(a) an equivalent cash deposit may be taken from him; or

(b) out of the gratuity payable to him, his nominee or legal heir, an amount equal to that recoverable on account of ascertainable Government dues shall be deducted.

Explanation - The expression "ascertainable Government dues" includes balance of house building or conveyance advance, arrears of rent and other charges pertaining to occupation of Government accommodation, over-payment of pay and allowances and arrears of income-tax deductible at source under the I.T. Act, 1961 (No. 43 of 1961), Apparently no action as such was taken before the petitioner retired from service. The recoveries pertained to the petitioner's posting at Harda and Itarsi in the year 1976 and 1980. The petitioner retired from service as Sub-Engineer w.e.f. 31st October, 1980. Going through all the Annexures filed by the respondents, it is clear that they were all issued after the date of retirement. The first list of Annexures contains 7 documents R-1 to R-7 and the earliest date in these documents is 27th June, 1981 which is a letter addressed from the Accountant General, Gwalior to Executive Engineer, Jhabua. This letter has absolutely no reference to any recovery to be made from the petitioner. Annexure R/2 is dated 27th July, 1981 a letter addressed by the Executive Engineer P.W.D. Division No. 2 Hoshangabad to Executive Engineer P.W.D. Division No. 2 Jhabua. It is significant to note that even a copy of this letter has not been endorsed to the petitioner. Annexure Rule 3 is a letter addressed to the petitioner by the Executive Engineer, P.W.D. Division No. 2, Jhabua but significantly enough it does not bear any number or date. However, in the list of Annexures it is shown to be dated 20th August, 1981, number and date is left blank. It is for the first time that the petitioner was called upon to submit an explanation even while doing so, the respondents do not come with a case that while handing over charge to his successors at Harda and Itarsi, that the shortage at such could not be verified for want of book balance. Had it been the case naturally the Engineer concerned, would have mentioned it in his letter. In any case, it is legitimately expected of him to make such a mention, either in the letter Annexure R-3 or in the enclosures. The irresistible conclusion in such circumstances is that, the justification of book balance, which has been advanced after filing the return as a reply to the petitioner's rejoinder is clearly an afterthought. Undoubtedly the recovery proceedings were initiated almost 10 months after the petitioner's retirement and 4 months after the letter Annexure R-l issued by the respondent No. 3 clearing the petitioner's pension papers and directing payment thereof. Even Sub-rule (2) of Rule 65 in such circumstances is not attracted. What this rule enjoins is in case a retiring Government servant does not clear the Government dues, and such dues are ascertainable an equivalent cash deposit may be taken from him under Clause (a) of Sub-rule (2) of Rule 65. It does not apply to a retired Government servant. The word "retiring Government servant" is significant in its connotation. Rule 65 does not use the term retired Government servant. The action therefore, contemplated by Section 65 is in respect of a Government servant who is retiring, or is on the verge of retirement but has not actually retired. Similarly, same is the case so far as duty of a retiring Government servant is concerned, it is not attributable to a retired Government servant. In the instant case it cannot be said that the petitioner failed in his duty. In fact the A.G.M.P. having cleared his pension and gratuity claim, only after this clearance that the Authorities came out with all their obstructionist tools: had it really been so that the petitioner had not cleared the government dues, the Authorities should have called upon the petitioner to make payments even while he was in service but nothing of this sort was done. The other question is about the ascertainability of such dues, the explanation includes balance of house-building or conveyance advance, arrears of rent and other charges pertaining to occupation of Government accommodation, over-payment of pay and allowance and arrears of Income-tax. Even on this count the contention which has been advanced by the respondents is absolutely baseless assuming that there was some shortage while handing-over charge at Harda and Itarsi. Such a due if there be any, by no stretch of law or logic falls within the purview of ascertainable government dues. Rule 65 has no application to such a case."

(Emphasis by us)

In the case at hand, the recovery is not shown to be done in purported exercise of power under Rule 65 of 1976 Rules, therefore, we refrain from expressing any opinion as the issue is referred to Larger Bench.

In the case at hand, as observed supra, since there is no undertaking by employee nor is the recovery in purported exercise of power under Rule 65 of 1976 Rules, we perceive no good ground to cause any indulgence with the impugned order.

Consequently, appeal fails and is dismissed. No costs.