

(2019) 08 CAT CK 0015

In the Central Administrative Tribunal

Case No : Original Application No. 3440 Of 2018

Sushil Kumar Bali

APPELLANT

Vs

Government Of India, Through And Ors

RESPONDENT

Date of Decision : 08-08-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 21

Citation : (2019) 08 CAT CK 0015

Hon'ble Judges : Nita Chowdhury, Member (A)

Bench : Single Bench

Advocate : B.S. Jarial, S.N. Verma

Final Decision : Dismissed

Judgement

1. The applicant has sought the following reliefs in this OA:-

"i. Direct the respondents to stop the recovery from the applicant immediately which is against the law and refund the amount so deducted since July 2018.

ii. Direct the respondents to pay compound interest @ 18%, on the already recovered amount till the date refund is made.

iii. To pass any such order/orders as may be deemed fit and proper by the Hon"ble Tribunal in the facts and circumstances of the case."

2. Brief relevant facts of the case are that the applicant was initially appointed as Junior Engineer on 27.3.1982. He was subsequently promoted to the post of Asstt. Engineer (C) (AE(C)) on ad hoc basis vide respondents" order No.15 dated 30.1.2009. The applicant took charge of the said post on 10.7.2009 on officiating capacity. According to the applicant, no further orders were issued for continuation by DG, CPWD office after one year and the applicant continue to officiate as AE(C). The DG, CPWD vide Office order No.110/2015 dated 14.7.2015 regularised the services of the applicant, which order came to the knowledge of the applicant only on 14.7.2015 through the website of CPWD.

However, the respondents issued an office order on 2.2.2017 regarding rectification of his pay alongwith other three AE(C).

2.1 Applicant further stated that he was getting regular pay with increment from July, 2011 till July, 2016 and suddenly, in July 2018, the respondents had started recovering an amount of Rs.35,000/- (an amount of Rs.5,28,132/- is to be recovered in fifteen installments) from the salary of the applicant, which according to the applicant without giving any show cause notice to him in this regard. The applicant made his representation dated 22.5.2017. The applicant was in receipt of communication dated 20.9.2017 addressed to Dy. Director (Adm.) C/o Director, CPWD, seeking directing regarding non-passing of departmental accounts examination and also whether the recovery be continued or not. However, without giving any show cause notice, the respondents started recovery from July 2018. Thereafter the applicant made another representation on 23.7.2018 requesting the respondents to defer the said recovery as recovery in the case of Shri R.L. Verma A.E.(P) upon his representation was deferred till date.

2.2 When the respondents have not stopped making aforesaid recoveries, the applicant preferred the present OA seeking the reliefs as quoted above.

3. Counsel for the applicant submitted that action of the respondents is illegal, arbitrary and unfair and also against the provisions of law as they have violated the provisions of Articles 14, 16 and 21 of the Constitution of India.

3.1 Counsel further submitted that the impugned recovery was initiated by the respondents without issuing any show cause notice which act is clearly in violation of the principles of natural justice.

3.2 Counsel further submitted that in the case of similarly situated employee, namely, Shri R.L. Verma A.E.(P), the respondents had deferred the recovery till date but despite making such averment in his representation, the respondents continued to make recovery, although by the intervention of this Tribunal, further recovery had been stayed.

3.3 Counsel further submitted that the said recovery is impermissible in law in view of the judgment of the Hon"ble Supreme Court in the case of State of Punjab and others vs. Rafiq Masih and others, 2015 (4) SCC 334 as well as no show cause notice was issued before passing the said impugned order. Applicant also averred the Department of Personnel and Training has also issued similar instructions vide their OM dated 2.3.2016. As the applicant was continuously getting increment till July 2016 i.e. for 05 years when suddenly, from July, 2018, the respondents started recovery on monthly basis without issuing any show cause notice, which is bad in law in view of the aforesaid judgment of the Apex Court as well as DOP&T OM dated 2.3.2016.

3.4 Lastly, he submitted that this Tribunal in OA 1281/2018 vide order dated 3.4.2018 held that "it is settled proposition of law that before passing any order

affecting civil consequences, notice must be issued. Here in this case, the applicants have been faced with civil consequences but without affording any opportunity to show cause. Therefore, it is a flagrant violation of the principles of natural justice". He therefore pleaded that the reliefs claimed by the applicant be allowed.

4. On the other hand, counsel for the respondents by referring to their counter affidavit submitted that the applicant was promoted and joined as AE(C) group "B" on ad hoc basis on 10.7.2009 and as per Sl. No.6 of CPWD Regular Establishment and Office procedure Manual-2013, the passing of departmental exam is mandatory to earn an annual increment for all Assistant Engineers within two years of holding the post.

4.1 Counsel further submitted that however inadvertently in the applicant's case the annual increment was released till 1.7.2015. This came into notice of the office of Superintending Engineer Maintenance Circle (North), PWD and the pay of the applicant was re-fixed vide their letter dated 9.2.2017 resulting in the present recovery of Rs.5,28,132/-. All the pay fixations done by the department were duly endorsed to the applicant. Hence, the applicant cannot deny that he was not informed. He further submitted that order of revised/corrected pay fixation was made on 9.2.2017 and the recovery of Rs.35000/- p.m. was started from July, 2018. He further submitted that the question of show cause notice to the applicant does not arise as the action was to be taken by the department after due consideration of the request made by the applicant.

4.2 Counsel further submitted that reliance placed by the applicant on the decision of the Apex Court in Rafiq Masih (supra) is not applicable in this case as the applicant being a Group "B" Gazetted Officer.

4.3 Counsel further submitted that the applicant is fully aware of the fact that mandatory accounts exam has to be passed by all the Assistant Engineers and since he did not pass the said mandatory accounts exam, he was not eligible for the increments, which however, were released to him inadvertently. He further submitted that as per departmental rules, exemption from passing the departmental accounts exam is granted from the date the employee attains the age of 57 years. In the instant case, the applicant was granted exemption vide letter dated 30.5.2018 w.e.f. 1.11.2017, i.e., the date when the applicant attained the age of 57 years. Hence, there is no illegality and arbitrariness on the part of respondents.

4.4 Counsel also submitted that applicant's representation dated 22.5.2017 was forwarded to O/o Superintending Engineer (North), PWD who intimated the over payment vide letter dated 10.7.2017, which was again received back vide letter dated 27.7.2017 and again forwarded to Dy. Director (Admn) vide letter dated 20.9.2017 asking for clarification in this regard. However, guidelines were received from Vigilance unit CPWD vide letter dated 6.9.2018 that recovery of any over payment made to concerned officer may be initiated by controlling

office without delay. Counsel further submitted that recovery order was issued only after due consideration of the exemption granted to the applicant and the amount which is overpaid to the applicant is only being recovered from the regular monthly salary of the applicant.

4.5 Last, counsel contended that in view of the above facts of this case, instant OA deserves to be dismissed by the respondents.

5. Having heard learned counsel for the parties and carefully perusing the pleadings available on record, it is observed that there is no denial of the fact that applicant was promoted on adhoc basis to the post of AE(C) vide order dated 9. 7.2009 on which post, he took charge on 10.7.2009. However, since the applicant had not passed the departmental accounts exam to occupy the said post, as per Rules of the respondents, the applicant was required to pass the said exam within two years from the date of promotion, failing which would result in stoppage of 2nd increment. However, on passing the said examination subsequently increment will be restored from normal date of increment but financial benefit would accrue from date following the date on which examination was held. Admittedly, the applicant had not passed the said examination in any subsequent years. However, when the aforesaid mistake came to the notice of the respondents, they passed the order dated 9.2.2017 re-fixing the pay of the applicant which resulted in initiation of recovery of amount of Rs.5,28,132/- which amount was proposed to be recovered in 15 installments. The representation submitted by the applicant against the aforesaid recovery order was forwarded to the Dy. Director (Admn.) vide letter dated 20.9.2017 asking for clarification. But the fact that applicant did not pass the said exam within two years and subsequently and had also attained the age of 57 years, as per the provisions contained in clause 6.2 of the departmental rules, which provides that exemption will be considered on case to case basis after attaining the age of 57 years. Hence, the matter was placed before the competent authority and the respondents vide order dated 30.5.2018, conveyed the approval of the competent authority granting exemption from passing the Departmental Accounts Examination prescribed for Assistant Engineers in the case of the applicant w.e.f. 1.11.2017. After receipt of the aforesaid order, the respondents have given effect to the aforesaid recovery order in July, 2018.

6. Respondents have also shown the order of the Vigilance Unit of the respondents" department, which specifically dealt with the complaints regarding allowing increments to EEs, AEs etc. despite of non passing of mandatory departmental exam by the officers, which is prerequisite/mandatory condition for release of increment in accordance with Sl. No.6 of Chapter 6 of CPWD Regular Establishment and Office Procedure Manual - 2013 under the heading of Departmental Examination. It has been specifically directed to all the head of offices of the respondents" organization to check in their respective offices regarding any irregularity of releasing increments to the officers without passing mandatory departmental exam. If any such irregularity is observed, corrective

measures shall be initiated without any further delay by refixing of their pay and recovering any over payment made to concerned officer vide order dated 6.9.2018 (Annexure-5 at page 58).

7. In view of the above factual position, this Tribunal does not find any illegality in the act of the respondents as actual recovery was given effect only in July 2018 although refixation order was issued way back on 9.2.2017. It is not the case that immediately after issuing the order of recovery the respondents have given effect to the same and without regard to rules.

8. So far as reliance placed by the learned counsel on the decision of the Apex Court in the case of Rafiq Masih (supra), the same is not applicable to the facts and circumstances of this case as in the said case the Apex Court while observing that 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 has summarized 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.

10. It is further relevant to mention that the Hon"ble Supreme Court again considered the issue of recovery in the case of High Court of Punjab and Haryana and others vs. Jagdev Singh in Civil Appeal No.3500/2006 decided on 29.7.2016, in which held as follows:-

"9 The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the

Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made."

9. Applicant herein being a Group "B" Gazetted Officer, his case does not come within the ambit of any of the aforesaid clauses. Rather not only the applicant but other three such similarly placed employees" pay was re-fixed as they had not passed the said exam within the period of two years of holding the posts.

10. The applicant was promoted on ad hoc basis in 2009 and the rules with regard to departmental examination as given by the CPWD clearly categorized the following requirements :-

- (a) For probation clearance and confirmation.
- (b) For earning 2nd increment.
- (c) Promotion through Departmental Examination.
- (d) Filling up of Direct Recruitment vacancy by departmental candidates.

For earning 2nd increment (Exam Conducted by Addl DG (Trg)), in respect of the post held by the applicant, the following is provided:-

Post Paper Remarks

Assistant Accounts-I,

Failure to pass examination within Engineer two years from date of promotion II, III will result in stoppage of 2nd increment. On passing the examination subsequently, increment will be restored from normal date of increment but financial benefit would accrue from date following the date on which examination was held.

The above rules are mandatory and clearly provide that failure to pass examination within two years will result in stoppage of second increment and probation clearance. On passing the examination subsequently, increment will be restored from normal date of increment but actual benefit would accrue from date following the date on which examination was held. Hence, this applicant knows that he did not have the automatic right to earn increment excepting as provided in the CPWD rules. The respondents are able to show that in the cases of three similarly placed employees, the pay was also refixed as they had not passed the said examination within the prescribed period for holding of the post and hence, they were not entitled to any increment. On attaining the age of 57 years, the applicant was permitted to be exempted from having to pass the said examination as per the Department Policy at Sl. No.6.2 quoted below:-

"6.2 Exemption from Passing Departmental Examination:

The Executive Engineer/Assistant Engineer/Junior Engineer and equivalent are required to pass the departmental examination within 2 years from the date of promotion/joining the department for earning the 2nd increment. Exemption

from passing the departmental examination will be considered on case to case basis after attaining age 57 years. Exemption will be granted by DG, CPWD subject to the officers having Very Good Service record."

11. The applicant has never passed the departmental examination. It was only his contention that as he could be exempted from passing the same, hence, increments given to him previously should be restored. But we find that the issue of grant of increment has been specifically answered in the CPWD Departmental Examination Rules as listed out in Chapter 6 at Serial No.6.1, which provides as under:-

"Failure to pass examination within two years from date of promotion will result in stoppage of 2nd increment. On passing the examination subsequently, increment will be restored from normal date of increment but financial benefit would accrue from date following the date on which examination was held."

Hence, we do not find any irregularity in the order passed by the respondents.

12. In view of the above factual position of this case and the law laid down by the Apex Court in the Jagdev Singh (supra), this Tribunal does not find any illegality in the action of the respondents. As such the present OA being devoid of merit is dismissed. Accordingly, interim order granted earlier stands vacated. There shall be no order as to costs.