IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CWP(T) No. 11500 of 2008

Date of decision: 29.07.2011

Smt. Rama. **.....Petitioner.**

Versus

state of H.P. & others. **.....Respondents.**

Coram

The Hon'ble Mr. Justice Kurian Joseph, C.J.
The Hon'ble Mr. Justice V.K. Sharma, J.
[1] Whether approved for reporting? No.

For the petitioners: Mr. Ajay K. Dhiman, Advocate vice Mr. R. Bharti, Advocate

For the respondent: Mr. R.K. Bawa, AG, with Mr. J.K. Verma, Dy. AG.

V.K. Sharma, J. *(Oral)*

The petition has been filed with the following prayer:

> *"That the impugned order dated 14.10.2003, Annexure A-1 and dated November, 2003 (Annexure A-2) may kindly be quashed and set-aside and the respondents be directed to release the same pay scale to the applicant which she was getting in pursuance to order Annexure A-3 i.e. Rs. 6400-10500/- with all consequential benefits."*

2. In reply, respondents No. 1, 3 and 4 have taken the following stand vide para 6(i-xiv) on merits:

> *"6(i-xiv). That in reply to these paras it is submitted that the facts qua engagement of applicants as Lecturer on contract basis are admitted. It is also submitted that as per the terms of the agreement of contract, the respondent had agreed to pay the applicants the pay scale of Rs. 1800-3200 (pre-revised). However, it is submitted that the replying*

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[1] *Whether reporters of Local Papers may be allowed to see the judgment? No.*

respondent did not enter into an agreement with the applicants, that during the terms of agreement if the pay scale of Rs. 1800-3200 are revised, the same would also be paid to them. It is worthwhile to mention here that the nature of the services of the applicant is contractual and the contract agreement regulates the services of the contractual employees and determines the liabilities and duties of both employer and the employee. The parties are governed by the terms of the contract and cannot claim anything beyond the same. The term of agreement do not contain any stipulation that the applicants would be entitled to the revised pay scale as granted to regular employees from time to time. In this regard the kind attention of this Hon'ble Tribunal is drawn to the H.P. Civil Services (Revised Pay) Rules, 1998 which in fact authorize the respondent to revise the pay scale of its regular employees only. It may be submitted that there is a clear stipulation in these rules that they would not be applicable to contractual employees. This rule is quoted in H.P. Civil Services (Revised Pay) Rules 1998 at page No. 1, sub para 2, clause (f) which follows as under:

Para 2(2). They shall not apply to the:-

"Persons employed on contract basis except when the contract provides otherwise."

Thus, it is incorrect for the applicants to state that they are entitled to the revised pay scale of Rs. 6400-10640 on the analogy of regular employees. It is further submitted that vide letter No. Shiksha-II-Kha(12)2/99 dated 23.-5.2003, the replying respondent had issued instructions of payment of revised pay scales to the contractual employees i.e. Lecturers (School Cadre), TGTs and other C & V teachers. However, specifically when the Finance Department found that the aforesaid letter was issued for the release of revised pay scales by the replying respondent without their prior concurrence which is mandatory under relevant provision of rules of Business of Govt. of Himachal Pradesh, 1971, the same was withdrawn on the advice and guidance of Finance Department. So far as justification and legality, Finance Department has submitted detailed reply in this regard in other so many cases of similar

nature, which is affirmed. It is submitted that the services of the applicants are covered under contractual agreement and as per the stipulation in the agreement of the contract neither applicants nor the employer i.e. respondent could travel beyond the scope of the contract agreement. It is denied that H.P. Civil Services (revised Pay) Rules, 1998 are automatically applicable to the applicants. It is worthwhile to mention here that the rules stated herein-in-above clearly state that these shall not be applicable to the persons employed on contract basis. It is submitted that revised pay scales were released to the applicants erroneously without resorting to codal formalities, specifically the necessary sanction without obtaining from the Finance Department. It is, however, submitted that revised pay scales were released contrary to the provision of H.P. Civil Services (Revised Pay) Rules, 1998 and was also released in contravention and without prior concurrence of the Finance Department which in fact is mandatory to obtain under Rule-9 and Rule 34 of the Rules of Business of Govt. of H.P. 1971. The erroneous release of revised pay scale was, therefore, withdrawn by the replying respondent on the advice of the Finance Department. The payment so received by the applicant has, therefore, been ordered to be recovered. The recovery of the revised pay scale to which the applicants were not legally entitled is legally sustainable and the applicants have no ground to challenge the same since the applicants are bound by the stipulations of contract agreement which do not provide that the contractual employees shall be entitled to the revised pay scales from time to time. An erroneous order cannot have any legal sanctity and an error can be rectified at any stage and needs not be repeated. The applicants cannot claim any right from a benefit which has wrongly been given to them and been rightly withdrawn. Article 14 of the Constitution of India does not permit the repetition of a wrong action; therefore, there is no discrimination against the applicants."

3. The learned counsel for the petitioner submits at the very outset that the case of the petitioner is covered under judgment dated

09.12.2009 rendered by a learned Single Judge of this Court in ***CWP (T) No. 11135 of 2008, Ravinder Kumar vs. State of H.P. & others.***, text whereof is as under:-

> *"The pay of the petitioner was revised/enhanced vide order dated 23.5.2003 (Annexure A-1). However, the same was withdrawn vide Annexure A-2 dated 14.10.2003. Admittedly the petitioner has not been heard before the issuance of Annexure A-2. He has been visited with civil and evil consequences. His pay has been reduced. The petitioner has neither misled nor played any fraud upon the respondents at the time of granting him revised/ enhanced pay. A conscious decision had been taken by the respondent-State to grant revised/enhanced pay to its employees.*
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> *Moreover, the learned counsel submits that on the basis of impugned order, recoveries are likely to be effected from the salaries of the petitioner.*
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> *Their Lordships of the Hon'ble Supreme Court in* ***Syed Abdul Qadir and others versus State of Bihar and others****, (2009) 3 SCC 475 have culled out the following principles governing the circumstances in which the excess amount cannot be recovered by the employer:*
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> *"55. That apart, it also appears from the record produced before us that while the Finance Department of the Government of Bihar was in favour of making the amended provisions of FR. 22-C applicable to the appellants-teachers after having come to know that the said rule did not exist and had been substituted, the Department of Human Resource Development, Government of Bihar, wanted to apply the unamended provision to the appellants-teachers so as to make available the benefit of additional increment provided for under FR.22-C to its teachers, unaware of the fact that even under FR.22-C they were not entitled to the additional*

increment as they were not discharging duties and responsibilities of greater importance on the promoted post.

56. This further goes on to show that the authorities in the State of Bihar were not even aware of the basic requirement for grant of additional increment and the decision appears to have been taken without proper application of mind. Otherwise, there was no reason for the Finance Department to state in the counter affidavit filed before the High Court that any affidavit filed on behalf of the Education Department may be ignored as Finance Department was the competent authority. In this very affidavit, the Finance Department while admitting that the pay fixation by the Education Department was wrong, stated as under:-

"...the fixation of pay under Fundamental Rule 22- C has wrongly been made as it was not in existence. Pay fixation on the basis of a nonexistent rule is a bona fide mistake."

57. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the

amount paid in excess. See Sahib Ram vs. State of Haryana, 1995 Supp. (1) SCC 18, Shyam Babu Verma vs. Union of India, [1994] 2 SCC 521; Union of India vs. M. Bhaskar, [1996] 4 SCC 416; V. Ganga Ram vs. Regional Jt., Director, [1997] 6 SCC 139; Col. B.J. Akkara [Retd.] vs. Government of India & Ors. (2006) 11 SCC 709; Purshottam Lal Das & Ors.,vs. State of Bihar, [2006] 11 SCC 492; Punjab National Bank & Ors. Vs. Manjeet Singh & Anr., [2006] 8 SCC 647; and Bihar State Electricity Board & Anr. Vs. Bijay Bahadur & Anr., [2000] 10 SCC 99.

59. Undoubtedly, the excess amount that has been paid to the appellants - teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made.

60. Learned counsel also submitted that prior to the interim order passed by this Court on 7.4.2003 in the special leave petitions, whereby the order of recovery passed by the Division Bench of the High Court was stayed, some installments/amount had already been recovered from some of the teachers. Since we have directed that no recovery of the excess amount be made from the appellant- teachers and in order to maintain parity, it would be in the

> *fitness of things that the amount that has been recovered from the teachers should be refunded to them."*
>
> *Consequently, in view of the definitive law laid down by their Lordships of the Hon'ble Supreme Court, order dated 14.10.2003 (Annexure A-2) is quashed and set aside. The respondents are restrained from making any recoveries from the petitioner. However, liberty is reserved to the respondents to proceed with the matter in accordance with law.*
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> *The petition stands disposed of. No costs."*

4. In view of the above, if on facts the case of the petitioner is covered under the judgment dated 09.12.2009 referred to hereinabove in CWP (T) No. 11135 of 2008 and the same has attained finality and has been implemented and she is similarly situate, she shall also be treated similarly without any discrimination and benefit of the said judgment shall be extended to her within six months from the date of production of copy of this judgment by the petitioner before the respondents/competent authority, after affording an opportunity of being heard to her, if so desired.

5. The petition is disposed of in the above terms, so also pending application(s), if any.

(Justice Kurian Joseph)
Chief Justice

(Justice V.K. Sharma)
Judge

29th July, 2011
(virender)