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**(2012) 10 AHC CK 0187**

**Allahabad High Court**

**Case No:** Civil Miscellaneous Writ Petition No. 59804 of 2007

Janki Prasad

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

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**Date of Decision:** Oct. 12, 2012

**Citation:** (2013) 5 ADJ 285

**Hon'ble Judges:** Arvind Kumar Tripathi, J

**Bench:** Single Bench

**Advocate:** D.S.M. Tripathi, for the Appellant; Rajesh Yadav, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Arvind Kumar Tripathi, J.

List revised. Heard learned counsel for the petitioner, learned Standing Counsel and perused the record. The present writ petition has been filed against the impugned order dated 5.9.2007 passed by District Basic Education Officer, Lalitpur, respondent No. 3, for recovery of Rs. 30270/- the amount paid in excess to the petitioner. By interim order dated 10.12.2007 the recovery was stayed.

2. The brief facts of the present case is that petitioner was duly selected and appointed as Assistant Teacher on 16.7.1971 in the institution known as Veerangana Awanti Bai Junior High School, Jakhoura (hereinafter referred as an "institution"), which is a recognised junior high school and was receiving grant-in-aid from the State. The institution was governed by the provisions of U.P. Recognized Basic School (Junior High School) Teachers Appointment & Service Condition Rules, 1978 and provisions of U.P. Junior High School (Payment of Salaries of Teachers and others Employees Act), 1978. The petitioner was working continuously. Thereafter, post of Head-Master fell vacant on 30.6.2000 after retirement of the then Head-Master. The petitioner being senior most qualified Assistant Teacher was promoted by the committee of management by the resolution dated 30.6.2000, which was duly approved by the District Basic Education Officer on 6.12.2001. After the manager of the institution was changed there was harassment of the petitioner

and petitioner was pressurised to tender the resignation. However, the resignation was not accepted by the committee of management because since there was unnecessary harassment and pressure hence there was no option but to tender the resignation. Since the resignation was not accepted hence he continued in service. He was granted selection and promotional grade. Now the petitioner has already retired during pendency of the writ petition.

3. Counsel for the petitioner submitted that the petitioner was duly selected and appointed teacher, whose services were approved on substantive post and subsequently, his promotion and appointment on the post of Head-Master was approved by the then District Basic Education Officer after resolution of the committee of management. Thereafter when Manager was changed he started torture and humiliation and under pressure petitioner required from the post of Head-Master, which was never accepted by the Committee of Management. Than just to harass the petitioner his salary was withhold. Then Writ Petition No. 1681 of 2003 was filed, which was disposed off on 30.1.2003. Thereafter, considering the representation, the Assistant Dy. Director of Education (Basic), Jhansi Region directed for payment of salary. It was held that resignation was not justified, hence was not acceptable and thereafter was withdrawn by the petitioner. He was allowed to work. The Manager continued to harass. Even the petitioner was suspended by order dated 5.6.2003 from the post of Head-Master. However, neither any charge-sheet was submitted nor any inquiry was conducted. Then the writ petition No. 39835 of 2003 was filed on behalf of petitioner, which was disposed off on 21.10.2005 with the direction to the committee of management to complete the inquiry within a period of four months. No inquiry was conducted and no information was given regarding time, date and place of inquiry. Even there was no information regarding appointment of any inquiry officer. However, after charge-sheet was given the petitioner submitted detailed reply. Since no inquiry officer was appointed and no inquiry was conducted within four months as directed by the Court hence just in defence from the contempt of Court, the charge-sheet was submitted and the punishment was awarded on 16.9.2006 with holding three increments. Thereafter, petitioner join the post of Head-Master on 25.9.2006 and signature was also attested and awardment of punishment withholding salary was not approved by the District Basic Education Officer as required under Rule 1978 and approval is mandatory. When petitioner was reinstated and suspension order was revoked he was entitled for the payment of arrear. The representation was given by the petitioner before the District Basic Education Officer, Lalitpur as well as to the Additional Director of Basic Education Jhansi, Region, Jhansi and even the reminders were issued. The petitioner was entitled to be given selection grade after completing 10 years of service and after 12 years of service in selection grade. The salary of the Head-Master and other teachers were fixed on 21.2.1987. The then District Basic Education Officer constituted a committee and after considering the claim of the petitioner granted selection grade and thereafter, promotional grade

on 24.9.2002. In view of the G.O. dated 24.7.1986 the teachers of the institution were given selection grade and promotional grade. Since the petitioner was entitled for the selection grade and promotional grade, the same was given by the District Education Officer. Though there was no error in calculating the salary, hence the petitioner was entitled for the same and the order passed for recovery is arbitrary, illegal and against principle of nature justice. Hence the impugned order dated 5.9.2007, which was passed without holding any inquiry and affording any opportunity of hearing is liable to be quashed. He relied the judgment of this Court in case of Ram Milan Yadav v. State of V.P., 2012 (3) ESC 1372, in which it was held that "the recovery of excess amount paid due to wrong fixation of pay, which was not due to result of any fraud or misrepresentation or fault of the petitioner then the recovery after retirement was arbitrary and the order for recovery was set aside."

4. In the counter-affidavit the aforesaid prayer was opposed and it was submitted by the learned Standing Counsel that the petitioner was not entitled since the amount was paid in excess hence rightly the direction was issued for recovery of amount. Due to inefficient of work of petitioner salary was not paid and he was suspended by the committee of management, In spite of direction the petitioner failed to handover charge of the Head-Master and petitioner did not cooperate in the inquiry in stead of information and unless regular service was unblemished the petitioner was not entitled for selection and promotion grade. Hence rightly the order was passed for recovery of excess salary paid to the petitioner.

5. Considered the submission of counsel for the parties. From perusal of the impugned order or counter-affidavit there is no indication that information was given to the petitioner regarding the inquiry date, time and place of the inquiry. If the proper opportunity was not afforded to the petitioner then the alleged inquiry or report if any was against the principle of natural justice though in the present case, case of the petitioner is that neither any inquiry officer was appointed nor any inquiry was hold and nor procedure was followed by the respondents. In Special Appeal No. 1317 of 2003 (M.D./Chief Engineer U.P. Jal Nigam and others v. Sri Nath Singh and others) decided on 22.12.2006 considering the various judgments it was held that "In the matter of recovery, we may remind to the authorities that now it is well-settled if certain payment has been made to the employee on account of any fault of the employer, and for which the employee is not responsible, namely, not guilty of fraud or misrepresentation, in such a case, the amount which has already been received by the employee and he has spent, should not be recovered." This judgment was again considered in case of Ram Murti Singh v. State of U.P. and others, 2006 (4) ESC 2370 (All) (DB) and it was held that "if employees have received higher scale due to no fault of theirs, it would only be just and proper not to recover any excess amount already paid to them". In case of Surya Deo Mishra v. The State of U.P. through Chief Secretary, 2006 (1) ADJ 467 (FB) : 2006 (1) ESC 379 (All) (FB), it was held that " in service matters, if the incumbent has worked and has been paid,

unless his claim was fraudulent, based upon frivolous grounds or upon acute factual dispute, the amount so paid ought not to be recovered. Even in cases of excess payment, it cannot be recovered unless said payment is result of the employee's mistake or on his showing." This judgment" and other several authorities were examined in the judgment of Ram Murti Singh (Supra). In case of [Syed Abdul Qadir and Others Vs. State of Bihar and Others,](#), it was held in para 57 that" 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. It was further held in para 58 that "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."

6. In case of [Shyam Babu Verma and Others Vs. Union of India \(UOI\) and Others,](#), the higher pay scale was erroneously paid in the year 1973, the same was sought to be recovered in the year 1984 after a period of eleven years. It was held in that case that the sudden deduction of the pay scale after several years of implementation of said pay-scale had not only affected financially but even the seniority of the petitioners hence in that circumstance it was held by the Hon"ble Supreme Court that it would not be just and proper to recovery any excess amount paid. In Sahib Ram v. State of Haryana, 1995 Supp (1) SCC 18, it was found that the appellants therein did not possess the required educational qualification and consequently would not be entitled to the relaxation but having granted the relaxation and having paid the salary on the revised scales, it was ordered that the excess payment should not be recovered applying the principle of equal pay for equal work.

7. Subsequently, considering earlier judgment of the Apex Court, including decision in case of Syed Abdul Qadir (Supra) in case of Chandi Prasad Uniyal and others v. State of Uttarakhand and others, 2012(4) ESC 509 (SC), it was held by the Hon"ble Supreme Court that in Syed Abdul Qadir case such a direction was given keeping in view the peculiar facts and circumstances of that case since the beneficiary had either retired or were on the verge of retirement and so as to avoid any hardship to them. It was further held that any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on payee to repay the money, otherwise it would amount to unjust enrichment. In paragraph 1.7 it was held that except few instances pointed out in Syed Abdul Qadir case (supra) and in

Col. B.J. Akkara (retd.) case (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered.

8. In [Col. \(Retd.\) B.J. Akkara Vs. The Govt. of India and Others](#), it was held that "Such relief, restraining recovery back of excess payment, is granted by Courts not because of any right in the employees, but in equity, in exercise of judicial discretion, to relieve the employees, from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the up-keep of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter being in the realm of judicial discretion, Courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery." In case of [Yogeshwar Prasad and Others Vs. National Inst., Edu. Planning and Admn. and Others](#), the Apex Court took the view that the grant of higher pay could be recovered unless it was a case of misrepresentation or fraud. In that case neither misrepresentation nor fraud could be attributed to appellants therein and hence, restrained the recovery of excess amount paid.

9. Normally the payment of excess amount from public fund cannot be allowed otherwise the employee would firstly manage to get payment in connivance with the official concerned and subsequently when there is direction to deduct then he would claim that the excess payment cannot be recovered. However, there might be various reasons apart from collusion, like favouritism, negligence, carelessness bona fide mistake due to incomplete information, confusion due to ambiguities in the provisions and clarification was issued after calculation and payment. Hence in view of the above discussion, the recovery of excess amount can be made or not, the same depends on facts and circumstance of each case.

10. In the present case, if no charge was proved and there was no valid enquiry and further no approval by B.S.A. regarding alleged proposed punishment then the punishment for withholding salary was illegal. Hence the service of the petitioner was satisfactory and unblemished and as such rightly selection grade and promotional grade was allowed. It is not case of the respondents that there was misrepresentation or fraud by the petitioner. During pendency of the writ petition, petitioner retired.

11. In view of the aforesaid discussion the impugned order dated 5.9.2007 passed by District Basic Education Officer, Lalitpur, respondent No. 3 (Annexure 15 to the writ petition) is illegal and against the principle of natural justice. Accordingly, the same is hereby quashed. The respondents are directed to consider the matter

afresh within a period of two months from the date of production of certified copy of this order and to pay the arrear of salary and retiral benefits in accordance with law. Accordingly, present writ petition is allowed. No order as to cost.