
(2018) 03 MP CK 0061

Madhya Pradesh High Court (Indore Bench)

Case No: WP NO.3421 OF 2017

Smt. Sharda Devi
Shraveya

APPELLANT

Vs

Public Health
Department

RESPONDENT

Date of Decision: March 7, 2018

Acts Referred:

- Constitution Of India, 1950 - Article 12, 14

Citation: (2018) 1 MPWN 111

Hon'ble Judges: PRAKASH SHRIVASTAVA, J

Bench: Single Bench

Advocate: Rakesh Pal, Bhakti Vyas

Final Decision: Disposed Of

Judgement

Heard finally with consent.

By this writ petition, the petitioner has challenged the order Annexure P/3 dated 3/10/2016 by which a recovery of a sum of Rs.4,49,884/- $\tilde{A}$, has been

directed against the petitioner.

The case of the petitioner is that she was initially appointed as a staff nurse vide order dated 17/11/1973 and after completing more than 43 years of

service she has retired on 31/1/2017 on reaching the age of superannuation and at the fag end of service $\tilde{A}$, just before her retirement the impugned

order $\tilde{A}$, or recovery has been passed.

A reply has been filed by the respondents taking the stand that the petitioner would have become eligible for grant of the kramonnati on 19/4/1999

after completing 24 years of service, but prior to that she was granted promotion in the year 1985, therefore, she was not eligible for the kramonnati,

but by mistake she was granted second kramonnati in the year 1999 and when the said mistake was detected, the impugned recovery was directed.Ã,

A further stand has been taken that the petitioner had given the undertaking Annexure R/5.

Learned counsel for petitioner submits that no opportunity of hearing has been given to the petitioner and the recovery at this stage will cause serious

hardship.

As against this, learned counsel for respondents submits that since the excess amount was paid to the petitioner on account of wrong grant of

kramonnati, it is sought to be recovered.Ã, He further submits that the recovery has rightly been directed.

Having heard the learned counsel for parties and on perusal of the record, it is noticed that the said wrong grant of kramonnati was not on account of

any misrepresentation or fraud at the instance of the petitioner.Ã, It is undisputed that before passing the impugned order no opportunity of hearing

has been given to the petitioner.Ã,

Ã, The Supreme Court in the matter of State of Punjab and others etc.Ã, Vs. Rafiq Masih (White Washer) etc Civil Appeal No.11527/2014 by order

dated 18thÃ, December, 2014 considering the issue of recovery of amount and hardship caused in consequent thereof in similar circumstances has

held that:-

Ã¢â,–Ã“12] 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 herein above, we may, as a

ready reference, summarise 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.Ã¢â€

The case of the petitioner is squarely covered by clause (i) and (iii) of the aforesaid judgment.Ã¢â€ Hence, in view of the judgment of the supreme court

in the matter of Rafiq Masih (supra), the respondents cannot be permitted to make the recovery at this stage.Ã¢â€

So far as the undertaking Annexure R/5 is concerned, the same does not relate to the benefit of second kramonnati which was extended to the

petitioner, but it was in respect of the benefit of the Revision of Pay Rules 1998 which was extended to her. Even otherwise the principal bench in

WA No.1232/2017Ã¢â€, in the matter of State of M.P. And others Vs. Chandrashwar Prasad SinghÃ¢â€, vide order dated 15/12/2017 while considering the

issue of undertaking has held that the giving of such an undertaking is not a voluntary act and the recovery on that basis, therefore, cannot be

sustained.Ã¢â€ The Division Bench in WA No.1232/2017Ã¢â€, (supra) in this regard has held that:-

Ã¢â€“The challenge in the present appeal is to an order passed by the learned Single Bench on 16.08.2017 whereby recovery of Rs.87,354/- on account

of excess payment in the matter of payfixation was set aside relying upon an order passed by the Supreme Court in the case reported as (2015) 4

SCC 334 (State of Punjab v. Rafiq Masih).

Learned counsel for the appellants relies upon a later judgment of the Supreme Court reported as (2016) 14 SCC 267 (High Court of Punjab and

Haryana and others vs. Jagdev Singh) to contend that as the writ petitioner has given an undertaking to the effect that the payfixation is provisional

and that if after final fixation, if any recovery is to be effected, the same can be effected from the benefits payable to the writ petitioner and also from

his legal heirs, if the situation so arises, therefore, the order passed by the learned Single Judge is not sustainable and that the State has a right to

recover the amount of excess payment made earlier.

We find that the said judgment relied upon by learned counsel for the State has no applicability in the facts of the present case as the undertaking itself

is unconscionable writing obtained by the State. The employee has no option but to submit undertaking to avail the benefit of pay-fixation. In a

judgment of the Supreme Court reported as (1986) 3 SCC 136 (Central Inland Water Transport Corporation Limited and Another v. Brojo Nath

Ganguly and Another), a condition in the appointment letter that the Corporation could terminate the services of the employees without prior notice if it

was satisfied that the employee was unfit medically or was guilty of any subordination in respect of other misconduct, was found to be illegal. The

Supreme Court held as under:-

“68. We now turn to the second question which falls for determination in these Appeals, namely, whether an unconscionable term in a contract of

employment entered into with the Corporation, which is “the State” within the meaning of the expression in Article 12, is void as being violative of

Article 14. What is challenged under this head is clause (i) of Rule 9 of the said Rules. This challenge levelled by the Respondent in each of these two

Appeals succeeded in the High Court. xxx xxx

78. Legislation has also interfered in many cases to prevent one party to a contract from taking undue or unfair advantage of the other. Instances

of this type of legislation are usury laws, debt relief laws and laws regulating the hours of work and conditions of service of workmen and their unfair

discharge from service, and control orders directing a party to sell a particular essential commodity to another.

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93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited.

The case of *A. Schroeder Music Publishing Co. Ltd. v. Macaulay* [(1974) 1 WLR 1308], however, establishes that where a contract is vitiated as

being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the

contract is illegal or immoral. In *Kedar Nath Motani and others v. Prahlad Rai and others*, [1960] 1 S.C.R. 861 reversing the High Court and restoring

the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars

to restore possession, this Court, after discussing the English and Indian law on the subject, said (at page 873):

The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff

cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Willistone

and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take

advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by

restoring to some subterfuge or by mis-stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as

part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage

the conscience of the Court, the plea of the defendant should not prevail.

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which

contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be

adjudged void.Ã¢â¬â¢

In view of the aforesaid judgment, we find that since the employee has no option but to give undertaking so as to avail the benefit of payfixation, it

cannot be said to be voluntary act thus, such undertaking cannot be made basis for sustaining the recovery of Rs.87,354/-.

In view of the said fact, we do not find any error in the order passed by the learned Single Bench warranting interference in the present appeal. The

same is dismissed.Ã¢â¬â¢

Having regard to the aforesaid facts and legal position, I am of the opinion that the impugned recovery cannot be sustained as it would cause serious

hardship to the petitioner who is a retired employee.Ã, Hence, the impugned orderÃ, of recovery isÃ, set aside.Ã, However, the pay fixation is

maintained.Ã, The respondents are directed to refund the amount to the petitionerÃ, within a period of three months from today.

The writ petition is accordingly disposed of. c.c as per rules.