

Before Harsimran Singh Sethi, J.

BALJEET SINGH—*Petitioner*

versus

DAKSHIN HARYANA BIJLI VITRAN NIGAM AND OTHERS—

Respondents

CWP-16754-2012

September 5, 2019

Constitution of India, 1950, Article 14 and 226—re-fixing of salary- Withdrawal of excess paid on foregoing promotion—Held, in the absence of any rule, the employer cannot withdraw higher standard scale—such act would be treated without jurisdiction—further non joining on promoted post immediately would also not mean forgoing promotion—in State of Punjab v. Rafiq Masih 2015(4) SCC 334, recovery cannot be effected from the retired employee.

Held, that the question which has been posed before this Court in this petition is as to whether, if an employee forgoes his promotion, the said act will entitle the respondents to withdraw the benefit, which already stand granted to the said employee prior to the date of forgoing the promotion and whether in the present writ petition, the petitioner had actually foregone the promotion or not. The next question which arises is as to whether respondents can recover the amount of excess payment from the pensionary benefits of the petitioner after re-fixing the salary of the petitioner.

(Para 5)

Held, that in the present writ petition, the benefit of higher standard scale granted to the petitioner in the year 1994 has been withdrawn by the respondents on the ground that in the year 2003, the petitioner was given promotion to the post of Assistant Foreman, which he had forgone. In the absence of any rule extending the power to withdraw a benefit already granted on account of refusal to accept promotion, the action of respondent in withdrawing the higher standard scale from the petitioner is to be treated as without jurisdiction and liable to be set aside and is accordingly set aside.

(Para 7)

Held, that non-joining on promoted post immediately under these circumstances cannot be treated as forgoing the promotion when

the petitioner had actually joined the promoted post in pursuance to the same promotional order dated 03.12.2003..

(Para 9)

Held, that further, it is a settled principle of law that the recovery cannot be effected from a retired employee.

(Para 10)

B.S.Mittal, Advocate
for the petitioner.

Vivek Chauhan, Advocate
for the respondents.

HARSIMRAN SINGH SETHI, J. oral

(1) In the present writ petition, the challenge is to the order dated 17.3.2010 (Annexure P-1) by which a sum of Rs.1,16,073/- has been deducted by re-fixing the salary of the petitioner. Further challenge is to the order dated 15.03.2012 (Annexure P-6) by which the high standard scale granted to the petitioner on 01.01.1994 on completion of 20 years of service, has been withdrawn that too after the retirement of the petitioner.

(2) The facts as stated in the writ petition are as under:-

The petitioner was appointed as Assistant Lineman in the year 1972. Thereafter, in December, 1986, he was promoted as Lineman and thereafter, promoted as Assistant Foreman in the year 2003 on which post, the petitioner actually joined on 1.7.2005 after rendering almost 30 years of service. The petitioner retired from service in the year 2010 as Assistant Foreman. Before his retirement, the petitioner was served with a notice for recovery of excess payment to the tune of Rs.1,16,073/- vide letter dated 17.3.2010. By the said letter, the petitioner was informed that his pay has been re-fixed and upon re-fixation, it was found that an excess amount of Rs.1,16,073/- has been made to the petitioner which needs to be recovered. The said letter has been annexed as Annexure P-1. A bare perusal of the letter shows that the said recovery was being done on the ground that the petitioner was not entitled for the higher standard pay scale as well as ACP which were wrongly granted to him.

The excess paid amount was deducted from the pensionary benefits of the petitioner. After deducting of the amount, the respondent passed an order on 15.03.2012, withdrawing the benefit of the higher

standard scale which was given to the petitioner on 1.1.1994 on completion of 20 years of regular service, but the recovery in pursuance to the withdrawal of the said benefit has already been done by the respondents from his retiral benefits in the year 2010. The petitioner is challenging the withdrawal of the benefit of the higher standard scale as well as the recovery of Rs.1,16,073/- which the respondents have deducted from the retiral benefits of the petitioner. The claim of the petitioner is that once the benefit of higher standard scale has already been extended to the petitioner on completion of 20 years of regular service, the same could not have been withdrawn due to some subsequent event such as non-joining on the promotional post in pursuance to the promotion order dated 03.12.2003. Further, grievance of the petitioner is that the recovery has been done from the petitioner after his retirement, which is not permissible under law.

(3) Upon notice, the respondents have filed the reply wherein the respondents have stated that if an employee forgoes his promotion, he loses his right to claim ACP scale which is given to him on the ground that the employee though eligible, has not been able to get the promotion on account of less vacancies available in the promotion cadre. Respondents have stated that as the petitioner did not join the promoted post after promotion order dated 03.12.2003, it is deemed that the petitioner had forgone his promotion, which entitled the respondents to withdraw the benefit of higher standard scale as has been given to the petitioner w.e.f. 1994 after completion of 20 years of regular service.

(4) I have heard learned counsel for the parties and have gone through the record with their able assistance.

(5) The question which has been posed before this Court in this petition is as to whether, if an employee forgoes his promotion, the said act will entitle the respondents to withdraw the benefit, which already stands granted to the said employee prior to the date of forgoing the promotion and whether in the present writ petition, the petitioner had actually foregone the promotion or not. The next question which arises is as to whether respondents can recover the amount of excess payment from the pensionary benefits of the petitioner after re-fixing the salary of the petitioner.

(6) In the present writ petition, the benefit of higher standard scale after completion of 20 years service was extended to the petitioner in the year 1994. The petitioner continued to get the said benefit even on the date when he was promoted to the next higher cadre on 03.12.2003. When the petitioner was promoted from the post of lineman

to the post of Assistant Foreman, no revision of pay has been extended. Learned counsel for the petitioners states that the benefit which has already been extended and duly accepted by the petitioner on completion of 20 years of service by granting him higher standard scale cannot be withdrawn. The benefit which was withdrawn from the petitioner, was given to him on completion of 20 years of service and the same cannot be withdrawn only on the ground that after the grant of said benefit, the petitioner had forgone his promotion. Forgoing of promotion can only be an impediment in grant of further benefits, which comes in the way of an employee.

(7) In the present writ petition, the benefit of higher standard scale granted to the petitioner in the year 1994 has been withdrawn by the respondents on the ground that in the year 2003, the petitioner was given promotion to the post of Assistant Foreman, which he had forgone. Without support of any rule, the said action has been taken by the respondent authority, which cannot be said to be in accordance with law and the same is to be set aside. No rule has been shown to this Court which entitles the respondent that on forgoing the promotion, even the benefits already granted, can be withdrawn. In the absence of any rule extending the power to withdraw a benefit already granted on account of refusal to accept promotion, the action of respondent in withdrawing the higher standard scale from the petitioner is to be treated as without jurisdiction and liable to be set aside and is accordingly set aside.

(8) The further question is whether the petitioner has foregone his promotion actually or not.

(9) It has been admitted by the respondents that the petitioner was promoted on 3.12.2003. The petitioner joined on the said post on 17.8.2005. No doubt, the petitioner failed to join the promoted post immediately on receiving promotion order but it is not the case of the respondents that promotion order dated 03.12.2003 was withdrawn or the petitioner got promotion later in the year 2005 on a promotion order passed afresh on which post he joined on 7.8.2005. It is not disputed by the respondents that petitioner joined the promoted post only on the basis of order of promotion dated 03.12.2003. At most, it can be said that the petitioner did not join the promoted post in pursuance to the promotional order dated 3.12.2003 immediately, therefore, from the facts, it can be seen that the petitioner never forgone his promotion rather, he did not join the said promoted post immediately. Non-joining on promoted post immediately under these circumstances cannot be

treated as forgoing the promotion when the petitioner had actually joined the promoted post in pursuance to the same promotional order dated 03.12.2003..

(10) Further, it is a settled principle of law that the recovery cannot be effected from a retired employee. Learned counsel for the petitioner relies upon the judgment of Hon'ble Supreme Court of India rendered in *State of Punjab and others etc* versus *Rafiq Masih*¹ to contend that the recovery cannot be effected from a retired employee.

(11) The relevant paragraph of the Rafiq Masih (supra) is as under:-

“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.”

(12) Learned counsel for the respondents states that the judgment

¹ 2015 (4) SCC 334

of Rafiq Masih (supra) is not applicable in the present case as the recovery was done in the year 2010 whereas the judgment of the Hon'ble Supreme Court was passed in December, 2014 and therefore, the said judgment cannot have the retrospective effect.

(13) The said question has also been considered by a Division Bench of this Court on 9.8.2018 while deciding the LPA No.2448 of 2016, titled as *State of Punjab and others* versus. *Amrik Singh and others* wherein it has been held that the judgment of the Hon'ble Supreme Court of India in *Rafiq Masih* (supra) will have the retrospective effect. The relevant portion of the order passed by the Division Bench in this regard is as under:-

“The contention that the principles laid down in **Rafiq Masih** will apply 'prospectively' cannot be accepted as no such limitation has been imposed by the Hon'ble Supreme Court. Taking into consideration the current status of the respondents, namely, that many of them have retired or are near retirement and the fact that they are holding Group 'C' & 'D' posts, we are satisfied that no interference in the discretion exercised by learned Single Judge is called for.”

(14) Keeping in view the above, not only withdrawing the higher standard scale vide impugned order dated 15.3.2012 is held to be bad, but even the recovery is held to be bad which has been effected from the retiral benefits of the petitioner.

(15) The respondents are directed to restore the benefits of higher standard pay scale to the petitioner and also refund the amount which has been recovered from the pensionary benefits of the petitioner. In case, the petitioner is entitled to only consequential benefits, such revision of retiral benefits, be also extended to him.

(16) Let the benefit for which the petitioner is entitled under this order, be calculated within a period of 02 months from the date of receipt of the certified copy of the order. However, if the petitioner is found entitled, the same be released to him within a period of next one month.

(17) The instant writ Petition is allowed in the above terms.

Payel Mehta