

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN**

Present: Hon'ble Mr. Justice U.C.Dhyani

----- Chairman

Hon'ble Mr. Rajeev Gupta

-----Vice Chairman (A)

**WRIT PETITION NO 201(S/S) OF 2018
[RECLASSIFIED AND RENUMBERED AS CLAIM PETITION NO. 13/DB/2023]**

1. Sishu Pal Bisht, aged about 62 years, s/o Late Sri Inder Singh Bisht, r/o Village Madhi (Umadhi) Chaurash, Near Rainbow Public School, P.O. Kilkileshwsar, District Tehri Garhwal.
2. Ratan Singh Jayada, s/o Late Sri Narayan Singh Jayada, presently posted as Junior Assistant, PMGSY, Irrigation Division Srinagar, Garhwal, District Pauri Garhwal.

.....Petitioners

vs.

1. The State of Uttarakhand through Principal Secretary, Irrigation Department, Dehradun.
2. Chief Engineer and Head of Department, Irrigation Department, Uttarakhand, Dehradun.
3. Chief Engineer, Garhwal, Irrigation Department, Uttarakhand, Dehradun.
4. Superintending Engineer, Irrigation Work Division, Srinagar Garhwal, District Pauri Garhwal.
5. Executive Engineer, PMGSY, Irrigation Division, Srinagar, District Pauri Garhwal.

.....Respondents

Present: Sri Amar Murti Shukla, Advocate, for the petitioners
Sri V.P.Devrani, A.P.O., for Respondents .

JUDGMENT

DATED: JUNE 20, 2023.

Justice U.C.Dhyani (Oral)

Hon'ble High Court of Uttarakhand at Nainital, passed an order, in WPSS No. 201/2018, Sishu Pal Bisht and another vs. State of Uttarakhand and others, on 30.11.2022, as follows:

“The present Writ Petition has been filed under Article 226 of the Constitution of India with the following main relief:-

- (i) Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 19.01.2018 (Annexure-13) issued by respondent no.2.
- (ii) Issue a writ order or direction in the nature of Mandamus commanding and directing the respondents to pay the grade pay of Rs.4200 to the petitioners from 23.01.2015 and arrears of the same.

2. Heard Mr. Amar Murti Shukla, learned counsel for the petitioners and Mrs. Anjali Bhargava, learned Additional Chief Standing Counsel for the State.

3. During the arguments, Mrs. Anjali Bhargav, learned Additional Chief Standing Counsel for the State, submitted that the present matter relates to the conditions of service of a public servant, therefore, the petitioner has alternate efficacious remedy to raise his grievances before the Uttarakhand Public Services Tribunal.

4. As the disputes raised in the present writ petition can be effectively adjudicated by the Uttarakhand Public Services Tribunal, the complete record along with the writ petition, after retaining the copies thereof, is being transmitted to the Uttarakhand Public Services Tribunal for hearing the writ petition as a claim petition in accordance with law.

5. The Uttarakhand Public Services Tribunal is also requested to consider entertaining the present matter as a claim petition taking into consideration this fact that the present matter has been pending for past four years.

6. The present Writ Petition (S/S No. 201 of 2018) stands disposed of accordingly.”

2. Writ Petition No. 201 (SS) of 2018 is, accordingly, reclassified and renumbered as Claim Petition No. 13/DB/2023. Since the reference in this Tribunal shall be of the writ petition filed before the Hon'ble High Court, but shall be dealt with as claim petition, therefore, the claim petition shall be referred to as 'petition' and petitioner shall be referred to as 'petitioner', in the body of the judgment.

PETITIONERS' VERSION

3 Facts necessary for adjudication of the petition, are as follows:

3.1 Petitioner No.1 was appointed as a *Meth* in respondent department on 25.01.1978. Petitioner No.2 was appointed as a *Meth* in respondent department on 01.03.1984. The State Govt. introduced ACP Scheme *vide* Govt. Order dated 08.03.2011, which became effective from 01.09.2008. ACP Scheme was amended from time to time. The State Govt. issued an order on 18.09.2014, by which pay scale/grade pay of *Meth*, working in the Irrigation Department has been upgraded. (Copy of order dated 18.09.2014: Annexure-1). By virtue of G.O. dated 18.09.2014, the grade pay of Rs.2800/- has been upgraded to Rs. 4200/- and is available to the *Meth* after completion of 26 years of service. The Executive Engineer of respondent department, *vide* order dated 22.11.2014 revised/ upgraded the pay scale/ grade pay of petitioners from Rs. 2800/- to Rs.4200/-, inasmuch as both the petitioner have completed 26 years of service in the Cadre of *Meth* on 25.10.2004 and 01.03.2010 respectively (Copy of order dated 22.11.2014: Annexure- 2).

3.2 The Executive Engineer, *vide* order dated 23.01.2015, reduced the grade pay of petitioners from Rs.4200/- to Rs. 2800/-, without assigning any reason and without issuing any show cause notice to the petitioners. (Copy of order dated 23.01.2015: Annexure- 3). Petitioners preferred WPSS No. 2355/2017 before Hon'ble High Court, in which they claimed parity with the others regarding the benefit of G.O. dated 18.09.2014.

3.3 WPSS No. 1039/ 2012 and WPSS No. 536/2016 were filed challenging the selection process/ promotional exercise from the post of *Meth* to the post of Junior Assistant on the ground that the promotion can only be made from Class IV to Class III post on the basis of seniority. On the basis of judgment passed by Hon'ble High Court on 25.07.2014, the respondents started fresh exercise for promotion (Copy of Judgment dated 25.07.2014: Annexure- 4).

3.4 The Superintending Engineer, in compliance of judgment dated 25.07.2014 issued an order dated 12.03.2015, whereby the petitioners were promoted to the post of Junior Assistant from the post of *Meth*. Thereafter, consequential order was passed on 09.04.2015, in which it was mentioned that after joining as Junior Assistant, the petitioners will be entitled to the benefits of Junior Assistant *w.e.f.* 01.11.2013. The petitioner joined as Junior Assistant on 20.03.2015. He was, therefore, entitled to grade pay of Rs.4200/-, which

was rightly given to him *vide* order dated 23.11.2016. (Copy of order dated 09.04.2015: Annexure- 5).

3.5 Petitioners moved several representations to the respondents for redressal of their genuine grievance, but no heed was paid on the representations of the petitioners. (Copy of representation dated 01.01.2018: Annexure- 12).

3.6 The petitioner No. 1, after attaining the age of superannuation, retired on 31.07.2016.

3.6 One Sri Indra Singh Negi was granted benefit of grade pay of Rs. 4200/- by the Executive Engineer, *vide* order dated 23.11.2016 (Copy of order dated 23.11.2016: Annexure- 9). Petitioners preferred WPSS No. 2355 of 2017 before the Hon'ble High Court of Uttarakhand. The Hon'ble Court while disposing of WPSS No. 2355/2017 on 14.12.2017, directed Respondent No.2 to decide the representation of the petitioners on parity with the order relating to co-worker Indra Singh Negi and the recommendation of Executive Engineer within four weeks of the presentation of certified copy of this order. (Copy of Order dated 14.12.2017: Annexure- 11).

3.7 The Respondent No.2, without considering the fact that the petitioners have held the post of *Meth* up to 10.04.2015 and 23.03.2015, which is much after the issuance of G.O. dated 18.09.2014, rejected the claim of the petitioners *vide* order dated 19.01.2018 (Copy of order dated 19.01.2018: Annexure- 13). Although the petitioners were actually promoted *vide* order dated 12.03.2015, but since they were given seniority with retrospective effect from 01.11.2013, which is prior to issuance of G.O. dated 18.09.2014, hence, they are not entitled to grade pay Rs.4200/-. Aggrieved with the same, present petition has been filed by the petitioners. Relevant documents have been filed by the petitioners in support of their claim.

3.8 The Executive Engineer, prior to deciding the representation of the petitioners, *vide* order dated 17.01.2018 cancelled the earlier order dated 23.11.2016, by which benefit of grade pay of Rs.4200/- was given to Sri Indra Singh Negi, therefore, the petitioners cannot claim parity *qua* Sri Indra Singh Negi.

RESPONDENTS' VERSION

4. Written Statement has been filed on behalf of Respondent No.1. Counter Affidavit has been filed by Sri Ranjeet Singh, Deputy Secretary, Irrigation Department, Govt. of Uttarakhand, Dehradun. Sri Muhammad Nawazish Husain, Assistant Engineer, PMGSY, Irrigation Division, Srinagar, District Pauri Garhwal, has filed Counter Affidavit on behalf of Respondents No. 2, 3, 4 & 5.

5. *Vide* order dated 01.03.2023, the Tribunal granted some time to the respondent department, to file supplementary C.A., on its request. Thereafter, Sri Bhagat Singh Rawat, Assistant Engineer, PMGSY, Irrigation Division, Srinagar, Garhwal, Uttarakhand has filed supplementary C.A. on behalf of respondents. Documents have been filed by the respondents in support of their counter affidavit.

PETITIONERS' SUBMISSIONS

6. It is the submission of Ld. Counsel for the petitioners that petitioners had completed more than 26 years of service prior to issuance of G.O. dated 18.09.2014, hence they are legally entitled for grade pay of Rs.4200/-, which was granted by Respondent No.5 *vide* order dated 22.11.2014, therefore, recalling the same by Respondent No.5, that too without issuance of any show cause notice to the petitioners, is wholly illegal, unjustified and is in violation of principle of natural justice, inasmuch as the order dated 19.01.2018 has civil and evil consequences.

7. Ld. Counsel for the petitioners elaborated further that since the order dated 19.01.2018 has civil and evil consequences and salary is property within the meaning of Article 300 A of the Constitution, hence reducing the same, that too without any show cause or inquiry, is not only illegal and unjustified but also is in violation of principle of natural justice, therefore, the impugned order is not sustainable.

RESPONDENTS' SUBMISSIONS

8. Ld. A.P.O. drew attention of the Tribunal towards paragraphs 12 to 20 of the supplementary Counter Affidavit. Ld. A.P.O. submitted that on 18.09.2014, the State Government issued letter by which grade pay Rs.1800/-

of the post of *Meth* was upgraded to the grade pay Rs. 1900/- and the effect of the said G.O. was prospective. Grade pay Rs. 2800/- of the petitioners has been upgraded to Rs. 4200/- due to wrong interpretation of Govt. letter dated 18.09.2014, on completion of 26 years of service as 3rd ACP.

8.1 The Sub Treasury , Srinagar raised objection on the wrong pay fixation order dated 22.11.2014 of the petitioners and returned the matter to the department for correct pay fixation. To remove the objection raised by Treasury, Srinagar, the correct pay fixation of the petitioners was made *vide* office order dated 23.01.2015.. Therefore, the adjustment of excess payment made to the petitioners, due to wrong fixation, was necessary to recover from the monthly pay of the petitioners into equal two installments (Copy of the Correct pay fixation in service book entry is enclosed: Annexure- 3 to the Supplementary C.A.).

8.2 Thereafter the adjustment order dated 19.01.2018 was issued to recover the excess payment to the petitioner. The said order has been challenged before the Hon'ble High Court and now this matter is sub-judice before this Tribunal.

8.3 In the entire service period, the petitioners have been given the benefit of three promotional pay-scales from the direct recruitment post of *Meth*. The post of *Meth* is in grade pay Rs. 1900/-, as such they have been given the benefit of 1st , 2nd and 3rd ACP in grade pay of Rs. 2000/-, 2400/-, 2800/- and an actual promotion on the post of Junior Assistant on 01.11.2013 by the department.

8.4 No inquiry proceedings under the Uttarakhand Government Servant (Discipline and Appeal) Rules, 2003 (as amended in 2010) have been initiated against the petitioners, therefore, there is no need to provide opportunity of hearing or to serve a show-cause notice to the petitioners. As per the objection of the Sub Treasury, Srinagar, the said benefit has been given to the petitioners, but later on said benefit has been cancelled *vide* order dated 19.01.2018.

8.5 In compliance of the Hon'ble High Court's Judgment passed in WPSS No. 2355/2017, the petitioners (*Meth*) had been given promotion in

Group 'C' post *i.e.* Junior Assistant in the pay scale /Pay band Rs. 5200-20200 Grade pay 2000/- w.e.f. 01.11.2013 hence the lien of the petitionera on the post of *Meth* came to an end on 01.11.2013, therefore the G.O. dated 18.09.2014 is not applicable to the petitioners due to change in service cadre as Junior Assistant, thus on this ground the petitioners do have any case claiming the pay scale on the post of *Meth*.

DISCUSSION

9. This Tribunal has decided Claim Petition No. 12/DB/2023, Indra Sing Negi vs. State and others today itself, in which, the law governing the field has been discussed. On the basis of law, thus discussed, in the above noted claim petition, the present claim petition is being discussed and decided as follows:

10. It has been stated in Paragraphs 15 and 19 of the supplementary Counter Affidavit that due to wrong interpretation of Govt. order dated 18.09.2014, grade pay Rs. 2800/- of the petitioners was upgraded to Rs. 4200/- on completion of 26 years of service as 3rd ACP. It has also been admitted by the respondents in Para 19 of the supplementary Counter Affidavit that the petitioners were neither given a show cause notice nor were given opportunity of hearing before passing the impugned order. It is the submission of Ld. A.P.O. that neither any inquiry proceedings under the Uttarakhand Government Servant (Discipline and Appeal) Rules, 2003 (as amended in 2010) have been initiated against the petitioners nor there was any need to issue show cause notice. Hence, neither any show cause notice nor opportunity of hearing was given to the petitioners before passing the impugned order, inasmuch as terms and conditions of the fixation order itself stipulates that in case, any discrepancy is found by the higher officers/ Finance Controller in fixation of salary, the same will be recovered from the petitioners.

11. This fact is under no dispute that the petitioner no.1 has retired from the post of Junior Assistant before passing the impugned order.

12. The petitioners were given monetary benefit, which was in excess of their entitlement. The monetary benefits flowed to them consequent upon a mistake committed by the respondent department in determining the

emoluments payable to them. The respondent department has admitted that it is a case of wrongful fixation of salary of the petitioners. Long and short of the matter is that the petitioners were in receipt of monetary benefit, beyond the due amount, on account of unintentional mistake committed by the respondent department.

13. It will not be out of place to mention here that the , Hon'ble Apex Court in Paragraphs 6, 7 & 8 of the decision rendered in *State of Punjab vs. Rafiq Masih*, (2015) 4 SCC 334, has observed as under:

“6. In view of the conclusions extracted hereinabove, it will be our endeavour, to lay down the parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In our considered view, the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee.

7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.

8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.”

[Emphasis supplied]

14. Based on the decision, rendered by Hon'ble Apex Court in Syed Abdul Qadir vs. State of Bihar, (2009) 3 SCC 475 and hosts of other decisions, which were cited therein including B.J. Akkara vs. Union of India, (2006) 11 SCC 709, the Hon'ble Apex Court concluded thus:

“18. 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.”

15. Hon'ble High Court of Uttarakhand has passed an order on 12.04.2018, in WPSS No. 1346 of 2018, Smt. Sara Vincent vs. State of Uttarakhand and others, as under:

“This question is no more res integra in view of the judgment rendered by their Lordships of the Hon'ble Supreme Court in (2015) 4 SCC 334 in the case of State of Punjab and others Vs. Rafiq Masih (White Washer) and others. Their Lordships have held as under:

18. 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 decision referred to herein above, we may, as a ready reference, summarize 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 the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period of excess of five years, before the order of recovery is issued.

(iv) Recovery in case 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.

In any other cases, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous of harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”

Accordingly, the writ petition is allowed. Impugned order is quashed and set-aside.

Pending application, if any, also stands disposed of accordingly.”

16. This fact is under no dispute that neither show cause notice was given to the petitioner nor any opportunity was given to him before passing the impugned order. In the W.S., which has been filed on behalf of the respondents, denial in Para 14 is evasive.

17. Petitioners stated in paragraph 29 of the petition that order dated 19.01.2018 has civil and evil consequences and salary is property within the meaning of Article 300 A of the Constitution, hence reducing the same, that too without any show cause or inquiry, is not only illegal and unjustified but also is in violation of principle of natural justice, therefore, the impugned order is not sustainable. It is the submission of Ld. A.P.O. that the impugned order has been passed to adjust the excess payment, it has not been passed to recover the excess payment made to the petitioners by way of punishment or is not punitive in nature.

18. In the supplementary Counter Affidavit, which was filed as per the direction of the Tribunal, it is admitted that neither show cause notice was served upon the petitioners nor any opportunity was given to them before passing the impugned order, although, the reasons have been assigned in the C.A./W.S. for neither serving the show cause notice nor giving opportunity of hearing before passing the impugned order, but they are not sufficient. The violation of principles of natural justice is writ large on the face of record. The petitioners were sanctioned grade pay of Rs.4200/- and they enjoyed such an enhancement for a substantial period, therefore, the same could not have been reduced without giving them due opportunity of hearing. Impugned order dated 19.1.2018 has civil and evil consequences. The salary is a property within the meaning of Article 300 A of the Constitution of India.

19. Moreover, it is trite law that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out, as has been observed by Hon'ble Apex Court in *Mohinder Singh Gill vs. Chief Election Commissioner, New Delhi and others*, (1978) 1 SCC 404.

20. It will be quite useful to reproduce the observations of Hon'ble Mr. Justice Vivian Bose in *Commissioner of Police, Bombay vs. Gordhandas Bhanji*, AIR 1952 SC 16, herein below for convenience:

“Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he Intended to do Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older”

21. Order impugned cannot sustain and is liable to be set aside, leaving it open to the respondent authority to proceed only after affording due opportunity of hearing to the petitioner. However, there shall be no recovery of excess payment from Petitioner No.1, since he has retired before passing of the impugned order dated 19.01.2018.

22. Order impugned dated 19.01.2018 (Annexure: 13) is set aside leaving it open to the respondent department to proceed only after affording opportunity of hearing to the petitioners, as discussed above. No order as to costs.

(RAJEEV GUPTA)
VICE CHAIRMAN (A)
(virtually from Nainital)

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: JUNE 20, 2023
DEHRADUN

VM