

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP(C) no. 1841/2022
CM nos. 1056/2023 & 4539/2022

Ghulam Mohamamd Dar

...Appellant(s)/Petitioner(s)

Through: Mr. Z. A. Qureshi, Sr. Advocate with
Ms. Monisa Manzoor, Advocate

Vs.

UT of JK and others

...Respondent(s)

Through: Mr. Rais ud Din Ganai, Dy. AG

CORAM:

HON'BLE MR. JUSTICE VINOD CHATTERJI KOUL, JUDGE

ORDER

04.03.2024

1. Objections have been filed by respondents.
2. It is with the consent of learned counsel for the parties that this petition is taken up for final disposal.
3. Petitioner is aggrieved of order No. DULB/Estt/353/229 of 2022 dated 22.04.2022, passed by Director, Urban Local Bodies, Kashmir (respondent no.2) whereby petitioner's placement in Pay Scale of Rs. 5000-8000 (PR) at MC level vide Order no. MC/Ant/2011/2223-25 dated 23.11.2011 has been rescinded on the ground that petitioner's placement was made in violation of the Rules. While rescinding petitioner's placement, recovery of excess amount drawn by the petitioner, on account of such placement has been ordered to be recovered from petitioner and to be recorded in his service book.

4. The petitioner's grievance is that action culminated in issuance of impugned order is in violation principles of natural justice inasmuch as he has not been afforded opportunity of hearing.
5. Petitioner's case is that he was working as Record Keeper-cum-Clerk in Sanitation Section on consolidated pay of Rs.350/- per month which was upgraded in the pay scale of Rs. 390-500 from 01.11.1985. Upon creation of various posts in Town Area Committee, Anantnag, petitioner, amongst others, was vide Government Order no.108-HUD/LSG of 1988 dated 08.04.1988, issued by Housing and Urban Development Department, Civil Secretariat, came to be posted as Junior Assistant. Petitioner, as is ostensible from his pleadings, was redesignated as Senior Assistant vide letter/order dated 15.11.1996, issued by respondent no.2. By virtue of Order no.DULB/Estt/353/302 of 2006 dated 11.05.2006, sanction was accorded to the grant of first Insitu promotion in favour of petitioner from pay scale of Rs.4000-6000 to Rs.4500-7000. Petitioner was thereafter, vide Order No.DULB/ESTT/ 536 of 2010 dated 01.09.2010, issued by respondent no.2, placed as incharge Head Assistant, Municipal Council, Anantnag, subject to his confirmation by Departmental Promotion Committee. Petitioner was, vide order dated 23.11.2011, placed in the grade of Rs.5000-8000.
6. It is stated that just few days before the date of retirement of petitioner, respondent no.1 has ordered that the petitioner was wrongly/unauthorizedly placed in the grade of Rs.5000-8000 (PR), as he was not eligible, therefore, rescinded the order dated 23.11.2011

and also ordered recovery of excess amount alleged to have been drawn by petitioner.

7. According to learned senior counsel, it was incumbent upon respondents to afford petitioner an opportunity of being heard prior to issuance of order impugned because order impugned has ramification of taking away the benefits that petitioner has earned since November, 2011. Action of respondents contained in order impugned has impact of punishment that cannot be inflicted upon a government employee without follow due procedure of law which entails and envisages conducting of enquiry and affording of opportunity to petitioner and observing those essentialities in breach violates principles of natural justice.

8. When objections are peeped, it would divulge respondents' contention, which is that petitioner's placement was unauthorized and against the rules and, therefore, there was no requirement to afford him any kind of opportunity of being heard, even though petitioner had performed duty on the post of Head Assistant for more than 12 years and has also drawn salary attached to it. So, respondents' vehemence is that nothing wrong can be found with order impugned as petitioner was not entitled to opportunity of being heard before passing of order impugned.

9. Order which is being rescinded after 12 years on the ground that same is unauthorized and illegal was passed on 01.09.2010. The said order reads as under: -

“ORDER NO. DULB/ESTT/536 of 2010
D A T E D : 01.09.2010

Whereas there are sufficient vacancies in the category of Senior Assistant/computer Assistant carrying pay scale of Rs. 4000-60009 (pre-revised) sanctioned vide Government Order No. 214-HUD of 2008 dated 23.05.2008 who can be lipped up for placement of Incharge Head Assistants in a stop gap arrangement.

Whereas the promotion on regular basis is not possible at this juncture in absence of the final seniority list and consideration of other factors viz, merit and suitability;

Whereas, it has become inevitable to make arrangements of institutions by placing the senior members of the feeding category as Incharge Head Assistants in a stop gap arrangement;

Whereas some of the members of Senior Assistants Category have been promoted of the hands of incompetent authority and though such persons have not been enlisted but some slots are being kept vacant so that in the event of consideration of such cases, the department may not face any difficulty.

In view of above and pending clearance by the Departmental Promotion Committee, Shri Gh. Mohd Dar, Senior Assistant is placed as Incharge Head Assistant Municipal Council, Anantnag. However, this arrangement shall not confer any right upon the incumbent to claim for regular promotion against the said post, which shall be subject matter of Departmental Promotion Committee to be strictly decided in terms of the Sanctioned Recruitment Rules on the basis of merit, suitability and seniority.

Sd/-

Director

Urban Local Bodies, Kashmir.”

10. Bare perusal of Order no.DULB /Estt/536 of 2010 dated 01.09.2010 reveals that petitioner has been placed as incharge Head Assistant Municipal Council, Anantnag by the order of respondent no.2. It is by virtue of Order No.MC/Ant/2011-12/2223-25 dated 23.11.2011, issued by respondent no.3, that petitioner has been placed in the grade of Rs.5000-8000 (PR) attached to the post of Head Assistant, subject to the confirmation from respondent no.2. These orders have been issued by authorities, i.e. Director, Urban Local Bodies, Kashmir, and Executive Officer, Municipal Council, Anantnag.
11. Learned senior counsel for petitioner submits that respondents cannot effect any kind of recovery from petitioner as he has worked and discharged his duties as Junior Assistant, Senior Assistant and Head Assistant, in compliance to the orders passed by the authorities and, therefore, the salary/emoluments given to and taken by him in lieu thereof cannot be recovered. In support of his submissions, he has placed reliance on an order dated 31.03.2022 passed by the Supreme Court in **Civil Appeal No.7841 of 2011** titled as **Man Singh v. The**

State of Uttar Pradesh through Secretary & ors, in which the Supreme Court has held that even if appointment is irregular, the employee, discharging his duties, is to be paid in lieu thereof and that the State/employer cannot take any work from the employee without payment of any salary. Reference is being also made to *State of Punjab and others v. Rafiq Masih (White Washer)*, reported in *AIR 2015 SC 696*, wherein it is observed by the Supreme Court that 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 concerned employee. If the effect of the recovery from the concerned employee would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then in such situation it would be iniquitous and arbitrary to effect the recovery.

12. Having regard to what has been stated hereinabove and in view of well settled legal position, impugned order No. DULB/Estt/353/229 of 2022 dated 22.04.2022, passed by Director, Urban Local Bodies, Kashmir is quashed.

Respondents are at liberty to pass fresh orders after giving the petitioner ample opportunity of being heard and in the meantime, till the matter is considered afresh, respondents shall process the case of the petitioner for pensionary benefits on the pay scale of Senior Assistant.

13. **Disposed of.**

(VINOD CHATTERJI KOUL)
JUDGE

SRINAGAR
04.03.2024
“Imtiyaz”