

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL,
MUMBAI**

**ORIGINAL APPLICATION NO.213 of 2020
with
MISC. APPLICATION NO.350 OF 2021**

District : KOLHAPUR

Shri Sitaram P. Khamkar)
Age 62 years, Occ : Retired)
At Post Thergaon, Tal. Shahuwadi,)
Dist. Kolhapur, Pin – 416213.)...**Applicant**

Versus

1. The State of Maharashtra, through)
Secretary, Irrigation Department,)
Mantralaya, Mumbai 400 032.)
2. The Executive Engineer, Chief Dwar)
Ubharani Pathak No.3, Waghwadi Phata,)
Islampur, Tal. Walwa, Dist. Sangli.)
3. The Supervising Engineer, Yantriki)
Mandal, Warna Bhavan, Tarabai Park,)
Kolhapur -3.)...**Respondents**

Shri Abhijeet Kandarkar, learned Advocate for the Applicant.

Smt. Archana B. K., learned Presenting Officer for the Respondents.

CORAM : Shri A.P. Kurhekar, Member-J

DATE : 16.11.2021

J U D G M E N T

The Applicant who stands retired in 31.05.2016 from the post of Fitter (Group-C employee) has filed this O.A. for direction to the Respondents for refund of Rs.2,66,247/- which is already recovered from his gratuity along with M.A. for condonation of delay of 245 days caused in filing Original Application.

2. Heard Shri Abhijeet Kandarkar, learned Counsel for the Applicant and Smt. Archana B.K. , learned Presenting Officer for the Respondents.

3. The Applicant stands retired in 31.05.2016 from the post of Fitter (Group-C employee) and after his retirement sum of Rs.2,66,247/-was recovered from his gratuity. The Applicant has made representations for refund of the said amount in view of the decision of the Hon'ble Supreme Court in **Civil Appeal No.11527/2014 (State of Punjab and others Vs. Rafiq Masih (White Washer), decided on 18th December, 2014** but in vain. By communication dated 28.06.2018, the Applicant was informed that the decision will be communicated to him on his representation but no such communication was made to him. It is on this background, the Applicant has filed O.A. for direction to refund of Rs.2,66,247/- with interest along with an application for condonation of delay of 245 days caused in filing O.A.

4. Learned Counsel for the Applicant submits that recovery of Rs.2,66,247/- was done without giving any notice to the Applicant directly from his gratuity which is impermissible in view of the judgment of the Hon'ble Supreme Court in **Rafiq Masih's** case (cited supra). He further submits that the Applicant has made various representations and at one point of time, the Applicant was informed by communication dated 28.06.2018 that his representations are under consideration, and therefore, the Applicant was under bonafide belief that his claim for refund is under consideration of the Respondents. Therefore, the Applicant waited for some time and thereafter filed present O.A. along with M.A. for condonation of delay. He, therefore, submits that delay be condoned and O.A. be allowed since the very impugned action of recovery of Rs.2,66, 247/- is totally bad in law.

5. Per contra, Smt Archana B.K., learned Presenting Officer for the Respondents submits that the Applicant stands retired on 31.05.2016 and after retirement when the service book was sent to Pay Verification Unit for verification, the excess amount was found paid at the time of fixation of pay in 2006. Therefore, recovery of Rs.2,66,247/- was

necessitated and accordingly it was done. As regard delay, she submits that mere representations will not extend the period of limitation and prayed to dismiss the O.A. as well as M.A.

6. Thus indisputably, the Applicant stands retired on 31.05.2016 from the post of Fitter (Group-C employee), it is only after his retirement, it was noticed that his pay was wrongly fixed in 2006 and amount of Rs.2,66,247/- was found paid excess. The said amount has been recovered directly from gratuity without giving any notice or intimation to the Applicant.

7. As regard recovery, the legal position is no more *res-integra* in view of the judgment of the Hon'ble Supreme Court in **Rafiq Masih's** case. Considering the hardship faced by retired Government servant particularly Group 'C' and 'D' employees, the Hon'ble Supreme Court in Para No.12 carved out five circumstances in which recovery is held impermissible. Para No.12 of the judgment 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, summarize the following few situations, wherein recoveries by the employers, would be impermissible in law.

- (i) Recovery from employees belong to Class-III and Class-IV services (or Group 'C' and Group 'D' services).*
- (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."

8. Turning to the facts of the present case, admittedly the Applicant is Class-III employee and his case is squarely covered by Clause Nos.(i), (ii), (iii) & (v) of Para No.12 of the decision in the **Rafiq Masih's** case (cited supra). No fraud or misrepresentation is attributed to the Applicant. It was mistake on the part of department while fixing his pay in 2006.

9. Thus, in view of the judgment of the Hon'ble Supreme Court in **Rafiq Masih's** case, the recovery was totally impermissible. Pertinent to note that despite protest application made by the Applicant on 27.10.2016, the Executive Engineer accorded approval of deduction of Rs.2,66,247/- from the gratuity of the Applicant. Suffice to say, the deduction from gratuity of Rs.2,66,247/- is in defiance of the decision of the Hon'ble Supreme Court in **Rafiq Masih's** case.

10. Now turning to the aspect of delay, since the act of recovery of the amount from gratuity was in total defiance of the decision rendered by the Hon'ble Supreme Court in **Rafiq Masih's** case non refunding of the same to the Applicant amounts to continuous/recurring cause of action in view of the decision of the Hon'ble Supreme Court in **(2008) 8 SCC 648 (Union of India V/s Tarsem Singh)**, and therefore, the question of limitation may not survive.

11. Apart at one point of time, the Applicant was made to believe by communication dated 28.06.2018 that his representations are under consideration. Thus, it appears that the Applicant was under bonafide belief that his claim was under consideration, and therefore, did not file O.A. immediately. Be that as it may, since the action of recovery from gratuity without notice is bad in law in the teeth of

judgment of the Hon'ble Supreme Court in **Rafiq Masih's** case, the Applicant is entitled for refund of the said amount deducted from his gratuity. Hence, in such situation, it would be too harsh and iniquitous to deny the relief to the Applicant on technical ground of limitation.

12. The totality of the aforesaid discussion leads me to sum up that the Applicant is entitled for refund of Rs.2,66,247/-. Hence the following order:-

ORDER

- (A) Original Application and Misc. Application are allowed.
- (B) The Respondents are directed to refund of Rs.2,66,247/- to the Applicant within a period of two months from today, failing to which they will be liable to pay interest at the rate 8% per annum from the date of this order till actual payment.
- (c) No order as to costs.

Sd/-

**(A.P. KURHEKAR)
MEMBER (J)**

Date : 16.11.2021
Place : Mumbai
Dictation taken by : *Vaishali Santosh Mane*

