

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL,
MUMBAI**

ORIGINAL APPLICATION NO.401 of 2019

District : PUNE

Shri Shakil Isaque Shaikh)
Age 60 years, Occ : Retired)
R/at Flat No.19, Radha Apartment, opp.)
Chitale Sweet Home, Gaikwad Nagpur,)
Aundh, Pune 411 007.)...**Applicant**

Versus

1. The Director General of Police, Old)
Vidhan Bhavan, Mumbai.)
2. The Commissioner of Police, Thane)
Commissionerate, Thane 400 601.)...**Respondents**

Shri V. V. Joshi, learned Advocate for the Applicant.

Shri A. J. Chougule, learned Presenting Officer for the Respondents.

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

DATE : 12.03.2021

J U D G M E N T

The Applicant has challenged the orders dated 03.04.2017 and order dated 12.06.2017 whereby after retirement sum of Rs.1,96,950/- has been adjusted from his gratuity invoking Section 19 of the Administrative Tribunal Act, 1985.

2. The facts lie in narrow compass :-

The Applicant stands retired as Sr. Police Inspector, Ulhasnagar on 31.03.2017. It is after retirement, the department noticed excess payment of Rs.1,96,950/- while fixation of pay on his promotion from 2008 onward. The Respondent No.2 – Commissioner of Police, Thane,

therefore, by impugned order dated 03.04.2017 directed to re-fix the pay and allowances of the Applicant and to recover excess payment. Accordingly, sum of Rs.1,96,950/- found paid in excess since 2008 and it was proposed to be adjusted from the gratuity payable to the Applicant after his retirement. Accordingly, the office of Accountant General, Mumbai deducted the said amount from the gratuity of the Applicant which is under challenge in the present O.A. with direction to the Respondent to repay the amount recovered from his gratuity.

3. Shri V. V. Joshi, learned Counsel for the Applicant sought to assail the impugned action contending that recovery after retirement from gratuity without giving any show cause notice and abiding principles of natural justice is illegal and secondly the recovery after retirement is impermissible 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.**

4. Per contra, Shri A. J. Chougule, learned Presenting Officer for the Respondents sought to support the impugned action contending that recovery is permissible in terms of Rule 132(3)(b) of Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as 'Rules, 1982' for brevity) and secondly, the Applicant being Group -A officer, the decision of the Hon'ble Supreme Court in **Rafiq Masih's** case is not applicable.

5. Indisputably, the Applicant stands retired on 31.03.2017 from the post of Sr. Police Inspector. The excess payment was paid to him on account of wrong fixation w.e.f. 30.01.2008 as evident from impugned order dated 03.04.2017. As such, it was a mistake on the part of the department committed while fixing pay of the Applicant and no fraud or misrepresentation can be attributed to the Applicant. The mistake was noticed by the department only after retirement of the Applicant. It is for the first time by order dated 03.04.2017, Respondent No.2 Commissioner of Police ordered for re-fixation and to recover the excess payment. Accordingly, from gratuity sum of Rs.1,96,950/- was deducted and

remaining amount was paid to the Applicant. Admittedly, no notice was given to the Applicant.

6. True, as per Rule 132 of 'Rules 1982', Government dues can be adjusted against the amount of gratuity of a Government servant . Government dues in terms of Section 132 (3) includes over payment of pay and allowances, dues other than those pertaining to government accommodation namely balance of house building or conveyance on any other advance over payment of pay and allowances or leave, salary, arrears of IT return at source under the Income Tax Act, 2019. Thus over payment of pay and allowances is included in government dues and those can be recovered or adjusted against the amount of gratuity.

7. Whereas, Section 134 (A) of 'Rules 1982' provides for recovery and adjustment after retirement about excess amount paid to a Government servant during his services. Section 134(A) of 'Rules 1982' is material which is as under

134(A): If in the case of a Government servant, who has retired or has been allowed to retired, it is found that due to any reason whatsoever an excess amount has been paid to him during the period of his service including service rendered upon re-employment after retirement or any amount is found to be payable by the pensioner during such period and which has not been paid by, or recovered from him, then the excess amount so paid or the amount so found payable shall be recovered from the amount pension sanctioned to him :

Provided that the Government shall give a reasonable opportunity to the pensioner to show cause as to why the amount due should not be recovered from him :

Provided further that the amount found due may be recovered from the pensioner in instalments so that the amount of pension is not reduced below the minimum fixed by Government."

8. As such, in view of first proviso, before recovery, an opportunity of hearing to the pensioner is mandatory and notice needs to be given. In the present case, no such notice was given to the Applicant. Resultantly, there is no compliance of Section 134(A) of 'Rules, 1982'. Apart, in view of the decision of the Hon'ble Supreme Court in **Rafiq Masih's** case, recovery is impermissible. True, the Applicant retired as Group-A officer. However, admittedly no undertaking was given by the Applicant when excess payment was made to him.

9. In case of **Rafiq Masih's** case, the question posed before the Hon'ble Supreme Court was whether the employee against whom an order of recovery on account of excess payment are made should be exempted in law and whether it is permissible to recover such amount after retirement. The Hon'ble Supreme Court after considering its various earlier decisions has culled out certain situations wherein recovery by the employer would be impermissible in law. In Para No.12 of the judgment, it is stated 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.*

10. True, the Applicant retired as a Class-I officer, and therefore, applicability of Clause -1 is ruled out. The submission advanced by learned P.O. that the decision in **Rafiq Masih's** case is applicable to Group -D and C employee only is misconceived. The Hon'ble Supreme Court has culled out five situations and out of which, situation No.(i) is in respect of Group -D and C employees. In so far as Class-II, III and V are concerned, the benefit of it, is not restricted to Group -C and D employees otherwise specific reference of Group-C and D would have find place but it is not so. In present case, excess payment has been made for a period excess of five years before the order of recovery is issued which attract clause (iii) of Para No.12 of the judgment. Apart, clause (ii) & (v) also attracted since recovery is iniquitous as well as arbitrary.

11. The totality of the aforesaid decision leads me to sum up that action of recovery is arbitrary and unsustainable in law and O.A. deserves to be allowed. Hence the following order :-

ORDER

- (A) O.A. is allowed.
- (B) Impugned order dated 03.04.2017 is quashed and set aside.
- (C) Respondents are directed to refund Rs.1,96,950/- deducted from the gratuity of the Applicant within two months from today.
- (D) No order as to costs.

Sd/-

(A.P. KURHEKAR)
MEMBER (J)

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