

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.426 OF 2019

DISTRICT : SOLAPUR

Shri Pratap D. Mule.)
Age : 58 Yrs., Retired as Multi Purpose)
Health Worker, in the Office of District)
Malaria Officer, Pandharpur, Solapur and)
Residing at A/p. Sakat, Tal. Barshi,)
District : Solapur- 413 401.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through the Secretary,)
Health Department, Mantralaya,)
Mumbai.)
2. The Director.)
Public Health Department,)
Arogya Bhavan, Mumbai.)
3. The Joint Director.)
Health Services (Malaria & Filariasis,)
Water Born Diseases), Arogya)
Bhavan, Parivartan Building,)
Opp. Vishrantwadi Police Station,)
Pune – 6.)
4. The Assistant Director.)
Arogya Bhavan, Parivartan Building,)
Opp. Vishrantwadi Police Station,)
Pune – 6.)
5. The District Malaria Officer.)
Ujani Vasahat, Opp. Datta Mandir,)
Pandharpur, District : Solapur.)

6. The Senior Accounts Officer.)
 Indian Audit & Accounts Dept.,)
 Office of Accountant General)
 (Accounts & Entitlements)-1,)
 Pratishtha Bhavan (Old CGO)
 Building), 101, Maharshi Karve Marg)
 Mumbai – 20.)
7. District Treasury Officer.)
 Collector Compound, 1st Floor,)
 Main Building, Sidheshwar Peth,)
 Solapur – 413 001.)...**Respondents**

Mr. M.B. Kadam, Advocate for Applicant.

Mr. A.J. Chougule, Presenting Officer for Respondents.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 11.11.2019

JUDGMENT

1. In the present Original Application, the Applicant has challenged the impugned communication dated 28.11.2015 and 27.04.2018 whereby the recovery of excess payment paid to him during the service is sought to be recovered after retirement.

2. The Applicant was appointed initially on Group 'D' post as Field Worker in Health Department in 1985. During the course of service, the benefit of first Time Bound Promotion (TBP) as well as benefit of 5th and 6th Pay Commission was extended to him. He stands retired on 31.05.2018. He was given the benefit of TBP from 1997. However, it was transpired that the sum of Rs.3,66,265/- was paid in excess to the Applicant for the period from 07.10.1997 to 31.10.2015 though the actual monetary benefit was extended in 2013. The Respondent No.5 – District Malaria Officer, therefore, issued communication on 28.11.2015 to recover Rs.3,66,265/- from the Applicant and further

directions were given to deduct Rs.7,000/- per month from his salary onwards November, 2015. Accordingly, for two months, the salary was deducted at the rate of Rs.7,000/- per month. However, later, from the request of Union, the recovery was stayed in the matter of Applicant as well as in the matter of Shri Swamy, Shri Mujavar and Shri Ghorpade by order dated 18.01.2016. The Applicant has, therefore, filed the present O.A. challenging the impugned communication contending that the recovery of the excess payment made to him is not permissible after retirement in view of Judgment of Hon'ble Supreme Court in **(2015) 4 SCC 334 (State of Punjab & Ors. Rafiq Masih & Ors.)**.

3. The Respondents resisted the application contending that the Applicant himself by his letter dated 28.05.2018 had given consent for recovery of excess amount from his gratuity, and therefore, the recovery cannot be faulted with.

4. Shri M.B. Kadam, learned Advocate for the Applicant submits that the recovery of excess payment made to the Applicant during the course of tenure is not permissible in view of Judgment of Hon'ble Supreme Court in **Rafiq Masih's** case and the consent letter dated 28.05.2018 was obtained under distress and in any case, in the light of Judgment of Hon'ble Supreme Court, it should not have been acted upon and course of action adopted by the Respondents is totally impermissible.

5. Per contra, Shri A.J. Chougule, learned Presenting Officer sought to justify the recovery in view of Undertaking dated 28.05.2018 given by the Applicant.

6. Thus, what emerges from the record that the sum of Rs.3,66,265/- was sought to be recovered which was paid in excess towards the benefit of TBP for the period from 1997 to 2015.

Admittedly, the Applicant retired as Class-III employee on 31.05.2018. No fraud or any kind of misrepresentation is attributed to the Applicant for the excess payment. It was the Department which granted excess payment mistakenly and it is now sought to be recovered from the gratuity. The Applicant's gratuity Rs.2,37,738/- is sought to be adjusted towards excess payment and remaining Rs.1,14,527/- is sought to be recovered from pension.

7. As pointed out by the learned Advocate for the Applicant in case of Shri C.S. Swami - the colleague of Applicant, the recovery is quashed by this Tribunal in O.A.1077/2017 decided on 27.11.2018. The case of the Applicant is similar to the case of Swami with only difference of Undertaking given by the Applicant on 28.05.2018.

8. As regard Undertaking given on 28.05.2018, the Applicant has filed Affidavit-in-Rejoinder wherein he explained that the Undertaking was taken in distress. In Para No.4 of Affidavit-in-Rejoinder, he explained as follows :-

“4. With reference to Letter dated 28.05.2018 annexed as Exh. R-2 to the affidavit-in-reply, I say and submit as under:

I say that my wife is cardiac patient, and had undergone cardiac surgery in the year 2010. Again in the year 2018 she started suffering cardiac problem, and hence her treatment for the same was going on when the papers of retirement benefits were under preparation. At that time the then District Malaria Officer, Pandharpur, District Solapur, informed me that unless I sign the papers as suggested by him, I would not get pension. I was not aware that such recovery is not permissible from my retiral benefits. Besides, because of ongoing treatment of wife I was in dire need of money. Therefore, under pressure of getting pension at the earliest, I signed whatever papers the then DMO suggested to sign. It is thus, the letter dated 28.05.2018 was brought into existence. The copies of some of the documents of medical treatment of my wife which are at

present available with me are annexed hereto and marked as Annexure – “J-1”. I crave leave to produce more documents of wife’s treatment if so found necessary.

I say that in view of mandate of Apex Court, it is not open for Respondents to make recovery from my retiral benefits, particularly when the excess payment, if any, is not attributable to misrepresentation or fraud on my part. Thus the act of recovering amount from my retiral benefit is illegal. The recovery from my retiral benefits is void-ab-initio. The thing which is void-ab-initio cannot be legalized even by consent, more so when the consent was obtained/given under circumstantial pressure.”

9. True, the Applicant himself has given Undertaking, but at the same time, he has explained that his pension was withheld, and therefore, in compelling circumstances, he has given the Undertaking.

10. In fact, the issue whether the recovery from the retiral benefits is permissible is no more *res-integra* in view of decision of Hon’ble Supreme Court in **Rafiq Masih’s** case. In Para No.12, the Hon’ble Supreme Court held as follows :-

“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."*

11. As such, the benefit even if given mistakenly for no fault or misrepresentation on the part of Applicant employee cannot be withdrawn and the amount cannot be recovered from the pensionary benefits. In the present case also, no *malafide* or misrepresentation or fraud is attributable to the Applicant. He was admittedly appointed as a Group 'D' employee and later was promoted in Group 'C'. At the time of retirement, he was holding Group 'C' post. This being the position, the present case is squarely covered by the principles laid down by the Hon'ble Supreme Court in **Rafiq Masih's** case.

12. Reliance was also placed on the Judgment of Hon'ble Bombay High Court in **2017(2) ALL M.R. 177 (Lata G. Wankhede Vs. State of Maharashtra)** wherein again, it has been held that the State is not entitled to recover the excess amount paid to the employee towards the salary and other benefits after retirement, if no misrepresentation or fraud is attributable to the employee. Suffice to say that the amount mistakenly paid to an employee in excess while in service, there being no misrepresentation or fraud on the part of employee cannot be recovered from the employee after his retirement.

13. In so far as Undertaking given by the Applicant is concerned, in view of mandate of the Judgment of Hon'ble Supreme Court that no recovery is permissible in law, no much importance can be given to the Undertaking, particularly when the Applicant is Class-III employee and where his case squarely falls within the parameters laid down in Hon'ble Supreme Court in Para No.12 of the Judgment. The

Applicant has also explained that the Undertaking was given in distress and in compelling circumstances. The Applicant being Group 'C' employee was not in a position to bargain and seems to have given Undertaking under distress. It is normal practice to obtain the Undertakings from the employees. *Necessitas non habet legem* is an age-old maxim which means necessity knows no law. The Applicants being Group 'C' employees, he was not in a position to bargain with the Government who is in stronger/dominant position. This aspect cannot be forgotten.

14. As such, when the recovery itself is held not permissible in law, no recovery can be justified on the basis of Undertaking obtained from the Applicant under distress. If the particular thing or action is held not permissible in law, then it cannot be legalized taking shelter of Undertaking to the detriment of his interest. It is the law of land which will prevail.

15. For the aforesaid discussion, I have no hesitation to sum-up that the Applicant's case is squarely covered by the decision of Hon'ble Supreme Court in **Rafiq Masih's** case and Undertaking have no sanctity in law, nor it can be pitted against the decision of Hon'ble Supreme Court. The impugned orders are, therefore, unsustainable in law and deserve to be quashed. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned communications dated 28.11.2015 and 27.04.2018 requires to be set aside.
- (C) The recovery is held impermissible.

- (D) The amount recovered from the Applicant be returned to him within two months from today.
- (E) No order as to costs.

Sd/-
(A.P. KURHEKAR)
Member-J

Mumbai

Date : 11.11.2019

Dictation taken by :

S.K. Wamanse.

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