

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

**ORIGINAL APPLICATION NO.890 OF 2017
WITH
MISC. APPLICATION NO.67 OF 2019**

DISTRICT : NASHIK

Shri Uttamrao P. Ugale.)
Age : 61 Yrs., Retired as Assistant)
Photographer from the office of below)
named Respondent No.1, R/o. Parijat,)
480/9, Dyaneshwar C.H.S.Ltd.,)
Konark Nagar, Nashik – 3.)...**Applicant**

Versus

1. The Superintendent of Police.)
Nashik [Rural], Nashik having)
Office at Nashik.)
2. The State of Maharashtra.)
Through Principal Secretary,)
Home Department, Mantralaya,)
Mumbai – 400 032.)...**Respondents**

Mr. A.V. Bandiwadekar, Advocate for Applicant.

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

CORAM : SHRI A.P. KURHEKAR, MEMBER-J

DATE : 04.02.2020

JUDGMENT

1. The Applicant has challenged the impugned order dated 23.08.2016 whereby his representation dated 06.06.2016 for refund of Rs.4,48,724/- deducted from retiral benefits stands rejected.

2. Shortly stated facts giving rise to this application are as under:-

The Applicant stands retired as Assistant Photographer from the establishment of Respondent No.1 – Superintendent of Police, Nashik Rural, Nashik. When he was at the verge of retirement in view of objection raised by Pay Verification Unit, it was revealed that some excess payment was paid to the Applicant because of incorrect fixation of pay scale from 1994. The Applicant was, therefore, directed to deposit Rs.4,48,724/- and produce copy of Challan by order dated 01.09.2014. The Applicant stands retired on 31.07.2014 on attaining the age of superannuation. In pursuance of order dated 01.09.2014, sum of Rs.4,48,724/- was recovered from his retiral benefits. The Applicant later made representation on 06.06.2016 requesting the Respondents to refund the said amount in view of decision of Hon'ble Supreme Court in **(2015) 4 SCC 334 (State of Punjab and others Vs. Rafiq Masih (White Washer))**. However, the representation dated 06.06.2014 is rejected by order dated 23.08.2016, which is challenged by the Applicant in the present O.A.

3. In reply, the Respondents initially did not dispute the point of limitation and on the contrary, the statement was made in written statement that the O.A. is within limitation. In so far as the recovery is concerned, the Respondents sought to justify the action of recovery contending that the Applicant was not entitled to pay scale granted to him right from 1994, and therefore, having noticed the same, his pay was re-fixed and accordingly, the excess amount of Rs.4,48,724/- was rightly recovered from his gratuity and other retiral benefits.

4. During the course of hearing, the learned P.O. raised the plea of limitation despite the admission in the reply admitting the Applicant's pleading that O.A. is within limitation. Therefore, the Applicant has filed M.A.67/2019 for condonation of delay, which is being considered along with O.A.

5. In view of above, the issue posed for consideration is whether the O.A. is within limitation and secondly, as to whether he is entitled to refund of Rs.4,48,724/-.

6. Heard Shri A.V. Bandiwadekar, learned Advocate for the Applicant and Shri A.J. Chougule, learned Presenting Officer for the Respondents.

7. Indisputably, the Applicant stands retired from the post of Assistant Photographer w.e.f.31.07.2014. For the first time, the Respondent No.1 issued order dated 01.09.2014 directing the office to recover Rs.4,48,724/- from the retiral benefits of the Applicant, that too, giving any notice to the Applicant. It is in pursuance of order dated 01.09.1994, sum of Rs.4,48,724/- has been deducted from the gratuity and other retiral benefits of the Applicant without giving opportunity of hearing. Thereafter, the Applicant came to know about the decision of Hon'ble Supreme Court in **Rafiq Masih's** case (cited supra) wherein the Hon'ble Supreme Court held that the recovery from the retiral benefits of Group 'C' employee is impermissible. It is in pursuance of this decision, the Applicant made representation on 06.06.2016, which is rejected by impugned order dated 23.08.2016 on the ground that in view of undertaking given by the Applicant on 20.05.2009, he cannot question the recovery of excess payment paid to him. As regard decision of Hon'ble Supreme Court, in impugned order it is stated that for refund of such amount on the basis of decision of Hon'ble Supreme Court, the Government is required to issue appropriate order and in absence of it, no refund can be granted.

8. The issue of recovery of excess payment from the retiral benefits of the employee particularly Group 'C' employee, is no more *res-integra* in view of decision of Hon'ble Supreme Court in **Rafiq Masih's** case. Hon'ble Supreme Court held that in following circumstances, it would be impermissible for the employer to recover the amount from the employee.

- (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.*

9. Turning to the facts of the present case, admittedly, the Applicant retired as Group 'C' employee. The recovery was made in respect of excess payment made to him on account of wrong fixation of pay scale from 1994. Thus, the excess payment was made from 1994 to 2013, which is recovered only after retirement of the Applicant, that too, without giving any notice to him. The Applicant had no role to play in fixation of pay scale. He was placed in wrong pay scale because of mistake on the part of Department. As such, no fault, fraud or mistake can be attributed to the Applicant. Suffice to say, wrong fixation was due to sheer inadvertence of the Department. In **Rafiq Masih's** case, the Hon'ble Supreme Court held that where no fraud or misrepresentation is attributable to the employee, then no such recovery is permissible from the retiral dues of the employee. As such, the present case squarely falls

within the parameters or circumstances (i), (ii) and (iii) mentioned in the decision of **Rafiq Masih's** case.

10. True, in the present case, the amount was recovered in 2014 after retirement of the Applicant and the decision in **Rafiq Masih's** case is of 2015. It is on the basis of decision in **Rafiq Masih's** case, the Applicant later made representation on 06.06.2016 for refund of amount, but the same has been rejected. In this behalf, the learned Advocate for the Applicant referred to the decision of Hon'ble High Court, Aurangabad Bench in **Writ Petition No.5367/2016 (Ravindra Patil Vs. State of Maharashtra) decided on 18.07.2017** and decision in **Writ Petition No.695/2016 (Prabhakar More & Ors. Vs. State of Maharashtra) decided on 12th February, 2018**. In **Writ Petition No.5367/2016**, the retired A.S.I. sought refund of the recovery made in 2012 on the basis of decision in **Rafiq Masih's** case. Hon'ble High Court directed for refund of amount with interest at the rate of 10% p.a. Whereas, in **Writ Petition No.695/2016**, 21 retired Police Personnel sought refund of the amount recovered from retiral benefits. In that case, those Police Personnel were retired in between 2007 to 2014. The State opposed the Writ Petition on the ground of delay in filing Writ Petition. However, the Hon'ble High Court turned down the objection and directed for refund of Rs.14,14,026/- with interest at the rate of 10% p.a. As such, in both the decisions, though the amount was recovered before the decision in **Rafiq Masih's** case, the Hon'ble High Court directed to refund the amount in view of the decision in **Rafiq Masih's** case that recovery itself is permissible. This being the position, the claim of the present Applicant for refund of Rs.4,48,724/- can hardly be opposed.

11. In-so-far as the Respondents' contention about undertaking is concerned, it seems to have been given in 2009 at the time of revision of pay. Whereas, amount recovered is towards excess amount paid to the Applicant in fixation of wrong pay scale from 1994. It is nowhere the case of the Respondents that any such undertaking is given in 1994.

This being the position, the issue of undertaking hardly be of any assistance to the Respondents. Suffice to say, the alleged undertaking of 2009 has no relation with the re-fixation of pay and the order of recovery. Indeed, in Writ Petition No.5367/2016 referred to above, the same contention was raised by the Government and in similar situation, it was turned down.

12. As such, the recovery of Rs.4,48,724/- from the retiral benefits of the Applicant is totally unsustainable in law and Respondents are required to refund the same.

13. In-so-far as limitation is concerned as stated above, initially, the Respondents in reply admits Applicant's contention that the O.A. is within limitation. However, when the matter was taken up for final hearing, an objection was raised by the learned P.O. on the part of limitation, and therefore, the Applicant has filed M.A.No,67/2019 for condonation of delay contending that, indeed, there is no delay as the O.A. is filed well within one year from the impugned order dated 23.08.2016 whereby the representation of the Applicant for refund of amount is rejected. However, in the alternative, the Applicant seeks condonation of delay of one year and nine months, if the delay is counted from the date of deduction of amount from retiral benefits.

14. Indeed, in view of decision of Hon'ble Supreme Court in **Rafiq Masih's** case, the representation made by the Applicant ought to have been allowed but the same was rejected on the ground of undertaking allegedly given by the Applicant in 2009 and on the ground that, for refund, the Government is required to issue separate orders. Once, the recovery itself is held impermissible in law, the request of the refund cannot be resisted on such technical ground of delay, as matter pertained to refund of the amount of pensioner from his retiral benefits. As such, there is no such intentional lapse or negligence on the part of

Applicant, so as to defeat his genuine claim. I am, therefore, inclined to allow the M.A. for condonation of delay.

15. The totality of aforesaid discussion leads me to sum-up that the impugned order dated 23.08.2016 is not sustainable in law and Applicant is entitled for refund of Rs.4,48,724/-. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned order dated 23.08.2016 is quashed and set aside.
- (C) The Respondents are directed to refund of Rs.4,48,724/- within six weeks from today.
- (D) No order as to costs.

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

Mumbai
Date : 04.02.2020
Dictation taken by :
S.K. Wamanse.