MAHARASHTRA ADMINISTRATIVE TRIBUNAL

NAGPUR BENCH NAGPUR

ORIGINAL APPLICATION NO. 41/2018 (S.B.)

Smt. Kavita Wd/o Sharad Fule,
Aged about 54 years, Occ. Nil,
R/o Santaji Ward, Kazi Nagar,
Bhandara, Tah. & Dist. Bhandara.

Applicant.

Versus

1) The State of Maharashtra,
Through it's Secretary,
Ministry of Health & Family Welfare,
Main Building Mantralaya,
Mumbai- 400 032.

2) Medical Superintendent,
Sub-District Hospital, Chimur,
Chandrapur, Maharashtra.

3) Assistant Accountant General,
Office of the Accountant General (A&E)-II,
Post Box No. 114, GPO, Nagpur-440 001.

4) The District Treasury Officer,
Bhandara, Tah. & Dist. Bhandara.

Respondents

Shri P.Chakole, the ld. Advocate for the applicant.

Shri A.M.Khadatkar, the ld. P.O. for the respondents.

Coram :- **Hon'ble Shri M.A.Lovekar, Member (J).**

JUDGMENT

Judgment is reserved on 16th Oct., 2023.

Judgment is pronounced on 31st Oct., 2023.

Heard Shri P.Chakole, ld. counsel for the applicant and Shri A.M.Khadatkar, ld. P.O. for the Respondents.

2. Case of the applicant is as follows. Sharad Fule, husband of the applicant, was working in the respondent department. He retired in September, 2016. He died on 09.05.2017. The applicant received a copy of the impugned order dated 20.11.2017 (A-2) which stated:-

> उपरोक्त विषयांकित प्रकरणी श्री. एस. एन. फुले, कनिष्ठ लिपीक (से.नि.) यांचे सेवाकाळात चुकीची वेतननिश्चिती झाल्याने, त्यांना देय नसलेले वेतन अदा झाल्याने वेतन पडताळणी पथक यांचा आक्षेप असल्यामुळे त्यांचे अतिप्रदान वेतनाची वसुली करणे क्रमप्राप्त आहे. श्री.एस.एन.फुले, कनिष्ठ लिपीक (से.नि.) यांच्या कार्यालयाकडे उपदानाचे देयक रु. २३६४४५/- व भविष्य निर्वाह निधी चे देयक रुपये २९६०९८/- असे एकूण रुपये ५३२५४३/- या कार्यालय स्तरावर ठेवण्यात आलेले होते.
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> त्यानुसार श्री एस.एन.फुले कनिष्ठ लिपीक (से.नि.) यांना झालेली अतिप्रदान वेतनाची रक्कम रु. ३,६१,४०९/- याव्दारे वसुल करुन, चालानने शासन खाती भरणा करण्यात येत आहे. करीता माहितीस व पुढील आवश्यक कार्यवाहिस आपणास सविनय सादर.

Said recovery is impermissible. Hence, this Original Application.

3. Stand of contesting respondent (R-2) is that what was admittedly an excess payment was recovered and this was done on the basis of an undertaking given by husband of the applicant (A-R-3). The undertaking read as follows:-

जोडपत्र - दोन

वचनपत्र

मी असे वचन देतो की, चुकीच्या वेतन निश्चितीमुळे किंवा पुढे वेतननिश्चितीमध्ये विसंगती आढळून आल्यामुळे मला अतिप्रदान झाल्याचे निदर्शनास आल्यास ते भविष्यात मला प्रदान करण्यात येणाऱ्या रकमेतून समायोजित करून किंवा इतर प्रकारे मी शासनास परत करीन.

4. To assail permissibility of the impugned recovery the applicant has relied on **State of Punjab and Ors. Vs. Rafiq Masih & Ors. 2015 (4) SCC 334** wherein it is held:-

> 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 hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
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> (1) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
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> (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
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> (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.

In reply, the respondents have relied on **judgment dated 23.07.2019 of Hon'ble Bombay High Court (Nagpur Bench) in W.P. No. 4919/2018** wherein it is held:-

The State has questioned the legality and correctness of the view expressed in the Original Application No.578/2016, decided along with other connected matters on 18th April, 2017 by Maharashtra Administrative Tribunal, Nagpur Bench, Nagpur. This order takes a view that for the Class-III employee of the State who has retired or is about to retire, the prohibition contained in **State of Punjab and others vs. Rafiq Masih, reported in (2015)4 SCC 334** brings benefits and so the State cannot pass any order of recovery of excess payment of salary made to him by mistakenly fixing higher pay scale, which, according to State, is incorrect.

Ms. Ketki Joshi, learned A.G.P. invites our attention to the undertaking dated 31.8.2010 submitted by the petitioners to the State. This undertaking has been given by the petitioners to the State while accepting grant of higher pay scale to them. It says that if any mistake in pay fixation is detected at a later stage, the author of the undertaking would refund the excess payment to him by letting the employer adjust the excess payment from the payments to be made to the employee or by resorting to any other recovery mode. According to the learned counsel for the respondents, this undertaking was only of casual nature not intended to be acted upon by the respondents and if such an undertaking had not been given to them, the respondents would not have been granted the benefits of higher pay scale and as such, the undertaking needs to be ignored.

The argument submitted in defence is fallacious. An undertaking has the effect of solemnity in law and if argument is to be accepted which has been submitted on behalf of the respondents, the

majesty of law would be lowered and there would be a travesty of justice. Besides, the undertaking is about wrong pay fixation and consequent excess payment. The undertaking is not about grant of higher pay on the basis of right pay fixation. Had it been an undertaking as regards the later dimension of the case, one could have perhaps said that the undertaking was only a formality. When the undertaking takes into account the contingency of the wrongful pay fixation, the undertaking has to be said to have been given intentionally and with a view to be acted upon, in case the contingency did really arrive.

So, what we have before us is an undertaking given consciously and intentionally by the respondents and the respondents would have to be held bound by this undertaking. That means in the present case, no equity whatsoever has been created in favour of the respondents while making the excess payment and as such there is no question of any hardship visiting the respondents.

The reason weighing with the Hon'ble Apex Court imposing prohibition against recovery of excess payment in Rafiq Masih (supra) was of hardship resulting from creation of awkward situation because of the mistake committed by the employer and there being no fault whatsoever on the part of the employee. In order to balance the equities created in such a situation, the Hon'ble Apex Court in Rafiq Masih, gave the direction that so far as Class-III and IV employees were concerned, and who were found to be not having very sound economic footing, would have to be exempted from the consequence of recovery of the excess payment, if considerable period of time has passed by in between. But, as stated earlier, even in case of such an employee, there would be no hardship for something which has been accepted by him consciously with an understanding that it could be taken away at any point of time, if mistake is detected. Clarifying the law on the subject, the Hon'ble Apex Court, in its recent judgment rendered in the case of **High Court of Punjab and Haryana and others vs. Jagdev Singh** reported in **2016 AIR (SCW) 3523**, in paragraph 11 it observed thus:

> "the principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking."

The fact situation of the present case is squarely covered by the above referred observations. These are the crucial aspects of the present case and the Maharashtra Administrative Tribunal, Nagpur

Bench, Nagpur appears to have missed out on them and the result is of passing of an order which cannot be sustained in the eye of law.

The applicant has further relied on **judgment of the Bombay High Court dated 27.03.2023 in W.P. No. 4835/2021** wherein it is held:-

> Thus, the supreme court in plethora of decisions, more particularly, in decision of Rafiq Masih (supra) has consistently held that the excess amount, which is not paid on account of any misrepresentation or fraud of the employee, are not recoverable later on.
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> Our attention has been drawn by the learned Counsel appearing for the respondents on the decision of the Supreme Court in **High Court of Punjab and Haryana and ors. Vs. Jagdev Singh reported in (2016) 14 SCC 267**, wherein after considering one of the situations enumerated in the decision in the case of **Rafiq Masih** (supra), the Supreme Court in paragraph no 11, has held as under:
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>> The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.
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> Taking help of this decision the learned Counsel for the respondents vehemently submits that the ratio of the decisions in case of **Jagdev Singh** (supra) is applicable to the present case, since, in the present case, also as the deceased employee had given an undertaking that in case of any excess payment made by the employer the same can be recovered from him.
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> The Supreme Court in **Rafiq Masih** (supra) has summarized some of the situations wherein the recovery by the employer would be impermissible in law. While enumerating the situations, the Supreme Court has also mentioned that it is not possible to postulate all situations of hardship which would govern the employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Thus, the situations enumerated in the paragraph no. 18 in the decision of Rafiq Masih (supra) are not exhaustive. There may be various other situations

which may create hardship to the employee on the issue of recovery, rather in the situation (v) enumerated in the case of Rafiq Masih (supra), the Supreme Court has mentioned if in any other case, if the recovery sought to be made is iniquitous or harsh to such an extent that it outweigh the equitable balance of the employer's right to recover, should be impermissible. The reason for this may be found in paragraph no. 8 in the case of Rafiq Masih (supra), which is reproduced below:-

> 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 it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.

Thus, the relief against the recovery of excess amount is granted not because of any right of the employee, but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered. The matter being in the realm of judicial discretion, the Court may on the facts and circumstances of any particular case order for recovery of amount paid in excess.

In the case of Jagdev Singh (supra), the employee was alive. He was getting full pension and the recovery was sought within a year from the date of his compulsory retirement. Considering the facts and circumstance of the said case, their Lordships under judicial discretion have held that when the officer has furnished an undertaking to refund the excess amount while opting for revised basic scale, is bound by the undertaking and the employer's recovery of excess amount was held valid.

Here is the case, where the deceased employee died in the year 2016 while he was in service. In the year 2002, his grade pay was fixed. In the year 2009, he had given an undertaking to refund the amount if excess amount is paid due to incorrect fixation of pay grade by the respondent no.2. Now, after 16 years and almost five years after the death of the deceased employee, the respondent no.2 comes up with the case that it had fixed the grade pay of the deceased employee

incorrectly and the petitioner - widow of the deceased employee has been asked to consent for recovery of the excess amount paid to the deceased employee from family pension.

It appears from the record that the petitioner, who is widow is not earning and is doing household work. Considering her age, it is also obvious that her children are also dependent upon her. She is getting Family Pension of Rs.14,250/- per month which is already 50% of the original pension. Whereas, an excess amount of Rs.2,62,841/- is sought to be recovered. Considering the facts that the deceased employee who died in his early age during his service leaving behind him, a widow and children; the time gap of 16 years, when the amount has been sought to be recovered; the quantum of recovery amount and the amount of Family Pension; we are of the opinion, that it would be iniquitous and harsh to effect the recovery from the Family Pension of the petitioner, who is a widow and dependent entirely on her Family Pension. Though, the deceased employee had, at the time of fixation of his salary, given the undertaking but considering the situation mentioned above, it will not be permissible to recover the excess amount of Rs.2,62,841/- from the Family Pension of the petitioner.

The applicant has further relied on **State of Maharashtra & Ors. Vs. Rekha Vuay Dubey, CLR 630 : (2021) 171 FLR 863** wherein it is held:-

First, the undertaking given by the respondent in Jagdev Singh (supra), while opting for the revised pay-scale, was in pursuance of the Haryana Civil Service (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules, 2001. Since the respondent had submitted an undertaking under the said Rules that he would refund to the Government any amount paid to him in excess either by adjustment against future payment due or otherwise, he was held to be bound by such undertaking. Additionally, the respondent had not retired from service on superannuation but he was compulsorily retired from service. Also, the respondent being a judicial officer was not holding a Class III/Group 'C post on the date he was compulsorily retired. It is in such circumstances that the Supreme Court held that the respondent was bound by the undertaking given by him and that the Government was justified in its action of seeking to recover excess payment that was made. That is not the case here. The facts here are quite dissimilar and, therefore, having regard to the settled proposition of law that a judgment is an authority for what it decides and not what can logically

be deduced therefrom, we hold the decision in Jagdev Singh (supra) to be distinguishable on facts.

The other reason for which we are not inclined to hold that Jagdev Singh (supra) has application to the facts of this case is because of situations (i) and (iii) forming part of paragraph 18 of Rafiq Masih (supra). Situation (i) clearly bars recovery from employees belonging to Class III/Group C service. Further, situation (iii) bars recovery from employees when excess payment has been made for a period in excess of 5 (five) years before the order of recovery is issued. We are not inclined to accept the contention of Mr. Pathan that although recovery from employees belonging to Class III/Group C cannot be made in terms of situation (i) (supra) while in service, such recovery could be made from retired Class III/Group C employees who have either retired or are due for retirement within one year of the order of recovery. If we were to accept Mr. Pathan's contention, it would lead to a situation that although there could be a declaration given by a Class III/Group C employee while in service that excess payment could be recovered from him from future salary to be paid to him, which cannot be recovered in terms of situation (i), but in terms of situation (ii), as interpreted in Jagdev Singh (supra), recovery could be effected from his retirement benefits after the relationship of employer-employee ceases to subsist. Rafiq Masih (supra), very importantly, carves out situation (v) (supra) too, proceeding on the premise that recovery from retirement benefits, by asking the retired employee to refund excess amount, if any, received by him, if found to be iniquitous and arbitrary and thereby causing hardship, such a step ought to be avoided. This being the reasoning, it would be far-fetched that what the employer (State) cannot resort to against a Class III/Group C employee while he is in service, such employer would be empowered to do so after retirement of the Class III/Group C employee. If accepted, the same would amount to a distorted interpretation of the situations in Rafiq Masih (supra), which has to be eschewed. We are of the considered opinion that the Tribunal was right in distinguishing Jagdev Singh (supra) by observing that paragraph 11 of the said decision must be confined to Class I/Group 'A' and Class II/Group 'B' officers. Mr. Pathan has not been able to show that the original applicants gave the declaration/undertaking in pursuance of a statutory rule. That not having been shown, the contention raised by him on the basis of Jagdev Singh (supra) has to be rejected. We, however, leave the question open as to whether Jagdev Singh (supra) would apply to cases of Class III/Group C employees who by giving declaration, mandated by a statutory rule, undertake to refund any sum received in excess of their entitlement.

Thirdly, we, cannot also be ignorant of the factual situation in the present case that monies paid as part of salaries to the original applicants, which the State considers to constitute excess payment, has

> continued-for a period in excess of 5 (five) years prior to the order of recovery, which was made only after retirement of the original applicants on superannuation. This is one other ground that persuades us to hold in favour of the original applicants and against the State.
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> Fourthly and finally, we had enquired of Mr. Pathan as to whether any of the original applicants by acts of misrepresentation or fraud had been instrumental in receiving excess payment. Law is well-settled that fraud vitiates even the most solemn of acts. We would venture to observe that even if a Class III/Group C employee, say a year or so after retirement or before retirement, is found to have indulged in fraud, recovery of excess payment may not be barred on equitable principles. There ought to be zero tolerance of fraudulent acts. Fortunately, for the original applicants, Mr. Pathan's answer to our query was in the negative; hence, the recovery process must be held to have been correctly interdicted by the Tribunal.
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> Since we have rendered a decision on the basis of our interpretation "of the decisions in Rafiq Masih (supra) and Jagdev Singh (supra), we have not examined the other part of the Tribunal's judgment, by which it has been held that no excess payment was made in favour of the original applicants.

5. In view of legal position laid down in the cases of Rafiq, Sudha and Rekha (supra) which is applicable to the facts of the case since the deceased was a Class-III employee and recovery was effected after his death from the funds payable to the widow thereby making it inequitable, the impugned recovery cannot be sustained. For all these reasons the O.A. is allowed. Order of impugned recovery is quashed and set aside. The amount recovered shall be refunded to the applicant **within two months** from today. No order as to costs.

Member (J)

Dated :- 31/10/2023
aps

I affirm that the contents of the PDF file order are word to word same as per original Judgment.

Name of Steno	:	Akhilesh Parasnath Srivastava.
Court Name	:	Court of Hon'ble Member (J).
Judgment signed on and pronounced on	:	31/10/2023
Uploaded on	:	01/11/2023