IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NOS.255, 745 & 886 OF 2018

DISTRICT : PUNE

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ORIGINAL APPLICATION NO.255 OF 2018

Shri Arvind V. Chavan.)
Age : 59 Yrs., Occu.: Retired,)
Residing at Flat No.6, Atharva Terrace,)
S.No.12/2/2/3, Wadgaon Budruk,)
Anandnagar, Pune – 411 041.)**...Applicant**

Versus

1. The State of Maharashtra.)
Through Addl. Chief Secretary.)
Home Department, Mantralaya,)
Mumbai - 400 032.)

2. The Director General of Police.)
M.S, Old Vidhan Bhavan, Colaba,)
Mumbai – 400 001.)

3. The Commissioner of Police.)
Pune City, Pune – 411 001.)

4. The Accountant General (I) Maharashtra)
101, Maharshi Karve Road,)
Mumbai – 400 021.)**…Respondents**

WITH

ORIGINAL APPLICATION NO.745 OF 2018

Shri Narayan R. Gaikwad.)
Age : 60 Yrs., Occu.: Retired,)
Residing at S.No.65/2, Anjani Nagar,)
Near Traikya Gym, Pune – 411 041.)**...Applicant**

Versus

1. The State of Maharashtra & 3 Ors.)**…Respondents**

WITH

ORIGINAL APPLICATION NO.886 OF 2018

Shri Hanumant R. More.)
Age : 58 Yrs., Occu.: Retired,)
Residing at 104/24, Shivajinagar,)
Police Line, Modern College,)
Pune – 411 005.)**...Applicant**

Versus

1. The State of Maharashtra & 3 Ors.)**…Respondents**

Shri V.V. Joshi, Advocate for Applicants.

Ms. N.G. Gohad, Presenting Officer for Respondents in O.A.Nos.255 & 886/2018.

Ms. S. Suryawanshi, Presenting Officer for Respondents in O.A.No.745/2018

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

DATE : 05.02.2019

JUDGMENT

1. All these O.As arising from common issue are disposed of by this common Judgment.

2. Shortly stated facts giving rise to these applications are as follows :

In O.A.No.255/2018, the challenge is to the impugned order of recovery dated 07.04.2016 whereby sum of Rs.70,947/- was ordered to be recovered from the gratuity payment order. The Applicant stands retired from the post of ASI w.e.f.31.05.2016. During process of preparation of pension papers, the excess payment of Rs.70,947/- was noticed. The said excess payment was made in the year 1986 onward. The amount of Rs.70,947/- was deducted from the gratuity of the Applicant on 06.12.2016. The Applicant by notice dated 4th December, 2017 requested for refund of the said amount, but it was not responded. Hence, the Applicant has filed the present O.A. for declaration that the recovery is illegal and also sought direction for the refund of amount with interest.

3. The Respondent No.3 resisted the application by filing Affidavit-in-reply (Page No.48 of the Paper Book) *inter-alia* denying the entitlement of the Applicant for the reliefs claimed. The Respondent contends that the O.A. is barred by limitation. It is further contended that the aspect of payment of excess amount from 01.01.1986 onward was noticed by Pay Verification Unit, and therefore, the recovery has been ordered, which is legal and correct.

4. In O.A.No.745/2018, the Applicant has challenged the recovery of Rs.64,973/- effected from the payment of gratuity. The Applicant stands retired from the post of ASI on 29.02.2016. However, during verification of pension

papers, it was noticed that sum of Rs.64,973/- was paid in excess due to wrong fixation of pay and allowances w.e.f.01.09.2000. The Applicant contends that the recovery is illegal, and therefore, prayed for declaration to that effect as well as for the refund of Rs.64,973/- with interest.

5. The Respondent No.3 resisted the application by filing Affidavit-in-reply (Page No.45 of the P.B.) *inter-alia* justifying the recovery of Rs.64,973/-. As the aspect of excess payment during the period from 2000 onward was noticed during the verification of pension papers, the amount was rightly recovered from the gratuity of the Applicant. In this behalf, the Applicant contends that the recovery was made on the basis of Undertaking / consent given by the Applicant on 11.12.2015. Therefore, the challenge to the recovery is untenable.

6. The Applicant in O.A.No.886/2018 has challenged the recovery of Rs.2,22,125/- effected from his gratuity amount. The Applicant stands retired on 30.04.2018 from the post of PSI. After retirement, the sum of Rs.2,22,125/- has been recovered from gratuity on the ground that the excess payment on account of wrong fixation of pay and allowances was made onward 01.09.2000. The mistake was noticed at the time of processing pension papers. The Applicant contends that, such recovery after retirement from gratuity is not legal, and therefore, he prayed for declaration to that effect as well as for the refund of Rs.2,22,125/- with interest.

7. The Respondent No.3 resisted the application by filing Affidavit-in-reply (Page No.41 of the P.B.) *inter-alia* contending that the recovery of Rs.2,22,125/- from gratuity is legal. At the time of finalization of pension, it was noticed that the excess payment has been made while fixation of pay and allowances onward 01.09.2000, and therefore, the recovery is correct and legal.

8. Heard Shri V.V. Joshi, learned Advocate for the Applicants and Ms. N.G. Gohad and Ms. S. Suryawanshi, learned Presenting Officers for the Respondents.

9. Out of these three O.As, the plea of limitation is raised in O.A.255/2018 whereas in O.A.745/2018, the delay is already condoned in M.A.No.419/2018. In O.A.No.886/2018, the application has been filed well within one year on date of recovery, and therefore, the question of limitation was not raised.

10. As regard limitation in O.A.255/2018, it is material to note that the amount has been actually deducted from the gratuity of the Applicant on 06.12.2016. The Applicant made representation on 04.12.2017 and having not received any communication, filed this O.A. on 21.03.2018. It is material to note that in all these O.As, the action of recovery is challenged on the basis of Judgment of 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*** which laid down the ratio that the recovery of excess payment for no fault on the part of Government employee is not permissible from retiral dues. In this aspect, the Judgment of Hon'ble Supreme Court will be dealt with a little later. At this stage, suffice to note that the amount has been recovered in contravention of the Judgment of Hon'ble Supreme Court whereby the Applicant has been deprived from monetary benefits. This being the position, it is a case of continuous cause of action.

11. Furthermore, though the Applicant made representation on 04.12.2017, the Respondent did not pay any heed, and therefore, after waiting for reasonable time, the Applicant has approached this Tribunal. Thus, the Applicant has approached this Tribunal after availing the alternate remedy. Section 20 of Administrative Tribunals Act, 1985 provides that where the appeal or representation has not been decided within six months, then such aggrieved

person can approach the Tribunal within one year from the date of expiry of the period of six months. As such, considering this provision, the Applicant cannot be said barred by limitation.

12. In view of above, the question comes whether such recovery where excess payment is made for more than a decade is permissible. This issue is no more *res-integra* in view of Judgment in ***Rafiq Masih's*** case (cited supra) which has been followed consistently by this Tribunal and was also upheld by the Hon'ble High Court. In ***Rafiq Masih's*** case, the Hon'ble Supreme Court held as follows :

> "**11.** For the above determination, we shall refer to some precedents of this Court wherein the question of recovery of the excess amount paid to employees, came up for consideration, and this Court disallowed the same. These are situations, in which High Courts all over the country, repeatedly and regularly set aside orders of recovery made on the expressed parameters.
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> (i) Reference may first of all be made to the decision in Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475, wherein this Court recorded the following observation in paragraph 58:
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> > "58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See Sahib Ram v. State of Haryana, 1995 Supp. (1) SCC 18, Shyam Babu Verma v. Union of India, (1994) 2 SCC 521, Union of India v. M. Bhaskar, (1996) 4 SCC 416, V. Ganga Ram v. Director, (1997) 6 SCC 139, Col. B.J. Akkara (Retd.) v. Govt. of India, (2006) 11 SCC 709, Purshottam Lal Das v. State of Bihar, (2006) 11 SCC 492, Punjab National Bank v. Manjeet Singh, (2006) 8 SCC 647 and Bihar SEB v. Bijay Bahadur, (2000) 10 SCC 99." (emphasis is ours).
>
> First and foremost, it is pertinent to note, that this Court in its judgment in Syed Abdul Qadir's case (supra) recognized, that the issue of recovery revolved on the action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorised payment is detected within a short period

of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference because an action is iniquitous, must really be perceived as, interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements, and a variety of sundry expenses. Based on the above consideration, we are of the view, that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee." "

13. The Hon'ble Supreme Court having considered its earlier decisions in Para No.12 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, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(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."

14. Thus, the conspectus of the aforesaid decision is that, if the payment had been made for long duration of time, it would be iniquitous to make recovery particularly from employees of Group 'C' and Group 'D' on the principle that, the Government employee is primarily dependent on his wages and if any deduction is to be made from wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family, and therefore, they should not be subjected to ordeal of recovery even if they were the beneficiaries of receiving higher emoluments, then were due to them and such recovery would be iniquitous and arbitrary and also breach of the mandate contained in Article 14 of the Constitution of India.

15. As such, it is no more *res-integra* that the recovery of the excess payment made for no fault on the part of Government employee is not permissible. The wrong payment was made by the mistake of the Department and no fault or fraud is attributable to the Applicants.

16. In O.A.745/2018, the learned P.O. sought to contend that, in view of consent letter given by the Applicant, the recovery is legal. The Respondents have placed on record consent letter dated 11th December, 2015 to show that the Applicant has consented for refund from retiral benefits, if noticed. The learned P.O. also placed reliance on the Judgment of Hon'ble Supreme Court in ***Civil Appeal No.3500 of 2006 (High Court of Punjab and Haryana & Ors. Vs. Jagdev Singh) decided on 29.07.2016.*** I do not think that this aspect of consent letter is of any assistance to the Respondents. The Respondents have also produced on record a copy of Undertaking given by the Applicants at the time of

fixation of pay. True, the Applicants seem to have given Undertaking at the time of fixation of pay. 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, they were not in a position to bargain with the Government who is in stronger/dominant position. This aspect cannot be forgotten.

17. In case of ***Jagdev Singh*** (cited supra), the matter relates to the Judicial Officer (Group 'A' Officer). In view of Undertaking given by him, the order of recovery was upheld. Whereas in the present case, the Applicants are Group 'C' employees. The excess payment is made for more than a period of decade, and therefore, at this stage, it would be iniquitous and arbitrary to recover this amount from them. As such, the facts in the present case are quite distinguishable. Therefore, the situation is squarely covered in ***Rafiq Masih's*** case which holds the field.

18. In O.A.886/2018, the learned P.O. sought to place reliance on the Judgment of Hon'ble Supreme Court in ***2014(2) SC 301 (U.T. Chandigarh & Ors. V/s. Gurcharan Singh & Anr.) decided on 01.11.2013***. So far as this Judgment is concerned, it was delivered on 01.01.2013 whereas ***Rafiq Masih's*** case has been decided on 18.12.2014 summarizing the legal position. As such, ***Rafiq Masih*** being subsequent has to be followed as a binding precedent, which holds the field.

19. Suffice to say, the situation in the present case is squarely covered particularly by Clause (i) and (iii) of Para 12 of ***Rafiq Masih's*** case. This being the settled legal position, it would be iniquitous and harsh to upheld the recovery to such an extent, which would far out-waive the equitable balance of the employer's right to recover the excess payment on the basis of Undertaking given by the Applicants, who were not in a position to bargain.

20. The necessary corollary of the aforesaid discussion leads me to sum-up that the O.As deserve to be allowed. The action of recovery on the part of Respondents is unsustainable in law. Hence, the following order.

O R D E R

In O.A.255/2018 :

(A) The Original Application is allowed.

(B) The impugned action of recovery of Rs.70,947/- is hereby quashed and set aside.

(C) The Respondents are directed to refund the amount of Rs.70,947/- recovered from the gratuity of the Applicant within two months from today, failing which it shall carry interest at the rate of 9% p.a. till the date of actual payment.

(D) No order as to costs.

In O.A.745/2018 :

(A) The Original Application is allowed.

(B) The impugned action of recovery of Rs.64,973/- is hereby quashed and set aside.

(C) The Respondents are directed to refund the amount of Rs.64,973/- recovered from the gratuity of the Applicant within two months from today, failing which it shall carry interest at the rate of 9% p.a. till the date of actual payment.

(D) No order as to costs.

In O.A.886/2018 :

(A) The Original Application is allowed.

(B) The impugned action of recovery of Rs.2,22,125/- is hereby quashed and set aside.

(C) The Respondents are directed to refund the amount of Rs.2,22,125/- recovered from the gratuity of the Applicant within two months from today, failing which it shall carry interest at the rate of 9% p.a. till the date of actual payment.

(D) No order as to costs.

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

Mumbai
Date : 05.02.2019
Dictation taken by :
S.K. Wamanse.
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