

GAHC020006262022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/235/2022

SMTI. P. BONGEI PHOM
W/O LATE HAMVOK PHOM,
R/O LEINAK WARD, LONGLENG, NAGALAND,
PERMANENT R/O YONGAM VILLAGE,
LONGLENG, NAGALAND

VERSUS

THE STATE OF NAGALAND AND 4 ORS
REPRESENTED BY THE HOME COMMISSIONER,
GOVERNMENT OF NAGALAND, NAGALAND, KOHIMA

2:THE COMMISSIONER NAGALAND KOHIMA
3:THE COMMISSIONER AND SECRETARY
GOVERNMENT OF NAGALAND DEPARTMENT OF
PERSONNEL AND ADMINISTRATIVE REFORMS(P AND
AR) NAGALAND KOHIMA
4:THE DEPUTY COMMISSIONER(DC)
LONGLENG NAGALAND
5:THE PRINCIPAL ACCOUNTANT GENERAL(A ND E)
NAGALAND KOHIMA

Advocate for the Petitioner : IMTONG KICHU

Advocate for the Respondent : GOVT ADV NL

**BEFORE
HONBLE MR JUSTICE KARDAK ETE**

JUDGMENT & ORDER (ORAL)

Date : 19-09-2023

Heard Ms. Mika H Aye, learned counsel for the petitioner and also heard Mr. N. Angami, learned State counsel for the State respondents and Mr. N. Mozhui, learned counsel for respondent No. 5.

2. By filing this application under Article 226 of the Constitution of India, the petitioner, (wife of late Hamvok Phom, who retired as Political Assistant to Deputy Commissioner, Longleng) has assailed the Cabinet decision and the Order No. LLG/ACCTT-18/2019-2020/249 dated 08.06.2020 issued by the Deputy Commissioner, Longleng for recovery of excess drawal of pay and allowances in respect of Late Hamvok Phom amounting to Rs. 14,90,273/- (Rupees Fourteen Lakh Ninety Thousand Two Hundred and Seventy Three) only, for the period from March 2015 to December, 2017 from his pension gratuity. The petitioner has also prayed for a direction to the respondents to complete the process for pension of the petitioner's late husband within a period of two months.

3. The case in brief is that vide common order No. EST-15/79-80/5211-14 dated 20.02.1980, the petitioner's late husband was appointed to the post of paid DB on contingency basis under the establishment of Deputy Commissioner, Tuensang, Nagaland in the fixed pay of Rs. 220 per month w.e.f. 10.02.1980. Thereafter vide order no. EST-15/82-83/4839-44 dated 09.02.1983, the petitioner's late husband was appointed as Interpreter Grade-II DB on regular basis under the establishment of Deputy Commissioner, Tuensang in the pay scale of Rs. 220-5-270...-6-800-..-8-

340/-per month. Vide order No. ESTT-2/2001-02/Pt(II)/161 dated 30.06.2001, the petitioner's late husband was given officiating promotion to Grade-I DB w.e.f., 01.07.2001 along with three others. Vide order No. LLG/ESTT-8/2009-10/277 dated 25.06.2012, the petitioner's late husband was promoted to DB (Special Grade) in the pay band of Rs. 5200-20200 with the grade pay of Rs. 2800/-

4. Vide Home Department Notification No. GAB-1/COM/232/2010 dated 08.09.2016, on the recommendation of the Departmental Promotion Committee, the petitioner's late husband was promoted from Special Grade DB to the post of Political Assistant (PA) to the Deputy Commissioner, Longleng w.e.f., 19.08.2016. On superannuation, the petitioner's late husband was released from service w.e.f., 01.03.2018 vide order No. LLG/ESSTT-17/2009-10/800 dated 07.03.2018.

5. After the retirement of the petitioner's late husband, the Deputy Commissioner, Longleng vide its letter no. LLG/ESTT-17/2009-10/80 dated 01.05.2018 wrote to the Commissioner, Nagaland regarding submission of pension papers and all relevant documents in respect of the petitioner's late husband. On receipt of the letter of the Deputy Commissioner, the Office of the Commissioner, Kohima vide letter No. CNE-16/RTD/LLNG/562 dated 18.06.2018, sought for release order from the Office of the Deputy Commissioner, Longleng, Nagaland and for clarifying as to whether there was any break in service after the initial appointment of the petitioner's late husband on 20.02.1980 on contingency basis as record in service book shows 01.03.1983. Vide letter dated 06.07.2018, the Deputy Commissioner, Longleng, clarified that there is no record regarding the petitioner's late husband's initial appointment on contingency basis. It

further clarified that there is no mention in the service book that the petitioner's late husband was earlier appointed on contingency basis as the record shows that he was appointed on 01.03.1983. Therefore, the Deputy Commissioner, Longleng requested to consider the over stay period for condonation since it was not the fault of the petitioner's late husband and to take the date of his regular appointment as entry period.

6. It is noted that the Service Book of the last husband of the petitioner was opened only in 1983 after he was appointed as Interpreter Grade-II, DB on regular basis.

7. The Personnel & Administrative Reforms Department examined and amended the date of release in service from 01.03.2018 to 28.02.2015 and prepared the proposal for condoning the period of overstay in service of 3 (three) years in respect of the petitioner's late husband subject to the approval of the Cabinet and with a condition that the period of overstay in service shall not be counted as qualifying service for pension. It also conditioned that the pay and allowances availed during the period of over stay shall be treated as honorarium and no recovery shall be made and the same had the approval of the Chief Secretary, which was subject to the approval of the Cabinet. The matter was placed before the State Cabinet. Vide letter No. CAB-79/2010 dated 18.11.2018, the decision of the Cabinet was conveyed to the Secretary to the Government of Nagaland, Home Department stating that the Cabinet has rejected the proposal of condonation for the period of over stay in service in respect of the petitioner's late husband.

8. Vide letter No. GAB-1/LLG/Pf-1/18/72 dated 24.01.2019, it further conveyed to the Commissioner, Nagaland that the Cabinet had taken the

decision not to entertain any proposal for condonation of overstay. The Office of the Commissioner vide letter dated 18.02.2019 forwarded to the Deputy Commissioner, Longleng, Nagaland regarding regret for condonation of period of overstay in service in respect of the petitioner's late husband.

9. Vide letter dated 26.03.2019, the Deputy Secretary wrote to the Deputy Commissioner, Longleng to issue release order in respect of the petitioner's late husband at the earliest for early settlement of pension as per the date amended vide directives from P& AR Department (OM Branch) dated 16.10.2018 in the post of Special Grade DB, as the appropriate authority is the Deputy Commissioner and not Home Department for CL-III, Non-Gazetted.

10. Thereafter vide letter No. LLG/ESTT-17/2009-10/92 dated 28th, 2019, the petitioner's late husband was purportedly released as Special Grade DB under the establishment of Deputy Commissioner, Longleng w.e.f. 28.02.2015.

11. By letter dated 30.02.2020, the Senior Accounts Officer (Pension Cell), Office of the Principal Accountant General (A&E), wrote a letter to the Additional Deputy Commissioner (HQ), Office of the Commissioner, Nagaland stating that there is excess pay drawn for overstay in service w.e.f. 01.03.2015 till 01.12.2017 may be furnished to be recorded in service book as well and commutation of pension after medical examination also be furnished. The department was directed to re-submit the documents after meeting the queries/points for early settlement of the pension/family pension case in respect of the petitioner's late husband.

12. In the midst of the problems faced with the process for pension of the petitioner's late husband, he unfortunately passed away on 18.02.2020.

13. The Office of the Deputy Commissioner, Longleng vide letter No. LLG/ACCTT-18/2019-2020 dated 08.06.2020 issued the impugned order stating that the excess drawal of pay and allowances amounts to Rs. 14,90,273/- (Rupees fourteen lakh ninety thousand two hundred seventy three) only, from the period of March, 2015 to December, 2017, to be recovered from the pension gratuity of the petitioner's late husband. By letter no. PEN/1019020438/T-3/315 dated 10.09.2020, the Senior Accounts Officer (Pension Cell), wrote a letter to the Deputy Commissioner, Longleng, stating that as per the letter, it is ordered that the excess drawal of pay and allowances amounting to Rs. 14,90,273/- (Rupees fourteen lakh ninety thousand two hundred seventy three) only, is to be recovered from the petitioner's late husband pension gratuity, however, his pension gratuity is calculated to Rs. 5,78,490/- only and sought for further course of action and to intimate early for settlement of pension.

14. Aggrieved by the proposed recovery of the excess drawal of pay and allowances amounting to Rs. 14,90,273/- (Rupees fourteen lakh ninety thousand two hundred seventy three) only the petitioner approached this Court by filing the writ petition being WP(C)/26/2021 which was withdrawn on 18.10.2022 with a liberty to file afresh as the Cabinet decision was not put to challenge. Hence, this present petition assailing the Cabinet decision and the consequential impugned order dated 08.06.2020 whereby the alleged excess drawal of pay and allowances in

respect of the petitioner's late husband amounting to Rs. 14,90,273/- (Rupees fourteen lakh ninety thousand two hundred seventy three) only is sought to be recovered from the period of March, 2015 to December, 2017 from the pension gratuity and for a direction to complete the process of pension of the petitioner's late husband.

15. Ms. Mika H Aye, learned counsel for the petitioner submits that the husband of the petitioner was initially appointed on contingency basis on 20.02.1980 as DB. However, he was appointed on 09.02.1983 as Interpreter Grade-II DB freshly. The Service Book for the late husband of the petitioner was opened only w.e.f. 01.03.1983 as such his service was counted w.e.f. 01.03.1983. The late husband of the petitioner was not aware that the service of the petitioner as contingency DB would be counted for the purpose of retirement or pensionary benefits, as he was appointed afresh in the year 1983 as Interpreter Grade-II DB. The petitioner's husband was promoted as Political Assistant to Deputy Commissioner, Longleng vide notification dated 08.09.2016. The late husband of the petitioner has served in different grades from DB and finally as Political Assistant to Deputy Commissioner, Longleng, till his retirement, w.e.f. 01.03.2018.

16. Ms. Mika H Aye, learned counsel for the petitioner submits that the law is settled in respect of the excess amount paid. Unless the excess amount is due to misrepresentation or fraud on the part of the employee, no recovery can be made. The pensionary benefit is no charity. Therefore, to direct the recovery of the excess amount purportedly paid to the late husband of the petitioner at this belated stage is a severe blow without his contribution to the mistake, if any, committed is not supported by law.

She further submits that the family of the petitioner is made to suffer in the last several years since the petitioner retired w.e.f. 01.03.2018 due to the action of the State respondents inability to take action as per the settled law.

17. Ms. Mika H Aye, learned counsel for the petitioner submits that the family of the petitioner is debt ridden and in great hardship running from pillar to post after the pensionary benefits of the petitioner's late husband has been halted, who passed away on 18.02.2020. She further submits that the impugned order for recovery of the alleged excess payment after his retirement after utilizing his best service and without any fault established against him is a grave error in law.

18. The petitioner being the wife of late Hamvok Phom, who had served the State in the capacity of DB and finally promoted to Political Assistant to Deputy Commissioner, Longleng would not contest and is not aggrieved by the re-issue of the release order dated 28th 2019 w.e.f. 28.02.2015, as Special Grade DB, if it is the right thing to do so. However, the petitioner is greatly aggrieved by the impugned order dated 08.06.2020, directing for the recovery of the amount of Rs. 14,90,273/- (Rupees fourteen lakh ninety thousand two hundred seventy three) only, from the pensionary benefit of late husband of the petitioner after utilizing his service. Moreso, the calculation by the Office of the respondent No. 5 in respect of the pension gratuity of Rs 5,78,490/- (Rupees five lakh seventy eight thousand four hundred ninety) only. Therefore, the impugned order dated 08.06.2020 to recover the alleged excess drawal of pay and allowances amounting to Rs. 14,90,273/- (Rupees fourteen lakh ninety thousand two hundred seventy three) only, in respect of the late husband of the

petitioner, Late Hamvok Phom for the period from March,2015 to December, 2017 from the pension gratuity be interfered with and set aside.

19. The learned counsel for the petitioner has relied on the following judgments of the Hon'ble Supreme Court and the Hon'ble High Court:

- (i) **State of Bihar Vs. Pandev Jagdishwar Prasad** reported in **(2009) 3 SCC 117.**
- (ii) **Syed Abdul Qadir & Ors Vs. The State of Bihar** reported in **(2009) 3 SCC 475.**
- (iii) **Chandi Prasad Uniyal & Ors Vs. State of Uttarakhand & Ors** reported in **(2012) 8 SCC 417.**
- (iv) **State of Punjab & Ors Vs. Rafiq Masih (White Washer) & Ors** reported in **(2015) 4 SCC 334.**
- (v) **Dipendra Nath Thakuria & Anr Vs. Assam State Electricity Board & Ors** reported in **(2015) 4 GLT 32.**
- (vi) **Anuradha Choudhury Vs. State of Arunachal Pradesh & Ors** reported in **(2013) 5 GLT 475.**
- (vii) **Thomas Daniel Vs. State of Kerala and Ors** reported in **(2022) SCC Online 536.**
- (viii) **High Court of Punjab and Haryana & Ors Vs. Jagdev Singh** reported in **(2016) 14 SCC 267.**

20. This Court would refer to the relevant paragraphs of some of the case laws referred to above.

In the case of **State of Bihar vs. Pandey Jagdishwar Prasad** (Supra), the Hon'ble Supreme Court held as follows:

"24. Considering the fact that there was no allegation of misrepresentation or fraud, which could be attributed to the respondent and considering the fact that the appellant had allowed the respondent to work and got works done by him and paid salary, it would be unfair at this stage to deduct the said amount of salary paid to him. Accordingly, we are in agreement with the Division Bench decision that since the respondent was allowed to work and was paid salary for his work during the period of two years after his actual date of retirement without raising any objection whatsoever, no deduction could be made for that period from the retiral dues of the respondent."

In the case of **Syed Abdul Qadir & others vs the State Bihar** (Supra), the Hon'ble Supreme Court held as follows:

"57. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

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 vs. State of Haryana, Shyam Babu Verma vs. Union of India, Union of India vs. M. Bhaskar, V. Ganga Ram vs. Regional Jt., Director, Col. B.J. Akkara [Retd.] vs. Government of India & Ors., Purshottam Lal Das & Ors., vs. State of Bihar, Punjab National Bank & Ors. Vs. Manjeet Singh & Anr., and Bihar State Electricity Board & Anr. Vs. Bijay Bahadur & Anr.

59. Undoubtedly, the excess amount that has been paid to the appellants - teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid

in excess to the appellants-teachers should be made."

In the case of **Chandi Prasad Uniyal & Ors. vs. State of Uttarakhand & Ors.** (Supra), the Hon'ble Supreme Court held as follows:

"11. We may in this respect refer to the judgment of two-Judge Bench of this Court in Col. B.J. Akkara (retd.) case (supra) where this Court after referring to Shyam Babu Verma case, Sahib Ram case (supra) and few other decisions held as follows:

"28. Such relief, restraining recovery back of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion, to relieve the employees, from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

12. Later, a three-Judge Bench in Syed Abdul Qadir case (supra) after referring to Shyam Babu Verma, Col. B.J. Akkara (retd.) etc. restrained the department from recovery of excess amount paid, but held as follows: (Syed Abdul Qadir case, SCC pp. 491-92, para 59)

"59. Undoubtedly, the excess amount that has been paid to the appellants

- teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned Counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries

have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made." (emphasis added)

We may point out that in Syed Abdul Qadir case such a direction was given keeping in view of the peculiar facts and circumstances of that case since the beneficiaries had either retired or were on the verge of retirement and so as to avoid any hardship to them."

In the case of **State of Punjab & Ors. vs. Rafiq Masih (White Washer) & Ors.** (Supra), the Hon'ble Supreme Court held as follows:

"18. *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 permissible in law:*

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

(ii) Recovery from retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the 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 the case of **Thomas Daniel vs. State of Kerala and Ors.** (Supra), the Hon'ble Supreme Court has held as follows:

"11. *In Col. B.J. Akkara (Retd.) v. Government of India and Others (2006) 11 SCC 709, this Court considered an identical question as under:*

"27. The last question to be considered is whether relief should be

granted against the recovery of the excess payments made on account of the wrong interpretation/understanding of the circular dated 7-6-1999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled (vide Sahib Ram v. State of Haryana [1995 Supp (1) SCC 18 : 1995 SCC (L&S) 248], Shyam Babu Verma v. Union of India [(1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121] , Union of India v. M. Bhaskar [(1996) 4 SCC 416 : 1996 SCC (L&S) 967] and V. Gangaram v. Regional Jt. Director [(1997) 6 SCC 139 : 1997 SCC (L&S) 1652]):

(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery.

29. On the same principle, pensioners can also seek a direction that wrong payments should not be recovered, as pensioners are in a more disadvantageous position when compared to in-service employees. Any attempt to recover excess wrong payment would cause undue hardship to them. The petitioners are not guilty of any misrepresentation or fraud in regard to the excess payment. NPA was added to minimum pay, for purposes of stepping up, due to a wrong understanding by the implementing departments. We are therefore of the view that the respondents shall not recover any excess payments made towards pension in pursuance of the circular dated 7-6-1999 till the issue of the clarificatory circular dated 11-9-2001. Insofar as any excess payment made after the circular dated 11-9-2001, obviously the Union of India will be entitled to recover the excess as the validity of the said circular has been upheld and as pensioners have been put

on notice in regard to the wrong calculations earlier made.

12. *In Syed Abdul Qadir and Others v. State of Bihar and Others (2009) 3 SCC 475 excess payment was sought to be recovered which was made to the appellants-teachers on account of mistake and wrong interpretation of prevailing Bihar Nationalised Secondary School (Service Conditions) Rules, 1983. The appellants therein contended that even if it were to be held that the appellants were not entitled to the benefit of additional increment on promotion, the excess amount should not be recovered from them, it having been paid without any misrepresentation or fraud on their part. The Court held that the appellants cannot be held responsible in such a situation and recovery of the excess payment should not be ordered, especially when the employee has subsequently retired. The court observed that in general parlance, recovery is prohibited by courts where there exists no misrepresentation or fraud on the part of the employee and when the excess payment has been made by applying a wrong interpretation/ understanding of a Rule or Order. It was held thus:*

"59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."

13. *In State of Punjab and Others v. Rafiq Masih (White Washer) and Others (2015) 4 SCC 334 wherein this court examined the validity of an order passed by the State to recover the monetary gains wrongly extended to the beneficiary employees in excess of their entitlements without any fault or misrepresentation at the behest of the recipient. This Court considered situations of hardship caused to an employee, if recovery is directed to reimburse the employer and disallowed the same, exempting the beneficiary employees from such recovery. It was held thus:*

"8. 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 employee concerned. If the effect of the recovery from the employee concerned 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.

18. 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:

- (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).*
- (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.*
- (iii) Recovery from the 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 the case of **High Court of Punjab & Haryana & Ors. vs. Jagdev Singh** (Supra), the Hon'ble Supreme Court held as follows:

"10. In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc¹. this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer 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."

11. *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."*

21. Mr. N. Angami, learned State counsel for the State respondents submits that there is no dispute with regard to the initial date of appointment of the petitioner's deceased husband as a contingency paid DB vide order dated 20.02.1980. The appointment order dated 09.02.1983 of Late Hamvok Phom clearly shows that the late husband of the petitioner was appointed as Interpreter Grade-II DB w.e.f., 01.03.1983 and that his appointment as Interpreter Grade-II DB flows from his initial appointment and therefore there is a continuity in his service.

22. He submits that the initial appointment of the petitioner's late husband as contingency paid DB as well as the order dated 09.02.1983 whereby the late husband of the petitioner was appointed as Interpreter Grade-II DB was issued by the Office of the Deputy Commissioner, Tuensang and not by the office of the Deputy Commissioner, Longleng, therefore, when a clarification with regard to his release order was sought for by the Office of the Commissioner, Nagaland vide letter dated 18.06.2018, the Deputy Commissioner, Longleng while replying to the

clarification has through its letter dated 06.07.2018, stated that there is no record in the Office of the Deputy Commissioner, Longleng regarding the initial appointment of the petitioner's deceased husband on contingency basis. No mention is made in the service book with regard to his earlier appointment on contingency basis which has led to overstay of three years.

23. He further submits that not only has the petitioner admitted about the contingency service of her deceased husband but has also annexed his initial appointment order which shows that the petitioner's deceased husband had the necessary documents in his possession with regards to his contingency appointment therefore, he has also contributed in the overstay in service as the petitioner's deceased husband ought to have been truthful and at the same time should have been responsible enough to inform the appropriate authorities to make the necessary correction in his service book with regard to his correct date of appointment which is 20.02.1980 and not 01.03.1983 as reflected in his service book in order to avoid overstay in service, however, that was not done, and also since the Office of the Deputy, Commissioner, Longleng from where the petitioner's deceased husband retired from service did not have his initial appointment order, therefore, this has resulted in releasing the deceased husband of the petitioner from service only on 01.03.2018 instead of 28.02.2015, which allowed him to over stay in the service for 3 (three) more years.

24. The learned State counsel submits that as the petitioner has overstayed in service for a period of three years the Deputy Commissioner Longleng, has by letter dated 06.07.2018, requested the Commissioner Nagaland, to consider and condoned the overstay in service made by the

petitioner deceased husband. The case for condonation of the overstay period of three years in service was examined by the Personnel & Administrative Department (Organization & Method Branch), and a clearance for condoning the overstay period was accorded vide U.O. No. 649, dated 16.10.2018, subject to the approval of the Cabinet with a condition that the period of overstay in service with effect from 01.03.2015 to 28.02.2018, shall not be counted as qualifying service for pension and the pay and allowances availed during the said period of overstay in service shall be treated as honorarium and no recovery thereof shall be made.

25. The learned counsel submits that this observation of the Personnel & Administrative Department (Organization & Method Branch), was placed before the Cabinet for its approval, however, the cabinet in its meeting had declined to condone the same. The decision of the Cabinet declining to condoned the overstay period as conveyed to the Secretary, to the Government of Nagaland, Home Department by the Joint Secretary to the Government of Nagaland, Home Department, vide letter dated 24.01.2019. Thereafter, the Home Department, Government of Nagaland, has through its letter dated 26.03.2019, requested the Commissioner, Nagaland, to direct the Deputy Commissioner Longleng, to issue Release Order in respect of the petitioner deceased husband as per the date amended vide directives from the P & AR Department (OM Branch) U.O. No. 649, dated 16.10.2018, in the post of Special Grade DB and basing on this direction a fresh release order was issued in respect of the petitioner deceased husband by the Deputy Commisisoner, Longleng, wherein, the petitioner deceased husband was released from service with effect from

dated 28.02.2015.

26. The learned State counsel further states that since the overstay in service by the petitioner deceased husband was declined to be condoned by the Cabinet and a fresh release order was issued releasing him from service with effect from 28.02.2015, a recovery of the excess drawal of pay and allowances which was received by the petitioner deceased husband was necessitated and therefore, by an Office Order dated 08.06.2020, issued by the Deputy Commissioner, Longleng, a recovery of an amount of Rs. 14,90,273 (Fourteen lakh Ninety Thousand Two hundred and Seventy three) drawn in excess by the petitioner deceased husband was made to be recovered from his pension gratuity. The learned counsel submits that the order dated 08.06.2020, became necessary to be issued by the State respondent for an early settlement of the family Pension in respect of the petitioner deceased husband for the fact that when his Pension paper was process to the Office of the Principal Accountant General (A&E), Nagaland, the Office of the Principal Accountant General (A&E), Nagaland, has through letter dated 03.02.2020, address to the Addl. Deputy Commissioner (HQ), Office of the Commissioner, Nagaland, returned certain documents along with the observation as regards to excess pay drawn for overstay w.e.f. 01.03.2015 till 01.12.2017, which are to be furnished and to be recorded in the service book and also Commutation of pension after medical examination are to be furnished. In the said letter dated 03.02.2020, it was also stated that the department may resubmit the case after meeting the quarries/points for early settlement of the case.

27. Mr. N. Angami, learned State submits that the petitioner deceased

husband as per his initial appointment order is supposed to retire from service in the year 2015 but due to non availability of his initial appointment order in the Office of the Deputy Commissioner Longleng, his entry in service was noted as 01.03.1983 in his service book and which has resulted him to overstay in service for a period of three years. The learned counsel submits that during this overstay period the petitioner husband was by a Notification dated 08.09.2016 promoted from Special Grade GB's to the Post of Political Assistant (PA) to Deputy Commissioner, Longleng. As stated above, the respondent authorities undertook the correct process to condone the period of overstay in service in respect of the petitioner husband by placing the proposal to condone the overstay period before the Cabinet for consideration and its approval by preparing a Cabinet Memorandum dated Kohima, Nov, 2018 however, the Cabinet declined to condone the same and the decision of the Cabinet was conveyed to the Secretary, to the Government of Nagaland, Home Department, Nagaland by the Joint Secretary, to the Government of Nagaland, Cabinet Secretariat (Cabinet Cell) vide letter dated 18.11.2018.

28. The learned State counsel further submits that the decision of the Cabinet in declining to condone the overstay of three years in service is a correct decision for the fact that if the overstay period of three years in respect of the petitioner husband is condone then the promotion to the post of Political Assistant to Deputy Commissioner, Longleng, which was accorded to him during the overstay period will remain and this will make him to retire and subsequently would make him to draw a pensionary benefits of a post which is wrongly accorded to him on account of his overstay in service and therefore, the Cabinet has rightly decline to

condone the period of overstay in service and as a result a fresh Release Order dated 28th 2019 was issued correctly releasing the petitioner husband from service as Special Grade DB w.e.f. 28.02.2015, and due to which the subsequent Office Order dated 08.06.2020 was issued.

29. The learned counsel for the State respondents submits that there is no merit in this writ petition as there is no infirmity in the impugned order whereby the recovery of Rs. 14,90,273/- (Fourteen lakh ninety thousand two hundred seventy three) only, from his pension gratuity is to be made.

30. The learned counsel for the State respondents has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Chandi Prasad Uniyal Vs. State of Uttarakhand** reported in **(2012) 8 SCC 417** which is reproduced herein below:

"14. We are concerned with the excess payment of public money which is often described as "taxpayers' money" which belongs neither to the officers who have effected overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in in such situations. The question to be asked is whether excess money has been paid or not, may be due to a bona fide mistake. Possibly, effecting excess payment of public money by the government officers may be due to various reasons like negligence, carelessness, collusion, favouritism, etc., because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment."

31. I have considered the submissions of the learned counsel for the

parties and the materials available on record.

32. The late deceased husband of the petitioner Shri. Hamvok Phom was appointed on contingency basis as DB vide order dated 20.02.1980. Thereafter, he was appointed as Interpreter Grade-II DB under the establishment of Deputy Commissioner, Tuensang, Nagaland on regular basis on 09.02.1983. Then he was promoted to Grade-I DB on 30.06.2001 and then promoted to DB (Special Grade) on 25.06.2012 and finally as Political Assistant (PA) to the Deputy Commissioner, Longleng vide order dated 08.09.2016 from where the deceased husband of the petitioner had retired. Late Hamvok Phom, late husband of the petitioner was released from the establishment of Deputy Commissioner, Longleng w.e.f., 01.03.2018 on his retirement from service on superannuation.

33. The problem started when the pension papers /documents in respect of late Shri Hamvok Phom as P.A. to D.C., Longleng was submitted before the Commissioner, Government of Nagaland. On receipt of the pension papers, it is noticed that vide letter dated 18.06.2018 the Assistant Commissioner in the Office of the Commissioner, Nagaland, Kohima wrote a letter of clarification to the Deputy Commissioner, Longleng, inter-alia seeking for a clarification that the first day of appointment as contingency basis shown in the appointment is 20.02.1980, while the record in the service book shows 01.03.1983, and to the effect there was no break in the service after the initial appointment. On such letter of clarification, the Deputy Commissioner, Longleng vide letter dated 06.07.2018 had clarified that late Hamvok Phom, P.A. to Deputy Commissioner, Longleng has been released from

that office w.e.f. 01.03.2018 on retirement from active service on superannuation and it also clarified that there is no record of the office of the Deputy Commissioner, Longleng regarding the first appointment on contingency basis on 20.02.1980. It further clarified that there is no mention in the service book that he was earlier appointed on contingency basis. The record only shows that he was appointed from 01.03.1983 which may have led to over stay of 3 years. It also clearly stated that authority may like to consider the over stay period for condonation since it was none of the petitioner's late husband fault and there appears to be lapses in recording in his service book and to take the date of his regular appointment as his entry period.

34. It also noticed that a cabinet memorandum was prepared for condonation of period of over stay in service in respect of the deceased, Hamvok Phom, P.A. to Deputy Commissioner, Longleng which is quoted herein below:

"While preparing his Release Order in 2018, the date of retirement of Shri Hamvok Phom was prepared as per the entries in his Service Book in which his service entry is dated 1/3/83 (copy enclosed at Annexure-II) and not as per his service entry as Contingency paid DB based on his Appointment letter dated 20th Feb'80 at Annexure-III which was not available in the office record and thereby indicating overstay in service for a period of 3 years. The matter was endorsed to P&AR Department for examination and it has been directed the Home Department to amend hi Release Order date to 28-02-2015 and not 01-03-2018, condoning the period of overstay in service of 3 years with the condition that the Cabinet approval should be obtained and the period of overstay in service from 28-02-2015 to 01-03-2018 should not be counted as qualifying service for pension benefits and pay and allowances availed by him against the said period of overstay in service should be treated as honorarium. The clearance and recommendation of P&AR Department may be seen at Annexure-IV.

The proposal is now placed before the Cabinet for consideration and approval.

This has the approval of the Minister-in-charge."

35. Vide order dated 18.11.2018 the Joint Secretary to the Government of Nagaland informed the Secretary, Home Department, Government of Nagaland that the condonation of period of over stay in respect of Late Hamvok Phom, P.A. to Deputy Commissioner, Longleng was rejected in so far as the letter dated 24.01.2019 has taken decision that the cabinet will not entertain any proposal for condonation of overage. And accordingly the Additional Deputy Commissioner, Office of the Commissioner, Nagaland forwarded the letter regarding regret for condonation of period of over stay in respect of the service of the deceased husband of the petitioner.

36. On careful consideration of the materials, the cabinet has decided not to condone the over age. The mistake appears to be not on the part of the deceased husband of the petitioner but it is on the part of the respondent authorities as they are duty bound to correct the records, if such requirement of counting the period of contingency service is to be taken for the purpose of counting retirement/ pension.

37. In pursuance to the letter dated 26.03.2019 issued by the Deputy Secretary to the Government of Nagaland, the Deputy Commissioner, Longleng issued the order dated Longleng the 28th 2019, whereby the deceased husband of the petitioner was purportedly released from the establishment of Deputy Commissioner, Longleng w.e.f. 28.02.2015 as Special Grade DB. On such release order, the Deputy Commissioner, Longleng again submitted the pension papers/documents in respect of late Hamvok Phom by showing him as retired Special Grade DB.

38. Thereafter the Senior Accounts Officer(Pension Cell) in the Office of the Principal Accountant General (A&E),wrote a letter to the Additional Deputy Commissioner (HQ), Office of the Commissioner, Nagaland, Kohima, returning the documents in respect of pension/ family pension of late Hamvok Phom as retired Special Grade DB with an observation that excess pay drawn for over stay in service w.e.f. 01.03.2015 till 01.12.2017 may be furnished and to be recorded in service book as well and commutation of pension after medical examination may also be furnished and directed to re-submit the case after meeting the queries/points for early settlement of the case. The Deputy Commissioner, Longleng had re-submitted the pension/family pension to the Commissioner, Government of Nagaland vide letter dated 17.03.2020.

39. The Deputy Commissioner, Longleng vide office order no. LLG/ACCTT-18/2019-2020 dated 08.06.2020 had issued the order whereby it states that excess drawal of pay and allowance in respect of Shri Hamvok Phom, retired Special Grade DB amounting to Rs. 14,90,273/- (Rupees fourteen lakh ninety thousand two hundred seventy three) only, from the period of March 2015 to December 2017 to be recovered from his pension gratuity.

40. Accordingly the same was forwarded to the Commissioner, Government of Nagaland for recovery of the aforesaid amount from the pension gratuity of the deceased husband of the petitioner vide letter dated 11.06.2020. Thereafter, the Senior Accounts Officer (Pension Cell), Office of the Principal Accountant General (A&E) wrote a letter to the Additional DC (HQ), Office of the Commissioner, Nagaland dated

03.02.2020, whereby, it was stated that the excess pay drawn for overstay in service w.e.f. 01.03.2015 till 01.12.2017 may be furnished and to be recorded it in the Service Book as well. It also stated that commutation of pension after medical examination may also be furnished and the department may re-submit the case after meeting the above queries/ points for early settlement of the case.

41. It is also noted that vide letter dated 10.09.2020, the Senior Accounts Officer (Pension Cell) in the Office of Principal Accountant General (A&E), Nagaland, Kohima, wrote to the Deputy Commissioner in respect of pension/family pension of the deceased husband of the petitioner stating that the excess drawal of pay and allowances amounting to Rs. 14,90,273/- (Fourteen lakh ninety thousand two hundred seventy three) only, to be recovered from his pension gratuity. However, his pension gratuity is calculated to be Rs. 5,78,490/- (Rupees five lakh seventy eight thousand four hundred ninety) only, for which further course of action was sought to be intimated for early settlement of the pension. It is also to be noted that in the midst of the process and the communications which appears to be shuttling amongst the respondent authorities, the husband of the petitioner unfortunately expired on 18.02.2020.

42. On careful examination of the facts and materials available on record, it is seen that though the deceased husband of the petitioner was appointed on contingency basis on 20.02.1980, his regular appointment was on 09.02.1983 from which date it can be said that the deceased husband of the petitioner was actually appointed to that post. In my

considered view, the appointment on contingency basis is no appointment in the eyes of law. Of course if the relevant policy/rules provides that the period of contingency service of an employee be counted for the purpose of retirement or pensionary benefits, it may be a different aspect to be considered. However, there is nothing on record to show that the period of contingency service of an employee is to be counted for the purpose of retirement or pension. On the specific query, the learned State counsel only submits that same may be allowed to produce by him. However, till the conclusion of the hearing of this matter, no such document has been produced on behalf of the State respondents.

43. Be that as it may, on careful consideration of the present case, this Court noticed that the impugned order dated 08.06.2020 by which the respondent authorities has sought for recovery of the excess amount of Rs. 14,90,273/- (Fourteen lakh ninety thousand two hundred seventy three) only, to be recovered from the pension gratuity of the deceased husband of the petitioner does not appear to be due the fault of the deceased husband of the petitioner even if the excess payment has been made due to over stay in the service. There is no fault on the part of the deceased husband of the petitioner as he has not made any misrepresentation and played any foul but has been drawing the salary while serving in the Office of the Deputy Commissioner, Longleng, on being duly promoted as P.A. to Deputy Commissioner, Longleng. Even if any mistake or error has been done, it has been done on the part of the respondent authorities as the respondent authorities ought to have corrected the service book if it is the requirement that the period for contingency service is to be counted for the purpose of counting the

retirement age and the pension. Therefore, in my considered view, the order for recovery of excess pay and allowances from the deceased husband of the petitioner without there being any misrepresentation or fraud on the part of the deceased husband of the petitioner is not sustainable.

44. This Court also takes note of the fact that during the entire process shuttling amongst the respondent authorities, the husband of the petitioner passed away. This court would find that the over stay, if any, which resulted in the excess drawal for a period of three years made to the deceased husband of the petitioner was not because of fraud or misrepresentation at his behest.

45. The Hon'ble Supreme Court in the case of **State of Punjab And Ors Vs. Rafiq Masih** (Supra) has held that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. The Hon'ble Supreme Court also by way of illustration held that in few situations, recovery of excess monetary benefits wrongly extended to the employees would be impermissible in law in situation such as recovery from employees belonging to Class-III and Class-IV service, recovery from retired employees, or employees who are due to retire within one year, of the order of recovery, 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, 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, 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.

46. Reverting back to the present case, as noted above, the excess drawal was not made because of any fraud or misrepresentation at the behest of the petitioner's deceased husband, it would be harsh or arbitrary which would outweigh the equitable balance of the employer's right to recover as held by the Hon'ble Supreme Court, as the recovery sought is after the retirement of the deceased husband of the petitioner. In the facts of the present case, the petitioner would be put to hardship and such hardship would outweigh the equitable balance of an employer's right to recover in view of the fact that the deceased husband has already expired and recovery sought for is after his retirement.

47. In view of what has been discussed above, I am of the considered view that the impugned order dated 08.06.2020 passed by the respondent authority for recovery of the excess payment of Rs. 14,90,273/- (Fourteen lakh ninety thousand two hundred seventy three) only, from the petitioner's late husband pension gratuity deserves to be interfered with.

48. Accordingly, cabinet decision and consequential impugned order dated 08.06.2020 passed by respondent authority for recovery of Rs.

14,90,273/- (Fourteen lakh ninety thousand two hundred seventy three) only are set aside and quashed.

49. In the result, the present writ petition is allowed and disposed of.

However, parties to bear their own costs.

JUDGE

Comparing Assistant