

Court No. - 39

Case :- CIVIL MISC REVIEW APPLICATION No. - 334 of 2023

Applicant :- Union Of India And 5 Others

Opposite Party :- Rakesh Chandra Verma And Another

Counsel for Applicant :- Saumitra Singh

Counsel for Opposite Party :- Nikhil Pandey

Hon'ble Saumitra Dayal Singh,J.

Hon'ble Shiv Shanker Prasad,J.

1. Heard Shri Saumitra Singh, learned counsel for the applicants and Shri Nikhil Pandey, learned counsel for the respondent.
2. Present review application has been filed arising from the order of the co-ordinate bench of this Court in Writ-A No. 4179 of 2023 (Union of India and 5 others Vs. Rakesh Chandra Verma and another). By that order, the co-ordinate bench dismissed the writ petition and thus confirmed the order passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad, dated 20.05.2022 passed in Original Application No. 330/01316/2017 (Rakesh Kumar Verma Vs. Union of India and 5 others).
3. The respondent worked as Income Tax Inspector with the Union of India, from 24.02.2005. He attained the age of superannuation on 30.06.2016. During his years in service, amongst other by virtue of Order No. 20 of 2023, dated 03.09.2013 issued by the Chief Commissioner of Income Tax (CCA), Lucknow, benefit of Modified Assured Career Progression Scheme (MACPS) was conferred, amongst others on the private-respondent. In that regard, his previous service rendered at another establishment was included (without break). Perusal of that order reveals the ground of MACP was qualified in the following terms :

"In future, if it is found that any official(s) does not qualify for grant of MACPS, the financial up gradation granted hereunder shall be withdrawn and the amounts

received by way of arrears or otherwise by the officer(s) shall be recovered."

4. Neither any rule or administrative instruction is shown to us as may have required any undertaking to be given by the private-respondent to give effect to the above clause qualified, noted above nor any undertaking was furnished by the private-respondent.

5. In such circumstances, relying heavily on the contents of paragraph-4(b) of the Supplementary Affidavit filed in the writ petition, it has been submitted that the above noted recital in the order dated 3.9.2023 draws a clear distinction of fact as may not allow the ratio of **State of Punjab and others v. Rafiq Masih (White Washer) and another, (2015) 4 SCC 334** to be applied to the facts of the present case. That essential contention has been ignored or has remained from being considered in the decision of the co-ordinate bench, which is the subject matter of the present review proceedings. For ready reference, the contents of paragraph 4(b) of the Supplementary Affidavit filed in the writ / main proceedings are quoted below :

"The pay fixation order dated 27.05.2015 has been passed in compliance to the order No. 20 of 2013 dated 03.09.2013 passed by CCIT (CAA) Lucknow, wherein it has been specifically mentioned that "In future, if it is found that any official(s) does not qualify for grant of MACPS, the financial upgradation granted hereunder shall be withdrawn and the amounts received by way of arrears or otherwise by the officer(s) shall be recovered." A photocopy of the order dated 03.09.2013 granting MACP benefits to Shri Rakesh Chandra Verma is being enclosed herewith and marked as ANNEXURE SA-2 to this affidavit."

6. Then referring to the decision in the case of **Rafiq Masih (supra)**, Shri Singh has referred to paragraph-18 of the report and submitted that the case of the private-respondent would fall under Clause (iii) thereof and therefore recovery was permissible. Also, for reason of the qualifying Clause, noted above, contained in the Office Order No. 20 of 2013, dated 03.09.2013 (quoted above), the case of the private-respondents would not fall under Clause (ii) of **Rafiq Masih (supra)**. For ready reference paragraph 18 of the said report reads as below :

"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 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."

7. Here, further reliance has been placed on another decision of the Supreme Court in **High Court of Punjab and Haryana and others v. Jagdev Singh, (2016) 14 SCC 267**. Relevant to the present discussion, heavy reliance has been placed on the ratio of that decision contained in paragraph-11. For ready reference, same is quoted below :

"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."

8. Thus, it has been submitted, as in the case of **Jagdev Singh (supra)** so in the present case, the recovery of excess amount paid to the private-respondent would remain recoverable as there exists a recovery clause in the order dated 03.09.2013-whereunder the amount came to be paid to the respondent. Since that recovery has been made within a period of five years from the date of payment made, the recovery would stand protected under Clause (iii) of **Rafiq Masih (supra)**.

9. On the other hand, learned counsel for the respondent would contend, arguments

as were raised by the petitioner at the stage of hearing of the writ petition have been noted in the judgement dated 23.03.2023. No other submission was advanced at that stage. The ground if any arising from the pleadings made in paragraph-4(b) of the Supplementary Affidavit filed in the writ-proceedings must be deemed to have been given up at the stage of hearing.

10. Alternatively, it has been submitted, neither any undertaking was required to be furnished by the respondent nor such undertaking was furnished by the respondent-to allow for recovery of the amount paid under MACP paid to the applicant.

11. Merely because the employer chose to introduce a qualifying Clause while making due payments to an employee, it may not become entitled to claim reversal of the same, on his own sweet will/volition.

12. Last, it has been submitted, undisputedly, the respondent was a Class-III employee having retired from service on 30.06.2016 whereas the payment was made in the year 2015. The case of the respondent falls under Clause (ii) of **Rafiq Masih (supra)**. Owing to the date of retirement preceding the date of recovery, no recovery is permissible, in law.

13. Having heard learned counsel for the parties and having perused the record, in the first place, it is wholly accepted and acknowledged principle in our jurisprudence that a point or ground though raised in the proceedings but not pressed at the stage of oral hearing has to be presumed to have been given up or not pressed. *Per se*, it may not give rise to a ground for review. In **Daman Singh and others Vs. State of Punjab and others (1985) 2 SCC 670**, speaking for a five judge Constitution bench of the Supreme Court, Chinnappa Reddy, J. succinctly observed :

"We attach no significance to this submission. It is not unusual for parties and counsel to raise innumerable grounds in the petitions and memoranda of appeal etc., but, later, confine themselves, in the course of argument to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable. No party or counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was

not considered it should be open to the party aggrieved to draw the attention of the court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be wasted in inquiring into the question whether a certain ground to which no reference is found in the judgment of the subordinate court was argued before that court or not ?"

14. Thus, such a ground may become available only if the litigant asserts, at the stage of filing of a Review Application that he had not only raised such ground but had pressed it at the stage of oral hearing. There, the other settled principle in our jurisprudence remains-an order passed by the Court is the only true record of the proceedings. If any error is claimed in the same, it may be applied for correction/rectification, in accordance with law. In the present case, neither any correction application came to be filed by the Union of India to correct the record of the proceedings as narrated in the order dated 23.3.2023 nor the Union has made any averment in the Review Application that the ground of challenge arising from the pleadings made in paragraph 4 (b) of its Supplementary Affidavit filed in the writ proceedings, had been pressed at the stage of the oral hearing. In **State of Maharashtra v. Ramdas Shrinivas Nayak, (1982) 2 SCC 463**, a submission was advanced before the Supreme Court that concession recorded by the High Court had not been made by the parties. That question was refused to be gone into in face of the record of the High Court. There, it was observed as under:

".....We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation." [Per Lord Atkinson in Somasundaram Chetty v. Subramanian Chetty, AIR 1926 PC 136 : 99 IC 742] We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error..."

15. In view of the above, it is not possible to accept the submission advanced by Shri Singh that the challenge arising from the pleadings made in paragraph 4(b) of the Supplementary Affidavit filed in the writ proceedings, had been pressed. The fact that such affidavit may have been taken on record, does not raise any presumption that all that was pleaded in that affidavit had actually been pressed at the stage of hearing.

16. Then, review is not a routine procedure. As observed in **Col. Avtar Singh Sekhon Vs. Union of India and others 1980 (Supp) SCC 562**, it may not be resorted to unless the Court is "satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice". The Supreme Court further took note of its earlier decision in **Sow Chandra Kante Vs. Sheikh Habib (1975) 1 SCC 674**, wherein it was observed :

"A review of a judgment is a serious steps and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility..... The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."

17. Applying the above principle, for below noted reasons, we find no occasion has arisen to grant the review prayed for.

18. In any case, the second submission advanced by learned counsel for Union of India also does not merit acceptance. As noted above, the equitable principle laid down by the Supreme Court in **Rafiq Masih (supra)** applies not only to retired employees but it also applies to the case of the serving employees as well, subject to stipulations contained in that decision. Second, the equitable principle referred to above applies not only to Class III and Class IV employees but it also applies to other employees, to the extent indicated in that decision. Thus, Clause-I is specific to Class III & IV employees whereas the other clauses may apply to other class of employees as well, subject to the stipulations contained in that decision.

19. Here, there is no dispute that the private respondent was a Class-III employee. Therefore, at first, he is entitled to benefit of Clause (i) of **Rafiq Masih (supra)**.

20. The case of the private respondent is squarely covered by Clause (ii) of **Rafiq Masih (White Washer) (supra)** inasmuch as it is not disputed to the applicant/Union of India that the monetary benefit of MACP granted to the private respondent vide order dated 03.09.2013 was conferred on the private respondent, vide order dated 27.05.2015 whereas he retired from service on 30.06.2016. The recovery order withholding the MACP qua prior period of service rendered to another employer, was first issued on 01.07.2016 and thereafter, again on 16.08.2016. Both orders were issued after the date of retirement of the private respondent. Those could not have been issued in terms of Clause (ii) of **Rafiq Masih (supra)**.

21. As to the submission advanced by learned counsel for the Union that the case of the private-respondent would fall under Clause (iii) of **Rafiq Masih (supra)**, we cannot accept that submission. Primarily, the same would apply to serving employees. If that clause were to be read to the detriment of a retired employee, a clear conflict would arise in the application of Clause (ii) of **Rafiq Masih (supra)**. Since no recovery is permitted from a retired employee within one year of his retirement, there may never arise any situation where such recovery may be permitted within five years of the disbursement of the amount, after his retirement.

22. The reliance placed by learned counsel for Union of India on the decision of the **Jagdev Singh (supra)** cannot be accepted. In the first place, it does not lay down any law contrary to **Rafiq Masih (supra)**. It only explains and carves out an exception to the general principle laid down in **Rafiq Masih (supra)**. That exception has not been laid down by way of a general principle of law but arising from peculiar facts of that case. In paragraph-2 of **Jagdev Singh (supra)**, it has been clearly noted, under Haryana Civil Service (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules, 2001, an undertaking was required to be submitted by an eligible employee that any excess payment would be refunded to the State Government. Thus, the Supreme Court noted as below:

"Under the rules, each officer was required to submit an undertaking that any excess

which may be found to have been paid will be refunded to the Government either by adjustment against future payments due or otherwise."

23. Then, by way of reasoning, in paragraph 9 of that report, it is observed as below:

"9. The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made."

24. It is upon that reasoning that the conclusion came to be recorded in paragraph 11 of the report, as has been noticed above.

25. Thus, according to **Jagdev Singh (supra)**, the exception to Clause (ii) of the **Rafiq Masih (supra)** would arise only in cases where an undertaking may have been furnished by the beneficiary/employee. That would allow for refund/recovery/reversal of any monetary benefit that may have been wrongly paid out to him during his years in service. Thus, furnishing of an undertaking is a *sine qua non* to invoke an exception to Clause (ii) of **Rafiq Masih (supra)**.

26. The qualifying Clause incorporated in the order dated 03.09.2013 is an unilateral act of the employer. It is not an undertaking given by the employee/recipient nor it can ever be equated with the same. Though the employer had unilaterally qualified the benefit of MACP, that restriction created could be enforced only in accordance with law. Once the Supreme Court has laid down the law in **Rafiq Masih (supra)** and provided that the recovery of any amount (that may have been wrongly paid to an employee), may be made subject to conditions laid down in that decision, the qualifying Clause relied by learned counsel for the Union of India would remain subservient to the law declared by the Supreme Court in **Rafiq Masih (supra)**. Being contrary to that, it is therefore unenforceable. To the extent, that law would not allow for recovery to be made from the Class-III

employee after his retirement, no benefit may be drawn by the Union on the strength of the said qualifying Clause.

27. As noted above, in the present case, it has not been shown to us, either that the respondent was obligated under the Rules to furnish such undertaking or that he had, as a fact, furnished such an undertaking. Consequently, the exception being claimed by the Union is wholly misconceived and unfounded. Consequently, the decision in the case of **Jagdev Singh (supra)** is distinguished on facts. The exception to Clause (ii) of **Rafiq Masih (supra)** being claimed by the Union of India, is unfounded and misconceived.

28. Earlier, this Court had the occasion to consider the decision of **Jagdev Singh (supra)**, in **Writ-A No. 33686 of 2017 (Union of India and another Vs. Mohd. Yunush) Neutral Citation No. 2023:AHC:170688-DB**, (in which one of us Saumitra Dayal Singh was a member). Therein, a similar view was expressed.

29. In view of the above, we find no merit in the present review application.

30. Accordingly, the review application is **dismissed**.

31. Any amount or consequential benefit that may have been withheld till now may be released within a period of two months from today, failing which, the same shall attract interest @ 8% from the date it became due till the date of its actual payment.

Order Date :- 23.11.2023

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(Shiv Shanker Prasad, J.) (S.D. Singh, J.)