

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

WP(C).No. 26585 of 2005 (M)

PETITIONER:

RADHA K.A., W/O.T.K.RAJAN, AGED 44 YEARS,
WORKING AS SENIOR ACCOUNTANT, THE KASARAGOD
DISTRICT CO-OPERATIVE BANK, KUMBALA BRANCH,
KUMBALA P.O., KASARAGOD.

BY ADV. SRI.N.UNNIKRISHNAN

RESPONDENTS:

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1. THE KASARAGOD DISTRICT CO-OPERATIVE
BANK LTD., KASARAGOD, REPRESENTED BY THE
CENTRAL MANAGER.
 2. THE PRESIDENT,
THE KASARAGOD DISTRICT CO-OPERATIVE BANK LTD.,
KASARAGOD-671 121.
 3. THE REGISTRAR OF CO-OPERATIVE SOCIETIES,
KERALA, THIRUVANANTHAPURAM.

R1 & R2 BY ADV. SRI.M.SASINDRAN,SC,KASARGOD DIST.CO.BAN
R1-R2 BY ADV. SRI.JAWAHAR JOSE, SC, KASARAGOD DIST. CO.OP
BANK LTD.
BY GOVERNMENT PLEADER, SRI. G. GOPAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
09-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

- EXHIBIT-P1 : COPY OF ORDER NO. G.O. (MS) 107/96/CO-OP. DATED 11.11.1996 ISSUED BY THE GOVERNMENT OF KERALA, TVPM.
- EXHIBIT-P2 : COPY OF ORDER NO. G.O. (MS) 140/97/CO-OP. DATED 18.11.1997 ISSUED BY THE GOVERNMENT OF KERALA, THIRUVANANTHAPURAM.
- EXHIBIT-P3 : COPY OF PROCEEDINGS NO. B/97-98 DATED 31.01.1998 ISSUED BY THE DY. GENERAL MANAGER-IN-CHARGE, KASARAGOD DIST. CO-OP. BANK LTD.
- EXHIBIT-P4 : COPY OF MEMO NO. B/2004-05 DATED 01.10.2004 ISSUED BY THE FIRST RESPONDENT TO THE PETITIONER.
- EXHIBIT-P5 : COPY OF LETTER DATED 15.10.2004 SUBMITTED BY THE PETITIONER TO THE FIRST RESPONDENT.
- EXHIBIT-P6 : COPY OF NOTICE NO. B/2004-05 DATED 16.11.2004 ISSUED BY THE FIRST RESPONDENT TO THE PETITIONER.
- EXHIBIT-P7 : COPY OF REPRESENTATION DATED 23.11.2004 SUBMITTED BY THE PETITIONER TO THE FIRST AND SECOND RESPONDENTS.
- EXHIBIT-P8 : COPY OF LETTER DATED 30.11.2004 SUBMITTED BY THE PETITIONER TO THE FIRST RESPONDENT.
- EXHIBIT-P9 : COPY OF PROCEEDINGS NO.B/2004-05 DATED 29.03.2005 ISSUED BY THE FIRST RESPONDENT TO THE PETITIONER.
- EXHIBIT-P10 : COPY OF LETTER DATED 25.04.2005 SUBMITTED BY THE PETITIONER TO THE FIRST RESPONDENT.
- EXHIBIT-P11 : COPY OF REVISION PETITION DATED 06.05.2005 SUBMITTED BY THE COUNSEL FOR THE PETITIONER TO THE THIRD RESPONDENT.
- EXHIBIT-P12 : COPY OF ORDER NO. EM(1) 20583/05 DATED 30.05.2005 ISSUED BY THE THIRD RESPONDENT TO THE FIRST RESPONDENT.
- EXHIBIT-P13 : COPY OF OBJECTION STATEMENT IN FILE NO. EM(1) 2583/2005 DATED 16.07.2005 SUBMITTED BY THE MANAGING DIRECTOR OF THE KASARAGOD DIST. CO-OP. BANK, KASARAGOD.
- EXHIBIT-P14 : COPY OF REPLY AFFIDAVIT IN FILE NO. EM(1) 2583/2005 DATED 21.07.2005 SUBMITTED BY THE PETITIONER TO THE RESPONDENT.
- EXHIBIT-P15 : COPY OF LETTER DATED 31.08.2005 SUBMITTED BY THE PETITIONER TO THE FIRST RESPONDENT.
- EXHIBIT-P16 : COPY OF ACQUITTANCE RLLL FOR THE MONTH OF AUGUST, 2005 ISSUED BY THE FIRST RESPONDENT ON 29.08.2005.

(CON..)

- EXHIBIT-P17 : COPY OF PROCEEDINGS NO. EM(1) 20583/05 DATED
31.08.2005 ISSUED BY THE THIRD RESPONDENT TO THE
COUNSEL FOR THE PETITIONER.
- EXHIBIT-P18 : COPY OF CIRCULAR NO. EM(2) 41541/95 DATED
30.04.1997.
- EXHIBIT-P19 : EXTRACT COPY OF RESOLUTION NO. 3 ADOPTED IN THE
MEETING OF THE BOARD OF DIRECTORS OF THE KASARAGODE
DISTRICT CO-OPERATIVE BANK LTD. IN THEIR MEETING
HELD ON 08.11.1986.
- EXHIBIT-P20 : COPY OF LETTER NO. CB(3) 69702/86 DATED 19.02.1987
ISSUED BY THE 3RD RESPONDENT.

RESPONDENTS' EXHIBITS:

- EXHIBIT-R(1) (a) : COPY OF THE REPRESENTATION MADE BY THE
PETITIONER DATED 20.12.1990.
- EXHIBIT-R(1) (b) : COPY OF THE MEMO GIVEN TO THE PETITIONER DATED
28.10.1991 INTIMATING THE DECISION OF THE
BOARD OF DIRECTORS.
- EXHIBIT-R(1) (c) : COPY OF THE PROCEEDINGS DATED 08.04.1995 WHERE
BY THE PETITIONER IS PROMOTED AS JUNIOR
ACCOUNTANT /JUNIOR INSPECTOR.
- EXHIBIT-R(1) (d) : COPY OF THE SENIORITY LIST DATED 14.06.1996.

//TRUE COPY//

P.A. TO JUDGE

DST

C.R.

Dama Seshadri Naidu, J.

W.P.(C) No. 26585 of 2005 M

Dated this the 9th day of October, 2015

JUDGMENT

In this writ petition, the petitioner has ventilated her grievance that the first respondent Bank has sought to recover with retrospective effect—after more than six years—the amounts paid to her initially on her attaining the grade promotion in the rank of Steno-Typist.

2. Briefly stated, the petitioner joined the first respondent Bank on 29.04.1989 as a Steno-cum-Typist, and later, on 20.01.1991, had her services regularized with effect from 13.05.1990. Soon thereafter, on 20.11.1991, the petitioner was transferred and posted in the main branch of the first respondent Bank as a Clerk-Cashier.

3. When two of her juniors, namely Mr.C.Thamban and Mr.K.V.Venu, were given grade promotion in 1991, the petitioner complained to the first respondent Bank about

the disparity. When nothing had been heard, the petitioner filed an appeal before the Government staking her claim on the strength of Exhibits P1 and P2 Government Orders.

4. In the wake of the directions said to have been given by the Government, the first respondent Bank on 31.01.1998 issued Exhibit P3 proceedings giving grade promotion to the petitioner as well with effect from 13.05.1990.

5. While the petitioner had been enjoying the grade promotion, ostensibly owing to audit objections, the first respondent Bank issued Exhibit P4 memo on 01.10.2004, ordering recovery of what is said to be the excess pay paid to the petitioner in the name of grade promotion for the period from 13.05.1990 to 01.01.1998. Aggrieved, the petitioner submitted Exhibit P5 representation before the General Manager of the first respondent Bank, in response to which it issued Exhibit P6 notice fixing the date for personal hearing.

6. Nevertheless, the petitioner once again

submitted another representation, Exhibit P7 dated 23.11.2004, seeking a copy of the audit report. Eventually, without supplying the documents sought by the petitioner; but, at any rate, after holding personal hearing on 23.11.2004, the General Manager issued Exhibit P9 proceedings on 29.03.2005 affirming Exhibit P4 memo.

7. Notwithstanding Exhibit P9 order passed by the General Manager, the petitioner submitted Exhibit P10 representation to the same authority, this time, seeking a copy of the order dated 21.03.2005, said to have been passed by the President of the first respondent Bank. The order dated 21.03.2005, according to the petitioner, assumes importance for there is a reference in Exhibit P9 order to the said communication and the General Manager seems to have decided against the petitioner, essentially based on the said order of the President.

8. When the petitioner's Exhibit P10 representation yielded no result, she finally filed Exhibit P11 revision before the third respondent by invoking Section 87 of the

Kerala Co-operative Societies Act, 1969 (the 'Act for brevity).

9. Initially, the third respondent issued stay against Exhibits P4 and P9 and eventually considered the revision on merits taking into account Exhibit P13 objection filed by the first respondent Bank. As is clear from the record, through Exhibit P17 proceedings the third respondent rejected the petitioner's revision, thereby affirming the demand of the first respondent Bank in Exhibit P4 that the petitioner should repay the monetary benefits she had secured in the name of the grade promotion. Under these circumstances, assailing Exhibit P17, the petitioner has filed the present writ petition.

10. In the above factual backdrop, Mr.Unnikrishnan, the learned counsel for the petitioner has, to begin with, submitted that Exhibits P4, P9, and P11 are unsustainable. According to him, the recovery was sought without providing to the petitioner the necessary material, such as audit report and the order of the

President of the first respondent Bank, to defend herself properly.

11. The learned counsel has further contended that the first respondent Bank has discriminated against the petitioner. In elaboration, he would contend that the Bank had not recovered the alleged excess pay from two other employees, who had also been extended the same benefit, despite they being juniors to the petitioner.

12. The learned counsel has eventually contended that the first respondent Bank shall not be permitted to recover the alleged excess pay from the petitioner, for she has neither mislead the employer nor played fraud on it to have any undue advantage. In support of his contentions, the learned counsel for the petitioner has placed reliance on **State of Punjab and Others v. Rafiq Masih (White Washer) and Others**¹.

13. Per contra, the learned counsel for the first respondent Bank has submitted that the petitioner had not at all been entitled to any grade promotion or any higher

¹ (2015) 4 SCC 334

grade pay. According to him, the petitioner got promoted in five years after her joining the service.

14. The learned counsel has also specifically contended that the first respondent Bank had extended the benefit of higher grade pay to the petitioner only on her repeated representations and on her approaching the Government in that regard. He has further contended that since the petitioner is still in service, the employer's efforts to recover the excess pay cannot be found fault with.

15. The learned counsel, in support of his submissions, has placed reliance on **Syed Abdul Qadir and others v. State of Bihar and Others²**, **Col. B.J.Akkara (Retd.) v. Govt. of India³**, **Chandi Prasad Uniyal and Others v. State of Uttarakhand and Others⁴** and **Registrar, Co-operative Societies Haryana and Others v. Israil Khan and Others⁵**.

16. Since the learned counsel for the petitioner has persistently submitted that the petitioner has been

² (2009) 3 SCC 475

³ (2006) 11 SCC 709

⁴ (2012) 8 SCC 417

⁵ (2010) 1 SCC 440

discriminated against and that no recovery had been effected from two of her juniors who had been extended the benefit of grade promotion. This Court directed the first respondent Bank to file an affidavit concerning the steps it has taken regarding the petitioner's juniors who are also said to have been paid on account of their grade promotion—erroneously or otherwise.

17. In response, the first respondent Bank did file its additional counter affidavit along with certain exhibits. The gravamen of the first respondent Bank's submission is that having realized that the benefit of grade promotion had been extended not only to the petitioner but also to two of her juniors, namely Mr.K.V.Venu and Mr.Choorikadan Thamban, it recovered the amounts. Illustratively, the first respondent Bank produced Exhibits R1(e) and R1(f) memos to hammer home the point that recovery had been effected even from the petitioner's juniors.

18. Nevertheless, the learned counsel for the

petitioner has strenuously contended that the petitioner's juniors were extended the benefit under 1:1 ratio grade promotion and that the first respondent Bank is trying to confuse the issue by conflating the time bound higher grade promotion with 1:1 ratio grade promotion.

19. In further elaboration, the learned counsel has contended that the petitioner's juniors were extended the benefit under this 1:1 ratio. In so far as the petitioner is concerned, the benefit extended through Exhibit P3, claims the learned counsel, is on account of her entitlement to the benefit of 1:1 ratio grade promotion.

20. Summing up his submissions, the learned counsel has submitted that Exhibits P4, P9 and P17 are totally unsustainable. The learned counsel has also submitted that the process of recovery was initiated very belatedly, to be more precise, after six years.

21. Heard the learned counsel for the petitioner and the learned counsel for the first respondent Bank, as well as the learned Government Pleader, apart from perusing

the record.

Issues:

- (1) Whether there is any difference between time bound higher grade promotion and 1:1 ratio grade promotion?
- (2) Whether the petitioner is entitled to any grade promotion?
- (3) Whether the first respondent Bank is justified in seeking to recover after a lapse of six years the excess pay paid to the petitioner?

Discussion:

Issue No.1:

22. To a great extent, the facts are not in dispute. Initially, one Mr.C.Thamban and Mr.K.V.Venu, admittedly juniors to the petitioner, were given the so-called grade promotion or higher grade pay in 1991. Having initially complained that the petitioner, though senior, had not been extended the benefit, when no response had been forthcoming from the employer, the petitioner appealed to the Government. In the course of time, understandably, as a result of the developments in the appeal filed by the

petitioner before the Government, the first respondent Bank issued Exhibit P3 proceedings dated 31.01.1998 granting higher grade pay to the petitioner as well with effect from 13.05.1990.

23. On realization of what is said to be its mistake, the first respondent Bank issued Exhibit P4 memo on 01.10.2004 with a view to recovering from the petitioner the excess pay paid to her between 13.05.1990 and 31.01.1998 in the name of higher grade pay. It is not in dispute that the first respondent Bank did follow the due procedure before demanding recovery. In other words, the first respondent Bank put the petitioner on notice, invited her objections, and only after examining them, issued the orders of recovery.

24. Evident from the record is the fact that the first respondent Bank took a decision to recover the alleged excess pay from the petitioner on account of the objection raised in the audit report. Despite the petitioner's asking for a copy of the audit report, the first respondent Bank,

without providing it, went ahead, held a personal hearing on 23.01.2004, and issued Exhibit P9 proceedings on 29.03.2005 affirming Exhibit P4 memo.

25. After the initial efforts to have Exhibit P9 proceedings recalled by the first respondent Bank, the petitioner filed Exhibit P11 revision before the third respondent, invoking Section 87 of the Act. When the third respondent rejected the petitioner's revision through Exhibit P17 proceedings, the petitioner has approached this Court.

26. Initially, the learned counsel for the petitioner has laid frontal thrust on the fact that the first respondent Bank has discriminated against the petitioner. In elaboration, it is the contention of the learned counsel for the petitioner that no recovery was sought from Mr.C.Thamban and Mr.K.V.Venu, the petitioner's juniors, who had also been given the benefit of higher grade pay.

27. In the face of the fact that the first respondent Bank recovered from the other two employees also and

that the petitioner has not been discriminated against, the learned counsel for the petitioner has nevertheless changed his line of attack.

28. The learned counsel for the petitioner, notwithstanding his singular contention earlier that the first respondent Bank had treated the petitioner with discrimination, now contended that the issue whether any amount had been recovered from those two employees is irrelevant. According to him, the petitioner's juniors were extended the benefit under 1:1 ratio grade promotion and that the first respondent Bank is trying to confuse the issue by conflating it with time bound higher grade promotion.

29. Obtuse are the contentions of the learned counsel for the petitioner on the issue of time bound higher grade promotion and 1:1 ratio grade promotion, if there were to be any distinction. Nevertheless, we will endeavour to examine the issue.

30. It is not in dispute that the post of Steno-Typist

was initially a standalone post without any promotional avenues. For the first time in 1996 through Exhibit P1 order, the Government equated the said post with Clerk/Cashier/Typist/Typist-cum-Clerk/Telephone Operator/Telex Operator. In that context, it is pertinent to extract a portion of Exhibit P1, which reads as follows:

“Government having examined the request in detail are pleased to amend clause 6(c) of the amended service regulation of employees of District Co-operative Banks approved in G.O (MS) 63/89/Coop. by including the post of Steno Typist also with immediate effect as follows:

The promotion of Sr. Inspector/Sr. Accountant and Jr. Inspector / Junior Accountant will be 1:1. The proportion of I Grade Typist/Steno-Typist and Typist/Steno-Typist will be 1:1. There will be no Spl.Grade Typist. But on acquiring..... rule of the Bank.”

31. Exhibit P1, as has been extracted above, reads to the effect that promotion of Senior Inspector/Senior Accountant and Junior Inspector/Junior Accountant will be 1:1. It further reads that the proportion of I Grade Typist / Steno-Typist and Typist-Steno Typist will be 1:1. There will be no special grade Typist.

32. Though the learned counsel for the petitioner has made a herculean effort to impress upon the Court,

having abandoned his initial plea of discrimination, that the petitioner's juniors were extended the benefit under 1:1 ratio grade promotion, I am afraid there is neither any conflation nor any confusion.

33. In other words, Exhibit P1, apart from equating certain posts, speaks of the manner of granting promotion from the feeder categories fixing the ratio among different equal cadres. Presumably, in the light of indiscriminate use of the expression 'grade promotion', the learned counsel for the petitioner may have been under an impression that getting higher pay in the same cadre also amounts to promotion, but it is different and distinct from the regular promotion for which alone the ratio has been fixed.

34. As can be seen from the above extract, first, the post of Senior-Typist has been put on a par with the other posts such as Clerk, Cashier etc. Second, the promotion to the higher cadre has also been fixed on a 1:1 ratio basis. In the present instance, the question of promotion being

not in consideration, it is not essential for us to examine the impact of Exhibit P1 on the issue of promotions of whatever ratio. Suffice to confine ourselves to the issue of higher grade pay or the so-called grade promotion.

What is a Grade Promotion?

35. It is too well established to be restated that the expression “grade promotion” is a misnomer, for it is no promotion to any higher post or rank. It is, in fact, a recognition that a person has been denied promotion for whatever reason and that he has been stagnating in the same carder.

36. To ameliorate the situation, when an employee has been kept in the same cadre for many years for want of promotion, the employer extends the benefit of higher grade pay. It is only an enhancement of pay without any enhancement in the rank of the employee. The sine qua non for the higher grade pay is the stagnation in the same cadre for more than a fixed numbers of years, which period is determined by the employer.

37. As to the nuance of grade in the same rank or cadre, a Constitution Bench of the Hon'ble Supreme Court in **Lalit Mohan Deb v. Union of India**⁶ has held that a promotion post is a higher post with a higher pay. A selection grade has higher pay but in the same post. A selection grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotions should at least be placed in the selection grade to prevent stagnation on the maximum of the scale. Selection grades are, therefore, created in the interest of greater efficiency.

38. Soon thereafter, a learned Full Bench of this Court in **N.G.Prabhu v. Hon'ble Chief Justice**⁷ has observed thus:

“15.[P]romotion is, of course, appointment to a different post carrying a higher scale of pay in the service. If, to better the conditions of service of the incumbents in posts in the same category, the scale of pay of all the posts in the category is raised, the incumbents would naturally get the higher scale of pay. But in such a case it may not be proper to characterize the event as promotion to higher posts though a benefit of a higher scale of pay is obtained

⁶ (1973) 3 SCC 862

⁷ 1973 KLJ 436

by all concerned. ..That is because there is no question of appointment from one post to another. Parties continue to hold the same post but get a higher scale of pay..."

(emphasis added)

39. During the course of arguments, the learned counsel for the first respondent Bank, at the Bar, handed over to me a copy of Circular No.15/97 issued by the Registrar of Co-operative Societies. The Circular reads, inter alia, to the effect that a person is entitled to higher grade pay on his or her completion of 10 years of service in the entry post. Circular also reads to the effect that in promotional post the employees are entitled to higher grade pay based on stagnation varying from 10 to 25 years.

40. There is no gainsaying the fact that the issue of the petitioner's entitlement to grade promotion was prior to 1997. In that context, the learned counsel for the first respondent has submitted that prior to Circular No.15/97 the minimum period was eight years. First, the learned counsel for the first respondent Bank has not contradicted the said statement as regards the length of service to

claim the higher grade pay. Second, we cannot assume that an employee is entitled to higher grade pay without any specific period of stagnation in the same cadre. Accordingly, I accept the plea of the learned counsel for the first respondent that when the petitioner joined the service, the period of stagnation was fixed at eight years.

Issue No.2:

41. In the light of Exhibit P1 order, owing to the amalgamation of different cadres such as Steno-Typist, Clerk, Cashier, etc., the petitioner's post initially stood converted as Clerk-cum-Cashier. Soon after the petitioner's regularization on 13.05.1990, she submitted Exhibit R1(a) revision dated 20.12.1990, before the first respondent seeking promotion to the post of Accountant Inspector or in the alternative to have her post converted as Clerk-Cashier.

42. From Exhibit R1(c) it is also evident that prior to her promotion as Junior Accountant, the petitioner was working as Clerk-Cashier, but not as Steno-Typist. Thus,

soon after joining service the petitioner not only had her position converted as Steno-Typist, but also had her promotion as Junior Accountant, within five years.

43. It is axiomatic to observe that a person could be entitled to any higher grade pay or grade promotion only when he or she completes the prescribed period of time in the said cadre. In the present instance, if we are to assume that the minimum period required for higher grade pay is eight years, the petitioner, indisputably, got promoted within five years. As such, she could not be entitled to any higher grade pay.

44. In the light of the subsequent pleadings and the material placed before this Court by the first respondent Bank, it cannot be said that the petitioner has been treated indiscriminately. For the fact remains that the first respondent Bank did recover the excess pay from the other two employees, the petitioner's juniors.

45. First, it has to be made clear that the ratio as has been fixed in Exhibit P1 has nothing to do with the

higher grade pay. The fact, further, remains that initially the petitioner's juniors were paid higher grade pay and later the petitioner, too, was paid the same benefit. In the course of time, the first respondent Bank realized its mistake and took remedial steps to recover the amounts.

46. I do not see anything amiss, much less illegal, in the approach of the first respondent Bank. Once it is declared that the petitioner is not entitled to any benefit of higher grade pay, it goes without saying that the first respondent Bank is entirely entitled to take remedial steps to make good the laws. It has suffered on account of, al beit, a bona fide administrative error on its part.

Issue No.3:

Can the excess pay be recovered?

47. Now, the last issue remains to be determined is whether the first respondent Bank is justified in making efforts to recover the excess amounts after a lapse of about six years.

48. Since the issue of recovery of the excess pay

frequently falls for consideration before various judicial fora, there is sufficient case law generated in this regard.

49. In Babulal Jain (supra), the Hon'ble Supreme Court has observed that no recovery can be effected once it is found that the employees have been paid higher pay than they have been entitled to on a misconception or misconstruction of law, rather than owing to the fraud committed or misrepresentation made by the very employee. In M.Ravindran (supra), a cryptic judgment, this Court has relied on Babulal Jain (supra).

50. In Aleyamma Varghese (supra), the Education Department has directed recovery of excess salary from its employee after seventeen years. The Hon'ble Supreme Court, keeping in view the peculiar facts and circumstances of the case, has held that the State of Kerala should not have taken recourse to the recovery proceedings after such a long time. It is observed that a mistake apparent on the face of the record may be rectified but in a matter of this nature, the State is

expected to react more magnanimously and not resort to recovery proceedings after a period of seventeen years. As has been observed by the Apex Court, the judgment was rendered essentially by taking recourse to Article 142 of the Constitution with a view to doing complete justice to the parties.

51. In Col. B.J.Akkara (Retd.) (supra), the Apex Court has held that the relief against the recovery of excess payment is granted by courts, not because of any right of the employees, but in equity and in exercise of the judicial discretion to relieve the employees from the hardship that will be caused if recovery is allowed. It is further observed that an employee, 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 will 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, a judicial interdiction in this regard is required.

52. Their Lordships in Col. B.J.Akkara (supra) have, however, served a word of caution by observing that where the employee has knowledge that the payment received is in excess of what is due to him, or where the error is detected or corrected within a short time, Courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may, in the facts and circumstances of each case, refuse to grant such relief against recovery.

53. Based on the ratio in Col. B.J.Akkara (supra), another learned Division Bench of the Hon'ble Supreme Court in Israil Khan (supra) has observed thus: What is important is that recovery of excess payments from the employees is to be refused only where the excess payment is made by the employer by applying a wrong method of calculation, or on a particular interpretation of the applicable rules, which is subsequently found to be

erroneous. But, where the excess payment is made as a result of any misrepresentation, fraud or collusion, courts will not use their discretion to deny to the employer the right to recover the excess payment.

54. In Syed Abdul Qadir (*supra*), the question is whether the amount that has been paid in excess to the appellants-teachers should be recovered or not. It is the submission of the learned counsel appearing on behalf of the appellants-teachers 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 that has been paid to the appellants cannot and should not be recovered; it having been paid without any misrepresentation or fraud on their part.

55. A learned Bench of Three-Judges of the Hon'ble Supreme Court has summed up the legal position by observing that the Supreme 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. The relief against recovery is granted by the courts not because of any right in the employees, but in equity, exercising the 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.

56. Eventually, keeping in view the peculiar facts and circumstances of the case at hand and to avoid any

hardship to the appellants-teachers, the Supreme Court has ordered against the recovery.

57. In Chandi Prasad Uniyal (supra), once again a learned Two-Judge Bench of the Hon'ble Supreme Court has considered the issue. Their Lordships, having referred to various precedents on the issue, have observed thus:

"15. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy."

58. Their Lordships have gone on to further observe that the issue is with regard to the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. The learned Bench observed that there is no place for bringing in the concept of fraud or misrepresentation in such situations and that the question to be asked is whether

excess money has been paid or not may be due to a bona fide mistake.

59. In elaboration, it is further held that possibly, effecting excess payment of public money by Government Officers may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such a 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.

60. Any amount paid/received without authority of law, declares the Apex Court, 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.

61. With reference to Syed Abdul Qadir (supra), decision of a Three-Judge Bench, their Lordships have observed that the decision was rendered 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.

62. In Rafiq Masih (White Washer) (supra) a learned Division Bench has noticed the apparent difference of views expressed on the one hand in **Shyam Babu Verma and Ors. v. Union of India and Others**⁸, and **Sahib Ram Verma v. State of Haryana**⁹; and, on the other hand, in Chandi Prasad Uniyal (supra). As a result, the learned Bench placed the matter before a Bench of Three-Judges.

63. A learned Three-Judge Bench in its judgement dated 08.07.2014, as reported in Rafiq Masih (I) (supra), has held that the observations made in the previous cases by the Supreme Court that the employer should not recover the excess amounts paid to the employees after a

⁸ (1994) 2 SCC 521

⁹ (1995) Supp. 1 SCC 18

long lapse of time were in exercise of its extraordinary powers under Article 142 of the Constitution of India. Having opined thus, their Lordships have further observed that the decisions of the Court based on different scales of Articles 136 and 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning.

64. There is no conflict, according to their Lordships, in the views expressed in the earlier judgments, which were noted by the learned Division Bench to have been in conflict, though. As a result, having felt that there was no need to answer the reference, the learned Three-Judge Bench remanded the matter for appropriate disposal.

65. Under the circumstances narrated above, a learned Division Bench of two Judges has rendered Rafiq Masih (II) (supra) by observing that the benefit cannot be extended to an employee merely on account of the fact that he was not an accessory to the mistake committed by the employer; or merely because the employee did not

furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in the absence of any fraud or misrepresentation at the behest of the employee.

66. Continuing in the same vein, their Lordships have observed that 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, 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 of recovery exercised by the employer will have to be weighed against its impact 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.

67. In the end, their Lordships have summarised the precedential position and fixed the parameters applicable to the cases of recovery of pay from an employee on the ground that there is an excess payment.

The summary is as follows:

"18. [B]e 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." (emphasis supplied)

68. From the above extract, it is obvious that there shall be no recovery if the excess pay is sought to be recovered after a gap of more than five years. In the present instance, indisputably, the first respondent Bank has sought to recover the excess pay after six years. I am, therefore, of the opinion that the ratio of Rafiq Masih (II) (supra) squarely applies.

69. In the facts and circumstances, this Court declares that Exhibits P4, P9, and P11 cannot be sustained and accordingly sets them aside.

In the manner indicated above, the writ petition is allowed.

Dama Seshadri Naidu, Judge

tkv/DMR