

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7154 OF 2019

**The State of Maharashtra & Ors. } Petitioners
Vs.
Mrs. Rekha Vijay Dubey } Respondent**

**WITH
WRIT PETITION NO. 7221 OF 2019**

**The State of Maharashtra & Ors. } Petitioners
Vs.
Mr. Sitaram Mamtaji Pote } Respondent**

**WITH
WRIT PETITION NO. 7191 OF 2019**

**The State of Maharashtra & Ors. } Petitioners
Vs.
Mr. Shashikant K. Chinchkar } Respondent**

Mr. Mehroz Pathan, Special Counsel with Mr. N. K. Rajpurohit, AGP for the petitioners.

Mr. Gaurav Arvind Bandiwadekar i/by Mr. Bhushan Arvind Bandiwadekar for the respondents.

**CORAM: DIPANKAR DATTA, CJ &
M. S. KARNIK, J.**

**HEARD ON: - SEPTEMBER 15, 2021
JUDGMENT ON: - SEPTEMBER 24, 2021.**

JUDGMENT: - [Per Dipankar Datta, CJ.]

1. Original Application Nos. 805-807 of 2016, on the file of the Maharashtra Administrative Tribunal, Mumbai Bench, Mumbai (hereafter "the Tribunal" for short), were allowed by

the Judicial Member thereof by a common judgment and order dated 5th December 2018. The State of Maharashtra and its officers, being the respondents in all such original applications, have challenged the said judgment and order by presenting these three writ petitions.

2. The common thread that runs through the claims of all three original applicants before the Tribunal is that they have retired from service on diverse dates while holding Class III/Group 'C' posts and their retirement benefits have been withheld on the ground that while in service, they had been paid salary in excess of their entitlement owing to erroneous fixation of their pay-scale. The question that arose for consideration before the Tribunal was, whether the State is justified in withholding the retirement benefits of the original applicants on the ground as noted above. Considering the decisions of the Supreme Court reported in (2015) 4 SCC 334 **[State of Punjab and Others vs. Rafiq Masih (White Washer) and Ors.]** as well as (2016) 14 SCC 267 **[High Court of Punjab and Haryana and Ors. vs. Jagdev Singh]**, the Tribunal was of the view that the State was unjustified in seeking to recover excess payment from the retirement benefits of the original applicants. The Tribunal also found, as a matter of fact, that the original applicants were rightly fitted in the appropriate pay-scale commensurate with their status as 'Instructors' and, therefore, negated the stand of the State that excess payment had been effected in their favour.

3. We have heard Mr. Pathan, learned Special Counsel appearing in support of the writ petitions and Mr. Bandiwadekar, learned advocate for the original applicants. The question we

are tasked to decide is, whether the Tribunal was right in its interference with the impugned action of the State in seeking to recover from the retirement benefits of the original applications any sum paid in excess.

4. In **Rafiq Masih** (supra), the Supreme Court, upon consideration of previous decisions, proceeded to hold in paragraph 18 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 impermissible in law:

- (i) Recovery from the employees belonging to Class III and 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."

5. **Jagdev Singh** (supra) had the occasion to consider **Rafiq Masih** (supra). In paragraph 10, the situations as referred to

in paragraph 18 of Rafiq Masih (supra) were quoted, whereafter, it was observed in paragraph 11 as follows: -

“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 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.”

6. It is paragraph 11 of **Jagdev Singh** (supra) that Mr. Pathan has relied upon in support of his contention that the Tribunal fell in error in holding that the State was unjustified in seeking to recover excess payment from the retirement benefits of the original applicants, notwithstanding the fact that the original applicants had signed a declaration in 2011 undertaking to refund excess payment, if any, made to them while they were in service.

7. The exception carved out by **Jagdev Singh** (supra) is in respect of situation (ii) as in paragraph 18 of **Rafiq Masih** (supra). There are multiple reasons for which we are not inclined to accept Mr. Pathan's contentions.

8. First, the undertaking given by the respondent in **Jagdev Singh** (supra), while opting for the revised pay-scale, was in pursuance of the Haryana Civil Service (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules, 2001. Since the respondent had submitted an undertaking under the said Rules that he would refund to the Government any amount paid to him in excess either by adjustment against future payment due or otherwise, he was held to be bound by such undertaking. Additionally, the respondent had not retired from service on superannuation but he was compulsorily retired from

service. Also, the respondent being a judicial officer was not holding a Class III/Group 'C' post on the date he was compulsorily retired. It is in such circumstances that the Supreme Court held that the respondent was bound by the undertaking given by him and that the Government was justified in its action of seeking to recover excess payment that was made. That is not the case here. The facts here are quite dissimilar and, therefore, having regard to the settled proposition of law that a judgment is an authority for what it decides and not what can logically be deduced therefrom, we hold the decision in **Jagdev Singh** (supra) to be distinguishable on facts.

9. The other reason for which we are not inclined to hold that **Jagdev Singh** (supra) has application to the facts of this case is because of situations (i) and (iii) forming part of paragraph 18 of Rafiq Masih (supra). Situation (i) clearly bars recovery from employees belonging to Class III/Group 'C' service. Further, situation (iii) bars recovery from employees when excess payment has been made for a period in excess of 5 (five) years before the order of recovery is issued. We are not inclined to accept the contention of Mr. Pathan that although recovery from employees belonging to Class III/Group 'C' cannot be made in terms of situation (i) (supra) while in service, such recovery could be made from retired Class III/Group 'C' employees who have either retired or are due for retirement within one year of the order of recovery. If we were to accept Mr. Pathan's contention, it would lead to a situation that although there could be a declaration given by a Class III/Group 'C' employee while in service that excess payment could be recovered from him from future salary to be paid to him, which

cannot be recovered in terms of situation (i), but in terms of situation (ii), as interpreted in **Jagdev Singh** (supra), recovery could be effected from his retirement benefits after the relationship of employer-employee ceases to subsist. **Rafiq Masih** (supra), very importantly, carves out situation (v) (supra) too, proceeding on the premise that recovery from retirement benefits, by asking the retired employee to refund excess amount, if any, received by him, if found to be iniquitous and arbitrary and thereby causing hardship, such a step ought to be avoided. This being the reasoning, it would be far-fetched that what the employer (State) cannot resort to against a Class III/Group 'C' employee while he is in service, such employer would be empowered to do so after retirement of the Class III/Group 'C' employee. If accepted, the same would amount to a distorted interpretation of the situations in **Rafiq Masih** (supra), which has to be eschewed. We are of the considered opinion that the Tribunal was right in distinguishing **Jagdev Singh** (supra) by observing that paragraph 11 of the said decision must be confined to Class I/Group 'A' and Class II/Group 'B' officers. Mr. Pathan has not been able to show that the original applicants gave the declaration/undertaking in pursuance of a statutory rule. That not having been shown, the contention raised by him on the basis of **Jagdev Singh** (supra) has to be rejected. We, however, leave the question open as to whether **Jagdev Singh** (supra) would apply to cases of Class III/Group 'C' employees who by giving declaration, mandated by a statutory rule, undertake to refund any sum received in excess of their entitlement.

10. Thirdly, we cannot also be ignorant of the factual situation in the present case that monies paid as part of salaries to the

original applicants, which the State considers to constitute excess payment, has continued for a period in excess of 5 (five) years prior to the order of recovery, which was made only after retirement of the original applicants on superannuation. This is one other ground that persuades us to hold in favour of the original applicants and against the State.

11. Fourthly and finally, we had enquired of Mr. Pathan as to whether any of the original applicants by acts of misrepresentation or fraud had been instrumental in receiving excess payment. Law is well-settled that fraud vitiates even the most solemn of acts. We would venture to observe that even if a Class III/Group 'C' employee, say a year or so after retirement or before retirement, is found to have indulged in fraud, recovery of excess payment may not be barred on equitable principles. There ought to be zero tolerance of fraudulent acts. Fortunately, for the original applicants, Mr. Pathan's answer to our query was in the negative; hence, the recovery process must be held to have been correctly interdicted by the Tribunal.

12. Since we have rendered a decision on the basis of our interpretation of the decisions in **Rafiq Masih** (supra) and **Jagdev Singh** (supra), we have not examined the other part of the Tribunal's judgment, by which it has been held that no excess payment was made in favour of the original applicants.

13. There is no merit in the writ petitions. Accordingly, the same stand dismissed. There shall, however, be no order as to costs.

14. The State shall proceed to implement the directions of the Tribunal within 3 (three) months from date of receipt of a copy of this judgment and order, failing which the original applicants shall be free to initiate appropriate proceedings in accordance with law before the Tribunal.

15. We also make it clear that if the State is genuinely interested in preventing drainage of tax payers' money and is of the firm opinion that the original applicants have been erroneously paid in excess of their entitlements, nothing contained in this order will prevent the State from fixing responsibility and drawing appropriate disciplinary proceedings in accordance with law against the erring employees for replenishment of the loss caused by such excess payment.

16. A parting observation may not be inapt. In this era of scientific and technological advancement, it is unfortunate that detection of excess payment is made to wait till an employee retires. Doubtless, there is lack of due diligence as well as total absence of checks at the appropriate level to secure the tax payers' money. It is high time that the State equips its system in such manner that an excess payment made to an employee during his service tenure, either out of erroneous fixation of pay scale or otherwise, is detected at the earliest instead of being detected while the pension papers are settled whereupon attempts are made to protect tax payers' money, obviously after retirement of such an employee and subjecting him to untold hardship. The system ought to be revamped in such a manner that audits at regular intervals are conducted to facilitate prevention of drainage of tax payers' money on the one hand and on the other to send a message to incompetent

officers/employees that any remissness would not be tolerated. In case of the latter, the option of drawing up disciplinary proceedings for imposing punishment against those who are found to be derelict in the discharge of their assigned duties and functions should be explored. We hope and trust that the State shall not leave any stone unturned to rise to the challenge.

SALUNKE
J V

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(M. S. KARNIK, J.)

(CHIEF JUSTICE)