

In The High Court At Calcutta
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Harish Tandon.
&
The Hon'ble Justice Shampa Dutt (Paul)

WP.CT. 28 of 2022
Union of India & Ors.
Vs.
Samir Kumar Bandyopadhyay & Ors.
With
WP.CT. 32 of 2022
Union of India & Ors.
Vs.
Subir Kumar Bhadra & Ors.
With
WP.CT. 33 of 2022
Union of India & Ors.
Vs.
Debajyoti De & Ors.

For the Petitioners : Mr. Subhankar Chakraborty,
Mr. Saptarshi Bhattacharjee,
Ms. R. Manna.

For the Respondents. : Mr. Ujjal Ray,
Mr. Arpa Chakraborty.

Heard on : June 20, 2022.

Judgment on : June 20, 2022.

The Court:- The instant writ petitions are filed at the behest of the Union of India assailing a common order dated 15th November, 2021 passed by the Central Administrative Tribunal disposing of several tribunal applications filed by the respective applicants therein by which

the direction was passed upon the writ petitioners to refund recovered amount within a period of two months from the date of the receipt of the said order.

The respondents being the applicants before the Tribunal were employed in different cadres in several zonal railways through the Railway Recruitment Board. Subsequently they were promoted and absorbed as motorman in the Metro Railway. By acceptance of the recommendation of 6th Pay Commission, they were entitled to Grade Pay of Rs.4,200/- in Pay Band 2 because of the stagnancy in the promotional avenues in the Metro Railway. Subsequently the Board adopted the Modified Assured Career Policy (MACP) scheme in the year 2009 and the applicants, respondents herein, were given the financial upgradation under the said scheme and received such benefits until the circular dated 28th April, 2017 was issued.

By the said circular, the recruited motorman in the Metro Railway were entitled to upgradation in Grade Pay of Rs.4,600/-, 4,800/- and 5,400/- in Pay Band 2 on completion of 10, 20 and 30 years of service respectively and the Grade Pay of Rs.4,600/-, which was allowed in the year 2011, was withdrawn. By virtue of the said circular, the writ petitioners attempted to recovery the excess amount paid by mistake and, in fact, recovered partial amount from the salary or the retiral benefits.

The challenge was made to the recovery of excess amount unilaterally when the respondents herein have neither practised fraud upon the employer i.e. the petitioners herein nor such benefit was extended by making incorrect representation.

The Tribunal disposed of the application relying on a judgement of the Supreme Court in case of *State of Punjab & Ors. vs. Rafiq Masih (White Washer) & Ors.* reported in (2015) 4 SCC 334 directing the refund of the amount already deducted and/or recovered within a specified time.

The learned Advocate appearing for the writ petitioners submits that the Apex Court in *Rafiq Masih* (supra) have laid down the conditions, circumstances and situations, when the recovery of excess amount is impermissible by law and Clause (iii) in paragraph 18 thereof indicates that any excess payment made for a period in excess of five years before the order of recovery is issued is impermissible. It is further submitted that the mistake was detected within three years from the date of extending such benefits and in view of exposition of law by the Supreme

Court in Rafiq Masih (supra), there is no impediment on the part of the writ petitioners to recover the excess amount paid to the respective respondents.

On the other hand, the learned Advocate appearing for the respondents in the aforesaid writ petitions submits that the benefit was extended by the writ petitioners voluntarily in the year 2009 and the recovery was sought for the first time in the year 2017 when the circular was issued on 28th April, 2017. It is thus submitted that the aforesaid contentions of the writ petitioners is untenable and the case falls within the peripheral of the judgement of the Supreme Court rendered in case of Rafiq Masih (supra).

On the conspectus of the aforesaid submissions made before us and the facts pleaded in the writ petitions as well as the tribunal application, it is no doubt true that the recovery of an excess amount if paid to the employee by mistake cannot be recovered in absence of any fraud or misrepresentation committed by the employee. The Apex Court in case of Rafiq Masih (supra) considered various judgements of the Apex Court rendered in this regard where the recovery of excess amount at the behest of the employer is impermissible and the Apex Court held that the decision to recover the excess amount amounts to hardship and, therefore, it would not be proper on the part of the employer to recover the said amount unless the employee receives such benefit by practising fraud or misrepresentation.

In paragraph 18 of the said Report the Supreme Court has succinctly jotted down few situations wherein the recoveries by the employers would be impermissible in law, which runs thus:

“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."*

From the meaningful reading of the language employed in the aforesaid paragraph there is no ambiguity in our mind that such situations are illustrative in nature and not exhaustive, which would be apparent from the observations made in the first sentence therein.

The Apex Court has held that it was not possible to speculate or postulate all the situations, which would render the recovery impermissible and, therefore, there may be any other cases or circumstances creating hardship impeding the recovery of the excess amount.

The first situation what has been highlighted in the aforesaid paragraph pertains to the recovery of excess amount from an employee belonging to Class III and Class IV service (or Group C and Group D service). The second situation relates to recovery from a retired employee or an employee who is due to retire within a period of one year from the date of the order of recovery. The third situation relates to recovery of excess amount made for a period in excess of five years before the order of recovery is issued. The fourth situation is relatable to an employee who has wrongfully discharged the duties of a higher post and was paid accordingly even though he was required to discharge the duties of inferior post; and the fifth situation, in our opinion, is somewhat omnibus and imbibe within itself the other situations or eventualities, which the Court thinks shall create hardship and would be iniquitous, harsh or

arbitrary to such an extent which would overweigh the equitable balance of the employer's right to recover.

The moment the Apex Court have illustratively laid down the eventualities and/or situations, which make the recovery of excess amount impermissible in law, any one of the above situations if found out from the pleadings would render the recovery of excess amount impermissible. It is misnomer to suggest that all such illustrative situations or eventualities must be eminently present in order to have the benefit of the judgement of the Apex Court, which does not appear to us the spirit and the ratio laid down therein.

The illustrations are given in order to have the clarity in the law expounded through a judicial fiat and do not render it exhaustive or rigid incapable of any flexibility. Furthermore the judgement has to be read in juxtaposition with the facts involved in the given case and not as a statute where each word is capable of being interpreted through a canon of interpretative process and assigning the meaning in order to render such statute workable in tune with the object and purpose for which it was enacted.

It is culled out from the aforesaid judgement that the moment the recovery of an excess amount is contemplated and/or attempted from a Class III and Class IV, i.e. Group C and Group D employee, it would create more hardship to such category of employee in comparison with the other categories and, therefore, it is beyond cavil of doubt that the moment the recovery is attempted against such employee, it comes within the circumference and ratio laid down in *Rafiq Masih (supra)*.

Furthermore we find that the benefit was extended in the year 2009 and the mistake was claimed to have been detected in 2012, but the order of recovery of excess amount was issued through a circular on 28th April, 2017, which is admittedly beyond five years from the date of extending such benefits to the respective respondents.

In *Rafiq Masih (supra)* the aforesaid period in our opinion was to be construed and meant or in other words reckoned from the date of the order of the recovery passed by the employer and not from the date when the mistake was detected and the decision remained in slumber for another period of five years.

In recent judgement rendered in case of *Thomas Daniel vs. State of Kerala & Ors.* (Civil Appeal No. 7115 of 2010, decided on May 2, 2022) the Apex Court after taking into consideration the judgement rendered by the Supreme Court on the above point including the judgement rendered in *Rafiq Masih (supra)* held that if the excess amount is not paid on account of misrepresentation or fraud played by the employee, in such case such recovery is impermissible. It would be apposite and profitable to quote the relevant excerpts from the said judgement in the following:

“(13) *In State of Punjab and others v. Rafiq Masih (White Washer) and others 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.

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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."*

(14) Coming to the facts of the present case, it is not contended before us that on account of the misrepresentation or fraud played by the appellant, the excess amounts have been paid. The appellant has retired on 31.03.1999. In fact, the case of the respondents is that excess payment was made due to a mistake in interpreting Kerala Service Rules which was subsequently pointed out by the Accountant General.

(15) Having regard to the above, we are of the view that an attempt to recover the said increments after passage of ten years of his retirement is unjustified."

Based upon the reasoning assigned hereinbefore the law as it stands is that no recovery is permissible if an excess amount is paid by the employer even under mistake from Group C and Group D employees or from retired employees or the employees who are due to retire within a year from the date of the recovery or the excess amount is made in excess

of five years before the order of recovery is issued. The recovery is not permissible if the employee has been wrongfully required to discharge the duties of higher post and paid accordingly when he has a right to receive the amount admissible to an inferior post. There may be another case of hardship which cannot be foresee and, therefore, it is open to the Court to take a decision taking into account the special factors and the facts germinats therefrom. Therefore, the judgement of Rafiq Masih (supra) cannot be construed as an inflexible and/or inviable declaration of law.

The point which is urged before us that the excess amount so paid is not in excess of five years from the date of the recovery does not appear to us to be factually correct and, therefore, we do not find that the contentions of the petitioners in this regard are acceptable.

The writ petitions san merit and are accordingly dismissed.

There will be no order as to costs.

(Harish Tandon, J.)

(Shampa Dutt (Paul), J.)