

**ORISSA HIGH COURT: CUTTACK**

**W.P.(C) NO. 11686 OF 2018**

In the matter of an application under Articles 226 and 227 of the Constitution of India.

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***AFR***

Dr. Surendranath Pati ..... Petitioner

-Versus-

Union of India and others ..... Opp. Parties

For Petitioner : M/s. S.K. Ojha and  
S.K. Nayak, Advocates

For Opp. Parties : Mr. P.K. Parhi, ASGI along  
with Mr. D. Gochhayat,  
Central Govt. Counsel

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI  
AND  
HONOURABLE MISS JUSTICE SAVITRI RATHO**

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**Date of hearing and judgment: 21.04.2022**

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***DR. B.R. SARANGI, J.*** The petitioner, who was working as  
Regional Director (H&FW), Regional Office, Bhubaneswar  
w.e.f. 01.05.2013 and retired on attaining the age of

superannuation on 31.12.2015, has filed this writ petition seeking to quash the order dated 23.02.2018 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 260/00556 of 2016 under Annexure-4, as well as order dated 09.05.2018 passed in R.A. No. 260/0006 of 2018 under Annexure-6, and to issue direction to the opposite parties to release the withheld retiral benefits in his favour within a stipulated time.

2. The factual matrix of the case, in brief, is that the petitioner was promoted to Supertime Administrative Grade, vide order dated 07.02.2013, with effect from 29.10.2008, in the pay band of Rs.37,000-67000/- with grade pay of Rs.10,000/-. He was extended with transport allowance, as per 6<sup>th</sup> CPC recommendation, after exercising option to avail transport allowance instead of availing the facility of staff car. As a consequence thereof, the petitioner received transport allowance for more than seven years, without any objection, till his retirement. After his superannuation,

the petitioner was extended with most of the retiral benefits, but his leave encashment and CGEGIS were withheld due to audit objection dated 06.11.2015, wherein suggestion was given for recovery from the Supertime Administrative Grade (SAG) Officers, who having no eligibility, but have received transport allowance. Thereafter, the petitioner filed representation before the authority indicating that his entitlement of transport allowance, instead of availing the facility of staff car, was not in dispute and if any excess amount was paid to him, the same cannot be recovered since he was protected under the judicial pronouncement made in the case of ***State of Punjab v. Rafiq Masih*** (Civil Appeal No.11527 of 2014 decided on 18.12.2014), reported in (2015) 4 SCC 334. As such, the circular dated 02.03.2016 issued by the DoP&T to that effect also debars any recovery from the retired employee or the employee going to retire within a period of one year from the date of such alleged order of recovery. In view of the clear instructions issued, vide letter dated 31.03.2016,

further order of sanction was issued by opposite party no.2 releasing full CGEGIS amount and part unutilized leave amount, after withholding a sum of Rs.7,85,549/-, likely to be adjusted as against the over payment in transport allowance.

2.2 Challenging the letter dated 31.03.2016, the petitioner approached the Central Administrative Tribunal, Cuttack Bench, Cuttack by filing O.A. No. 260/00556 of 2016 with the following prayer

*“(i) To admit the OA and further be pleased to declare/direct that letter dated 07.12.2015 cannot stand on the way to release entire benefits as due and admissible to the applicant;*

*(ii) To quash sanction order dtd. 19.05.2016 and direct the Respondent No.1 & 2 to accord sanction for Rs.18,61,500/- allowing the Respondent No.3 to release the balance withholding amount of Rs. 7,85,549/- with permissible interest;”*

*(i) And/or pass any other order/orders as deemed fit and proper.*

The tribunal, vide order dated 23.02.2018, dismissed the original application with the following orders:-

*“9. Before parting with this case, I would like to do draw the attention of the DoP&T to the letter*

No. F.No.18/03/2015-Estt. (Pay)-1 dated 02.03.2016 regarding recovery of wrongful/excess payment made to Govt. servant. In this connection, it may be reiterated that the judgment rendered on 18.12.2014 by the Hon'ble Apex Court in the case of State of Punjab and Ors. Vs. Rafiq Masiq (Whitewasher) and relied on in the circular by the DoP&T cannot override the earlier decision rendered by a co-ordinate Bench of the Hon'ble Apex Court on 17.08.2012 in the case of Chandi Prasad Uniyal and Ors. Vs. State of Uttarakhand and Ors. reported in AIR 2012 SC 2951 in view of precedential value of earlier decision when two contrary views are available by two co-ordinate Benches. So long the decision rendered in the case of Chandi Prasad Uniyal and Ors. vs State of Uttarakhand and Ors. is not overruled by a larger Bench, the O.M. issued by the DoP&T dated 02.03.2016 based on the decision rendered in the case of State of Punjab and Ors. Vs. Rafiq masih, in my considered opinion, needs further clarification. The Do&PT is to re-examine the legal impact of both the decisions and issue the clarification/appropriate order in regard to recovery of wrongful/excess payments made to Govt. servants. In case of undue hardship, the matter is different but the government must be very careful about unjust enrichment in terms of cores of rupees of public money due to wrong calculation or incorrect application of governing guidelines and norms."

Seeking review of the order dated 23.02.2018 passed in O.A. No. 260/00556 of 2016, the petitioner filed R.A. No.260/0006 of 2018, which was also dismissed, vide order dated 09.05.2018, on circulation without placing the matter on Board. Therefore, aggrieved by the order

dated 23.02.2018 passed in O.A. No. 260/00556/2016, which has been confirmed in R.A. No.260/0006 of 2018, vide order dated 09.05.2018, the petitioner has approached this Court by filing the present writ petition.

3. Mr. S.K. Ojha, learned counsel for the petitioner contended that there was no dispute that the petitioner, who was working as Regional Director (H&FW), Regional Office, Bhubaneswar, was retired from service on attaining the age of superannuation w.e.f. 31.12.2015. He was promoted to SAG w.e.f. 29.10.2008 in Pay Band-4 (Rs.37400-67000) with grade pay of Rs.10,000/-. On being so promoted, he was extended with the benefit of transport allowance, by exercising option to avail the same instead of availing the staff car. As the petitioner exercised option, the benefit of transport allowance was extended to him. But, pursuant to audit objection that the petitioner was not entitled to get the benefit of transport allowance, by letter dated 06.11.2015 communication was made to recover the over payment, so made to the petitioner towards transport

allowance, from his retiral benefits. No doubt, all other retiral benefits had been extended to the petitioner by that time, save and except, un-utilized leave encashment and CGEGIS, which were withheld. But subsequently that CGEGIS amount was also released in his favour, vide order dated 31.03.2016, and part of the unutilized leave salary amounting to Rs.7,85,549/- was withheld to be adjusted against excess payment of transport allowance. It is further contended that non-release of a part of unutilized leave salary amounting to Rs.7,85,549/-, after retirement of the petitioner, cannot sustain in the eye of law.

To substantiate his contention, he has relied upon the judgments of the apex Court in the cases of ***State of Punjab v. Rafiq Masih***, (2015) 4 SCC 334; ***Syed Abdul Qadir v. State of Bihar***, (2009) 1 SCC (L&S) 744; ***Chandi Prasad Uniyal v. State of Uttarakhand***, AIR 2012 SC 2951; and ***High Court of Punjab and Haryana v. Jagdev Singh***, AIR 2016 SC 3523.

4. Mr. P.K. Parhi, learned Asst. Solicitor General of India appearing, along with Mr. D. Gochhayat, learned Central Government Counsel, for opposite parties vehemently contended that since the petitioner was an employee of SAG, he is not entitled to get transport allowance. It is contended that on the basis of audit report submitted, the excess amount paid to the petitioner is recoverable from his retirement benefits. It is further contended that DoP&T O.M. dated 02.03.2016 does not prohibit recovery of excess payment made to an employee from retiral dues. However, in para-4 of the said O.M. it is provided that in certain situations, where recovery of excess amount paid may cause hardship to the employee, recovery by the employer would be impermissible in law. It is further contended that if by mistake transport allowance had been released in favour of the petitioner, the same can be recovered by the authority, when the same was brought to its notice. Even though the petitioner had retired from service, but his dues were not settled. Therefore, on the basis of the

report of the auditor, the amount the amount of transport allowance @ Rs.7000/- per month plus D.D. thereon, which was erroneously paid to the petitioner was directed to be recovered, as such payment was made at higher rate for more than seven years. It is further contended that only a portion of leave encashment amount was withheld to recover the amount of overpayment made to the petitioner. It is further contended that the contention raised by learned counsel for the petitioner, that since the petitioner has already retired from service, recovery cannot be made from his retiral dues in view of the judgment of the apex Court in the case of **Rafiq Masih** (supra) and the DoP&T O.M. dated 02.03.2016, is not correct in view of the fact that on the basis of audit objection, the communication to stop payment of transport allowance at higher rate was issued on 9.08.2014, whereas the petitioner was retired from service much after that period, i.e., 31.12.2015. Therefore, it was made known to the petitioner that he was granted with transport allowance erroneously.

Thereby, finding of the tribunal, that the judgment relied upon by the petitioner in the case of **Rafiq Masih** (supra), has not given blank cheque to government employees who draw excess transport allowance ignoring the T.A. Rules, is well justified and, as such, the excess transport allowance received by the petitioner is contrary to the norms contained in DoP&T O.M. dated 02.03.2016. It is further contended that the recovery has been done in consonance with the judgment passed by the apex Court in the case of **Chandi Prasad Uniyal** (supra), wherein the apex Court held that when the money does not belong to payer or payee, it becomes tax payer's money, and, as such, the amount is recoverable. Thus, it is contended that the tribunal, after taking into consideration the contention raised by the petitioner, held that the petitioner is not entitled to get the transport allowance, even though he has exercised his option for the same and, as such, recovery of the excess amount which was paid erroneously to him towards transport allowance, cannot be said to be illegal.

Therefore, the tribunal is well justified in passing the order impugned, which does not warrant interference of this Court at this stage and, accordingly, he seeks dismissal of the writ petition.

5. This Court heard Mr. S.K. Ojha, learned counsel for the petitioner; and Mr. P.K. Parhi, learned Asst. Solicitor General of India appearing along with Mr. D. Gochhayat, learned Central Government Counsel for opposite parties by hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. On the basis of undisputed facts, as discussed above, this Court finds that the petitioner, while working as a Senior Regional Director in Health and Family Welfare Department, retired from service on 31.12.2015. The Govt. of India, Ministry of Health and Family Welfare Department, New Delhi, vide letter dated 07.12.2015, communicated the report of the Director General of Audit (Central Expenditure) dated 06.11.2015, relating to the

illegality committed in the matter of payment of transport allowance, to the following effect:-

*“The ministry of Finance Department of Expenditure through its office Memorandum prescribed (August 2008) the rates of Transport Allowance on the basis of recommendations given by the sixth Pay Commission. According to this rate of Transport Allowance to employees drawing grade pay of Rs. 5400/- and above was fixed as Rs.3200 (plus DA thereon). Further as per para 3 of OM, Officers drawing grade pay of Rs. 10000 and Rs. 1200 and those in the HAG + Scale who are entitled to the use of official car in terms of OM of January, 1994 shall be given the option to avail themselves of existing facility or to switch over to the payment of Transport Allowance as admissible under these order.*

*Test check of records of Doctors of Safdarjung Hospital (Hospital) drawing grade pay of Rs.10000 and above disclose that Transport Allowance at the rate of Rs. 7000. Per month plus dearness thereon was being paid to them. During September 2008, April, 2015 the Doctors had been paid transport allowance aggregating to Rs. 10.79 crore at these rates. We observed that since they were not equal to the level of joint Secretary to the Government of India and were not entitled to the staff car facility and as such were entitled to payment of transport allowance at the rate of Rs.5.86 crore to the Doctors as detailed in the Annex.*

*Similar issues pertaining to the Doctors of CGHS was included in the CAG's Audit report No.18 of 2015. In this case the Ministry of Finance had clarified (December,2014) that Doctors were not eligible for drawal of Transport Allowance @ Rs.7000 per month in terms of the stated OM even though they may be drawing pay with grades pay of Rs.1000 per month.”*

It is recommended that overpayment of transport allowances of Rs.5.86 crore made by the Hospital to its Doctors may be recovered."

7. In response to the above audit objection, the petitioner submitted his representation on 08.02.2016 contending that he has already retired from service w.e.f. 31.12.2015 and, therefore, if any recovery of overpayment is made from his retiral benefits, it will be a huge financial loss to him. The Regional Director (H&FW) instructed the Director, NVBDCP, Delhi that, as the petitioner has already retired and all his retirement dues have been paid except unutilized leave encashment and CGEGIS, the overpayment amount be recovered from unutilized leave encashment to the following effect:-

- "1. The amount of un-utilized Rs.18,61,500/- leave encashment due to Dr. pati
2. Over payment of transport Rs.4,32,713/- allowance from 29.10.2008 to 30.04.2013 during his tenure at CGHS, Bhubaneswar (as per due & drawn statement)
3. Overpayment of transport Rs. 3,52,836/- allowance from 01.05.2013 to 31.12.2015 during his tenure at this organization (as per due and drawn statement)"

8. As a consequence thereof, vide order dated 19.05.2016, an amount of Rs.10,75,951/-, as unutilized leave encashment, was sanctioned in favour of the petitioner with a note that an amount of Rs.7,85,549/- was withheld due to over-payment of transport allowance, as per the audit objection, till clarification made by the Regional Director, ROH&FW, Bhubanewar is received.

9. It is worthwhile to mention here that while audit notices systematic violation of law, rules and regulations by the departmental officers, its paramount duty is to take effective actions to prevent its abuse and misuse of public funds. The C&AG is the Head of the Indian Audit and Accounts Department. The Office of the C&AG directs, controls and monitors the activities of the various offices of the department and is responsible for development of organizational objectives and policies, auditing standards and systems, laying down policies for management of man power and final approval of the audit report. For carrying out these responsibilities, field

formations exist for each specific area of auditing and accounting. As such, on the basis of note mentioned above, the audit has objected payment of transport allowance to doctors, de-hors the rules to the extent of 5.86 crores. Out of the said amount, the liability of the petitioner was Rs.7,85,549/-, which was directed to be recovered, pursuant to letter dated 19.05.2016, from the unutilized leave salary sanctioned for an amount of Rs.10,75,951/-. As such, withholding of excess transport allowance paid to the petitioner amounting to Rs.7,85,549/- was made till receipt of clarification sought, vide letter dated 13.04.2016, which was in accordance with audit objection. Thereby, the amount of Rs.7,85,549/- was withheld, vide letter dated 19.05.2016, for the reasons of audit objection and, as such, the same cannot be said to be illegal on the part of the authority concerned.

10. Learned counsel for the petitioner vehemently contended that in view of the law laid down by the apex Court in the case of **Rafiq Masih** (supra) restraining

recovery of excess payment from the retired Government employee, the petitioner, being a retired government employee, recovery from his unutilized leave salary, cannot sustain in the eye of law. But this contention cannot sustain, in view of the fact that **Rafiq Masih** (supra) is a case where he was working as a White Washer and a low paid employee. As such, the apex Court held that Article 136 declares the law as under Article 141 of the Constitution of India. Article 142 of the Constitution of India is supplementary in nature and cannot supplant the substantive provisions, though they are not limited by the substantive provisions in the statute. It is a power that gives preference to equity over law. It is a justice oriented approach as against the strict rigors of the law. Therefore, while analyzing Articles 141 and 142 of the Constitution of India, the apex Court held that the directions of the Court under Article 142 of the Constitution, while moulding the relief, that relax the application of law or exempt the case in hand from the rigour of the law in view of peculiar facts and

circumstances do not comprise the ratio decidendi and, therefore, lose its basic premise of making it a binding precedent. Therefore, the apex Court held that the salary/pension wrongly paid, is recoverable irrespective of whether payment is made or not due to misrepresentation or fraud. While holding so, the apex Court took note of the judgment of the apex Court in the case of **Chandi Prasad Uniyal** (supra), wherein specific issue was raised and canvassed and, a such, the issue was whether the appellant therein can retain the amount received on the basis of irregular/wrong pay fixation in the absence of any misrepresentation or fraud on his part. The Court, after taking into consideration various decisions of the apex Court, had come to the conclusion that even if by mistake of the employer the amount is paid to the employee, after proper determination of the same discovers that the excess payment is made by mistake or negligence, the excess payment so made could be recovered and while holding so, the apex Court in paragraphs-14 and 16, observed as under:-

*“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 over payment nor to the recipients. We fail to see whey the concept of fraud or misrepresentation is being brought in such situations. The question to be asked is whether excess money has been paid or not, may be due to a bone 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 situation 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.*

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*16. The appellant in the appeal will not fall in any of these exceptional categories, over and above; there was stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However we order that excess payment made be recovers from the appellants salary in 12 equal monthly installments.”*

11. As such, the apex Court has clarified that law laid down in **Chandi Prasad Uniyal** (supra) in no way conflicts with the observations made by this Court in the other two cases. In those decisions, directions were issued in exercise of the powers of the apex Court under Article 142 of the Constitution, but in the subsequent decision, the apex Court under Article 136 of the Constitution in laying down the law had dismissed the petition of the employee. As such, the apex Court in a number of cases had battled with tracing the contours of the provision in Articles 136 and 142 of the Constitution of India. Distinctively, although the words employed under the two aforesaid provisions speak of the powers of the apex Court, the former vest a plenary jurisdiction in Supreme Court in the matter of entertaining and hearing of appeals by granting special leave against any judgment or order made by a Court or tribunal in any cause or matter. The powers are plenary to the extent that they are paramount to the limitations under specific provisions for appeal contained in the Constitution or

other laws. Article 142 of the Constitution of India, on the other hand, is a step ahead of the powers envisaged under Article 136 of the Constitution of India. It is the exercise of jurisdiction to pass such enforceable decree or order as is necessary for doing 'complete justice' in any cause or matter. The word 'complete justice' was fraught with uncertainty until Article 142 of the Constitution received its first interpretation in **Prem Chand Garg v. Excise Commission, U.P.**, AIR 1963 SC 996.

12. While deciding the reference, after discussing the power of the apex Court with regard to Articles 136 and 142 of the Constitution of India in relying upon various judgments of the apex Court, in paragraph-12 of the judgment in **State of Punjab v. Rafiq Masih**, reported in AIR 2015 SC 1267 : (2014) 8 SCC 883, the apex Court held as under:-

*“12. Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion,*

*there is no conflict in the views expressed in the first two judgments and the latter judgment.”*

As such, by opining that the reference was unnecessary and without answering the reference, the matter was sent back to the Division Bench for its appropriate disposal.

13. The Division Bench of the apex Court had taken the call to resolve the issue, vide order dated 18.12.2014, in Civil Appeal No.11527 of 2014, arising out of SLP (C) No. 11684 of 2012, reported in (2015) 4 SCC 334, and in paragraph-2 of the said order, the apex Court formulated the questions to the following effect:

*“The long and short of the matter is , that all the private respondents were beneficiaries of a mistake committed by the employer, and on account of the said unintentional mistake, employees were in receipt of monetary benefits, beyond their due.”*

In paragraph-4, the apex Court framed the following issues:

*“The issue that we have been required to adjudicate is, whether all the private respondents, against whom an order of recovery ( of the excess amount) has been made, should*

*be exempted in law, from the reimbursement of the same to the employer . For the applicability of the instant order, and the conclusion recorded by us hereinafter, the ingredients depicted in the foregoing two paragraphs are essentially indispensable.”*

In paragraphs-5 and 6, the apex Court held as under:

*“5. Merely on account of the fact, that the release of these monetary benefits was based on a mistaken belief at the hands of the employer, and further, because the employees has no role in the determination of the employer, could it be legally feasible, for the private respondents to assert, that they should be exempted from refunding the excess amount received by them? Insofar as the above issue is concerned, it is necessary to keep in mind, that the following reference was made by a Division Bench of two Judges of this Court, for consideration by a larger Bench:*

*“In view of an apparent difference of views expressed on the one hand in Shyam Babu Verma and Ors. vs. Union of India & Ors.(1994) 2SCC 521 and Sahib Ram Verma vs. State of Haryana (1995) Supp.1 SCC 18; and on the other hand in Chandi Prasad Uniyal and Ors. vs. State of Uttarakhand & Ors. (2012) 8 SCC 417, we are of the view that the remaining special leave petitions should be placed before a Bench of Three Judges. The Registry is accordingly directed to place the file of the remaining special leave petitions before the Hon’ble the Chief justice of India for taking instruction for the constitution of a Bench of three Judges, to adjudicate upon the present controversy.’*

*(emphasis is ours)*

*The aforesaid reference was answered by a Division Bench of three Judges on 8.7.2014. While disposing of the reference, the three-Judge Division Bench, recorded the following observations in paragraph 7:*

*“7. In our considered view, the observations made by the Court not to recover the excess amount paid to the appellant-therein were in exercise of its extra-ordinary powers under Article 142 of the Constitution of India which vest the power in this Court to pass equitable orders in the ends of justice.”*

*Having recorded the above observations, the reference was answered as under:*

*“12. Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the views expressed in the first two judgments and the later judgment.*

*13. in that view of the above, we are of the considered opinion that reference was unnecessary. Therefore, without answering the reference, we send back the matters to the Division Bench for its appropriate disposal.”*

*6. In view of the conclusion extracted hereinabove, it will be our endeavor, to lay down the parameters of fact situation, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In our considered view, the instant benefit cannot extent to an employee merely on account of the fact, that he was not an accessory to the mistake committed by 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 absence of any fraud or misrepresentation at the behest of the employee.*

In paragraph-11 of the aforesaid judgment, the apex Court making reference to paragraph-58 of the judgment of the apex Court in the cases of **Syed Abdul Qadir** (supra), wherein reference was made to **Shyam babu Verma v. Union of India**, (1994) 2 SCC 521 and **Col. B.J. Akkara v. Government of India**, (2006) 11 SCC 709, in paragraph-12 held as under:-

*“12. It is not possible to postulate a situation 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 (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 far 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. Mr. S.K. Ojha, learned counsel for the petitioner contended that in view of the law laid down by the apex Court, as mentioned in paragraph-12(iii), even though the as amount of Rs.7,85,549/- was paid to the petitioner erroneously towards transport allowance, the same cannot be recoverable after his retirement.

15. In **Jagdev Singh** (supra), even though the apex Court set aside the order of the High Court as unsustainable, but held that the recovery should be made in reasonable installments and, as such, directed that the recovery be made in equated monthly installments spread over to a period of two years.

16. Considering the law laid down by the apex Court and applying the same to the present context, this Court finds that the process of recovery of excess transport allowance had been started against the petitioner by stopping to release the transport allowance, while he was in service, w.e.f. 19.08.2014, on the basis of audit instructions issued by the authority, whereas the petitioner retired from service on 31.12.2015. On perusal of the original application, as well as the writ petition, it appears that this fact has not been disclosed by the petitioner in his pleadings. If the payment of transport allowance was stopped w.e.f. 19.08.2014, while he was in employment, and, as such, he was retired from service w.e.f. 31.12.2015 and paid the retiral benefits, except the unutilized leave salary and CGEGIS amount, which were subsequently released by the authority only withholding a part of unutilized leave salary amounting to Rs.7,85,549/-, out of Rs.10,75,951/-, because of excess payment made towards transport allowance during his tenure as a government employee, he is not

entitled to such benefits, as per the DoP&T office memorandum applicable to the petitioner. Thereby, if erroneously some amount had been released in favour of the petitioner, the authorities are well justified in recovering such amount. More so, the emphatic submission of learned counsel for the petitioner is that, after retirement of the petitioner, the amount paid in excess should not have been recovered applying the principles of **Rafiq Masih** (supra). As it appears, the judgment in **Rafiq Masih** (supra) is also distinguishable from the present case in facts and circumstances, in view of the fact Rafiq Mashih was a White Washer, whereas the present petitioner was continuing as a supertime scale employee adorning the highest level of charge in the office.

17. As regards the contention, that after retirement of the petitioner on 31.12.2015, the excess payment made towards transport allowance should not have been recovered from him, is not factually correct. As a matter of fact, payment of transport allowance was

stopped w.e.f. 19.08.2014, while he was in employment, and, as such, he was retired from service w.e.f. 31.12.2015. This fact, the petitioner has suppressed before the tribunal as well as this Court. Therefore, non-disclosure of fact before this Court, amounts to fraud on Court. In such view of the matter, this Court is of the considered opinion that the petitioner has not approached this Court with clean hands and, as such, is not entitled to get any relief, as claimed in the writ petition.

18. In ***Smith v. East Elloe Rural District Council***, (1956) AC 736, Lord Denning said that “No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything”.

19. In ***Smith v. East Ellows Rural District Council***, (1956) 1 All ER 855, it has been held that “Fraud vitiated any act or order passed by any quasi judicial authority even if no power of review is conferred

upon it. The effect of fraud would normally be to vitiate all acts and orders”.

20. In ***R v. West Sussex Quarter Sessions, ex p Albert and Maud Johnson Trust Limited***, (1974) QB 24, it has been held by Lord Denning that “there is ample authority for holding that, where there is evidence that the decision of an inferior court has been obtained by the fraud of a party or by collusion, the court of Queen’s Bench will order it to be brought up and will quash it.

21. In ***Smt. Shrisht Dhawan v. Shaw Brothers***, AIR 1992 SC 1555, it has been held that “Fraud and collusion vitiate even the utmost solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct.”

22. In ***S.P. Chengalvaraya Naidu v. Jagannath***, (1994) 1 SCC 1: AIR 1994 SC 853, the apex Court in no uncertain terms observed “The principle of finality of litigation cannot be passed to the extent of such an

absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not process of the court is being abused. Property-grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the Court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation... A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage... A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If we withhold a vital document in order to gain advantage on the other side

then he would be guilty of playing fraud on the Court as well as on the opposite party.”

23. In **Indian Bank v. Satyam Fibres (India) Pvt. Ltd.**, (1996) 5 SCC 550 : AIR 1996 SC 2592, the apex Court observed that “since fraud affects the solemnity, regularity and orderliness of the proceedings of the court it also amounts to an abuse of the process of the Court that the courts have inherent power to set aside an order obtained by practicing fraud upon the court and that where court is misled by a party or the Court itself commits a mistake which prejudice a party, the court has the inherent power to recall its order.

24. In **R. v. Kensington, Income Tax Commissioner**, (1917) 1 KB 486 at page 506, it was held that “the prerogative writ is not a matter of course; the applicant must come in the manner prescribed and must be perfectly frank and open with the Court.”

25. In **State of Haryana v. Karnal Distillery**, AIR 1977 SC 781, the apex Court refused to grant relief on the ground that the applicant has misled the Court.

26. In **Chancellor v. Bijayananda Kar**, AIR 1994 SC 579, the apex Court held that a writ petition is liable to be dismissed on the ground that the petitioner did not approach the Court with clean hands.

27. Taking into consideration the above judgments, this Court, in **Netrananda Mishra v. State of Orissa**, 2018 (II) OLR 436, came to a conclusion in paragraph-26 of the said judgment and held as under:-

*“..... For suppression of facts and having not approached this Court with a clean hand, the encroacher is not entitled to get any relief, particularly when the valuable right accrued in favour of the petitioner is being jeopardized for last 43 years for no fault of him, on which this Court takes a serious view. ....”*

28. In view of the facts and law, as discussed above, this Court does not find any error apparent on the face of the order impugned dated 23.02.2018 passed in O.A. No. 260/00556/2016 under Annexure-4 and order

dated 09.05.2018 passed in R.A. No. 260/0006/2018 under Annexure-6 by the Central Administrative Tribunal, Cuttack Bench, Cuttack, so as to warrant interference with the same.

29. Accordingly, the writ petition merits no consideration and the same is hereby dismissed. However, there shall be no order as to costs.

**SAVITRI RATHO, J.** I agree.

.....  
**DR. B.R. SARANGI,**  
**JUDGE**

.....  
**SAVITRI RATHO,**  
**JUDGE**

**Orissa High Court, Cuttack**  
**The 21<sup>st</sup> April, 2022, Ashok/GDS**