Uday S. Jagtap

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1192 OF 2021

Prasad Vinayak Sohoni .. Petitioner
Vs.
The Treasury Officer,
Thane and Anr. .. Respondents

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Mr. Sanjay Kulkarni for the petitioner
Mr. B.V. Samant, AGP for the respondents

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CORAM : DIPANKAR DATTA, CJ &
PRITHVIRAJ K. CHAVAN, J.

DATED : JANUARY 12, 2022

P.C.

1. The petitioner was appointed as a Clerk in the establishment of the Bombay High Court (Appellate Side) on April 25, 1984. Thereafter, he was promoted as Assistant on July 3, 2001. After serving as Assistant for about a decade, the petitioner applied on August 1, 2011, seeking voluntary retirement from service. By a notice dated October 12, 2011, the Registrar (Personnel) informed the petitioner of the decision of the Administration to accept his application for voluntary retirement and that he would stand retired voluntarily w.e.f. November 1, 2011. This was followed by a further order dated November 3, 2011 issued by the Registrar General of the Court recording that the petitioner had retired voluntarily w.e.f. November 1, 2011.

2. After such retirement, the petitioner started receiving monthly pension of Rs.10,435/- from April 2012 till December

2018. The petitioner had, however, applied for commutation of pension. Having regard thereto, the petitioner was entitled to receive monthly pension @ Rs.6,261/-. However, by mistake and/or inadvertence, he was paid Rs.4,174/- per month in excess. In course of an exercise that had been undertaken for computerization of the pension system, it came to the notice of the respondents that the petitioner was being paid Rs.4,174/- per month in excess. Accordingly, a decision was taken to recover the excess payment from the petitioner's pensionary benefits. It is at this stage that the petitioner had the occasion to approach this Court with a writ petition (Writ Petition No. 9936 of 2019) challenging a communication dated May 28, 2019 issued by the Treasury Officer, Thane, respondent no.1. By such communication, it was conveyed to the petitioner that recovery of Rs.4,174/- would be made from April, 2019 till January 19, 2027 and also that the balance amount of Rs.3,60,580/- would be recovered in 72 installments of Rs.5,000/- and one installment of Rs.580/-.

3. By the time Writ Petition No. 9936 of 2019 was posted for hearing before the coordinate Bench of this Court on February 24, 2021, the respondents had recovered Rs.3,60,580/- from the petitioner. It was contended on behalf of the petitioner before such bench that recovery of Rs.3,60,580/- from the pensionary benefits is in the teeth of the decision of the Supreme Court, reported in (2015) 4 SCC 334 **[State of Punjab & Others Vs. Rafiq Masih (White Washer) and Ors.]** and that the respondents ought to be directed to refund the amount of Rs.3,60,580/- to the

petitioner. To be fair, the petitioner did not dispute that he was receiving monthly pension in excess of his entitlement and as such took no exception to payment of pension at the reduced rate.

4. Having regard to the aforesaid claim of the petitioner, the coordinate Bench proceeded to dispose of the writ petition by granting liberty to the petitioner to institute appropriate proceedings against the respondents, if he is desirous of recovery of the said sum of Rs.3,60,580/- along with interest. Liberty was also granted to the respondents to recover further amount, if any, due and payable by the petitioner after following due process of law, i.e., issuing show-cause notice and after hearing the petitioner.

5. Availing the liberty granted by the coordinate Bench, the petitioner has instituted this writ petition on April, 21, 2021 seeking, *inter alia,* the following principal relief: -

> (a) By a suitable writ, order or direction this Hon'ble Court may be pleased to quash and set aside the impugned communication bearing No. JiKoKaTha/NiVe/Karyasan-10/2021-22/430 dated 17th February, 2021 issued by the Respondent No.1 thereby informing the petitioner that Rs.3,60,580/- has been recovered from the pension arrears of the petitioner;
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> (b) By a suitable writ, order or direction this Hon'ble Court may be pleased to direct the Respondents to refund to the petitioner the amount of Rs.3,60,580/- recovered by the Respondents as per the impugned communication bearing No. JiKoKaTha/NiVe/ Karyasan-10/2021-22/430 dated 17th February, 2021 issued by the Respondent No.1, with interest at the rate of 12% per annum from the date of deduction till payment by the Respondents to the petitioner;
> ***"

6. Mr. Kulkarni, learned counsel representing the petitioner, referring to the decision in **Rafiq Masih** (supra), contends that the respondents grossly erred in the exercise of their jurisdiction by seeking to recover an amount of Rs.3,60,580/- from the pensionary benefits of the petitioner more than 7 years after such payment had been released in his favour. According to him, clauses (i) and (iii) of paragraph no.18 of the decision in **Rafiq Masih** (supra) are squarely attracted and, therefore, the petitioner may be granted relief as prayed in this writ petition.

7. *Per contra*, Mr. Samant, learned AGP representing the respondents, contends that the petitioner is not entitled to any relief as claimed in the writ petition. According to him, the petitioner being a former Government employee, was well and fully aware that he had applied for commutation of pension and that he was being paid monthly pension @ Rs.10,435/- although he was entitled to Rs.6,261/- only. It is his submission that as an honest ex-employee of the Government, the petitioner had a moral duty to point out the error in fixation of the amount of pension payable to him and that by failing to do so, has failed to discharge his duty as a pensioner. It is also contended by him that the clauses in paragraph 18 of the decision in **Rafiq Masih** (supra) cannot be read in isolation and that the same ought to be read together with paragraphs 7 to 10 of such decision. So read, it is not the law that in no case can the employer recover monies from the retiral benefits of an employee. The employee must make out a case of hardship for grant of relief, which is lacking in the present case. He has,

accordingly, prayed for dismissal of the writ petition.

8. Having heard learned counsel appearing for the parties, we are of the considered opinion that the issue raised in this writ petition is no longer *res integra*. The law regarding recovery of monetary benefits paid in excess of entitlement from the retiral benefits now stands concluded with the decision in **Rafiq Masih** (supra). We consider it appropriate to quote paragraph 18 of such decision hereinbelow:

> "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:
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> (*i*) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).
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> (*ii*) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.
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> (*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.
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> (*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."

9. In our opinion, the decision in **Rafiq Masih** (supra) rendered by a Bench of 2 (two) Hon'ble Judges has carved out exceptions where recovery would be impermissible. This, however, sounds somewhat of a discordant note with what

was laid down by another Bench of 2 (two) Hon'ble Judges in the decision reported in (2012) 8 SCC 417 (**Chandi Prasad Uniyal Vs. State of Uttrakhand**), since affirmed by a bench of 3 (three) Hon'ble Judges in the decision reported in (2014) 8 SCC 883 **[State of Punjab & Others Vs. Rafiq Masih (White Washer)]**, while hearing a reference as whether **Chandi Prasad Uniyal** (supra) conflicts with the views expressed in the decisions reported in (1994) 2 SCC 521 **(Shyam Babu Verma Vs. Union of India)** and 1995 Supp (1) SCC 18 **(Sahib Ram Vs. State of Haryana)**. However, **Rafiq Masih** (supra) being the last decision on the point, we feel bound by what is expressed in paragraph 18 extracted supra.

10. It is not in dispute that the petitioner retired from the service of this Court while holding a Class III post. Clause (i) of paragraph 18 of the decision in **Rafiq Masih** (supra) does hold that recoveries from retiral benefits of Class III employees would be impermissible. Mr. Kulkarni is right in his submission that clause (i) of paragraph 18 is immediately attracted, on facts and in the circumstances of the present case. Mr. Kulkarni is, however, not right in referring to clause (iii) of paragraph 18 barring recovery of excess payment which has been made for a period in excess of five years, before the order of recovery is issued. This is because there has been no one-time excess payment in favour of the petitioner prior to five years of the issuance of the order of recovery but excess payment in his favour had continued, month by month, till the order of recovery was issued on May 28, 2019. The petitioner, being in receipt of excess payment

till that date, clause (iii) would not apply. Nonetheless, in addition to clause (i), clause (v) of paragraph 18 of the decision in **Rafiq Masih** (supra) holding that, 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, seems to be attracted here. The petitioner has pleaded in the writ petition that he had to incur substantial expenditure for a surgery that his spouse had undergone and that he is in some sort of financial hardship.

11. Having regard to the difficulties that the petitioner is likely to face during his retired life, if the order of recovery of Rs.3,60,580/- is not interdicted and he is refunded such amount, we are inclined to so interdict and direct refund with interest for the ends of justice. This writ petition, therefore, succeeds. The respondents are directed to refund to the petitioner Rs.3,60,580/- with interest @ 6% p.a. from the date recovery was made till such time the refund is made in terms of this order, within eight weeks.

12. This order shall, however, not debar the respondents to appropriately calculate the monthly pension payable to the petitioner in future and to make payment accordingly.

13. At this stage, Mr. Samant prays for stay operation of this order. Since, we have granted eight weeks' time to effect the refund with interest, the prayer for stay is refused.

14. The writ petition stands disposed of, without costs.

(PRITHVIRAJ K. CHAVAN, J.) **(CHIEF JUSTICE)**

UDAY SHIVAJI JAGTAP

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