IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12664 OF 2018

Union of India	**}**	**Petitioner**
Versus		
Shri. Maqbul Hasanmian Mirkar	**}**	**Respondent**

Mr. Ashok Shetty with Ms. Anamika Malhotra for the petitioner (UoI).

None for the respondent.

CORAM: DIPANKAR DATTA, CJ &
M. G. SEWLIKAR, J.

DATE: APRIL 13, 2022

P.C.:

1. This writ petition dated 19th September 2018 is directed against a judgment and order dated 26th July 2018 passed by a Judicial Member of the Central Administrative Tribunal, Mumbai Bench, Mumbai (hereafter "the Tribunal") allowing Original Application No. 238 of 2018, being an application under section 19 of the Administrative Tribunals Act, 1985, instituted by the respondent (hereafter "the original applicant").

2. Although we find from the array of respondents in the original application that there were 4 (four) respondents, this writ petition is only at the instance of the respondent no. 1 before the Tribunal, i.e., the Union of India with the original applicant solely being shown as a respondent. Without the respondent nos. 2, 3 and 4 before the Tribunal being arrayed in the writ petition, at least as proforma respondents, the writ petition in its present form is no doubt defective; however, we do not wish to dismiss the same merely on this technicality. We grant leave to Ms. Malhotra, learned advocate-on-record for the Union of India to include such of the left-out respondents as proforma respondents in the writ petition here and now in the presence of the Associate.

3. The case pleaded by the original applicant before the Tribunal reveals that he had superannuated while holding the post of Master Craftsman; that, while in service, the original applicant was placed in the pay-scale of Rs. 4500-7000 following the recommendations of the 6th Pay Commission; that, in due course of time, the pay-scale of Master Craftsmen was upgraded from Rs.4500-7000 to Rs.5000-8000 and the post was granted pay-band to the corresponding grade pay of Rs. 4200 with effect from 1st January 2006; that, in accordance with the Government of India, Ministry of Defence letter dated 14th June 2010 and the Modified Assured Career Progression Scheme (hereafter "MACP Scheme") of the Department of Personnel and Training, introduced vide office memorandum dated 19th May 2009, Master Craftsmen were granted MACP Scheme benefits to the next grade pay of Rs.4600 after completion of 30 years of regular service in the grade pay structure in accordance with the MACP Scheme, which had come into force from 1st September 2008; that, in terms of the MACP Scheme, the original applicant was moved to the revised pay-scale of Rs.4600 vide order dated 2nd March 2012; that, subsequently, for reasons unknown to the original applicant, it was decided by the authorities that

Master Craftsmen would not be eligible for grant of third MACP grade pay of Rs. 4600; and that consequently, it was decided to revert them to the grade pay of Rs.4200 and steps were taken to recover monies from Master Craftsmen, who had been granted pay-scale of Rs.4600 upon extension of benefits of third MACP grade.

4. It is not in dispute that the original applicant was due for superannuation on 31st October 2017. An order dated 22nd March 2017 was passed seeking to recover alleged excess payment of Rs. 2,43,828/- made to him. Challenging the order dated 22nd March 2017, the original applicant along with Naval Employees Union had moved the Tribunal seeking, *inter alia,* the following relief: -

> "a. This Hon'ble Tribunal be pleased to quash and set aside Order dated 22.03.2017;
>
> b. This Hon'ble Tribunal be pleased to direct the Respondent Authorities not to recover monies from the Applicant No. 2 as sought to be undertaken at Order dated 22.03.2017.
>
> c. This Hon'ble Tribunal be pleased to direct the Respondents to pay the Pension and all other terminal benefits with 18% interest."

5. In course of hearing, the Tribunal passed an order that the original application would be confined only to the original applicant and not to other members of the Naval Employees Union.

6. A counter affidavit was filed by the Union of India and its officers (the respondents before the Tribunal). At paragraph 9, it was clearly admitted that excess payment was made in favour of the original applicant mistakenly. At paragraph 11, it was also admitted that the original applicant had not submitted any undertaking regarding recovery.

7. On behalf of the original applicant, attention of the Tribunal was drawn to the decision of the Supreme Court in **State of Punjab and Others vs. Rafiq Masih (White Washer)**[1], in support of the contention that no recovery could have been effected within a year preceding superannuation.

8. On behalf of the respondents, reliance was placed on the decision of the Supreme Court in **Chandi Prasad Uniyal and Ors. vs. State of Uttarakhand and Ors.**[2], to contend that excess payment made in favour of the applicant mistakenly practically amounts to an unjust enrichment and that in view of such decision, it was open to the respondents to initiate the process for recovery of excess payment.

9. The Tribunal formulated a sole question for answer, which is found at paragraph 7 of the judgment reading as follows: -

> "7. The short question which has arisen in the present OA is whether the wrongful/excess payment made to applicant either by mistake or undue bonafide belief is liable to be recovered or not by the respondents. The applicant has not challenged the reversion of his Grade Pay from 4600 to Grade Pay of Rs. 4200."

10. After noticing the law laid down in the decision in **Rafiq Masih (White Washer)**[1] as well as the decision in **Chandi Prasad Uniyal**[2], the Tribunal was of the view that the case of the original applicant squarely fell in one of several exceptions carved out by the Supreme Court in **Rafiq Masih (White**

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[1] (2018) 4 SCC 334 (DB)
[2] (2012) 8 SCC 417

Washer)[1]. One of such exceptions was that recovery by an employer would be impermissible in law from a retired employee or an employee who is due to retire within 1 (one) year of the order of recovery. The original applicant retired on 31st October 2017 and the order of recovery having been made on 22nd March 2017, the Tribunal was of the clear view that the impugned order of recovery, in view of **Rafiq Masih (White Washer)**[1] could not have been issued. This led to the following operating direction: -

> "14. We hereby set aside the order of recovery of excess payment dated 22.03.2017. Relief (B) has become infructuous since the respondent no. 4 has already with-held the amount of Rs.2,43,828/- towards the excess payment from the pensionary benefits. So far as the relief (C) is concerned, the respondents have already paid the pensionary benefits to the applicant except for the payment of Rs.2,43,828/- which has been with-held towards the excess payment. The respondents are hereby directed to pay applicant the amount of Rs.2,43,828/- at the earliest maximum within a period of six weeks."

11. Appearing in support of the writ petition, Mr. Shetty, learned advocate has placed before us the decision of a Bench of 3 (three) Hon'ble Judges of the Supreme Court in **State of Punjab and Ors. vs. Rafiq Masih (White Washer)**[3]. According to him, a reference was made to a larger Bench of the Supreme Court by a Bench of 2 (two) Hon'ble Judges vide its order in **Rakesh Kumar vs. State of Haryana**[4]. The order of reference, to which our attention has been drawn, is found in paragraph 1 reading as follows: -

[3] (2014) 8 SCC 884 (FB)
[4] (2014) 8 SCC 892

> " *****
>
> In view of an apparent difference of views expressed on the one hand in *Shyam Babu Verma v. Union of India* (1994) 2 SCC 521 and *Sahib Ram v. State of Haryana* 1995 Supp (1) SCC 18, and on the other hand in *Chandi Prasad Uniyal v. State of Uttarakhand* (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 instructions for the constitution of a Bench of three Judges, to adjudicate upon the present controversy."

12. Mr. Shetty has next taken us through the entire decision with particular reference to paragraphs 8 and 9. According to him, the decision in **Shyam Babu Verma vs. Union of India**[5], and **Sahib Ram vs. State of Haryana**[6], have been held to be decisions rendered by the Supreme Court in exercise of its power conferred by Article 142 of the Constitution of India, whereas **Chandi Prasad Uniyal**[2] has been declared to have laid down law binding upon all Courts under Article 141 of the Constitution of India read with Article 136 thereof. It has also been brought to our notice by Mr. Shetty that in **Rafiq Masih (White Washer)**[3], the Bench of 3 Hon'ble Judges were of the view that the reference was unnecessary and the matters were sent back to the respective Division Benches for their appropriate disposal. It is his categorical submission that after such decision in **Rafiq Masih (White Washer)**[3] by the Bench comprising of Hon'ble 3 Judges, the decision in **Shyam Babu Verma**[5] and **Sahib Ram**[6], which were held to be decisions rendered by the Court

[5] (1994) 2 SCC 521
[6] 1995 Supp (1) SCC 18

in exercise of power conferred by Article 142 of the Constitution of India, could not have been followed by the Bench of 2 Hon'ble Judges in **Rafiq Masih (White Washer)**[1]. It is shown to us by him that reference to **Chandi Prasad Uniyal**[2] can be found only in paragraphs 4 and 6 which contain quotations from the decisions in **Rakesh Kumar**[4] and **Rafiq Masih (White Washer)**[3]. According to him, there has been no independent consideration of **Chandi Prasad Uniyal**[2] and, therefore, bearing in mind the law laid down therein, since affirmed by the Bench of 3 Hon'ble Judges in **Rafiq Masih (White Washer)**[3], the Tribunal fell in error in preferring **Rafiq Masih (White Washer)**[1] to **Chandi Prasad Uniyal**[2].

13. Based on such submission, Mr. Shetty has prayed for setting aside of the impugned judgment and order of the Tribunal.

14. The submission made by Mr. Shetty with reference to the decisions in **Chandi Prasad Uniyal**[2], **Rafiq Masih (White Washer)**[3] and **Rafiq Masih (White Washer)**[1] to the effect that there has been no effective consideration in the latter decision of the former two decisions does not appear to be altogether without any substance. We also agree with him that guidance was derived in **Rafiq Masih (White Washer)**[1] from other decisions of the Supreme Court, which do not have binding force under Article 141 of the Constitution as held in **Rafiq Masih (White Washer)**[3]. However, in our considered opinion, nothing turns on it. The Supreme Court, while deciding the case of **Rafiq Masih (White Washer)**[1], in fact had before it its earlier decisions. Once a decision has been

rendered by the Court aware of what its earlier decisions on the point are, it is the later decision that would prevail. Such decision has to be given effect, whether the Union of India likes the result or not. In such view of the matter, we are left with no other alternative but to proceed to draw guidance from the law laid down in paragraph 18 of **Rafiq Masih (White Washer)**[1].

15. It is not in dispute that the order of recovery was issued on 22nd March 2017, i.e., within one year prior to superannuation of the original applicant; hence paragraph 18(ii) of **Rafiq Masih (White Washer)**[1] is attracted. The Tribunal was, therefore, right in holding that the recovery, in the present case, was impermissible.

16. That apart, in course of hearing, we have ascertained from Mr. Shetty that Master Craftsman is a post which is comprised in Class III service. Once it is so conceded, the situation is covered by paragraph 18(i) of **Rafiq Masih (White Washer)**[1].

17. We place on record that Mr. Shetty has referred to the decision of the Supreme Court in **High Court of Punjab and Haryana and Ors. vs. Jagdev Singh**[7], in support of his contention that if there is an undertaking given by an employee that he would refund excess payment, if any, upon detection later on, it would be permissible for the employer to proceed with recovery since the employee must be held to be bound by such an undertaking. For this purpose, our attention is drawn to a document at page 139 of the writ petition, which is a writing of the original applicant dated 12th October 2017.

[7] (2016) 14 SCC 267

We quote the same below: -

> "To
> PM
> Naval Dockyard Mumbai
> Subject: Withdrawal of recovery amount regarding grade pay of 4600.
> Sir,
> I the undersigned would like to state the following for your kind and sympathetic consideration
>
> 1. I had given consent to deduct the amount given to me for Grade pay for Rs 4600/-
> 2. But by deliberation from …. (illegible) ….. that recovery of amount above said is illegal hence I vacate my previous consent.
> 3. Therefore, you are kindly requested not to deduct from salary or entitlement.
>
> Yours faithfully,
>
> (M. H. Mirkar)
> T. NO:-5307500."

18. Having read the aforesaid writing, we cannot persuade ourselves to agree with Mr. Shetty that the same is an unequivocal undertaking or declaration signed by the original applicant agreeing to pay back money paid in excess to him. The decision taken to proceed for recovery from the original applicant after the decision in **Rafiq Masih (White Washer)**[1] was illegal and, therefore, the original applicant was quite right in his retraction of the consent earlier given. We, therefore, see no reason to accept Mr. Shetty's contention.

19. We must also place on record the fair stand of Mr. Shetty to bring to our notice a decision of the coordinate Bench of this Court in **State of Maharashtra and Ors. vs. Rekha**

Vijay Dubey[8], where similar issue arose for consideration and the Court proceeded to dismiss the writ petitions of the State of Maharashtra for the reasons assigned therein. The present case also seems to be covered by such decision.

20. For the reasons aforesaid, we find no ground to interfere with the impugned judgment and order of the Tribunal. The writ petition stands dismissed. No costs.

21. The directions passed by the Tribunal shall be implemented by the Union of India and the proforma respondents within six weeks from date.

SALUNKE
J V
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by SALUNKE J V
Date: 2022.04.18
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(M. G. SEWLIKAR, J.) **(CHIEF JUSTICE)**

[8] 2021 III CLR 630