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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 181 OF 2019

Shalaka Shankar Rajadhyax .. Petitioner

Vs.

The Chairman/Managing Director/
Secretary Life Insurance Corporation
of India & Ors. .. Respondents

Mr. Shyam Dewani a/w Mr. Chirag Chanani a/w Daksha Sawant i/by Dewani Associates for petitioner.

Ms. Sucheta D. Ghaisas for respondent nos.1 to 4.

CORAM: DIPANKAR DATTA, CJ. &
MADHAV J. JAMDAR, J.

DATE : SEPTEMBER 13, 2022

P.C.:

1. Life Insurance Corporation of India (hereafter "LIC", for short), respondent no.1, employed the petitioner as a Telephone Operator with effect from 1st September, 1980. During 2009-2010, LIC decided to abolish the post of Telephone Operator due to advancement of technology. All the Telephone Operators working at the relevant time were directed to work as Assistant. After having put in nearly two years' service as an Assistant, the petitioner was selected and promoted to the post of Higher Grade Assistant. While working as Higher Grade Assistant, the petitioner attained the age of superannuation and retired on 31st December, 2014.

2. At the time of her retirement, the petitioner was in receipt of basic pay of Rs.28,810/-. Such pay was fixed with effect from 31st March, 2012. However, according to LIC, the petitioner's basic pay should have been Rs.26,290/- + Personal Allowance.

3. More than two years after her retirement, the petitioner was surprised to receive a letter dated 9th January, 2017 issued by the Manager (OS), SSS Division of LIC. The letter reads as follows: -

> "Consequent upon the revision of pay scales of the employees of the Corporation, it has been decided to update the pension admissible to the employees of the Corporation who had retired on or after 01.08.2012. Accordingly, the difference in commuted value of pension and arrears of pension payable to you have been worked out and given in the enclosed sheet. Further, an amount of Rs.2,44,345/- is to be received as advised by MDO-IV vide their letter dated 31.12.2016 (copy of the letter is enclosed) from the amount of Rs.4,41,463/- payable to you as per enclosed sheet.
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> You are requested to submit the form of authorization and receipt enclosed herewith duly filled in to enable us to effect the payment."

4. Aggrieved by the letter dated 9th January, 2017 to the extent it sought to recover Rs.2,44,345/- from Rs.4,41,463/-, which was due and payable to the petitioner on account of arrears of pension and difference in commuted value of pension, this writ petition was instituted on 2nd July, 2018 by her seeking, *inter alia*, the following reliefs: -

> "(a) The Writ Petition filed by Petitioner by way of Writ of Mandamus and/or Writ of Prohibition be

allowed.

(b) Respondents be directed to pay Rs.2,34,135/- towards alleged arrears with 12% p.a. interest to Petition.

(c) Respondents be directed to pay 12% p.a. interest for the late payment of pension since December, 2016.

(d) Respondents be directed to calculate arrears towards salary and pension amount on the basic salary of Rs.28,810/- and pay the difference with interest @ 12% p.a. and continue to pay pension on Basic Salary of Rs.28,810/-.

(e) Respondents be directed to pay Rs.5 lakhs towards mental agony and economic loss occurred to Petitioner.

(f) Cost of the Writ Petition be provided for."

5. Appearing in support of the writ petition, Mr. Dewani, learned advocate submits that the purported action of recovery of Rs.2,44,345/- by the respondents is absolutely illegal and arbitrary. According to him, Regulation 7 (2)(iii)(b) of the Life Insurance Corporation of India (Staff) Regulations, 1960 (hereafter "the Regulations", for short) would clearly show that an incumbent on the post of Higher Grade Assistant would belong to Class-III service. Since the petitioner was a Class-III employee when she retired, no recovery ought to have been made in terms of the law laid down by the bench of two Hon'ble Judges of the Supreme Court in its decision reported in (2015) 4 SCC 334 [**State of Punjab & Ors. vs. Rafiq Masih (White Washer) & Ors**.]. It is also his contention, relying on such decision, that recovery from a retired employee is clearly barred.

6. Mr. Dewani further places reliance on a decision of the Division Bench of this Court reported in 2017 SCC OnLine Bom 9687 (**Issak Abbas Hawaldar vs. Block Education Officer, Panchayat Samiti & Ors.**) where the decision in **Rafiq Masih** (supra) was followed. It was declared that recovery of Rs.3,97,092/- from the petitioner was not permissible in law following which a direction was issued to refund such amount to the petitioner along with interest @ 6% p.a. within a period of eight weeks.

7. In support of the claim of the petitioner that pension ought to be calculated reckoning Rs.28,810/- as the last pay drawn by her, Mr. Dewani cites the decision of the Supreme Court reported in (2014) 16 SCC 444 (**Sushil Kumar Singhal vs. Pramukh Sachiv Irrigation Department & Ors.**). Placing strong reliance on paragraph 7 of the decision, Mr. Dewani submits that neither salary paid by mistake to the petitioner can be recovered nor pension reduced.

8. Resting on such contentions, Mr. Dewani submits that the petitioner is entitled to the reliefs claimed in the writ petition.

9. Ms. Ghaisas, learned advocate, appears on behalf of the respondents and strongly contests the writ petition. According to her, the petitioner's basic pay was wrongly fixed on 31st March, 2012. Such wrong fixation of pay was detected in course of an annual financial audit of 2016-2017 when random samples were picked up for checking by the auditor as a matter of practice. Had the error not been detected, the petitioner would have been paid pension far in excess of her entitlement. It is her submission that a mistake does not create a right in favour of any person and, thus, the petitioner is precluded from claiming that the excess payment which has already been made in her favour should not be deducted from the amount payable to her on account of arrears of pension and difference in commuted value of pension, as well as her pension should be fixed taking into consideration the pay which was given to her erroneously.

10. Reliance has been placed by Ms. Ghaisas on the decisions reported in (2016) 14 SCC 267 (**High Court of Punjab and Haryana & Ors. vs. Jagdev Singh**) and the Division Bench decision of the High Court of Himachal Pradesh at Shimla dated 24th March, 2022 in Civil Writ Petition (Original Application) No. 3145 of 2019 (**S. S. Chaudhary vs. State of Himachal Pradesh & Ors.**).

11. Ms. Ghaisas also places before us an unreported judgment dated 2nd May, 2022 of the Supreme Court in Civil Appeal No. 7115 of 2010 (**Thomos Daniel vs. State of Kerala & Ors.**) in support of her contention that the petitioner had knowledge of payment being received by her in excess of what was due and that the error having been detected or corrected within a short time, the Court may decline exercise of discretion in her favour.

12. We have heard learned advocates for the parties and perused the decisions cited at the bar.

13. **Jagdev Singh** (supra) has no application on facts and in the circumstances of this case since there is no declaration/undertaking given by the petitioner to refund excess payment, if made. Also, **Thomos Daniel** (supra) does not in so many words lay down any law as contended by Ms. Ghaisas.

14. We propose to look at the problem from a different viewpoint.

15. Although the decision reported in (2012) 8 SCC 417 (**Chandi Prasad Uniyal vs. State of Uttarakhand**) has direct relevance on the point of recovery of excess payment, the decision in **Rafiq Masih** (supra) has not dealt with it at all. Reference of **Chandi Prasad Uniyal** (supra) finds place only in two earlier orders passed by the Court, which are quoted in paragraphs 4 and 5 of **Rafiq Masih** (supra). The Supreme Court after considering section 72 of the Contract Act, 1872, which provides that a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it, had the occasion to hold in **Chandi Prasad Uniyal** (supra) as follows: -

> "8. We are of the considered view, after going through the various judgments cited at the Bar, that this Court has not laid down any principle of law that only if there is misrepresentation or fraud on the part of the recipients of the money in getting the excess pay, the amount paid due to irregular/wrong fixation of pay be recovered.
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> 13. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any

> proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or were on the verge of retirement or were occupying lower posts in the administrative hierarchy.
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> 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 overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in in such situations. The question to be asked is whether excess money has been paid or not, may be due to a bona 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 situations 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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> 15. We are, therefore, of the considered view that except few instances pointed out in Sayed Abdul Quadir case and in Col. B. J. Akkara case, the excess payment made due to wrong/irregular pay fixation can always be recovered."

16. In the process, the Supreme Court appears to have distinguished the decisions reported in (1994) 2 SCC 521 (**Shyam Babu Verma vs. Union of India**), 1995 Supp (1)

SCC 18 (**Sahib Ram vs. State of Haryana**), (2006) 11 SCC 709 (**Col. B. J. Akkara vs. Govt. of India**) and (2009) 3 SCC 475 (**Sayed Abdul Qadir vs. State of Bihar**) amongst other decisions.

17. It is noteworthy that because of a cleavage of opinion as noticed in the decision reported in (2014) 8 SCC 892 (**Rakesh Kumar vs. State of Haryana**), the matter came to be referred to a larger Bench of three Hon'ble Judges of the Supreme Court in its decision reported in (2014) 8 SCC 883 [**State of Punjab & Ors. vs. Rafiq Masih (White Washer**)] whereupon it was held that:

> "8. In our view, the law laid down in *Chandi Prasad Uniyal case*, 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 this Court under Article 142 of the Constitution, but in the subsequent decision this Court under Article 136 of the Constitution, in laying down the law had dismissed the petition of the employee. ***"

Therefore, we would read **Chandi Prasad Uniyal** (supra) as a decision laying down a law which binds us as a precedent whereas **Shyam Babu Verma** (supra) and **Sayed Abdul Qadir** (supra) are decisions which were rendered in the peculiar facts of each case and contain directions issued under Article 142 of the Constitution.

18. While deciding the question of grant of relief to the petitioner, as claimed in this writ petition, we cannot remain oblivious of what has been laid down as law by the Supreme Court in paragraphs 13 and 14 in **Chandi Prasad Uniyal** (supra) extracted above. Not to speak of being overruled, it has the imprimatur of the larger Bench decision.

19. The legal position as it emerges from the decision in **Chandi Prasad Uniyal** (supra) and the decision of the two Hon'ble Judges in **Rafiq Masih** (supra) need to be read harmoniously so as to avoid any impression of impropriety on our part since, technically, both the decisions are binding on us. We now embark on this task.

20. No doubt, the petitioner retired as a Class-III employee. This is also supported by the provisions contained in Regulation 7 (2)(iii)(b) of the Regulations. It has not been pleaded in the reply-affidavit of the respondents that erroneous pay fixation of the petitioner was due to any sharp practice committed by her. On the contrary, the stand of the respondents is that there had been an error in fixation of her pay, which went unnoticed. The petitioner was, therefore, not responsible in any manner whatsoever for erroneous fixation of her basic pay and consequent payment of salary in excess of her entitlement. Since revision of pension was sought to be effected by the respondents and in course thereof the petitioner was found entitled to an amount of Rs.4,41,463/-, we are of the considered view that any recovery therefrom would cause undue hardship to the petitioner; therefore, it would be iniquitous if we do not extend protection to her as envisaged in paragraph 18 of the decision in **Rafiq Masih** (supra) rendered by the two Hon'ble Judges.

21. However, we cannot accept Mr. Dewani's contention that the petitioner's pension should also be worked out reckoning Rs.28,810/- as the last pay drawn by her. Pension payable to a retired employee no doubt has to be worked out reckoning the last pay drawn but the last pay must be validly drawn and not erroneously. It has not been shown by Mr. Dewani with reference to any pleading or documentary evidence that the petitioner was entitled in law to basic pay of Rs.28,810/-. On the contrary, there are materials in the reply-affidavit of the respondents to show that the petitioner was in fact entitled to Rs.26,930/- as basic pay which, as noted above, was erroneously fixed at Rs.28,810/-. It is here that we feel persuaded to apply the law laid down in paragraphs 13 and 14 of **Chandi Prasad Uniyal** (supra). Any amount which has been erroneously paid to the petitioner, based on erroneous fixation of pay, cannot be directed to be continued for all times to come and till such time the pension is payable. A mandamus cannot issue directing the respondents either to act contrary to law or to refrain from enforcing the law. If the petitioner was entitled to Rs.26,290/- towards basic pay as on the date of retirement, her pension should be fixed considering such pay only and till such time such pension is payable to her, she cannot be paid any amount over and above that which is now being received by her.

22. The decision in **Sushil Kumar Singhal** (supra) turns on its facts and is, therefore, distinguishable. There, the action impugned could not have been taken by the respondents in view of G.O. dated 16th January, 2007. There is no such policy decision here which precludes the respondents from paying the petitioner pension calculated on her basic pay which she would have received, but for the erroneous fixation.

23. We, thus, decline prayer clause (d) of the writ petition.

24. However, for the reasons aforesaid, we partly allow the writ petition by directing that the respondents shall credit the account of the petitioner with Rs.2,44,345/- together with interest @ 6% p.a. from the date it should have been credited. Let such credit be effected as early as possible but positively within a period of two months from date of receipt of a copy of this order. Needless to say, the other prayers for compensation and costs are declined.

25. There shall be no order as to costs.

(MADHAV J. JAMDAR, J.) **(CHIEF JUSTICE)**

PRAVIN DASHARATH PANDIT Digitally signed by PRAVIN DASHARATH PANDIT Date: 2022.09.14 18:19:50 +0530