IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.15555 of 2022

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Nirmal Kumar Ram son of Late Ram Ashray Ram resident of village and P.O. Chandi, Police Station- Charpokhari, District- Bhojpur, Ara

... ... Petitioner/s

Versus

1. The State of Bihar through the Director General of Police, Bihar, Patna.
2. The Inspector General of Police, Bihar, Patna.
3. The Deputy Inspector General of Police, Dehri-On- Sone, District- Rohtas.
4. The Superintendent of Police, Bhojpur, Ara.
5. The Treasury Officer, Bhojpur, Ara.
6. The Accountant General, Bihar, Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Rajiva Ranjan, Adv.
For the Respondent/s	:	Mr. Md. Nadim Seraj, GP 5

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CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR

ORAL JUDGMENT

Date : 22-12-2023

Heard Mr. Rajiv Ranjan, learned counsel appearing on behalf of the petitioner and Mr. Md. Nadim Seraj, learned Government Pleader-5 for the State.

2. The petitioner has preferred the present writ petition under Article 226 of the Constitution of India seeking a direction upon the respondent authorities to ensure payment of all his retiral dues as well as benefit of ACP and on the basis thereof to enhance the pension and further sought a direction not to recover Rs.5,71,203/- from the gratuity amount of the petitioner.

3. The petitioner was appointed in the year 1988 as

Constable and after rendering more than 33 years of service, he superannuated in the year 2022 from the post of Havildar, Ara Police Line, Bhojpur.

4. It is submitted that the petitioner in course of his service also passed Hindi Noting and Drafting Examination *vide* Memo No. 529 in the year 2010 but the benefit was denied to him and all on a sudden vide Bhojpur District Order No. 2917/2021 dated 27.09.2021 his salary has been revised w.e.f. 01.01.2006 and an alleged excess amount of Rs.5,71,203/- has been recovered from the gratuity amount in a most arbitrary manner.

5. A counter affidavit has been filed on behalf of the respondent No. 4 and a categorical assertion has been made that after submission of all the documents on behalf of the petitioner as also on verification of the service book, it transpired that the petitioner was appointed on 14.07.1988 and got promotion to the rank of Havildar in the year 2001. The petitioner has further been accorded the benefit of 2nd MACP vide Muzaffarpur Rail District Order No. 03/13 with effect from 11.10.2009. Accordingly, the petitioner's payment was revised by Muzaffarpur Rail District Order No. 1750/2013. It is further averred that due to delay in passing of Hindi Noting and

Drafting Examination, he got delayed benefit on ACP, and when the petitioner's service book was sent to District Account Office, Bhojpur for verification of salary, an objection was raised and the service book was returned to make necessary correction and accordingly vide Bhojpur District Order No. 2917/2021 dated 27.09.2021 his salary fixation has been revisited and revised w.e.f. 01.01.2006 and thereafter service book has been sent to the Account Officer, Bhojpur and the excess amount to the tune of Rs.5,71,203/- was recovered.

6. At this juncture, learned counsel for the petitioner submits that apart from the action of recovery, being illegal and wholly without jurisdiction, the impugned order of recovery from the gratuity amount of a retired employees is in the defiance of the mandate of the Hon'ble Apex Court in the case of ***State of Punjab & Ors vs. Rafiq Masih (White Washer) & Ors.*** reported in ***(2015) 4 SCC 334.***

7. On the other hand, learned counsel for the State submits across the Board that once during verification regarding the entitlement of the petitioner, the Department came to know that wrong fixation of pay has been made, necessary action has been taken in accordance with law and direction has been issued to recover the excess amount. While drawing the attention of

this Court to the order issued by the Superintendent of Police, Bhojpur dated 27.09.2021, an emphasis has been made that at the time of fixation undertaking was given by the petitioner that any amount found excess to his entitlement, the same shall be recovered. Reliance has been made on the judgment rendered in the case of ***High Court of Punjab And Haryana & Ors. vs. Jagdev Singh*** reported in ***(2016) 14 SCC 267.*** He next submitted that since there was an undertaking given by the petitioner that he would be liable to return any excess payment, and on verification it was found that a payment, in excess, had been made to the petitioner, the Department has rightly recovered the excess amount, which was a public money, otherwise it would amount to unjust enrichment. Further reliance has been made upon the judgment in the case of ***Manuel Kisku & Ors. vs. Bihar School Examination Board*** reported in ***2023 (4) BLJ 113,*** especially, paragraph Nos. 39 and 40 which reads as under:

> *"**39**. In the case of **Ram Bahadur Mochi** (supra), this Court has noticed that in paragraph '18' of the judgment in **Rafiq Masih** the Hon'ble Supreme Court has held that where payments have 'mistakenly' been made by the employer, the recovery of same would be made impermissible in law in the given circumstance. The basic fact which is required to be looked into is as to whether this case may be taken as one in which payments have*

been made 'mistakenly'. The judgment of the Hon'ble Supreme Court is not to be read as an absolute bar in the matter of recovery from a Class III or IV employees.

***40**. In the facts of this case huge public money has been disbursed to the petitioners and others, the petitioners haveobtained the benefit of post of Assistant with effect from the date of their obtaining graduation degree even as they were not promoted/working on the said post by filing several representations and pressurizing the Board to take a positive decision in their favour. They threatened the Board to go on strike leaving the examination work from the same date, therefore, they cannot be held innocent. They cannot claim reliefs on equitable grounds in the facts of this case."*

8. This Court has heard the submissions advanced on behalf of the respective parties and also perused the materials available on record. So far the issue with regard to recovery of any amount paid in excess to the entitlement of the employee on or after his or her retirement is concerned, the highest Court of the land, in catena of decisions has consistently held that if the amount was not paid on account of any misrepresentation or fraud on the part of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous, such excess amount of emoluments or allowances are found to be not recoverable.

9. In case of ***Syed Abdul Qadir vs. The State of Bihar & Ors. [(2009) 3 SCC 475],*** the Apex Court while considering the identical issue has been pleased to hold that,

> *"the relief against recovery is granted by Courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, Courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. However, if the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee and if such excess payment was made by applying a wrong principle for calculating the pay/allowances or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous, no such recovery of the amount should be made".*

Emphasis supplied.

10. Further the Hon'ble Supreme Court in the case of ***Rafiq Masih*** (supra) dealing with the similar issue relating to

recovery of amount paid in excess without fault of recipient, after his superannuation, has been pleased to hold that:

> *"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 concerned employee. If the effect of the recovery from the concerned employee 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."*

11. The Hon'ble Supreme while parting with the judgment has been pleased to postulate certain situations of hardship wherein recovery by the employer would be held impermissible in law. For the proper appreciation, para. 18 whereof is quoted herein below:

> *"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 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 (or Group 'C' and Group 'D' service).

<u>(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.</u>

<u>(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.</u>

(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."

<u>Emphasis supplied.</u>

12. As to whether excess amount to an employee on account of error in granting increments paid for long time, i.e., almost 10 years, the Apex Court in the case of ***Thomas Daniel Vs. State of Kerala, 2022 SCC Online SC 536*** taking note of the aforementioned judgments has been pleased to hold that if the excess amount was not paid on account of any misrepresentation or fraud of the employee or if such excess

payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable and thus further held that "an attempt to recover the said increments after passage of his retirement is unjustified".

13. Now coming to the facts of the present case, undisputedly, as per the stand of the State, the petitioner has been allowed higher pay with effect from 01.01.2006 and the similar error has occurred subsequently at the time of revision of pay scale which is said to have been detected in course of verification at the time of final fixation of his retiral benefits/other admissible dues in the year 2021 and accordingly vide order No. 2917 dated 27.09.2021 salary fixation has been revised with effect from 01.01.2006.

14. Admittedly, it is not the case of the respondents that the petitioner was in any way responsible or instrumental to the decision of the alleged enhanced pay fixation and in fact the same was done by the Department itself. So far as the reliance of the respondents on the judgment rendered by the Apex Court in the case of ***Jagdev Singh*** (supra) is concerned, the

proposition enunciated by the Apex Court holding, inter alia, that the officer furnished an undertaking while opting for the revised pay scale, is bound by the undertaking, would not be applicable in the facts of the present case since the respondents have not come out with any such undertaking furnished by the petitioner while opting for the revised pay scale.

15. Needless to observe that the fixation of pay was done some time in the year 2009 and 2013 itself and the petitioner had never been placed on notice that any payment found to have been made in excess would be recovered. Now any such kind of notice or undertaking on or after the retirement of the employee would not come to rescue of the employer to get the error committed by them, rectified at the fag end or after superannuation of the employee.

16. The reliance of the respondent-State, so far on the judgment rendered in the case of ***Munuel Kisku*** (supra) is concerned, the facts of the said case are distinguishable to the present one as in the said case, the petitioners were employees of the Bihar School Examination Board and they have obtained the benefit of post of Assistant with effect from the date of their obtaining graduation degree even as they were not promoted/working on the said post. Further, the petitioners of

the said case even as they are said to be Class III employees, the steps for recovery of illegally paid money was initiated well within five years preceded by show cause notice and thus the learned single Judge while highlighting the judgment of the Apex Court in the case of ***Rafiq Masih*** (supra) has been pleased to hold that, true it is if payments have 'mistakenly' been made by the employer, recovery of same would be made impermissible in law, in the circumstances stipulated, however, the basic fact which is required to be looked into is as to whether this case may be taken as one in which payments have been made 'mistakenly'. The Bench held that the judgment of Hon'ble Supreme Court is not to be read as an absolute bar in the matter of recovery from a Class III or Class IV employees. The learned Bench, thus, did not find any illegality in the order of recovery.

17. This Court is in agreement with the afore-noted proposition of law. However, the case in hand, is quite distinguishable and thus the reliance of the State is wholly misconceived.

18. Having gone through the materials and taking note of the settled legal proposition, this Court, *prima facie,* finds that the case of the petitioner falls within the situation

postulated by the Apex Court in the case of ***Rafiq Masih*** (supra), where the recovery of excess payment from the retired employee after such a long time is held to be impermissible in law.

19. In view thereof, the present application stands allowed. The impugned order/action directing for recovery of excess amount of Rs.5,71,203/- from the gratuity amount of the petitioner is held to be not sustainable and the respondent is directed to restore the amount to the petitioner forthwith, if not paid, or recovered. Respondents are further directed to ensure payment of differential amount after revision and also accord the benefit of ACP and MACP in accordance with law.

(Harish Kumar, J)

Anjani/-

AFR/NAFR	
CAV DATE	
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