

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION (WP) NO. 4835/2021

Smt Sudha wd/o Bhagirath Meshram
aged about 52 Yrs., Occ; household
r/o Badegaon Tehsil: Korchi
District Gadchiroli.

..... PETITIONER

// VERSUS //

1. Zilla Parishad, through its
Chief Executive Officer,
District Gadchiroli
2. Zilla Parishad, through its
Accounts Officer, Finance
Department, District Gadchiroli
3. Zilla Parishad High School and
Jr. College through its Principal
Bedgaon taluka – Korchi
District Gadchiroli.

.... RESPONDENT(S)

Ms. Rashi A. Deshpande, Advocate for the petitioner
Mr. S.D. Zoting, Advocate for the respondents

CORAM : A.S. CHANDURKAR AND M. W. CHANDWANI, J.J.

DATED : 27/03/2023

JUDGMENT : (PER:- M. W. CHANDWANI, J.)

Rule. Rule made returnable forthwith. Heard the learned
counsel for the parties.

2. Whether an employer can recover an amount paid in excess to a deceased employee from the legal heirs of the deceased employee, on the basis of undertaking given by the deceased employee is a question raised in this petition.

3. The petitioner is wife of deceased Bhagirath Meshram (hereinafter referred the “**deceased employee**”), who was employed as Junior Lecturer at Zilla Parishad High School. He expired on 06.12.2016 while he was in service. The petitioner started getting Family Pension of Rs.14,250/- per month. While the grade pay was being fixed by the respondents, the deceased had given an undertaking to refund an excess amount, if any, paid to him. Pursuant to the said undertaking by the deceased employee, respondent no. 2 by two communications dated 18.01.2021 and 22.04.2021 asked the petitioner to execute a consent letter for recovery from pension an excess amount of Rs.2,62,841/- paid to the deceased employee due to wrong fixation of grade pay, which are under challenge in this writ petition.

4. Having heard the learned Counsel for the petitioner as well as learned Counsel for the respondents, let’s briefly note the law with regard to recovery of excess payment made to an employee.

5. In **Sahib Ram v. State of Haryana and Others** reported 1999 **Supp (1) SCC 18**, the Supreme Court restrained recovery of payment

which was given under the upgraded pay scale on account of wrong construction of relevant order by the authority concerned, without any misrepresentation on part of the employees. It was held thus :

“5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation, the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant. The principle of equal pay for equal work would not apply to the scales prescribed by the University Grants Commission. The appeal is allowed partly without any order as to costs.”

6. In **Col. B.J. Akkara (Retd.) v. Government of India and Others** reported in (2006) 11 SCC 709, the Supreme Court held as under:

“27. The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the wrong interpretation/ understanding of the circular dated 7-6-1999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled (vide Sahib Ram v. State of Haryana [1995 Supp (1) SCC 18 : 1995 SCC (L&S) 248], Shyam Babu Verma v. Union of India [(1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121], Union of India v. M. Bhaskar [(1996) 4 SCC 416 : 1996 SCC (L&S) 967] and V

Gangaram v. Regional Jt. Director [(1997) 6 SCC 139 : 1997 SCC (L&S) 1652]:

(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(b) 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.

28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery.

29. On the same principle, pensioners can also seek a direction that wrong payments should not be recovered, as pensioners are in a more disadvantageous position when compared to in-service employees. Any attempt to recover excess wrong payment would cause undue hardship to them. The petitioners are not guilty of any misrepresentation or fraud in regard to the excess payment. NPA was added to minimum pay, for purposes of stepping up, due to a wrong understanding by the implementing departments. We are therefore of the view that the respondents shall not recover any excess payments made towards pension in pursuance of the

circular dated 7-6-1999 till the issue of the clarificatory circular dated 11-9-2001. Insofar as any excess payment made after the circular dated 11-9-2001, obviously the Union of India will be entitled to recover the excess as the validity of the said circular has been upheld and as pensioners have been put on notice in regard to the wrong calculations earlier made.”

7. In ***Syed Abdul Qadir and Others v. State of Bihar and Others*** reported in (2009) 3 SCC 475 excess payment was sought to be recovered which was made to the appellants—teachers on account of mistake and wrong interpretation of prevailing Bihar Nationalised Secondary School (Service Conditions) Rules, 1983. The appellants therein contended that even if it were to be held that the appellants were not entitled to the benefit of additional increment on promotion, the excess amount should not be recovered from them, it having been paid without any misrepresentation or fraud on their part. The Supreme Court held that the appellants cannot be held responsible in such a situation and recovery of the excess payment should not be ordered, especially when the employee has subsequently retired. The Court observed that in general parlance, recovery is prohibited by courts where there exists no misrepresentation or fraud on the part of the employee and when the excess payment has been made by applying a wrong interpretation/ understanding of a Rule or Order. It was held thus:

“59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its

counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made.”

8. In the decision in ***State Of Punjab & Others Vs. Rafiq Masih (White Washer) and anr.*** reported in ***[(2015) 4 SCC 334]***, the Supreme Court has dealt the issue of right of employer to recover the amount paid in excess to the employee without any fault of employee. The Supreme Court in paragraph no. 18 of its judgment has held as under:-

“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:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from the 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 be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”

Thus, the supreme court in plethora of decisions, more particularly, in decision of **Rafiq Masih** (supra) has consistently held that the excess amount, which is not paid on account of any misrepresentation or fraud of the employee, are not recoverable later on.

9. Our attention has been drawn by the learned Counsel appearing for the respondents on the decision of the Supreme Court in ***High Court of Punjab and Haryana and ors. Vs. Jagdev Singh*** reported in ***(2016) 14 SCC 267***, wherein after considering one of the situations enumerated in the decision in the case of **Rafiq Masih** (supra), the Supreme Court in paragraph no 11, Court has held as under:

11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer

furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.”

10. Taking help of this decision the learned Counsel for the respondents vehemently submits that the ratio of the decisions in case of **Jagdev Singh** (supra) is applicable to the present case, since, in the present case, also as the deceased employee had given an undertaking that in case of any excess payment made by the employer the same can be recovered from him.

11. The Supreme Court in **Rafiq Masih** (supra) has summarized some of the situations wherein the recovery by the employer would be impermissible in law. While enumerating the situations, the Supreme Court has also mentioned that it is not possible to postulate all situations of hardship which would govern the employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Thus, the situations enumerated in the paragraph no. 18 in the decision of **Rafiq Masih** (supra) are not exhaustive. There may be various other situations which may create hardship to the employee on the issue of recovery, rather in the situation (v) enumerated in the case of **Rafiq Masih** (supra), the Supreme Court has mentioned if in any other case, if the recovery sought to be made is iniquitous or harsh to such an extent that it outweighs the equitable balance of the

employer's right to recover, should be impermissible. The reason for this may be found in paragraph no. 8 in the case of **Rafiq Masih** (supra), which is reproduced below:-

“8. 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.”

12. Thus, the relief against the recovery of excess amount is granted not because of any right of the employee, but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered. The matter being in the realm of judicial discretion, the Court may on the facts and circumstances of any particular case order for recovery of amount paid in excess.

13. In the case of **Jagdev Singh** (supra), the employee was alive. He was getting full pension and the recovery was sought within a year

from the date of his compulsory retirement. Considering the facts and circumstance of the said case, their Lordships under judicial discretion have held that when the officer has furnished an undertaking to refund the excess amount while opting for revised basic scale, is bound by the undertaking and the employer's recovery of excess amount was held valid.

14. Here is the case, where the deceased employee died in the year 2016 while he was in service. In the year 2002, his grade pay was fixed. In the year 2009, he had given an undertaking to refund the amount if excess amount is paid due to incorrect fixation of pay grade by the respondent no.2. Now, after 16 years and almost five years after the death of the deceased employee, the respondent no.2 comes up with the case that it had fixed the grade pay of the deceased employee incorrectly and the petitioner - widow of the deceased employee has been asked to consent for recovery of the excess amount paid to the deceased employee from family pension.

15. It appears from the record that the petitioner, who is widow is not earning and is doing household work. Considering her age, it is also obvious that her children are also dependent upon her. She is getting Family Pension of Rs.14,250/- per month which is already 50%

of the original pension. Whereas, an excess amount of Rs.2,62,841/- is sought to be recovered. Considering the facts that the deceased employee who died in his early during his service leaving behind him, a widow and children; the time gap of 16 years, when the amount has been sought to be recovered; the quantum of recovery amount and the amount of Family Pension; we are of the opinion, that it would be iniquitous and harsh to effect the recovery from the Family Pension of the petitioner, who is a widow and dependent entirely on her Family Pension. Though, the deceased employee had, at the time of fixation of his salary, given the undertaking but considering the situation mentioned above, it will not be permissible to recover the excess amount of Rs.2,62,841/- from the Family Pension of the petitioner.

16. To sum up, the writ petition is allowed. The communications dated 18.1.2021, and dated 22.4.2021, to the extent it directs recovery of alleged excess pay Grade from 1.7.2002 till 5.7.2016 i.e. 14 years amounting to Rs.2,62,841/- from the family pension of the petitioner are set aside.

17. Rule is made absolute in the aforesaid terms with no order as to costs.

**SANDIP
MAHADEV
GATE**

Personal Assistant to the
Hon'ble Judge
Digitally signed by
SANDIP MAHADEV GATE
Date: 2023.03.30
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(M. W. CHANDWANI, J.)

(A. S. CHANDURKAR, J.)