IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17436 of 2023

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1. Ashok Kumar Tiwary, Son of Late Chandradip Tiwary, Resident of Mounia Babu Thakurbari, Salimur Ahra, Lane No.- 02, P.S.- Gandhi Maidan, District- Patna, presently Residing at CDA Colony, North Shastrinagar, P.S.- Shastri Nagar, District- Patna.
2. Syed Shabbur Hasan, Son of Late Syed Hashim Hasan Khan, Resident of Opposite of Polytechnic College, Gulzarbagh, Waqf Estate, P.S.- Alamganj, Patna City, District- Patna.

... ... Petitioner/s

Versus

1. The State of Bihar through the Additional Chief Secretary, Finance Department, Government of Bihar, Old Secretariat, Bailey Road, Patna.
2. The Secretary, Law Department, Government of Bihar, Patna.
3. The District and Sessions Judge, Civil Courts, Patna.
4. The Judge-in-charge, Accounts, Civil Courts, Patna.
5. The Drawing and Disbursing Officer, Civil Courts, Patna.
6. The Civil Court Patna, through the Registrar, Civil Courts, Patna.
7. The Treasury Officer, Treasury Officer, Collectorate Patna, District- Patna.
8. The Accountant General, A and E, Bihar, Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s :	Mr. Sunil Kumar Singh, Advocate
For the Respondent/s :	Mr. Ajay Bihari Sinha, GA- 8
	Ms. Seema Ghazala, AC to GA-8
For the Respondent Nos. 3 to 6:	Mr. Piyus Lall, Advocate

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CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT
Date : 10-09-2024

This Court has heard Mr. Sunil Kumar Singh, learned Advocate for the petitioners, Mr. Piyus Lall, learned Advocate for the respondent nos. 3 to 6 and Ms. Seema Ghazala, learned Advocate for the State.

2. The petitioners are retired Class-III employees of the judgeship of Patna, superannuated from the post of

Sheristedars have preferred the present writ petition under Article 226 of the Constitution of India seeking quashing of the order of recovery of excess amount drawn from the amount of unutilized earned leave of the petitioners amounting to Rs. 3,35,165/- and Rs. 4,45,975/- issued under the signature of District and Sessions Judge, Patna vide Sanction order dated 20.07.2021 and 16.09.2021 respectively.

3. Bereft of immaterial details, the relevant facts of the case are that petitioner no.1 was appointed as a clerk on 08.12.1979 and superannuated on 31.01.2021 while working on the post of Sheristedar from Civil Court, Patna. Similarly petitioner no.2 appointed on 19.05.1981 as Clerk and superannuated on 20.03.2020 while working on the post of Sheristedar from Civil Court, Patna City, Patna.

4. Initially vide Order No. 29/2006 dated 26.08.2006, the petitioners were granted the benefits of 1st and 2nd financial up-gradation under the A.C.P. Scheme in the pay scale of Rs.5000-8000/- and Rs.5500-9000/-. Subsequently, vide Order no. 47/2012 dated 02.03.2012, the Class-III employees of the judgeship were granted the benefit of 3rd Financial up-gradation under the MACP scheme in the pay scale of Pay Band 2 Rs.9300-34800/- with Grade Pay of Rs.4800/-. Thereafter by

Order No. 121/2013 dated 24.08.2013 issued by the District and Sessions Judge, Patna, the employees who have not been accorded the 3rd A.C.P. were allowed higher pay scale of Pay Band 3 Rs.15600-39100/- with Grade Pay Rs.6600/-. However, vide Order No. 145/2013 dated 16.11.2013, the aforenoted Order No. 121/2013 dated 24.08.2013 was cancelled awaiting the opinion of the Law Department, Government of Bihar, Patna.

5. Being aggrieved, the Bihar State Civil Court Employees Association made a representation before the concerned respondents as also in view of the report dated 23.02.2016 of the Screening Committee of the Judgeship of Patna vide Order No. 55/2016 dated 24.02.2016, the cancellation Order No. 145/2013 dated 16.11.2013 was rescinded and earlier Order No. 121/2013 dated 24.08.2013 granting higher pay scale of 3rd ACP in Pay Band 3 Rs.15600-39100/- with Grade Pay Rs.6600/- was restored; but with a caveat that, if in future, it was found that excess amount was received by any employee it shall be recovered from them and they shall file their respective affidavits for refund of excess amount. Pursuant thereto the petitioners filed their respective affidavits dated 10.03.2016 and 17.03.2016 respectively to the

effect that excess amount is drawn by them, then it would be recovered from them.

6. In the meanwhile, the Law Department, Government of Bihar, Patna came out with letter no. 3153 dated 10.04.2018 informing all the judgeship of the State that with regard to grant of benefit of ACP scheme to Class-III employees of Civil Courts of the State, the Finance Department, Government of Bihar, Patna has reiterated its opinion that 3rd financial upgradation would be granted in the pay scale of PB3 with grade pay of Rs.5400/-. It was further stipulated that those employees who had retired with the said benefit in pay scale of PB 3 with grade pay of Rs.6600/- their pension should be revised accordingly, but no recovery of pay drawn by them till retirement of the employee would be made. In the light of the aforenoted letter dated 10.04.2018, grade pay of all the employees, including the petitioners, who had earlier been granted the said benefit with grade pay of Rs.6600/- was modified to grade pay of Rs.5400/- and so far the retired employees were concerned, their service books were sent to the Accountant General, Bihar for re-fixation.

7. In the aforesaid premise, the impugned order came to be issued by respondent no.3 vide Sanction Order dated

20.07.2021 under Memo No. 522(4)/Accounts and Sanction Order dated 16.09.2021 under Memo No. 679(3)/Accounts, which are put to challenge before this Court.

8. Learned Advocate for the petitioners while assailing the impugned orders primarily contended that any recovery from retiral benefits is in the teeth of the mandate of the Hon’ble Supreme Court in the case of **State of Punjab Vs. Rafiq Masih (White Washer) and Others,** reported in **(2015) 4 SCC 334.** There is no misrepresentation or fraud on the part of the petitioners; since the petitioners are superannuated, any recovery from the retiral benefit would be iniquitous or harsh; putting them to serious undue hardship. It is further contended that on being aggrieved by the recovery from pensionary benefits one Ajoy Kumar Verma, who had also been superannuated from the post of Sheristedar in Patna Civil Court preferred C.W.J.C. No. 11189 of 2018 and the learned Court having taken note of the fact that since the petitioner stood superannuated held, no recovery can be made from him with regard to the amount paid in excess on account of third financial progression and thus directed the respondent-State to forthwith refund the amount recovered from the petitioner. The Court, further observed that only the pension of the petitioner shall be

liable to be revised, if not already revised. The copy of the judgment/order, as noted above, has been placed on record as Annexure-P/6.

9. Learned Advocate for the petitioners further contended that so far undertaking given through the affidavits duly filed by the petitioners to the effect that excess amount is recoverable from them are concerned, that was under the duress and coercion, thus, it cannot be used against the petitioners.

10. In sum and substance, the petitioners are not in opposition to re-fixation of their pension in the light of the order dated 10.04.2018, however, they are only aggrieved to the extent whereby the order for recovery has been issued by misinterpreting the order dated 10.04.2018. It is also the contention of the petitioners that even if certain amounts have been found to be excessively paid to them in excess to their entitlement, but in no circumstances it can be recovered from the Leave encashment, which can only be allowed either after a proper disciplinary or criminal proceeding, leading to order of recovery from the employee after his superannuation, but this is not the case of the petitioners. In support of the contention, reliance has also been placed on a Division Bench Judgment of High Court of Orissa at Cuttak in the case of **Union of India**

and Others Vs. Md. Ahmed Baig [W.P.(C) No. 9987 of 2021].

11. Per contra, Mr. Piyus Lall, learned Advocate for respondent nos. 3 to 6 countering the submission of the petitioners submits that in view of the undertaking tendered by the petitioners vide affidavits dated 10.03.2016 and 17.03.2016 respectively, which fact has suppressed in the writ petition, the petitioners cannot be allowed to raise any grievance against the recovery of excess pay drawn by them due to grant of higher pay scale towards the benefit of 3rd financial upgradation under the ACP Scheme. The recovery of Government dues is permissible from amount of unutilized leave encashment of an employee as it is a part of salary as per Bihar Service Code. The judgment of the Hon'ble Supreme Court passed in the case of **Rafiq Masih (supra)** is not applicable in the facts and circumstances of the present case, especially in view of the undertakings of the petitioners; thus reliance is placed on the decision of the Hon'ble Supreme Court in the case of **High Court of Punjab & Haryana & Ors. Vs. Jagdev Singh**, reported in **(2016) 14 SCC 267.**

12. It is also urged that the case of the petitioners are not on similar footing as that of the petitioner of CWJC No. 11189 of 2018, inasmuch as the petitioner of CWJC No. 11189

of 2018 had already retired prior to the issuance of letter no. 3153 dated 10.04.2018 issued by the Government of Bihar in the Department of Law making it clear that recovery of excess pay drawn from those who had already retired would not be made. The letter did not stipulate that no recovery of excess pay drawn by those, who are still in service and are to retire; thus, the order of recovery is sustainable in law, is the contention of the learned Advocate for the respondent nos. 3 to 6.

13. Adverting to the aforenoted facts, learned Advocate for Respondent Nos. 3 to 6 placed further reliance on a decision of the Division Bench of this Court in the case of **Union of India & Ors. Vs. Sri Bijoy Kumar (C.W.J.C. No. 12844 of 2021)** wherein the Union of India being aggrieved by the order of the Central Administrative Tribunal, Patna Bench whereby the learned Tribunal relying on the decision of the Hon'ble Supreme Court in the case of **Rafiq Masih** (supra) allowed the applicant's application directing the Union of India to refund all the amount, which has been deducted by way of recovery of excess payment made by the respondents from the retiral dues of the applicant. The learned Division Bench having found that it is not in dispute that the respondent had been paid amount in excess to what he was legally entitled to because of

incorrect fixation of pay at the time of granting him ACP/MACP and before fixation of pay there had been an undertaking by the respondent that the excess amount shall be returned. In such circumstances, the learned Division Bench held; the Hon'ble Supreme Court decision in the case of **Jagdev Singh** (supra) applies with full force and set aside the order/judgment of Central Administrative Tribunal, Patna Bench.

14. Learned Advocate for the State supported the impugned orders on the same line by adopting the argument of Respondent Nos. 3 to 6.

15. This Court has heard the rival submission of the learned Advocates for the respective parties and anxiously perused the materials available on record.

16. Before parting with the final outcome, it would be apt to quote the relevant extract of letter no. 3153 dated 10.04.2018, which is as follows:

> ''2. इस मामले में ही पुनः समीक्षा के क्रम में संचिका वित्त विभाग को भेजी गई, जिसमें वित्त विभाग द्वारा अपने पूर्व में दिये गये परामर्श को ही सही बताते हुए पुनः परामर्शित किया गया है, जो निम्नवत हैः–
>
> ''व्यवहार न्यायालय के वर्ग–3 के कर्मियों को पी0बी0–3+5400 में तृतीय वित्तीय

उन्नयन की स्वीकृति दी जायेगी। यदि तृतीय वित्तीय उन्नयन के रूप में पी0बी0–3+6600 के लाभान्वित कर्मी सेवानिवृत हो चुके है तो उनके द्वारा ली गई राशि वसूलनीय नहीं होगी परंतु पेंशन यथानुसार परिमार्जित किया जायेगा। ऐसे कर्मी जो दिनांक–01.01.2016 को सेवारत है और उन्हें पी0बी0–3+5400 में तृतीय उन्नयन मिला है, तब पी0बी0–3+5400 के प्रतिस्थानी को राज्य सरकार द्वारा स्वीकृत नहीं किये जाने के कारण, दिनांक–01.01.2016 के प्रभाव से उन्हें Level-11 अनुमान्य होगा। '

'3. अतः उपर्युक्त वर्णित स्थिति में वित्त विभाग द्वारा पुनः इस मामले में दिये गये परामर्श के आलोक में विभागीय पत्रांक–4479/जे0 दिनांक–04.08.2017 को निरस्त करते हुए अनुरोध है कि उपरोक्त कंडिका–2 में वित्त विभाग द्वारा दिये गये परामर्श के साथ विभागीय ज्ञापांक–2201/जे0 दिनांक–25.04.2017 एवं विभागीय ज्ञापांक–2195/जे0, दिनांक–25.04.2017 के आलोक में नियमानुसार कार्रवाई करने की कृपा की जाय।''

17. The impugned order of recovery are issued in the light of the aforenoted letter, which clearly says that the

Finance Department has advised that all the Class-III employees of the Civil Court shall be granted 3rd Financial Progression in the Pay Band-3 with Grade Pay of Rs.5400/-. In case, the Class III employees, who have been accorded the benefit of PB 3 with Grade Pay of Rs.6600/- and now they have already been superannuated, no recovery shall be made, but the pension shall be revised accordingly.

18. It is true that the case of Ajoy Kumar Verma is not identical to that of the petitioners, as he had already superannuated while working as a Sheristedar on 31.01.2018 before coming into effect of letter no. 3153 dated 10.04.2018. Thus, in no case, he can be subjected to recovery from the retiral benefits, nonetheless, the pension can definitely be revised accordingly. But the letter dated 10.04.2018, which has been made the basis for issuance of the impugned order, however, is silent with respect to the recovery of the excess amount paid to them while they were in service and only stipulates that the employees who were in service on 01.01.2016 they shall be entitled to the pay scale of PB3 with grade pay of Rs.5400/-.

19. The Hon'ble Supreme Court having faced with a situation of recovery of amount from the retired employee in the case of **State of Punjab Vs. Rafiq Masih (Supra)** taking

note of the previous judgments on such issues, summarized the following few situations wherein recovery by the employer would be impermissible in law, which reads as follows:

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

20. Bare reading of the mandate of the Hon’ble Supreme Court, it appears to be crystallized that recovery from the employees belonging to Class III and Class IV service is not permissible. The conditions are independent to each other. Condition (ii) bars the Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery. Similarly other conditions talk about situations where 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 or where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly and lastly in any other case, where the court comes to the conclusion, that recovery if made from the employee is iniquitous or harsh.

21. Indubitably, the petitioners were put to notice not at the first instance, but certainly in the midst of consideration of the entitlement of the petitioners before the Finance Department and, accordingly, the petitioners have

submitted their undertaking. Once, letter has been issued with clarification to the effect that Finance Department has advised that all the Class-III employees shall be granted 3rd Financial upgradation in the Pay Band 3 with Grade pay of Rs.5400/- with a clear stipulation that no recovery shall be made pertaining to the excess amount paid to the persons, who have already superannuated, but the pension shall be revised; and those, who are in service they shall be entitled to Level-II after refixation of their pay scale; in the opinion of this Court, there is no reason or occasion to recover the amount, which is said to have been paid excess to the entitlement by creating two different groups of the employees only for the purpose of recovery; one who have fortunately been superannuated before 10.04.2018 and the others, who have been found working; albeit all the Class-III employees have tendered their respective undertaking in pursuant to the Order No. 55/2016 dated 24.02.2016.

22. The Hon'ble Supreme Court in the case of **Rafiq Masih (Supra)** in no uncertain terms has held that the right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned 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.

23. Excluding those employees, who have superannuated prior to issuance of letter dated 10.04.2018 and recovery from those who were working at that point of time and superannuated subsequently not only iniquitous, but cause serious hardship, if the excess payment shall be recovered from their retiral benefits (Leave Encashment) after their superannuation, nonetheless, their pay scale have already been revised, which have been accepted by all.

24. This Court also finds that the petitioners are Class-III employees and they were not in a bargaining position with the employer, hence in any view of the matter they do not have any option, but to accept the directives issued by the State Government of tendering their undertaking. So far the case of **Jagdev Singh** (supra) is concerned, it was the case of recovery of excess payment made to an Additional Civil Judge, who was allowed Senior Pay Scale under the Haryana Civil Service (Judicial Branch) and Haryana Superior Judicial Service

Revised Pay Rules, 2001 and the officer was required to submit an undertaking that any excess amount which may be found to have been paid will be refunded to the Government either by adjustment against future payments due or otherwise.

25. The case in hand relates to Class-III employees, who have been protected from recovery under the dictum of the Hon'ble Supreme Court in **Rafiq Masih** (supra) in certain contingencies. Any undertaking contrary to the mandate of the Apex Court would certainly put a cloud on the right of Class-III and IV employees of their right to be defended from recovery and thus certainly be an attempt to outweigh the equitable balance of the employer's right to recover from retiral benefits.

26. With due respect to the decision of the learned Division Bench in the case of **Union of India & Ors. Vs. Sri Bijoy Kumar** (supra) this Court is of the opinion that though the respondent of the said case was put to notice at the first instance and he has given an undertaking that in case of incorrect fixation of pay at the time of granting him ACP/MACP, such amount paid to him shall be recovered, but it has not been discussed as to whether the respondent was the Class-III or Class-IV employee and all the more the facts of the case in hand is differentiable for the reason that person, who superannuated

before issuance of letter dated 10.04.2018, they have been exempted from recovery and those who were working and superannuated subsequently saddled with the offshoot of recovery; despite the fact that many of the employees tendered their undertaking in the light of Order No. 55/2016 dated 24.02.2016, but fortunately superannuated before the issuance of letter dated 10.04.2018, thus exempted from recovery. The case of **Ajoy Kumar Verma** is also one of such example, who superannuated on 31.01.2018 from the post of Sheristedar.

27. On account of the aforenoted discussions, this Court is of the opinion that there cannot be any discrimination on account of the fact that some of the persons be excluded from the recovery only on account of they being superannuated; nevertheless they have also submitted undertaking pursuant to the letter as contained in Order No. 55/2016 dated 24.02.2016 and the recovery has only been directed from those, who at the time of issuance of letter no. 3153 dated 10.04.2018, were working only on account of their undertaking submitted through affidavit. Thus in the opinion of this Court, the impugned order of recovery basing upon letter no. 3153 dated 10.04.2018 suffers from the vice of arbitrariness and discrimination, apart from being not rational.

28. In view of the aforesaid discussions and the opinion formed by this Court, the impugned order of recovery dated 20.07.2021 as contained in Memo No. 522(4)/Accounts (Annexure-P/2) as well as the order dated 16.09.2021 as contained in Memo No. 679(3)/Accounts stand quashed. The respondents are hereby directed to refund the amount recovered from the petitioners preferably within a period of eight weeks from the date of receipt/production of a copy of this order.

29. Since the issue has already been decided in favour of the petitioners after having found the impugned orders unsustainable in law, this Court does not find any reason to adjudicate the issue as to whether any amount can be recovered from the leave encashment on any other grounds, except when the employees have been found guilty in a disciplinary or criminal proceeding.

30. The writ petition stands allowed. However, there shall be no order as to cost.

(Harish Kumar, J)

uday/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	13.09.2024
Transmission Date	NA