



2024:DHC:827-DB



\$~
*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision:- 05.02.2024

+ W.P.(C) 843/2024 & CM APPL. 3558/2024 -Stay
UNION OF INDIA & ANR.

..... Petitioners
Through: Ms. Arunima Dwivedi, Adv.

versus

ANOOP KUMAR UPADHYAY

..... Respondent
Through: Mr. B.S. Jarial, Adv.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

REKHA PALLI, J(ORAL)

1. The present writ petition under Article 226 & 227 of the Constitution of India seeks to assail the order dated 02.12.2022 passed by the learned Central Administrative Tribunal (Tribunal) in O.A. 4677/2018. Vide the impugned order, the learned Tribunal has allowed the Original Application filed by the respondent by quashing the order dated 17.12.2018, whereby a sum of Rs. 9,01,173/- was sought to be recovered from him on account of the purported excess payment made to him during the period between 01.07.2011 to 30.11.2018.
2. The respondent joined the Central Public Works Department (CPWD)



2024 : DHC : 827-DB



as a Junior Engineer on 13.04.1982 and was, on 18.08.2009 promoted as an Assistant Engineer (Civil) on *ad hoc* basis. In 2010, the respondent appeared in the promotional departmental examination but was unable to clear the same but was still granted an increment w.e.f., 01.07.2011, which learned counsel for the petitioners submits, was payable only to those employees who had cleared the departmental examination. Upon realising this mistake, the petitioners, after verifying the position regarding the respondent having not cleared the departmental exam, proceeded to issue the order dated 17.12.2018, directing recovery of a sum of Rs. 9,01,173/- from the respondent.

3. Being aggrieved, the respondent preferred an O.A. before the learned Tribunal on 18.12.2018 and while the same was pending, he superannuated from service on 31.05.2020. Vide its impugned order, the learned Tribunal has set aside the order dated 17.12.2018 by relying on the decision of the Apex Court in ***State of Punjab v. Rafiq Masih (2015) 4 SCC 334***. The learned Tribunal also noted that the respondent was not put to any notice before issuing the recovery order.
4. In support of the petition, learned counsel for the petitioners submits that the impugned order is wholly perverse and liable to be set aside as the learned Tribunal has failed to appreciate that the decision in ***Rafiq Masih (supra)*** was not applicable to a Group B employee like the respondent who cannot claim that he would suffer grave hardship in case the recovery of excess amount is made from him. Once the respondent does not deny that he had not been able to clear the accounts paper in the departmental exam, which was a pre-condition



2024 : DHC : 827-DB



for grant of increment, it is evident that he was being wrongly paid the amount towards the increment since 01.07.2011, which mistake was realized when his records were examined on account of his impending superannuation. She contends that once the respondent has been made the over payment due to mistake, he is bound to refund the same. In support of her plea, she seeks to place reliance on a decision of the Apex Court in *Thomas Daniel vs. State of Kerala (2022) SCC OnLine SC 536*. She, therefore, prays that the impugned order be set aside.

5. On the other hand, learned counsel for the respondent supports the impugned order and submits that the learned Tribunal has rightly relied on the decision in *Mohd Rafiq (supra)*, which is squarely applicable to the facts of the present case, where recovery is sought to be made when the respondent is already a pensioner. He further submits that this plea that the decision in *Mohd Rafiq (supra)*, would not be applicable to the respondent as he was a group B employee, was not even raised by the petitioners before the learned Tribunal. He, therefore, prays that the writ petition be dismissed.
6. In order to appreciate the rival submissions of the parties, we may begin by noting the relevant extracts of the impugned order. The same read as under:

“9. I have heard the learned counsel for the parties and also carefully examined the pleadings. The facts of the case are not disputed. Nowhere, has it come on record that before issuing the order of recovery, any notice was issued to the applicant' or he was afforded an opportunity in any other manner.

10. Moreover, it is not disputed that recovery was



2024 : DHC : 827-DB



initiated after a lapse of 8 years from the date the first wrong increment was alleged to have been made in his favour. In addition, there is no allegation that the applicant can be held guilty of any misconduct by way of any misleading information or misrepresentation to obtain the financial benefits by way of annual increments. If annual increments were awarded and continued to be released

in his favour for eight long years, the responsibility for the same lies singularly on the shoulder of the respondents.

12. Moreover, the issue has been deliberated upon and adjudicated by various benches of this Tribunal in a large number of cases. I have no reason or cause to hold a view which is divergent from what has already been taken. Moreover, the issue at hand gets settled against the background of law laid down by Hon'ble Apex Court in Rafiq Masih (White Washer) CIVIL APPEAL NO. 11527 OF 2014 {Arising out of SLP(C) No.11684 of 2012) case.

13. In the facts and circumstances, the present OA is allowed, and the impugned order is set aside with a direction to the respondents that they shall not make any recovery from the applicant. Pursuant to the impugned order, which is said to have been issued on account of re-fixation of his salary. If any recovery has already been made or some other admissible dues of the applicant have been withheld on account of this recovery, the same shall either be refunded or released to him forthwith, in no case later than a period of six weeks' from the date of this order."

7. From a perusal the aforesaid, what emerges is that while the learned Tribunal has not interfered with the decision of the petitioner to re-fix the pension of the respondent on the basis of their purported mistake in now realising that the respondent had been wrongly granted an



2024 : DHC : 827-DB



increment w.e.f., 01.07.2011, it has quashed the order directing recovery of a sum of Rs. 9,01,173/- from the respondent. While quashing the recovery order, the learned Tribunal observed that it was an admitted position that the respondent was not guilty of any misrepresentation or fraud and therefore could not be faulted for making any excess payment to him. The learned Tribunal, therefore, held that the decision in ***Mohd. Rafiq (supra)*** was squarely applicable to the facts of the present case.

8. Even before us, learned counsel for the petitioner has not been able to deny that the respondent could not be faulted for grant of the increment to him w.e.f., 01.07.2011, as a result whereof, he received excess payment. She has, however, urged that the decision in ***Mohd. Rafiq (supra)*** was applicable only to group C and D employees, who would face grave hardships if recoveries are made from them after delay. Her submission, thus, being that Group B employees like the respondent, cannot be extended the benefits of the decision in ***Mohd. Rafiq (supra)***. Having given our thoughtful consideration to this plea of the petitioner that the respondent, being a group B employee, the decision in ***Mohd. Rafiq (supra)***, is not applicable to him, we are unable to agree. It would therefore be apposite to refer, hereinbelow, para 18 of the decision in ***Mohd. Rafiq (supra)***, wherein the Apex Court summarised the few situations wherein recoveries by employers would be impermissible.

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



2024 : DHC : 827-DB



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.*

9. From the aforesaid, it is evident that the Apex Court was not dealing with cases of only group C and D employees and had therefore opined that it would not be possible to postulate all situations of hardships, which would govern the employees on the issue of recovery. In fact clause (ii) of the situations summarised in para 18 pertained to recovery from retired employees or employees who were due to retire within one year from the date of order of recovery being passed. Similarly, clause (iii) thereof refers to cases where recoveries were sought to be made from employees when excess payment was made for more than five years. In the present case, the respondent was made excess payment for over seven years, i.e., from 01.07.2011 to 30.11.2018 and therefore, his case would squarely fall within clause



2024 : DHC : 827-DB



(iii) of para 18 of the said decision. Furthermore, the respondent superannuated within barely one year and five months of the passing of the recovery orders and was certainly a pensioner, when the learned Tribunal allowed his O.A. on 02.12.2022. Being a pensioner, it cannot be said that he was not facing any hardship.

10. We have also considered the decision in **Thomas Daniel (supra)** on which reliance has been placed by the petitioners. We find that the said decision instead of forwarding the case of the petitioners, supports the case of the respondent. In the said case, the Apex Court, after considering its earlier decisions including the decision in **Col. B.J. Akkara (Retd.) Vs. Govt. of India (2006) 11 SCC 709** held as under:

“14. Coming to the facts of the present case, it is not contended before us that on account of the misrepresentation or fraud played by the appellant, the excess amounts have been paid. The appellant has retired on 31.03.1999. In fact, the case of the respondent is that excess payment was made due to a mistake in interpreting Kerala Service Rules which was subsequently pointed out by the Accountant General.

15. Having regard to the above, we are of the view that an attempt to recover the said increments after passage of ten years of his retirement is unjustified.”

11. In the light of the aforesaid, we find absolutely no merit in the petitioners' plea that the decision in **Rafiq Masih (supra)** has to be treated as confined to only Group B officers. Having said so, we may clarify that it is not in every case where an over payment has been made that the employer can be barred from seeking recovery. The



2024:DHC:827-DB



matter has to be in each case, examined on facts. In the present case, we find that the over payment was not on account of any misrepresentation made by the respondent and the recovery sought to be made by the petitioner pertains to payments made for a period of more than seven years. The respondent is today a senior citizen, who is surviving only on his meagre pension and therefore, it cannot be said that no hardship would be caused to him if the recovery as per order dated 17.12.2018, is permitted to be made from him.

12. For the aforesaid reasons, we find no infirmity with the impugned order. The writ petition being meritless, is accordingly dismissed along with all pending applications

(REKHA PALLI)
JUDGE

(RAJNISH BHATNAGAR)
JUDGE

FEBRUARY 5, 2024/acm