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* **IN THE HIGH COURT OF DELHI AT NEW DELHI*****Date of Decision:- 16.08.2024***

+ W.P.(C) 8340/2021 & CM APPL. 25820/2021 –Stay.

CM APPL. 6843/2022 –Dir., CM APPL. 47115/2024 –Delay 147

JAWAHAR LAL DEKA

.....Petitioner

Through: Mr. Abhay Kumar Bhargava,
Advocate with Mr. Satyarth B. Sinha,
Advs.

versus

UNION OF INDIA AND ORS

.....Respondents

Through: Ms. Nidhi Raman, CGSC with Mr.
Zubin Singh and Mr. Akash Mishra
and Ms. Rashi Kapoor, Advs.**CORAM:****HON'BLE MS. JUSTICE REKHA PALLI****HON'BLE MS. JUSTICE SHALINDER KAUR****REKHA PALLI, J(ORAL)**

1. The petitioner, who now stands superannuated from the Border Security Force (BSF), has approached this Court by way of the present writ petition under Article 226 of the Constitution of India seeking the following reliefs:

“(i) Issues a writ of certiorari of any other appropriate order or direction in the nature of Mandamus quashing the impugned order dated 15.07.2021 issued by the respondents.

(ii) Pass any other order in the interest of Justice.”

2. The petitioner joined the BSF as a Constable on 27.12.1980. With the passage of time, he was promoted first to the rank of a Head Constable and then as an Assistant Sub- Inspector in the year 2012. Finally he was promoted to the rank of a Sub Inspector in 2013. Though the present writ petition assailing the order dated 15.07.2021 was filed in 2021 when the



petitioner was in service, he now stands superannuated from service on 31.08.2023.

3. Vide an order dated 02.02.2015, while the petitioner was serving as a Sub-Inspector, the respondents issued an order granting him the benefits of the 2nd financial up-gradation under the ACP scheme w.e.f. 27.12.2004. Consequently, not only his pay was revised w.e.f. 27.12.2004, but, after deduction of income tax, he was paid arrears for the period between 27.12.2004 to 02.04.2015 amounting to Rs.5,74,954/-. Further, as a result of this revision in pay, the petitioner continued to draw the benefits of 2nd financial up-gradation under the ACP scheme till 15.07.2021, when based on a purported discovery of an excess payment made by the respondents in 2019, an order was passed withdrawing the benefits of 2nd financial up-gradation under the ACP scheme. Vide the impugned order dated 15.07.2021, not only were the benefits of 2nd financial up-gradation under the ACP scheme granted to the petitioner withdrawn but he was also informed that he was liable to refund the excess amount of Rs.11,94,860/- paid to him towards revised pay for the period between 27.12.2004 to 15.07.2021. Being aggrieved, the petitioner has approached this Court in August, 2021.

4. On 12.08.2021, while issuing notice in the petition, this Court passed an interim order restraining the respondents from making any recoveries from the petitioner. This interim order has continued for the last three years, during which period, the petitioner, as noted hereinabove, has superannuated on 31.08.2023.

5. Learned counsel for the petitioner submits that the benefit of the 2nd financial up-gradation under the ACP scheme was admittedly extended to



the petitioner, without there being any misrepresentation on his part. He, therefore, contends that the amount towards higher revised pay, having been paid to the petitioner for a period of almost 18 years i.e. from 27.12.2004 to 15.07.2021, the recovery thereof from him in July, 2021, when he was already at the verge of superannuation, was wholly unjust and impermissible.

6. In support of his plea, he seeks to place reliance on the decision of the Apex Court in *State of Punjab & Ors. vs. Rafiq Masih (While Washer)* (2015) 4 SCC 334 and in *Col. B.J. Akkara (Retd.) vs. Govt. of India* (2006) 11 SCC 709. He also places reliance on a recent decision of this Court dated 05.02.2024 in **W.P.(C) 843/2024** titled *Union of India & Anr. Vs. Anoop Kumar Upadhyay*. He, therefore, prays that the impugned order be set aside and the writ petition be allowed.

7. On the other hand, Ms. Nidhi Raman, learned counsel for the respondents seeks dismissal of the writ petition and contends that the petitioner being a Group B employee is not governed by the decision in *Rafiq Masih* (supra), which was applicable only to Group C & D employees. Furthermore, the impugned order was passed about two years before the petitioner was due to superannuate, i.e on 31.08.2023, thus on this count as well, his case is not covered by the decision in *Rafiq Masih* (supra). This decision, it is her plea, is applicable only to an employee, who is likely to superannuate within an year from the date of the recovery order and not to those like the petitioner who still had two years remaining service when the recovery order was passed. Finally, she submits that the petitioner's plea that the excess amount, which is now sought to be recovered, was paid to him over a span of about 18 years is also incorrect,



as the order incorrectly granting him the revised pay was passed in February, 2015. She, therefore, prays that the writ petition be dismissed.

8. Having considered the submissions of the learned counsel for the parties and perused the record, we may begin by noting hereinbelow the relevant extracts of the decision in **Rafiq Masih (supra)**:

“12. 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).*
- (ii) Recovery from 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.*
- (iv) 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. A bare perusal of the aforesaid extracts of this decision shows that in this decision the Apex Court, while setting out some of the circumstances where recoveries for excess payment made to an employee would not be permissible, had categorically observed that it would not be possible to lay down all the situations where recoveries from employees ought not to be made. Even though recoveries sought to be made from Group C and



Group D employees has been categorised as one of the cases of hardship, this does not imply that recoveries in case of Group B and Group A employees can never cause hardship. In fact, what emerges is that by way of clause (iii) of para 18, the Apex Court has, without referring to any category of employee, clarified that recovery of excess amount would not be permissible in a case where the payment has been made for more than a period of five years. In the present case, the recovery sought to be made from the petitioner admittedly pertains to payment made to him for a period of almost 18 years. This, in our view, would certainly qualify as a case of grave hardship to the petitioner, who was at the verge of superannuation, when the impugned order was passed.

10. In this regard, it would be apposite to refer to the relevant observations of this Court as contained in para 9 of its decision in **Anoop Kumar Upadhyay** (supra). The same reads as under:

“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 (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.”



11. In the instant case, we find that it is not even the respondents' case that the excess payment made to the petitioner, which is now sought to be recovered, was on account of a misrepresentation or fraud on his part. In fact, the respondents candidly admit that the mistake in extending the benefits of the 2nd financial upgradation under the ACP scheme to the petitioner was solely on their part. In these circumstances, we are of the considered opinion that grave hardship will be caused to the petitioner in case recovery from his terminal dues is permitted at this stage, when he is already a senior citizen surviving only on the meagre pension which he is drawing as a superannuated Sub-Inspector.

12. The writ petition is accordingly allowed by setting aside the impugned order insofar as it directs recovery of Rs.11,94,860/- from the petitioner. It is, however, made clear that this will not come in the way of the respondents re-fixing the petitioner's pay and pension as per law.

(REKHA PALLI)
JUDGE

(SHALINDER KAUR)
JUDGE

AUGUST 16, 2024
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