IN THE HIGH COURT OF HIMACHAL PRADESH AT

SHIMLA

ON THE 29th DAY OF JULY, 2022

BEFORE
HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN
&
HON'BLE MR. JUSTICE SANDEEP SHARMA

CIVIL WRIT PETITION No. 4694 OF 2022

Between:-

SMT. BHIMA DEVI, W/O LATE SH. HOSHIAR CHAND, R/O VILLAGE NALWARI, P.O. GALMA, TEHSIL BALH, DISTRICT MANDI, H.P.

……PETITIONER

(BY MR. RAKESH KUMAR DOGRA, ADVOCATE.)

AND

1. HIMACHAL ROAD TRANSPORT CORPORATION THROUGH ITS MANAGING DIRECTOR, SHIMLA-171003, H.P.

2. THE MANAGER (TECHNICAL), HIMACHAL ROAD TRANSPORT CORPORATION, DIVISIONAL WORKSHOP MANDI, DISTRICT MANDI-175001, H.P.

……RESPONDENTS

(BY MS. SHUBH MAHAJAN, ADVOCATE.)

This petition coming on for orders this day, ***Hon'ble Mr. Justice Tarlok Singh Chauhan****, passed the following :-*

O R D E R

The instant petition has been filed for the grant of following substantive relief:-

> *"That a writ in the nature of mandamus may kindly be issued, directing the respondents to refund a sum of Rs. 1,59,729/- only (as reflected in Annexure P-2) alongwith interest @ 9% per annum to the petitioner forthwith, which has illegally and arbitrarily been recovered from the death-cum-retirement gratuity amount of the petitioner's husband in violation of the judgment contained in Annexure P-4 dated 26.04.2022 passed by this Hon'ble Court in CWPOA NO. 7283 of 2020 titled as Tara Chand Vs. HRTC and others."*

2. The issue regarding recoveries has been decided by this Court in batch of petitions, lead case being CWPOA No. 3145/2019, titled ***S.S. Chaudhary*** Vs. ***State of H.P. & Others***, decided on 24.03.2022, wherein, after taking into consideration entire law on the subject, this Court has laid down the following parameters where recovery by the employer would be permissible/impermissible from the employee. Paragraph 35 whereof reads as under:-

> *"35. In view of the aforesaid discussion, as held by Hon'ble Supreme Court in **Rafiq Masih's case** (supra), it is not possible to postulate all situations of hardship, where payments have mistakenly been made by the employer, yet in the following situations, recovery by the employer would be impermissible in law:-*
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> *(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.

(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 be far outweigh the equitable balance of the employer's right to recover.

(vi) Recovery on the basis of undertaking from the employees essentially has to be confined to Class-I/Group-A and Class-II/Group-B, but even then, the Court may be required to see whether the recovery would be iniquitous, harsh or arbitrary to such an extent, as would far overweigh the equitable balance of the employer's right to recover.

(vii) Recovery from the employees belonging to Class-III and Class-IV even on the basis of undertaking is impermissible.

(viii) The aforesaid categories of cases are by way of illustration and it may not be possible to lay down any precise, clearly defined, sufficiently channelized and inflexible guidelines or rigid formula and to give any exhaustive list of myriad kinds of cases. Therefore, each of such cases would be required to be decided on its own merit."

3. At this stage, it would be apt to refer to a recent judgment rendered by Hon'ble Supreme Court in ***Thomas Daniel*** Vs. ***State of Kerala & Others***, 2022 AIR (SC) 2153, decided on 02.05.2022, wherein it has been held as under:-

"(9) This Court in a catena of decisions has consistently held 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. This relief against the recovery is

granted not because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be

caused if the recovery is ordered. This Court has further held that if in a given case, it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may on the facts and circumstances of any particular case order for recovery of amount paid in excess.

(10) In Sahib Ram v. State of Haryana and Others1 this 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 1 1995 Supp (1) SCC 18 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."*

(11) In Col. B.J. Akkara (Retd.) v. Government of India and Others2 this Court considered an identical question 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 76 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 2 (2006) 11 SCC 709 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 inservice 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 761999 till the issue of the clarificatory circular dated 11-92001. Insofar as any excess payment made after the circular dated 1192001, 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."*

(12) In Syed Abdul Qadir and Others v. State of Bihar and Others3 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 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 counteraffidavit, 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."

(13) In State of Punjab and Others v. Rafiq Masih (White Washer) and Others4 wherein this court examined the validity of an order passed by the State to recover the monetary gains wrongly extended to the beneficiary employees in excess of their entitlements without any fault or misrepresentation at the behest of the recipient. This Court considered situations of hardship caused to an employee, if recovery is directed to reimburse the employer and 4 (2015) 4 SCC 334 disallowed the same, exempting the beneficiary employees from such recovery. It was held thus:

"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 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.

xxx xxx xxx

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."

(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 respondents 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."*

4. The case of the petitioner is squarely covered under Clause (i) and (ii). Accordingly, for the reasons, as stated in S.S. Chaudhary's case (supra), the instant petition is allowed and impugned order of recovery dated 28.12.2018 (Annexure P-1) is quashed and set aside.

5. The petition is disposed of in the aforesaid terms, so also pending application(s), if any, leaving the parties to bear their own costs.

6. However, we make it clear that in case the recovery or a part thereof is or has been effected by the employer, then, the employer shall be bound to refund the same to the employee.

(Tarlok Singh Chauhan)
Judge

(Sandeep Sharma)
Judge

29th July, 2022
(himani)