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**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

**BEFORE
HON'BLE SHRI JUSTICE PRANAY VERMA**

ON THE 31st OF MARCH, 2023

WRIT PETITION No. 28551 of 2022

BETWEEN:-

**SANTOSH MISHRA S/O BHAGWATIPRASAD JI, AGED
ABOUT 63 YEARS, OCCUPATION: RETIRED
UPNIRIKSHAK (KARYAVAHAK), R/O 206, ARADHANA
NAGAR, AERODROME ROAD, INDORE (MADHYA
PRADESH)**

.....PETITIONER

(BY SHRI ANAND AGRAWAL - ADVOCATE)

AND

- 1. THE STATE OF MADHYA PRADESH THROUGH
PRAMUKSH SACHIV MANTRALAYA, VALLABH
BHAWAN, BHOPAL (MADHYA PRADESH)**
- 2. POLICE UPAYUKT MUKHYALAY NAGARIYA
INDORE RANI SARAY, REGAL CHOWRAHA,
INDORE (MADHYA PRADESH)**
- 3. SANBHAGEEYA PENSION ADHIKARI
COLLECTORATE CAMPUS, INDORE (MADHYA
PRADESH)**

.....RESPONDENTS

(BY SHRI ANENDRA SINGH PARIHAR - PANEL LAWYER)

*This petition coming on for admission this day, the court passed the
following:*

ORDER

Heard finally with the consent of both the parties.

By this petition preferred under article 226 of the Constitution of India,

the petitioner has prayed for the following reliefs:-

अ. याचिकाकर्ता को पूर्ण पेंशन, पूर्ण ग्रेच्युटी, जीपीएफ एवं 6ठे वेतन आयोग का एरियर की राशि मय ब्याज के अदा करें।

ब. रिकवरी आदेश तथा पैसा जमा कराने का आदेश दिनांक 04.11.2022 एनेक्सर पी/1 को निरस्त करने का कष्ट करें।

ब. अन्य न्यायोचित सहायता जो भी उचित हो प्रदान करने का कष्ट करें।

2. Brief facts leading to filing of this petition are that the petitioner was appointed as a Class-III employee. Thereafter, he had been performing his duties to the utmost satisfaction of all concerned till his superannuation on 31.08.2022. He had been drawing the pay scale as fixed. Subsequently, enquiry was raised to the effect whether the petitioner would be entitled for the same. In response to the query, it was submitted that the petitioner is not so entitled.

3. In view of the aforesaid re-fixation of salary of the petitioner was done and it was held that the excess amount of Rs.6,38,942/- paid to him is to be recovered. The order dated 04.11.2022 (Annexure P/1) was subsequently passed by the Deputy Commissioner Police Heard Quarter, Indore respondent No.2. The petitioner was asked to deposit the aforesaid amount by order dated 04.11.2022 (Annexure P/1).

4. Learned counsel for the petitioner contended that the impugned order of recovery is detrimental to the petitioner. There had not been any misrepresentation on part of the petitioner and therefore the order of recovery from his retiral dues is not sustainable in the light of decision of the Apex Court in the case of **State of Punjab and others Vs. Rafiq Masih (2015) 4 SCC 334**. It is submitted that the alleged undertaking which was submitted by the petitioner on 09.08.2022 was under compulsion for finalization of his pensionary benefits. The petitioner had submitted the undertaking but had not waived his right to

challenge the illegal recovery and re-fixation. The forcible and compulsive letter dated 04.11.2022 is not a consent. It is further submitted that the impugned order of recovery is liable to be quashed and the respondents deserve to be directed to release entire dues with interest on delayed payment.

5. On the other hand learned counsel for the respondents has submitted that the undertaking was given by the petitioner at the time of settlement of his pension. The matter of undertaking is pending before the Larger Bench hence the respondents have rightly withdrawn benefits of pay fixation granted to the petitioner. Reliance has been placed on the decision of the Apex Court in the case of **Chandi Prasad Uniyal and others Vs. State of Uttarakhand and others (2012) 8 SCC 417** wherein it is held that payment made due to irregular/wrong pay fixation due to mistake of authorities concerned can be recovered. It is hence submitted that the petition is liable to be dismissed.

6. I have heard the learned counsel for the parties and have perused the record.

7. The issue regarding recovery from the employees either in service or after attaining the age of superannuation is no more res integra and has been settled in the case of **Rafiq Masih (supra)** wherein the Apex Court in paragraph 18 has postulated certain categories and has observed that recovery from them is impermissible. Paragraph 18 is reproduced below:-

"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 here in 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 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."

8. In Writ Petition No.10959/2020 (Smt. Veena Verma Vs. State of Madhya Pradesh and others) decided on 09.03.2021 a co-ordinate Bench of this Court at Gwalior has considered the aspect as regards undertaking given by the employees and has held in paragraph 11 as under:-

"(11) Thus, the controversy with respect to entitlement of Establishment Clerk is decided by this Court and is settled. Thus, the only criteria for granting the benefit of Third Time Bound Scale was to consider the case of the petitioner as per the promotional criteria. The petitioner has fulfilling the promotional criteria, therefore, she was found entitled by the DPC. The similarly situated employees have already extended the benefits of Third Time Bound Pay Scale in the DPC meeting held on 5.2.2015 vide order dated 25.2.2015, which is filed along with the list of documents which clearly reflects that on completion of 30 years of service the time scale pay has been extended to similarly situated employees. In such circumstances as far as undertaking given by the employee is concerned the matter stood concluded and settled by the Division Bench in the case of State of M.P. Vs. Chandraeswar Prasad Singh (supra) and the Division Bench has held as under:

"We find that the said judgment relied upon by learned counsel for the State has no applicability in the facts of the present case as the undertaking itself is unconscionable writing obtained by the State. The employee has no option but to submit undertaking to avail the benefit of pay-fixation. In a judgment of the Supreme Court reported as (1986) 3 SCC 136 (Central Inland Water Transport Corporation Limited and Another v. Brojo Nath Ganguly and Another), a condition in the appointment letter that the Corporation could terminate the services of the employees without prior notice if it was satisfied that the employee was unfit medically or was guilty of any subordination in respect of other misconduct, was found to be illegal. The Supreme Court held as under:-

“68. We now turn to the second question which falls for determination in these Appeals, namely, whether an unconscionable term in a contract of employment entered into with the Corporation, which is "the State" within the meaning of the expression in Article 12, is void as being violative of Article 14. What is challenged under this head is clause (i) of Rule 9 of the said Rules. This challenge levelled by the Respondent in each of these two Appeals succeeded in the High Court.

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78. Legislation has also interfered in many cases to prevent one party to a contract from taking undue or unfair advantage of the other. Instances of this type of legislation are usury laws, debt relief laws and laws regulating the hours of work and conditions of service of workmen and their unfair discharge from service, and control orders directing a party to sell a particular essential commodity to another.

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93. The normal rule of Common Law has been that a party who seeks to enforce an

agreement which is opposed to public policy will be non-suited. The case of *A. Schroeder Music Publishing Co. Ltd. v. Macaulay* [(1974) 1 WLR 1308], however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In *Kedar Nath Motani and others v. Prahlad Rai and others*, [1960] 1 S.C.R. 861 reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at page 873):

"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Willistone and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by restoring to some subterfuge or by mis-stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void."

Â, In view of the aforesaid judgment, we find that since the employee has no option but to give undertaking so as to avail the benefit of pay-fixation, it cannot be said to be voluntary act thus, such undertaking cannot be made basis for sustaining the recovery of Rs.87,354/-.

(12) Thus, merely submitting an undertaking by an employee to claim the benefit does not entitle the authorities to make an recovery on the basis of an undertaking."

9. Thus in view of the aforesaid pronouncement, merely submitting an undertaking by an employee to claim the benefits either at that time or at the time of his retirement does not entitle the authorities to make any recovery on the basis of said undertaking. The petitioner has already retired after attaining the age of superannuation on 31.08.2022. In such circumstances, recovery from a retired employee i.e. Class-III employee is not permissible as has been held by the Supreme Court in the case of **Rafiq Masih (supra)**. Thus, considering the over all facts and circumstances of the case the impugned order dated 04.11.2022 is unsustainable and is hereby quashed. The respondent authorities are directed to refund the amount of Rs.6,38,942/- to the petitioner, if

recovered, from the petitioner along with interest at the rate of 6% from the date of recovery. The respondents are further directed to release the pension, gratuity and amount of GPF to the petitioner. The entire exercise be completed with a period of two months from the date of receipt of certified copy of this order.

10. The respondents are further directed to examine the case of the petitioner for payment of 6th pay scale to him within a period of three months from the date of receipt of certified copy of this order. In case petitioner is found entitled to the said benefit, the same be extended to him within a period of two months from the date of decision.

11. Accordingly, the petition is allowed and disposed off.

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(PRANAY VERMA)
JUDGE

