CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

O.A. No. 231 of 2017

Present: **Hon'ble Mr.Gokul Chandra Pati, Member (Admn.)**

Pramod Chandra Patnaik, aged about 66 years, S/o. Late Gobind Chandra Patnaik, Plot No. 423, Sector-5, Niladri Vihar, Bhubaneswar- 751021, District- Khurda, Odisha

.....Applicant

-Versus-

1. State of Odisha represented through the Special Secretary to Government of Odisha, General Administration Department, Odisha Secretariat Building, Bhubaneswar-751001, Dist- Khurda

2. Union of India represented through its Secretary to Government of India, the Ministry of Personnel, P.G. and Pension, Department of Personnel and Training, New Delhi-110001

.....Respondents

For the Applicant: Mr. S. Mohanty, Counsel

For the Respondents: Mr. J. Pal, Counsel (for Respondent No.1)
Mr. S. Behera, Counsel (for Respondent No.2)

Order reserved on: 07.09.2020 Date of order on: 23.09.2020

O R D E R

Per Mr. Gokul Chandra Pati, Member (A):

The applicant, being aggrieved by the decision of the respondent no.1 to recover an amount of Rs. 2,88,389/- from gratuity payable to the applicant on his retirement in accordance with the orders at Annexure- A/6 and A/7 of the respondents, has filed this OA, seeking the following reliefs:-

"(a) Under the facts and law stated above, this Hon'ble Tribunal be pleased to admit this O.A., issue notice to the Respondents to file their show cause within a stipulated period and upon hearing the counsel for the parties, pass the following order:

(b) Quash the orders/letters dated 02.02.2017 and 14.12.2016 under Annexure-A/6 and Annexure-A/7 respectively; and

(c) Direct the Respondent No.1 to refund the amount of Rs. 2,88,389 (Rupees two lakh eighty eight thousand three hundred eighty nine only) with 6% Interest from the date of deduction, illegally deducted from the Gratuity of the Applicant towards recovery of excess payment made due to alleged wrong fixation on account of revision of pay."

2. The undisputed facts of the case are that the applicant, after his retirement from service on 30.6.2010, was served with an order dated 1.7.2011 for re-fixation of the applicant's pay w.e.f. 17.11.2006 on the basis of the clarification of the respondent no.2 vide letter dated 14.1.2011. Because of the above re-fixation of pay, the applicant's pay after revision as per the recommendation of sixth Central Pay Commission (in short CPC) was fixed at a lower level and vide order dated 3.4.2012 (Annexure-A/2) and 10.10.2012 (Annexure-A/3), an amount of Rs. 2,88,389/- was found to be recoverable from the applicant towards drawal of excess pay for the period from 17.11.2006 till 30.6.2010 and excess commutation of pension. On the basis of these orders, the Treasury Officer effected the aforesaid recovery from the gratuity dues of the applicant after making an endorsement dated 6.12.2012 in the Pension Payment Order copy at Annexure-A/4 of the OA).

3. The applicant submitted a representation dated 9.8.2016 (Annexure-A/5) referring to the judgment of Hon'ble Apex Court in the case of **State of Punjab and Others vs. Rafiq Masih and Others in Civil Appeal No. 11527/2014, reported in (2015) 4 SCC 334** and requested the respondents to refund the amount recovered from him after his retirement. The representation was forwarded to the Respondent No.2, who rejected the same vide order dated 4.12.2016 (Annexure-A/7 of the OA) and the rejection order communicated by Respondent No.1 to the applicant vide order dated 2.1.2017 (Annexure-A/6 of the OA). The applicant has challenged both the orders of rejection at Annexure-A/6 and A/7 in this OA.

4. Heard learned counsel for the applicant, who stressed that the law decided by Hon'ble Apex Court in the case of Rafiq Masih (supra) is binding on all authorities and the Tribunal under Artcle 141 of the Constitution of India. He also cited the judgment of Hon'ble High Court of Orissa in the case of **Akhaya Kumar Patra vs. M.D., Andhra Pradesh Power Generation Corporation & Others, reported in 2016 (I) ILR-Cut-744**, in which it was held that recovery by employer from a retired employee is impermissible in law. It was, therefore, submitted by learned counsel for the applicant that the impugned orders violated Article 141 and 300A of the Constitution of India.

5. Learned counsel for the respondent no.1 was heard. He submitted that the applicant's pay in IAS was fixed w.e.f. 17.11.2006 after appointment to IAS, vide order dated 28.4.2010 (Annexure-R-1/1 of the Counter), which, after receipt of the clarification from respondent no.2 in letter dated 14.1.2011 (Annexure-R-1/2 of the Counter), was found to be in excess of pay to which the applicant was entitled. Accordingly, the A.G. was informed vide letter dated 3.4.2012 (Annexure-A/2 of the OA) to deduct the excess payment of Rs.

1,95,306/- towards salary from the gratuity benefit of the applicant, who had retired w.e.f. 30.6.2010. It was submitted that on the representation of the applicant dated 9.8.2016 (Annexure-A/5 of the OA), the Respondent No.2 (DOPT, Government of India) was requested to clarify about the judgments cited by the applicant in the representation. Respondent No.2 clarified vide letter dated 14.12.2016 (Annexure-A/7 of the OA) that the judgments cited by the applicant in his representation will be applicable to the petitioners in those cases which cannot be extended to others. Learned counsel for the Respondent No.1 further submitted that at the time of pay fixation of the applicant, the undertaking was furnished by him to refund if later on it is found that he had drawn excess pay compared to what he is entitled to. A copy of the undertaking was furnished by learned counsel for Respondent No.1 vide his Memo dated 31.8.2020.

6. Perused the pleadings on record and considered the grounds taken by learned counsels for the parties in their submissions. The short question involved in this OA is whether the applicant is entitled for refund of the amount recovered from him towards excess amount paid to him due to wrong fixation of his pay. It is noticed that the applicant has not challenged the decision of the authorities to revise his pay downward after rectifying the mistake found in earlier fixation of his pay on receipt of the clarification from the Respondent No.2. The recovery of excess payment has been challenged in this OA relying on the judgment in the case of Rafiq Masih (supra) and Akhaya Kumar Patra (supra).

7. In the case of Rafiq Masih (supra), the hardship of the government servants, who were paid more than their entitled dues, was considered by Hon'ble Supreme Court and it was held as under:-

> "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 herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, 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 far outweigh the equitable balance of the employer's right to recover."

8. In paragraphs 7 and 8 of the judgment in the case of Rafiq Masih, it was observed by Hon'ble Supreme Court as under:-

> "7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.
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> 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 concerned employee. If the effect of the recovery from the concerned employee 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."

9. After reviewing the provisions of the Constitution of India, it was observed in paragraph 10 of the above judgment as under:-

> "10. In view of the aforestated constitutional mandate, equity and good conscience, in the matter of livelihood of the people of this country, has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent, that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law....."

10. Applying the principles of law laid down in the judgment in Rafiq Masih, Hon'ble High Court of Orissa in the case of Akhaya Kumar Patra (supra) has held the recovery from the employees to be unsustainable. It is seen from the judgment in Akhaya Kumar Patra (supra) that the recovery order in that case was challenged by the affected employees and vide interim order on 29.2.2008, Hon'ble High Court had directed the stay of the recovery order.

11. But in the present OA in hand, the applicant has not challenged the recovery of excess payment from his gratuity dues in the year 2012 vide orders dated 3.4.2012 (Annexure-A/2 of the OA) and 10.10.2012 (Annexure-A/3 of the OA) in accordance with the law. There is nothing on record to show that the

applicant had raised any objection before the authorities about the recovery in the year 2012. After a lapse of more than three years from the date of such recovery, the applicant submitted a representation dated 9.8.2016 (Annexure-A/5 of the OA) claiming benefit of the Rafiq Masih judgment. There is no explanation furnished by the applicant for not challenging the recovery orders dated 3.4.2012 (A/2) and 10.10.2012 (A/3) and for remaining silent from the date of recovery till the date of submission of the representation on 9.8.2016 (A/5). Hence, the facts and circumstances of the present OA are different from those in Akhaya Kumar Patra case, for which the applicant cannot claim the benefit of the judgment in the case of Akhaya Kumar Patra (supra).

12. It is further noticed that the applicant has not mentioned anything in the OA or in his representation to explain how the impugned recovery has been harsh for him. Applicant has not disclosed to what extent the recovery has affected his gratuity benefit and the gratuity actually drawn by him after the impugned recovery has not been indicated in the OA or in the representation. Based on the materials available on record, it cannot be said that the recovery in question had an adverse effect on the applicant. It is seen from the observations in the judgment in Rafiq Masih (supra) as quoted in paragraphs 8 and 9 above, it was required on the part of the applicant to disclose how the recovery in question had a harsh and arbitrary effect on him in order to claim waiver of recovery in question. The fact that such recovery was not objected to by the applicant in the year 2012, when it was recovered from his gratuity and that the recovery orders at Annexure- A/2 and A/3 have not been challenged by the applicant in accordance with law, would imply that the applicant had accepted such recovery and wanted to claim the benefit of the judgment in the case of Rafiq Masih (supra) by submitting a representation dated 9.8.2016 (Annexure-A/5).

13. Taking into consideration of the facts and circumstances of the case as discussed above, I am of the considered view that the judgment in the case of Rafiq Masih (supra) will not be applicable to the case of the applicant.

14. Learned counsel for the respondents had submitted at the time of hearing that the applicant had furnished an undertaking on 17.1.2009 to refund if any excess payment is detected later on and a copy of such undertaking was filed by him in his Memo dated 31.8.2020. It is seen that such contention about furnishing of an undertaking was not mentioned in the Counter filed by Respondent No.1 and it was pointed out subsequently. Hence, such contention of learned counsel for the Respondent No.1 was not considered while passing this order.

15. In the facts and circumstances as discussed above, I do not find any justification to interfere with the decision taken by the respondents in the matter. The OA, being devoid of merit, is accordingly dismissed. There will be no order as to cost.

(GOKUL CHANDRA PATI)
MEMBER(J)

(csk)