

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No.180/00065/2017

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Original Application No.180/00071/2017

Wednesday, this the 1st day of September 2021

C O R A M :

HON'BLE Mr.P.MADHAVAN, JUDICIAL MEMBER

HON'BLE Mr.K.V.EAPEN, ADMINISTRATIVE MEMBER

Original Application No.180/00065/2017

K.Sudheendran, S/o Kamalsanan, aged 55 years,

Residing at 120/2 MES Quarters, Vayuvihar, Pulayanarkotta,
Thuruvickal P.O, Trivandrum, Pin 695011.

Working as CMD GDE-1, O/O Garrison Engineer (AF),

Thuruvickal P.O, Thiruvananthapuram, Kerala, Pin-695011. ...Applicant

(By Advocate Mr.C.R.Sureshkumar)

v e r s u s

1. Union of India represented by Secretary,
Ministry of Defence, New Delhi-110001.

2. Garrison Engineer (AF), Thuruvickal P.O,
Trivandrum, Pin-695011.

3. AAO (Area Account Office), Zonal Office Kochi,
Kataribagh, Naval Base, Kochi-682004.

...Respondents

(By Advocate Mr.Sreenath.S., ACGSC)

Original Application No.180/00071/2017

C.Muralidharan Nair, aged 53 years,

S/o Late Chellappan Pillai,

Residing at Lekshmi Bhavan, Kottapuram,
Paravor P.O, Kollam, Pin-691 301.

Working as CMD-I in the O/o CWE (AF),

(Commander Works Engineers Air Force),

Thuruvickal P.O, Thiruvananthapuram,

Kerala, Pin-695011.

...Applicant

(By Advocate Mr.C.R.Sureshkumar)

v e r s u s

1. Union of India represented by Secretary,
Ministry of Defence, New Delhi-110001.
2. Commander Works Engineers (AF),
Thuruvickal P.O, Trivandrum, Pin-695011.
3. AAO (Area Account Office), Zonal Office Kochi,
Kataribagh, Naval Base, Kochi-682004. ...Respondents

(By Advocate Mr.Thomas Mathew Nellimoottil, Sr.PCGC)

This application having been heard on 27th July 2021, the Tribunal on 1st September 2021 delivered the following :

ORDER

Per : Mr.K.V.EAPEN, ADMINISTRATIVE MEMBER

These two Original Applications are taken up together for adjudication as the issues raised in both are largely similar.

2. In O.A.No.180/65/2017 the applicant is a serving Civilian Motor Driver (CMD) Grade-I (GDE-I) working under the 2nd respondent, Garrison Engineer (Air Force), Trivandrum. He had joined service on 06.10.1987 as a Motor Transport Driver (MTD), which was later redesignated as CMD. He was fixed in the pay scale of Rs.4000-100-6000/- with effect from 01.04.1997 on his promotion to the higher grade (Grade-II), with future increments falling on 01.04.1998 onwards. A copy of the Special Part-II Order (PTO) No.01 dated 05.01.2006 is produced at Annexure A-1. Later, he was promoted to the higher grade of Grade I with effect from 01.04.2008 and had been drawing salary and allowances fixed progressively on the basis of the Spl. PTO at Annexure A-1. While so doing he submits that he

was served with a copy of Special PTO No.2/2016 dated 21.05.2016 that his pay and allowance are to be refixed with effect from 01.04.1998, due to the preponment of date of promotion under the newly introduced Four Grade system. This Special Part II Order has been produced by him as the impugned order at Annexure A-2. He immediately made a representation to the 2nd respondent stating that the recovery indented as well as the refixation was illegal and he prayed for cancelling the aforesaid impugned order. This representation has been produced at Annexure A-3. Thereafter, the applicant was issued a letter by the 2nd respondent, vide Annexure A-5, stating that an amount of Rs.57939/- had to be recovered due to refixation of pay and to refund the amount through MRO at the earliest. The applicant then approached the 2nd respondent again with a representation (copy produced at Annexure A-6) in which he requested that there should be waiver of the recovery, which he claimed could be done with the express approval of the Department of Expenditure, Government of India, relying on a Government of India, Department of Personnel & Training (DoPT) letter based on a Hon'ble Supreme Court verdict. However, the 2nd respondent rejected his plea and also stated that the waiver of recovery through express approval of the Department of Expenditure was not feasible in his case, as he had submitted an undertaking that any excess payment received as a result of incorrect pay fixation or any payment detected in the light of discrepancies would be refunded to the Government by adjustment against future payments due to him or otherwise. It was stated that any waiver can be processed only in case of no payment recoverable from an individual due to death or retirement (copy of the letter produced at

Annexure A-7). It was also mentioned in the same letter that similar recovery in respect of CMDs of other MES offices including CWE (AF) Trivandrum have since been done by CDA concerned. Thus, the applicant was instructed to remit the amount at the earliest to avoid penal recovery from his monthly pay and allowance.

3. The applicant submits that, accordingly, from the month of December 2016, recovery was started from his salary and a sum of Rs.10,000/- was deducted, as evidenced in the copy of the pay slip provided at Annexure A-8. He then made another representation, vide copy provided at Annexure A-9, wherein, he once again drew attention to the directions of the Hon'ble Supreme Court that recovery from employees belonging to Class-III and Class-IV services (Group C and Group D service) would be impermissible in law in certain situations. The Hon'ble Supreme Court had arrived at the conclusion that such recoveries, if made from employees, would be iniquitous or harsh or arbitrary to an extent as would for outweigh the equitable balance of the employer's right to recover. This had also been indicated at para 4 in the aforementioned DoPT Memorandum dated 02.03.2016 (produced at Annexure A-11). He submits therefore that any recovery has to be made only after due consideration and if, there is any proposal for waiver of the same, it can be allowed with the express approval of the Department of Expenditure. Accordingly, he again requested that such express approval be obtained by the competent authority in his case. The applicant submits that he did not get any response from the respondents on this representation. Further he submits that he was promoted to Grade I

with effect from 01.04.2008, whereas his Grade Pay was granted only with effect from 03.11.2009. He also, therefore, claims that 20 months Grade Pay at the rate of Rs.2800/- still remains unpaid to him. He has accordingly claimed reliefs as follows :

“1. To declare that Annexure A-2 order and Annexure A-5 are illegal, improper and arbitrary, hence only to be quashed.

2. To declare that the applicant is entitled for the grade fixed according to Annexure A-1 and further pay progressive on the basis of that.

3. To declare that the recovery made by the 2nd respondent on Annexure A-8 is illegal; hence to be reimbursed and respondents are not entitled for further recovery from the pay of the applicant.

4. To declare that applicant was entitled for Grade Pay of CMD-1 with effect from 01.04.2008 to 02.11.2009.

5. To declare that the applicant is entitled for pay and allowances with one more increment fixed.

6. Such other orders which are proper to the Hon'ble Tribunal in this case.”

4. The applicant in the second O.A., No.180/71/2017 is a serving CMD Grade I (Civilian Motor Driver – Grade I) working under the 2nd respondent, therein, Commander Works Engineers (AF), Trivandrum. He joined service on 07.10.1987 as Motor Transport Driver (MTD) and was placed in the pay scale of Rs.4000-100-6000/- with effect from 01.04.1997 on promotion to the higher grade (Grade-II), with future increments due on 01.04.1998 onwards as per PTO at Annexure A-1. He was then promoted to the Grade I with effect from 01.04.2008 and was drawing salary fixed on the basis of Annexure A-1. While so doing, he was served with the PTO No.08/2016

dated 22.02.2016 re-fixing his pay and allowances with effect from 01.04.1998, due to the preponment of date of promotion under the Four Grade System. A copy of the relevant portion of the PTO has been produced at Annexure A-2, as an impugned order. He was then issued with a letter by the 2nd respondent for refund of an amount of Rs.61612/- as recovery due to re-fixation. He claims to have then approached the 2nd respondent to obtain express approval for waiver in his case from the Department of Expenditure though no proof of application is provided in his case. While the matter was pending consideration, an amount of Rs.44212/- was recovered from his salary for the period from August 2016 to December 2016, as per recovery details produced at Annexure A-4. Further, he submits that while he was fixed in the Grade I with effect from 01.04.2008, there is non payment of 19 months Grade Pay at the rate of Rs.2800/- till October, 2009. This has remained unpaid till date, as can be confirmed by point No.5 of Annexure A-2. He claims exemption from recovery under the conditions of the aforesaid circular of the DoPT dated 02.03.2016 which had issued guidelines in the light of the decision of the Hon'ble Supreme Court. He submits that has not been followed by the respondents. The reliefs sought by the applicant are as follows :

“1. To declare that Annexure A-2 order and Annexure A-4 recovery are illegal, improper and arbitrary hence only to be quashed.

2. To declare that the applicant is entitled for the grade fixed according to Annexure A-1 and further Pay progressive on the basis of that.

3. *To declare that the recovery made by the 2nd respondent on Annexure A-4 is illegal hence to be reimbursed and respondents are not entitled for further recovery from the pay of the applicant.*
4. *To declare that applicant was entitled for grade pay of CMD-I with effect from 01.04.2008 to 02.11.2009.*
5. *To declare that the applicant is entitled for pay and allowances with one more increment fixed.*
6. *Such other orders which are proper to the Hon'ble Tribunal in this case."*

5. The first OA came up for admission before this Tribunal on 24.01.2017. It was ordered on the date of admission itself that the recovery of arrears from the salary of the applicant was to be stayed till next date of hearing. The second OA came up on 25.01.2017. Similar orders were passed that no recovery would be made from the salary of the applicant till the next posting date. These interim orders on stay of recovery have continued till date.

6. The respondents have submitted very similar replies in both cases. They submit that as a part of cadre management and career advancement policy, the promotion structure of the MTD's had been changed by the Government. A new Four Grade Promotion Structure was introduced which opened wider promotional avenues to the driver cadre. It is submitted that earlier there was a three grade promotion structure with Grade Pays Rs.1900/- (CMD), Rs.2400/- (CMD-II) and Rs.2800/- (CMD-I). This was changed to a four grade promotion structure with Grade Pays Rs.1900/- (CMD), Rs.2400/- (CMD-II), Rs.2800/- (CMD-I) and Rs.4200/- (CMD

Special Grade). It is submitted that the Government decided to implement the revised structure with retrospective effect as it would be beneficial to the Motor Transport Driver Cadre. It is submitted that this was agreed to by the cadre. The promotions of both applicants were accordingly preponed and they were granted promotion-cum-redesignation as Civilian Motor Transport Driver (CMD) Grade II with effect from 01.04.1998 along with notional promotion-cum-redesignation as Civilian Motor Transport Driver (CMD) Grade I with effect from 01.04.2008. Both the applicants had accepted the revised promotion structure and had rendered their options for pay fixation. Copies of their option certificates along with form of undertaking for refund in case of any overpayment have been produced in both the cases, separately, as Annexure R-1 and Annexure R-2 respectively. In the first matter when the revised pay fixation was carried out, the difference between the present pay and previous pay was worked out to be a sum of Rs.57939/- which was to be refunded to the department. In the second matter a similar exercise was carried out and the difference between the present pay and previous pay was worked out to be a sum of Rs.61612/-. However, since the applicants did not refund these amount, action was initiated to recover the same in installments through the Area Accounts Office, Kochi.

7. It is submitted that the applicants did not make any representation while promotions were given to them and they had accepted the same. In the first matter the applicant had submitted a representation stating that recovery should not be effected. However, since he had agreed for the

promotion-cum-redesignation and revised pay fixation recovery due to difference of present pay and previous pay cannot be avoided. Such refund of excess payment made cannot be waived. The guidelines issued by the Government of India, DoPT as per their letter dated 02.03.2016 provided by the two applicants is about non-recovery in cases of wrongful/excess payments made to Government servants unintentionally by the employer and employee. The cases of the two applicants are different from the ones covered in the above Government order. Their promotions were preponed only due to change in the cadre management and career advancement policy by the Government which was inevitable, considering the larger interest of the cadre. It is submitted that their cases do not come under the purview of this order and the waiver of recovery through express approval as mentioned in the O.As is not feasible.

8. Further, with regard to the relief sought by the applicant in the first matter for the Grade Pay of Rs.2800/- to be paid for the period between 01.04.2008 up to November, 2009, it is submitted that the applicant had been promoted with effect from 01.04.2008 and the revised payment with Grade Pay Rs.2800/- has also been paid to him with effect from 01.08.2008, vide PTO No.48 dated 26.11.2012 produced at Annexure R-4 in the first O.A. Thus his statement that 20 months Grade Pay at the rate of Rs.2800/- still remains unpaid till date is baseless and not correct. However in the case of the applicant in the second O.A., it is submitted that he was notionally promoted with effect from 01.04.2008. His pay and allowances were given from the date when he had actually been

promoted as CMD Grade I, ie., during October 2009, as per PTO No.8 dated 22.02.2016 which in turn has been issued by Chief Engineer, Southern Command, Pune's letter dated 14.10.2009. It is submitted that the pay and allowances of a person promoted can be given only from the actual date of assuming the duty or as indicated in the department's orders. As such, the applicant's claim that he is eligible for payment from 01.04.2008 is not justifiable in the light of promotion orders issued to him only on 14.10.2009 a true copy of which has been produced at Annexure R-3 in the second O.A.

9. Similar Rejoinders have been filed by the applicants in both cases. It is submitted that they were drawing salaries in higher grade since 1997 due to timely promotions by the respondents, given by them without any fault, mistake or interference on part of the applicants. The principle followed in such cases is that the payments made for a long time by the employer cannot be recovered, if it is done due to his own mistake. The options and undertakings were obtained in February, 2016, 18 years after the promotions to the higher grade which an employee cannot refuse. Such options and undertakings are nothing more than administrative formalities. The amount of Rs.57939/- which is to be recovered in first case and Rs.61612/- which is to be recovered in the second case are huge amounts for employees in Group C. Making such recoveries after a period of 18 years due to no mistake committed by the employee as also without considering their liabilities like family expenses etc. is unfair. The same has been adjudicated in favour of the employee by various orders of the Hon'ble Apex Court, as

also by the DoPT Memorandum dated 02.03.2016 produced in both O.As, which was a direction to the respondents not to recover such arrears. Hence the applicants are entitled to the reliefs sought.

10. The respondents have filed additional reply statements to the rejoinder wherein they have reiterated their position. They submit that the four grade promotion structure with a higher Grade Pay of Rs.4200/- following the existing Grade Pay of Rs.2800/- is a benefit being given to the applicants and other eligible drivers. It is submitted that all documents in this regard in respect of the two applicants have since been submitted to their respective higher administrative offices for grant of revised grade pay as per the new policy for giving them Pay Band of Rs.9300-34800/- plus Rs.4200/- Grade Pay in place of Pay Band Rs.5200-20200/- plus Grade Pay Rs.2800/-. It is, therefore, as a result of the new promotion structure that the applicants have been recommended for this higher Grade Pay of Rs.4200/- and this is a part of their career advancement. The process by which this higher Grade Pay of Rs.4200/- is to be given to the two applicants has been produced by the respondents at Annexure R-5 and Annexure R-6 in the first OA and at Annexure R-4 in the second OA. It is submitted that this benefit being given solely because of the introduction of four grade promotion system, as per the revised policy, which is clearly more beneficial to them. Further, it is submitted that the revised redesignation cum promotion has been implemented throughout the country and widely accepted. It is submitted that any interference in this policy may disturb the settled cases of promotion as others too may resort to legal

recourse for refund of the alleged excess payments. The respondents submit that the applicants cannot deny the fact that they had accepted the revised promotion structure and had exercised options for fixing their pay as per the new norms. They had also given undertakings to the effect that they will refund the overpayment if any received.

11. Further, it is submitted by the respondents that the applicants cannot demand that they will accept only that part of a Government policy which is beneficial to them. While it was a fact that they had been initially promoted as CMD Grade II with effect from 01.04.1997, the same was later changed and the promotion/redesignation was granted with effect from 01.04.1998 along with the notional promotion-cum-redesignation as CMD Grade I given with effect from 01.04.2008 as per the new policy. They did not make any representations on the structure at that time while their promotions were being issued and they have thus fully accepted the same. It is again submitted that the new career advancement policy had caused this change. It is submitted that this was inevitable considering the larger interest as well as the requirements of the drivers cadre and was also supported by their Association at an all India level. The applicants thus having submitted their undertakings and options and also having not made any representation while accepting their promotions, cannot now turn around and submit that the recovery of the difference between the present pay and previous pay should not be made. They cannot select just one beneficial part of the scheme while ignoring the other, especially as they had agreed to refund the differences of pay due to change in date of promotion.

12. It is submitted that due consent from the applicants have been taken in these cases. The applicants are only concerned about the recovery, notwithstanding the fact that they would have gained by much better promotional benefits during their careers. All other similar cases of refixation in the drivers cadre have been agreed to by almost all the drivers posted in various places in India except for a few cases. Recoveries have been made in all the cases in monthly installments taking into consideration the financial constraints of the employees. It is submitted that since the revised promotion order was implemented only in February, 2016 the issue of pay fixation rises only after that date, therefore, the options were obtained during February, 2016. The respondents have adhered to the policy instructions of the Government while implementing the scheme and the applicants are well aware of that fact. The DoPT guidelines of 02.03.2016 are not applicable to their cases since that order is about non recovery of wrongful/excess payments made to Government servants unintentionally by employer or employee. The cases of the applicants are different from those mentioned in the above Government order, as their promotion was only preponed due to the change in cadre management and career advancement policy by the Government.

13. We have closely heard Shri.C.R.Sureshkumar, learned counsel for the applicant in the two O.As, Shri.Sreenath.S., learned ACGSC for the respondents in O.A.No.180/65/2017 and Shri.Thomas Mathew Nellimoottil, learned Sr.PCGC for the respondents in O.A.No.180/71/2017. We have also perused the documents provided by the applicant and respondent counsels.

Learned counsel for the applicant has largely relied on the decisions/directions by the Hon'ble Apex Court in *Civil Appeal No.11527/2014 in State of Punjab & Ors. v. Rafiq Masih (White Washer)*. It is submitted that, as indicated in para 6 of the said order, if a fraud or misrepresentation was committed or if the employee has acted an accessory to the mistake committed by the employer, then the employee may not be beneficiary of the wrongful gain. At the same time, the Hon'ble Apex Court has also held in para 7 that recovery being effected without the mistake of the employee, can be interfered with only in such cases where it would be iniquitous to recover the payment made. In para 8 the Hon'ble Court further observed that “*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.*”

14. In effect, argument by learned counsel for the applicant is that recoveries such as in these two matters which are being intended to be made after a period of 19 years and where there is no involvement of the employee in payment of the said excess amount and where there was no fraud, misrepresentation or any other involvement of the employee, are definitely iniquitous and arbitrary and bound to be struck down by the ratio of *Rafiq Masih* (supra). It is further submitted that *Rafiq Masih* (supra) has also directed that there is need to consider the all round requirements of the employees, which include food, clothing, shelter, education of children and medical needs, before allowing any prayer of recovery after a long period. In this case, the option certificates signed in 2016 by Group C employees working as drivers cannot be the basis of the recoveries taking place after a very long period. It is argued that option certificates along with forms of undertaking are more of a proforma advice which are signed by every employee. It is argued that this cannot be used as a weapon against the applicants as every time an employee signs it it should not be taken as a reason by his superior for recovery of money. It is argued that the Government cannot expect an undertaking given by a Class III employee to act as a boomerang to recover his pay and allowances, that too after a long period of 19 years. The PTOs issued in 2016 were not with the consent of the applicants and they had no active participation in publishing such orders. It cannot be argued, as contended in the reply statements, that the applicants have accepted promotions at the relevant time and this is their consent to recover the salary issued about 20 years back as per the promotion scheme, available to the incumbent at that time. Thus the

recovery ordered is violative of Article 14 of the Constitution of India and the guidelines issued by the Hon'ble Supreme Court in *Rafiq Masih* (supra). It is prayed that appropriate orders may therefore be passed declaring that the applicants should not be subjected to any recovery made by the respondents and directions may be issued to fix their pay and allowances properly from the date of entry in service.

15. In response learned counsel for the respondents in O.A.No.180/71/2017 has argued that not only the promotion structure has been changed, the applicant now has been recommended for higher grade pay of Rs.4200/- and is therefore getting the benefit of more promotions in the new structure. The applicant has also accepted the revised promotion norms and has exercised his option for fixing his pay as per the new norms. He had agreed to refund the overpayment as per his undertaking. Further, in view of the Hon'ble Supreme Court's decision in ***High Court of Punjab and Haryana and others v. Jagdev Singh (2016) 14 SCC 267***, the dictum laid down in *Rafiq Masih* (supra) is not applicable in this matter in the light of undertaking given at Annexure R-2. The case of the applicant is different from the contents of DoPT O.M dated 02.03.2016, which is about non recovery of wrongful/excess payments made to Government servants unintentionally by employer or employee. On the other hand, the promotion of the applicant was preponed due to the change in cadre management and career advancement policy by the Government. Thus the recovery to be made is inevitable considering the larger interest of the cadre. The case of the applicants thus does not come within the purview of the aforesaid DoPT

O.M. Further, in the case of the applicant in O.A.No.180/71/2017, it is to be noted that he was only notionally promoted with effect from 01.04.2008 and his enhanced pay and allowances were allowed only from the date when he had actually promoted as CMD Grade I, ie. during October 2009. The pay and allowance of a person promoted can only be given from the actual date of assuming duty or as indicated in the department orders. As such the applicant's claim that he is eligible for payment from 01.04.2008 is not justifiable in the light of promotion orders issued to him only on 14.10.2009, as evidenced by Annexure R-3 produced in the reply statement.

16. We have carefully considered these contentions and arguments. On balance, we are of the opinion that the dictum of the Hon'ble Supreme Court as laid down in *Rafiq Masih* (supra) cannot apply in these O.As. It is instructive in this regard to be guided by the opening paragraphs of *Rafiq Masih* (supra) which bring out the specific conditions under which the judgment was pronounced. It is indicated as follows in *Rafiq Masih* (supra) paragraphs 2 to 4 :

“2. All the private respondents in the present bunch of cases, were given monetary benefits, which were in excess of their entitlement. These benefits flowed to them, consequent upon a mistake committed by the concerned competent authority, in determining the emoluments payable to them. The mistake could have occurred on account of a variety of reasons; including the grant of a status, which the concerned employee was not entitled to; or payment of salary in a higher scale, than in consonance of the right of the concerned employee; or because of a wrongful fixation of salary of the employee, consequent upon the upward revision of pay-scales; or for having been granted allowances, for which the concerned employee was not authorized. The long and short of the matter is, that all the private respondents were

beneficiaries of a mistake committed by the employer, and on account of the said unintentional mistake, employees were in receipt of monetary benefits, beyond their due.

3. Another essential factual component in this bunch of cases is, that the respondent-employees were not guilty of furnishing any incorrect information, which had led the concerned competent authority, to commit the mistake of making the higher payment to the employees. The payment of higher dues to the private respondents, in all these cases, was not on account of any misrepresentation made by them, nor was it on account of any fraud committed by them. Any participation of the private respondents, in the mistake committed by the employer, in extending the undeserved monetary benefits to the respondent-employees, is totally ruled out. It would therefore not be incorrect to record, that the private respondents, were as innocent as their employers, in the wrongful determination of their inflated emoluments.

4. The issue that we have been required to adjudicate is, whether all the private respondents, against whom an order of recovery (of the excess amount) has been made, should be exempted in law, from the reimbursement of the same to the employer. For the applicability of the instant order, and the conclusions recorded by us hereinafter, the ingredients depicted in the foregoing two paragraphs are essentially indispensable.”

(emphasis added)

17. From the above, it clearly appears that *Rafiq Masih* (supra) is to be relied on only when employees are given monetary benefits due to an unintentional mistake committed by the employer and also when on account of the said unintentional mistake, the employees are in receipt of monetary benefits. It has also been clearly indicated in para 4 of the judgment that for the applicability of the order and the conclusions recorded by the Hon'ble Apex Court thereafter, the ingredients depicted in the previous two paras (para 2 and 3 of the judgment) are essentially indispensable. Applying this direction to the cases at hand it is quite clear that the revision in pay and consequent recovery in these matters have arisen not due to any mistake

committed by the employer that created the conditions or the reason for change of the pay, but solely due to the implementation of a new Scheme duly agreed to by the applicants. Hence, the conditions mentioned in *Rafiq Masih* (supra) and in the matters in the two O.As are quite different. We therefore do not believe that the provisions and the directions of *Rafiq Masih* (supra) would apply in the facts and circumstances of these O.As. As a corollary, we are also in agreement that the aforesaid DoPT OM dated 02.03.2016 would also not be applicable to the facts and circumstances of these cases.

18. We note that the applicants had also given options/undertakings to refund any excess payment made to them as a result of payment of pay and allowances in case any discrepancies/overpayment is detected at any stage. It is not that these undertakings are being given all the time and are not intelligible to even Grade C employees. Learned counsel for the respondents in O.A.No.180/71/2017 has drawn our attention to the directions in *Jagdev Singh* (supra). However, on going through that judgment, it is seen that the matter is related to an individual who was placed under suspension and later compulsorily retired from service. The Hon'ble Apex Court found that in such cases where the employee has been retired from service it is not to be taken as blind procedure that the principle enunciated through situation (ii) of para 12 of *Rafiq Masih* (supra) i.e., that recovery from retired employees, or employees who are due to retire within one year of the order of recovery will be impermissible in law. In *Jagdev Singh* (supra) an undertaking was furnished by the officer at the time when

his pay was initially revised accepting that any pay found to have been made in excess would be liable to be adjusted. The Hon'ble Apex Court found that the exemption from recovery due to situation (ii) of para 12 of *Rafiq Masih* (supra) would not apply to situations such as in *Jagdev Singh* (supra). The Hon'ble Apex Court observed that the officer to whom the payment was made was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale and he was bound by the undertaking. On applying *Jagdev Singh* (supra) to the matters at hand we note first that both the employees are not retired and thus, in any case, cannot be said to be entirely covered by the reasoning therein. However, since we have already found that the provisions of *Rafiq Masih* (supra) do not apply in this matter, we do wish to examine further the aspect of the applicability of the undertaking furnished by them except to state that there is nothing wrong, per se, for the respondents to go by undertakings furnished by employees while initiating recoveries from payments made in excess.

19. Thus, for the reasons brought out above i.e., that the case does not fall within the parameters of the directions of the Hon'ble Apex Court in *Rafiq Masih* (supra) and also after consideration of relevant facts, including the fact that the said re-fixation of pay was due to the implementation of a new scheme for Drivers under which they seem to have gained overall in terms of promotional prospects, we do not find that the recovery made/balance recovery sought to be made are in any way iniquitous or arbitrary or illegal

in nature. We also do not find that such recovery will place an unbearable burden on the two employees/applicants given their pay structure and length of service, including the aspect that they may have already been granted the benefit of the Special Grade with Grade Pay of Rs.4200/-. We do not find that the recovery to be made would alter in any way the balance of equity taking into account the cost of such recoveries to the Government or employee compared to the benefit to the Government. Hence, we do not wish to interfere or stop the process of recovery of the balance amounts which are yet to be made by the concerned authorities. However, we direct the authorities not to impose any interest or other additional costs on the amounts calculated in 2016 as due to them from both the applicants. We direct that the money may be recovered by way of monthly installments the amounts of which may be decided by the authorities concerned after taking into account usual factors such as the burden on the employees.

20. The O.As are, therefore, dismissed. There shall be no order as to costs.

(Dated this the 1st day of September 2021)

K.V.EAPEN
ADMINISTRATIVE MEMBER

P.MADHAVAN
JUDICIAL MEMBER

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List of Annexures in O.A.No.180/00065/2017

1. **Annexure A1** - Copy of the order (PTO) No.01 dated 05.01.2006.
2. **Annexure A2** - Copy of the special PTO dated 21.05.2016.
3. **Annexure A3** - Copy of the representation dated 26.08.2016.
4. **Annexure A4** - Copy of the special PTO No.5 dated 01.08.2016.
5. **Annexure A5** - Copy of the letter dated 01.12.2016.
6. **Annexure A6** - Copy of the letter dated 02.12.2016.
7. **Annexure A7** - Copy of the letter dated 16.12.2016.
8. **Annexure A8** - Copy of the pay slip for the month of December 2016.
9. **Annexure A9** - Copy of the representation dated 03.01.2017.
10. **Annexure A10** - A copy of PTO number 2 dated 09 January 2012.
11. **Annexure A11** - Copy of the memorandum vide F-No.-18.03.2015 Estt (pay-1) dated 02.03.2016.
12. **Annexure R1** - Copy of the option certificate dated 08.03.2016 of the applicant submitted before the respondents.
13. **Annexure R2** - Copy of the undertaking dated 08.03.2016 given by the applicant and submitted before the respondents.
14. **Annexure R3** - Copy of the Letter No.1027/2086/E1P dated 06.01.2017.
15. **Annexure R4** - Copy of the Office PTO No.48 dated 26.11.2012.
16. **Annexure R5** - Copy of the Tvm Letter No.1063/MACP/10/E1R dated 28.02.2017 of the Garrison Engineer, Trivandrum.
17. **Annexure R6** - Copy of the Tvm Letter No.10307/MACP/2415/E1R dated 09.03.2017 of the Commander Works Engineer (AF), Trivandrum.

List of Annexures in O.A.No.180/00071/2017

1. **Annexure A1** - Copy of the order (PTO) No.045 dated 06.11.2016.
2. **Annexure A2** - Copy of the PTO No.08 dated 22.02.2016.
3. **Annexure A3** - Copy of the representation dated 29.08.2016.

4. **Annexure A4** - Copy of the recovery details issued by 2nd respondent.
 5. **Annexure A5** - Copy of the memorandum vide F-No.-18.03.2015 Estt (pay-1) dated 02.03.2016.
 6. **Annexure R1** - True copy of option exercised by the applicant.
 7. **Annexure R2** - True copy of undertaking submitted by the applicant.
 8. **Annexure R3** - True copy of the promotion order issued.
 9. **Annexure R4** - True copy of order recommending applicant for higher grade pay of Rs.4200/- which forms part of career advancement.
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