

**Central Administrative Tribunal
Principal Bench**

OA No. 1174/2016

Order Reserved on: 19.11.2016
Order Pronounced on: 02.12.2016

Hon'ble Dr. B.K. Sinha, Member (A)

Bimal Kumar Bahl
S/o Late Sh. S.K. Bahl,
R/o 9-D, Vikrant Apartments,
Plot No.45, Sector-13,
Rohini, Delhi-110085

Aged about 60 years,
Presently Posted as:
Pharmacist, Bhagwan Mahavir Hospital
(GNCT of Delhi)
Pitampura, Delhi-110034

- Applicant

(By Advocate: Mr. Sourabh Ahuja)

VERSUS

1. Govt. of NCT of Delhi,
Through its Chief Secretary,
Delhi Sachivalaya,
Players Building, New Delhi

2. Secretary,
Health & Family Welfare,
Department of Health & Family Welfare,
GNCT of Delhi,
9th Level, A-Wing, IP Extension,
Delhi Secretariat, Delhi-110002

3. Medical Superintendent,
Bhagwan Mahavir Hospital,
GNCT of Delhi,
Pitampura, Dehi-110034

4. Head of Office,
Bhagwan Mahavir Hospital,
GNCT of Delhi,
Pitampura, Delhi-110034

- Respondents

(By Advocate: Ms. Ritika Chawla)

O R D E R

The dispute in the instant O.A. relates to refund of an amount of Rs.4,00,127/-, which was erroneously paid to the applicant on account of mis-calculation of the financial upgradation benefits.

2. The case of the applicant is that the applicant was a Pharmacist occupying a Group 'C' post with no promotional avenues. He was granted the benefit of third financial upgradation under MACP Scheme w.e.f. 01.09.2008 and his Grade Pay was fixed as Rs.5400/-. He was paid arrears with effect from the same date, i.e., 01.09.2008 and continued to be paid at Grade Pay of Rs.5400/- till April, 2014. Vide impugned order dated 15.03.2016, the pay of the applicant was re-fixed from Rs.18,500+5400 to Rs.17,110+Rs.4800. Accordingly, he was directed to deposit sum of Rs.4,00,127/-. The applicant has no grievance regarding re-fixation of his pay, but he only assails the recovery of the amount, principally, on two grounds. In the first instance, the applicant submits that the action of the respondents is violative of clause (iii) of Para 4 of the DoP&T OM dated 02.03.2016, which was issued in the lines of the judgment of the Apex Court in the case of **State of Punjab & Ors. vs. Rafiq Masih (White**

Washer) etc., 2014 (8) SCALE 613. In the second instance, the applicant submits that he is identically situated as one Chand Prakash Vats (Pharmacist), who had been appointed w.e.f. 28.10.1976 and had been placed in the Grade Pay of Rs.5400/-, but was never reverted to the Grade Pay of Rs.4800/- and no recovery had been made from his salary on account of his reversion. Here, the applicant has relied upon an RTI information provided at Annexure-6 (page 49).

3. Learned counsel for the applicant has further relied upon the order of the Tribunal dated 26.11.2015 in OA No.98/2015 whereby a Coordinate Bench of this Tribunal found the judgment of the Hon'ble Supreme Court in **State of Punjab and Ors. vs. Rafiq Masih (White Washer) etc.** (supra) duly applicable and directed the respondents not to recover any amount from his pay.

4. Learned counsel for the respondents, on the other hand, has filed a counter affidavit, vehemently, opposing the averments in the OA. It has been stated that the applicant had been granted 1st, 2nd and 3rd MACP in Grade Pay of Rs.4600, 4800 and 5400 respectively vide office order dated 26.07.2011, in pursuance of the OM dated 18.11.2009 with the prior approval of the Finance Department. Thereafter, a clarification had been issued by the Department of Personnel and Training on 20.09.2013

that pharmacist with entry of Rs.2800 in PB-1 and in receipt of NF grade in the grade pay of Rs.4200 on completion of 2 years of service is eligible for 2nd and 3rd financial upgradation under MACP in the grade pay of Rs.4600 and 4800 respectively. Thereby the pay of the applicant, who was granted 3rd MACP in the Grade Pay of Rs.5400/- was reverted back vide order dated 28.05.2016 to Grade Pay of Rs.4800. The order of pay re-fixation was issued before the superannuation of the applicant on 20.05.2014. The respondents have relied upon the case of similarly placed persons, including one RR Dhruv (Pharmacist), who had also been granted Grade Pay of Rs.5400 and had been similarly reverted vide order dated 01.07.2014 and excess payment had been recovered from him. Learned counsel for the respondents, vehemently, argued that the case of Rafiq Masih (White Washer) etc. (supra) would not have been attracted to the instances in this case for the reason that the order of grant of 3rd MACP had been issued on 26.07.2011 where re-fixation had been done vide order dated 28.05.2014, thereby being within five years and defeating the clause (iii) of para 4 of the aforesaid OM dated 02.03.2016. The respondents have further submitted that the applicant himself had requested that his recovery should commence from 01.01.2015, as he had

moved this Tribunal and a decision was expected within six months.

5. Learned counsel for the respondents has relied upon the decision of the Hon'ble High Court of Delhi in WP(C) No. 2750/2002 dated 10.04.2015 in **A.S. Kain & Anr. vs. Managing Director, National Seeds Corporation Ltd.** In this Writ Petition, the petitioners had been promoted from the post of Deputy Managers to Joint Managers by the order dated 08.12.1997 and in view of the 5th Central Pay Commission Report, the scales of pay of Deputy Managers and Joint Managers of Rs.3000-100-3500-125-4500 and Rs.3000-100-3500-150-5000 respectively had been merged into one scale of Rs.10000-325-15200 w.e.f. 1.1.1996. The respondents in that case had interpreted this as a case of promotion, as if promotion from Deputy Manager to Joint Manager vide office order dated 08.12.1997. Subsequent to audit objection, the respondents had re-fixed the pay of the petitioners vide order dated 08.02.2000. The petitioners had argued that they had worked on the higher post of Joint Managers, no recovery could have been made by them. The Hon'ble High Court, while noticing the judgments of **Rafiq Masih (White Washer) etc. (supra), Syed Abdul Qadir vs. State of Bihar, (2009)3 SCC 475** and **Shyam Babu Verma vs.**

Union of India (1994) 2 SCC 521, had held that the para 12 (iv) of the judgment of Rafiq Masih (supra) would have to be read with Para 11 thereof, which lays down that wrongful payment, if deducted within five years, can always be recovered by the employer. The petitioners had wrongly granted payment in 1997, which was deducted in Feb, 2000, i.e., within five years. Thus, the respondents were entitled to make recovery.

6. I have carefully examined the pleadings of the parties as also the documents submitted by them and also listened oral submissions made by their respective counsels.

7. The basic and lone issue to be decided in this case is that whether the para 12 of the judgment of the Hon'ble Supreme Court in **State of Punjab & ors. etc. vs. Rafiq Masih (White Washer) etc** (supra) will be attracted to the facts of the instant case. For the sake of clarity, I extract para 12 from the order as under:-

“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.
- (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."

The applicant has claimed that there is an immunity from recovery, extending to employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service) or those, who are due to retire, within one year; or employees in respect of whom excess payment has been made for five years prior to the order of recovery being passed.

8. The question would now arise that whether anyone of these five conditions in Para 12 of the afore judgment are required to be fulfilled in order to acquire immunity or it would be sufficient even if one of the conditions is fulfilled. A plain reading of Para 12 clearly establishes that the requirement of law is not that all the five conditions should be fulfilled; meeting within one of the conditions is sufficient for availing immunity under these provisions.

9. Now, I proceed to take each of these conditions. It is uncontrovertable that the applicant is an employee of Group 'C' category. It is equally uncontrovertable that the applicant is a retired employee. The order of benefit of MACP was passed on 20.05.2011 w.e.f. 01.09.2008. The arrears were also paid with effect from that date. However, the order of recovery was made on 28.05.2014. According to the applicant, the period of five years had already elapsed before the date of recovery was passed. The payment was made w.e.f. 01.09.2008 and the order of recovery issued only in 2011. Hence, the applicant had not completed the period of five years. Here, the respondents have placed reliance on a similarly situated person, namely, RR Dhruv Dhruv (Pharmacist), who had also been granted Grade Pay of Rs.5400/- and had been similarly reverted and excess payment had been recovered from him. However, I am of the opinion that even if recovery had been made in respect of RR Dhruv, the application of Para 12 of the judgment of Rafiq Masih (supra) overrides the other consideration. In any case, it remains undisputed that if any of the five points laid down in para 12 of the judgment of Rafiq Masih (supra), if attracted, would be sufficient for relief.

10. As regards the judgment in the case of **A.S. Kain & Anr. vs. Managing Director, National Seeds Corporation Ltd.** (supra), I am of the opinion that the same is not attracted because the writ petitioners were Joint Directors and not a Group 'C' or 'D' employee. Thus, two judgments are dissimilar in facts, as A.S. Kain's case would not be covered by the decision of Rafiq Masih (supra).

11. I would like to place on record that in a decided case of **Yogendra Mishra vs. Union of India & Ors.** in OA No 50/2015, decided on 01.07.2015. The Coordinate Bench of this Tribunal had held, after consider a number of cases, including **Rafiq Masih (supra), Shyam Babu Verma (supra) and Chandi Prasad Uniyal vs. State of Uttarkhand** [(2012)8 SCC 417] held that the decision in Chandi Prasad Uniyal (supra) does not conflict with the case of Rafiq Masih (supra), which had been issued under Article 142 of the Constitution of India. It remains confined to the facts of its own case. However, as the applicant had acquiesced to reduction in Grade Pay, the issue of correctness of Rafiq Masih or Chandi Prasad Uniyal does not form the issue here. Therefore, I would leave the issue open.

12. In conclusion, I can only say that the case of the applicant at hand is covered by Para 12 of the judgment of

Rafiq Masih (supra), even I were to leave out clause 12(iii), still by another two clauses. Rafiq Masih happens to lay down good law. Therefore, the OA is allowed. No order as to costs.

**(Dr. B.K. Sinha)
Member (A)**

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