

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA 2083/2015

Reserved on: 03.08.2016

Pronounced on: 20.08.2016

HON'BLE MR. V.N.GAUR, MEMBER (A)

Jai Singh Jain
S/o Late Shri Ram Chandra,
Retired as Pharmacist,
In Delhi Govt. (Dispensary)
District Courts, Rohini,
Delhi-110085
R/o Flat No.2, Sukhdham Apt.,
Plot No.1, Sector-9,
Rohini, Delhi.
(By Advocate: Mr. Narendra Singh Hooda)

... Applicant

VERSUS

Govt. of NCT of Delhi through

1. Chief Secretary,
Delhi Govt. Delhi Govt. Secretariat,
I.P.Estate, New Delhi.
2. Principal Secretary,
Health and Family Welfare,
Govt. of NCT Delhi, 9th Floor,
I.P.Estate, New Delhi.
3. Finance Secretary,
Delhi Govt., 4th Level, A-Wing,
I.P.Estate, New Delhi.
4. Director,
Department of Health Services,
GNCTD, F-17, Karkardooma,
Delhi-110032
5. CDMO (NWD),
DHS (GNCTD),
Sector-13, Rohini,
Delhi-110085

... Respondents

(By Advocate: Mr.Vijay Pandita)

ORDER

The applicant has filed this Original Application questioning the order of respondents withdrawing the 3rd MACP benefit given in the Grade Pay of Rs.5400 and effecting a reduction of Rs.3,69,587/- from the gratuity of the applicant. The applicant retired from the post of Pharmacist under respondent no. 4 on 30.04.2015. He was granted 1st ACP/MACP in the Grade Pay of Rs.4600/- after completion of 10 years of regular service, Grade Pay Rs.4800 under 2nd ACP/MACP after completion of 20 years and the Grade Pay of Rs.5400 under 3rd ACP/MACP after completion of 30 years following the clarification issued by the respondent no. 4 on 01.06.2011 and 18.10.2011 (A-4 and A-5 of the OA). However, the respondents issued a further clarificatory order on 20.09.2013 stating that the Pharmacist with the entry grade pay of Rs.2800 in Pay Band-1 and in receipt of Non-Functional Grade in the Grade Pay Rs.4200/- on completion of 2 years of service, were eligible for 2nd and 3rd Financial upgradation under MACPS in the Grade Pay Rs.4600 and Rs.4800 respectively. The respondents have implemented that order and effected recovery of Rs.3,69,587/-.

2. The learned counsel for the applicant submitted that the respondents have issued arbitrary and illegal order for

recovery of such huge amount from a pensioner without giving any opportunity of being heard. The applicant was given 3rd MACP of Rs.5400/- following the letter dated 1.06.2011 issued by the respondents, which clearly stated that 1st, 2nd and 3rd ACP/MACP shall be given in the Grade Pay of Rs.4600, 4800 and Rs.5400 respectively. It was, therefore, illegal to alter the same to the disadvantage of the applicant without giving any notice and hearing him. The respondents have also not replied to the representations submitted by the applicant in this regard. Learned counsel further referred to the judgment of Hon'ble Supreme Court in **State of Punjab & Others Vs. Rafiq Masih** (2014 (4) Scale 613) to emphasize that the applicant who is a Group 'C' employee and also retired from service, is squarely covered by the aforesaid judgment and the respondents are legally barred from recovering any amount that has been paid to him by their own mistake. The learned counsel also referred to the order of this Tribunal in OA 98/2015 (**Som Prakash Vs. GNCTD**) dated 26.11.2015.

3. The learned counsel for the respondents, on the other hand, stated that the first order issued by the Directorate of Health Services dated 1.06.2011 was reviewed by the Fast Track Committee of the Government and it was decided after taking into account all the relevant factors to restrict the 2nd

and 3rd financial upgradation under MACPS to the Grade Pay of Rs.4600 and 4800 only. Relying on **Union of India Vs. S.R.Dhingra** (2008 (2) SCC 229) and **Chandi Prasad Uniyal Vs. State of Uttarkhand** (2012)(8) SCC 417), the learned counsel submitted that once the pay of the applicant has been correctly fixed at a lower level, the respondents were responsible for recovery of the amount received by the applicant in excess of the salary/pension.

4. I have heard learned counsels for the parties and perused the record. The prayer of the applicant is in two parts. First, that his 3rd MACP benefit should be restored to the Grade Pay of Rs.5400 and second the amount of Rs.3,69,587/- recovered from his gratuity should be reimbursed.

5. With regard to the first prayer, we do not find any justification placed on record except for the letter dated 1.06.2011 to support the contention that 3rd MACP could not have been reduced from the Grade Pay of Rs.5400 to 4800. The applicant has not placed on record any law that puts injunction on the right of the employer to make any correction or alteration in the salary structure of the employees. In the present case, though the Directorate of Health Services had issued letter dated 1.06.2011 prescribing Rs.5400 Grade Pay as the 3rd MACP to the Pharmacist but the same had been

corrected through a letter dated 20.09.2013 laying down the Grade Pay Rs.4800 as the 3rd MACP. We do not see any legal infirmity in issuing such a clarification. The lowering of Grade Pay for the 3rd MACP was for the entire cadre and not a reduction in respect of the applicant alone. Therefore, the question of show cause notice to the applicant would not be relevant in this case. However, it cannot be disputed that the Grade Pay of Rs.5400 as the 3rd MACP as notified on 1.06.2011 was given to the Pharmacists not because of any action or misrepresentation on the part of the applicant. It was admittedly a mistake on the part of the respondents in the interpretation of the MACP scheme that led to wrong fixation of pay initially, and later on the same had to be corrected through the clarification dated 20.09.2013. In such a situation the applicant cannot be held responsible for the excess payment made to him and following the law laid down in **Rafiq Masih** (supra) case and also the OM issued by the Ministry of Personnel, Public Grievances and Pension, Department of Personnel and Training on 2.03.2016, such recovery could not have been made. The relevant portion of the aforesaid OM is reproduced below:-

“4. The Hon’ble Supreme Court while observing that 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 has summarized the following few situations, wherein recoveries by the employers would be impermissible in law:-

- (i). Recovery from employees belonging to Class-III and 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.

5. The matter has, consequently, been examined in consultation with the Department of Expenditure and the Department of Legal Affairs. The Ministries/Departments are advised to deal with the issue of wrongful/excess payments made to Government servants in accordance with above decision of the Hon'ble Supreme Court in CA No.11527 of 2014 (arising out of SLP (C) No.11684 of 2012) in State of Punjab and Others etc. vs. Rafiq Masih (White Washer) etc. However, wherever the waiver of recovery in the above-mentioned situations is considered, the same may be allowed with the express approval of Department of Expenditure in terms of this Department's OM No.18/26/2011-Estt (Pay-1) dated 6th February, 2014."

6. With regard to the reliance of counsel for respondents on **Union of India Vs. S.R.Dhingra and Chandi Prasad Uniyal Vs. State of Uttarkhand** (supra), needless to mention that the judgment of Hon'ble Supreme Court in **Rafiq Masih** (supra) has taken note of the aforementioned judgments relied upon by the respondents and the latter judgement is squarely applicable in the context of the present case.

7. It may be noted that the judgment in **Rafiq Masih** came on 18.12.2014 2014 and the recovery from the gratuity of the

applicant was made by the respondents by order dated 17.04.2015. The applicant had already brought to the notice of the respondents the aforementioned judgment by his letter dated 26.02.2015 (A-7 of the OA) and subsequent reminders. Despite that the respondents chose to go ahead with the recovery in the face of the Supreme Court judgment. In this background the contention of the respondents that amount once recovered cannot be refunded cannot be accepted. Once there is a law the respondents ought to have to complied with it and they cannot be allowed to take advantage of their own wrong action or omission.

8. Taking into account the aforementioned discussion, the facts of the case and law, the respondents are directed to refund the amount of 3,69,587/- deducted from the gratuity of the applicant within a period of three months from the date of receipt of a copy of this order. The respondents shall, however, fix the pay and pension of the applicant keeping in view the clarification dated 20.09.2013 and pay fixation order dated 08.12.2014. No costs.

(V.N.Gaur)
Member (A)

‘sk’

August 20, 2016