

**Central Administrative Tribunal
Principal Bench, New Delhi.**

OA-4285/2017

Reserved on : 23.04.2018.

Pronounced on : 08.05.2018.

Hon'ble Ms. Praveen Mahajan, Member (A)

Sh. Sunil Kumar Gupta, 62 years
Retired Pharmacist,
S/o Late Sh. Bhanu Mal Gupta,
R/o E-21/63-64, Sector-3,
Rohini, Delhi-110085.

.... **Applicant**

(through Sh. Sourabh Ahuja, Advocate)

Versus

1. Govt. of NCT of Delhi through
Its Chief Secretary,
Delhi Sachivalaya,
Players Building,
New Delhi.
2. Secretary Principal Secretary
Health & Family Welfare,
Department of Health & Family Welfare,
GNCT of Delhi,
9th Lelvel, A-Wing, IP Extension,
Delhi Secretariat, Delhi-110002.
3. CDMO (North-West District),
Delhi Health Service (GNCT of Delhi)
DGD Building Complex,
Sector-13, Rohini,
Delhi-110085.
4. Pay and Account Officer,
PAO-VII,
GNCT of Delhi,
Peeragarhi, Delhi.
5. Director,

Department of Health Service,
GNCT of Delhi,
F-17, Karkardooma, Delhi.

6. Finance Secretary,
GNCT of Delhi,
4th Level, A-Wing,
IP Estate, New Delhi. Respondents
(through Sh. Amit Anand, Advocate)

O R D E R

Briefly stated, the facts of the current O.A. are that the applicant joined as Pharmacist (Group-C) in the office of the respondents on 26.09.1974 from where he retired on attaining the age of superannuation.

2. The applicant was drawing pay scale equivalent to PB-I plus Grade Pay of Rs. 2800/- under the 6th Central Pay Commission. He was granted Non-Functional Selection Grade (NFSG) in the Grade Pay of Rs. 4200/- on completion of two years of service and thereafter was granted benefits of second and third financial upgradations under the MACP Scheme, in the Grade Pay of Rs. 4600/- and Rs. 4800/-, respectively. In pursuance of Government of India Office Memorandum dated 18.11.2009 and 23.10.2010, the respondents refixed the pay of the applicant, and granted him benefit of 3rd financial upgradation under MACP Scheme w.e.f.

01.09.2008. His grade pay was fixed at Rs.5400/- and arrears paid to him. He continued to draw the grade pay of Rs.5400/- till May, 2015.

3. The applicant submits that the respondents reduced the grade pay of the applicant from Rs.5400/- to Rs.4800/-w.e.f. April, 2014, without issuing any show cause notice to him. Hence the reduction in his grade pay from Rs.5400/- to Rs.4800/- is violative of principles of natural justice.

4. Further, the applicant received an order dated 26.05.2014, whereby the respondents withheld/recovered an amount of Rs. 2,72,170/- from his gratuity, just five days before his superannuation on 31.05.2014.

5. Against the recovery amount of Rs. 2,72,170/-, the applicant submitted a representation to refund the amount withheld by the respondents from his gratuity. The applicant has placed reliance on the judgment of Hon'ble Supreme Court in the case of **State of Punjab & Ors. Vs. Rafiq Masih & Ors.**, 2014(8)SCALE 613 wherein the following has been held:-

“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."

6. The applicant states that similarly situated persons, namely, Jai Singh Jain and Bimal Bahl approached this Tribunal by filing OA Nos. 2083/2015 and 1174/2016 respectively and the same were allowed. He avers that in the case of Sh. Chand Prakash Vats (Pharmacist, who retired in 2014 from Rao Tula Ram Hospital, Jafarpur, GNCT of Delhi), the respondents have not reduced the grade pay from Rs.5400/- to Rs.4800/-. It is contended that the action of the respondents is discriminatory and against the mandate of Article 14 of the Constitution of India.

7. Aggrieved by the recovery order, the applicant has filed the current O.A. seeking the following relief:-

"(a) Declare that the impugned action of the respondents qua the Applicant illegal and arbitrary, whereby, they have withheld/recovered an amount of Rs. 2,72,170/- from the gratuity of the Applicant just few days prior to his retirement/superannuation.

(b) Direct the respondents to revisit/rectify their order dated 22.09.2014 to limited extent and refund an amount of Rs.2,72,170/- (Rupees three Lacs Fifty Five Thousand One Hundred Eighty Only) along with interest @ 17% per annum along with all the consequential benefits (i.e. re-fixation of pay/pension, grant of arrears etc.).

(c) Call for the records.

(d) Award cost in favour of the Applicant and against the respondents.

(e) Pass any other order/direction which this Hon'ble Tribunal deem fit and proper in favour of the applicant and against the respondents in the facts and circumstances of the case."

8. At the outset, the respondents in their counter, state that the O.A. is time barred and is liable to be dismissed on this ground alone. They have placed reliance on the judgment of Hon'ble Supreme Court in the case of **Basawaraj & Anr. Vs. The Spl. Land Acquisition Officer**, (2013) 14 SCC 811 in which the following has been held:-

"15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain to the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bonafide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature.

16. In view of above, no interference is required with impugned judgment and order of the High Court. The appeals lack merit and are, accordingly, dismissed."

They contend that in the case of **Chandi Prasad Uniyal & Ors. Vs. State of Uttarakhand & Ors.**, 2012(8) SCC 417, Hon'ble Apex Court has held as follows:-

"2. The question that arises for consideration in this appeal is whether over-payment of amount due to wrong fixation of 5th and 6th pay scale of teachers/principals based on the 5th Pay Commission Report could be recovered from the recipients who are serving as teachers. The Division Bench of the High Court rejected the writ petition filed by the appellants and took the view that since payments were effected due to a mistake committed by the District Education Officer, the same could be recovered. Aggrieved by the said judgment, this appeal has been preferred.

18. Appellants in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However, we order the excess payment made be recovered from the appellant's salary in twelve equal monthly installments starting from October 2012."

The respondents further contend that the impugned order is also legal and valid as per the then O.M. of DoP&T dated 06.02.2014 and that DoP&T O.M. dated 02.03.2016 would not be applicable because the applicant retired during 2014-15.

9. I have gone through the facts of the case and carefully considered the rival contentions of both sides.

10. Admittedly, the benefits of 3rd MACP were refixed as per the orders of the competent authority vide letter No. F.6/30/TRC/H&FW/2010/9425-65 dated 20.09.2013. Vide this letter, it was informed that the benefits of 3rd MACP have been revised and Pharmacists with entry Grade Pay of Rs.2800/- in PB-I and in receipt of NFSG in Grade Pay of Rs.4200/-, on completion of 02 years service,

are eligible for 2nd and 3rd financial upgradation under MACP Scheme in Grade Pays of Rs.4600/- and Rs.4800/- only.

11. However, the fact remains that the applicant was granted the Grade Pay of Rs.5400/- w.e.f. 01.09.2008 and he received arrears arising out of the difference in the pay w.e.f. 01.09.2008 itself. The applicant continued to receive the upgraded salary for more than 05 years i.e. w.e.f. 01.09.2008 to July, 2014, till the respondents refixed the Grade Pay of all Pharmacists.

12. As per the law laid down by Hon'ble Supreme Court in the case of **Rafiq Masih** (supra) recovery from employees when the excess payment has been made for a period in excess of 05 years before the order of recovery is issued, is impermissible in law. Facts of this case make it clear that it is also covered under stipulations laid down in Para-12 (i), (ii) & (iii) of the **Rafiq Masih** judgment, which lay down that recovery of excess payment made from Group-C employees, and from those who are due to retire within one year from the date of recovery, is bad in law.

13. The respondents have tried to make out a case that the law aid down in **Rafiq Masih** is only prospective in operation, hence the recovery from the applicant is legal as per the O.M. of DoP&T dated 06.02.2014. Here, a reference needs to be made to the decision of

the Apex Court in the case of **M.A. Murthy Vs. State of Karnataka and Others**, 2003(7)SCC 517, para-8 of which reads as under:-

"The doctrine of prospective over-ruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in L.C. Golak Nath and Ors. v. State of Punjab and Anr. (AIR 1967 SC 1643). In Managing Director, ECIL, Hyderabad and Ors. v. B. Karunakar and Ors. (1993 (4) SCC 727) the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (See Ashok Kumar Gupta v. State of U.P. (1997) 5 SCC 201, Baburam v. C.C. Jacob (1999) 3 SCC 362). It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective over-ruling, unless it is so indicated in the particular decision....."

The Hon'ble Apex Court held that it is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling unless it is so indicated in the particular decision. It is for the Apex Court to indicate whether a particular decision will apply prospectively. It is apparent that no such direction has been given by the Apex Court in the case of **Rafiq Masih**, hence the law laid down cannot be held to be only prospective in operation. The plea of the respondents that the recovery was legal and valid as per O.M. dated 06.02.2014, therefore is not tenable.

14. In a catena of judgments, relief has been granted against recovery of excess payment of allowances if the excess amount is the result of interpretation of a rule/order, which is subsequently found to be erroneous by the respondents. Such relief is essential not because of any right of the employees but to relieve the employees from the hardship, which will ensue, if recovery is ordered. Had the error been detected and corrected within a short span of time, such order for recovery, (of the amount paid in excess) could have been recovered, which is not the case here.

15. In view of the aforesaid, I allow the O.A. and direct the respondents to rectify their order dated 26.05.2014 by refunding the amount of Rs.2,71,170/- recovered from the gratuity of the applicant. This should be refunded back to him within a period of two months from the date of receipt of a certified copy of this order. The respondents will, however, fix the pay and revise pension of the applicant keeping in view of the O.M. No. F.6/30/TRC/H&FW/2010/9425-65 dated 20.09.2013. No costs.

**(Praveen Mahajan)
Member (A)**

/Vinita/