

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 285 of 2018

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

Dr. Prabhas Ranjan Pradhan, aged about 63 years, S/o Late Pravakar Pradhan, permanent resident At-GA-61, SAILASREE VIHAR, PO – CHANDRASEKHARPUR, Bhubaneswar, Dist. - Khurda – 753021.

.....Applicant

VERSUS

1. Union of India represented through the Secretary to the Govt. of India, Health & Family Welfare Department (CHS Division), Nirman Bhawan, New Delhi – 110011.
2. Addl. Secretary & Director General (CGHS), Ministry of Health & Family Welfare (CHS Division), Nirman Bhawan, New Delhi – 110011.
3. Director (CGHS), Ministry of Health & Family Welfare (CHS Division), Nirman Bhawan, New Delhi – 110011.
4. Additional Director, CGHS, Old AG Colony, Unit-IV, Bhubaneswar.
5. Sr. Accounts Officer, Pay & Accounts Office, Ministry of Health & Family Welfare, 15/1 Chowringhee Square, Kolkata – 700069.

.....Respondents.

For the applicant : Mr.S.K.Ojha, counsel

For the respondents: Mr.D.K.Mallick, counsel

Heard & reserved on : 25.1.2019

Order on : 11.2.2019

O R D E R

Per Mr. Gokul Chandra Pati, Member (A)

The present OA has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs :

- "(i) To quash the order dated 15.9.2016, 23.7.2017 & 9.10.2017 holding that the aforesaid letters/order are against the law laid down by the Hon'ble Apex Court in the case of Rafiq Masih case and also against the DOP&T OM dated 2.3.2016.
- (ii) To declare/direct that letter dated 7.12.2015 cannot stand on the way to release entire benefits as due and admissible to the applicant.
- (iii) To direct the respondent No.2 & 3 to release the balance withholding amount of Rs.8,34,149/- with permissible interest.
- (iv) And/or pass any other order/orders as deemed fit and proper."

2. The facts in this case are undisputed. The applicant was allowed by the respondents the benefit of Transport Allowance after 6th CPC recommendation

at the rate of Rs. 7000/- plus dearness per month. He was promoted to the senior administrative grade (in short SAG) with Grade Pay of Rs. 10,000/-. But an objection was raised by the Audit to the effect that the applicant was not entitled for the Transport Allowance at the rate of Rs. 7000/- plus DA as per the OMIs issued by the Ministry of Finance from time to time, as such a facility was available to the Joint Secretary level officers or those officers who were declared as Head of Department.

3. In the Counter filed by the respondents, the OM dated 30.6.2016 (Annexure-R/3 to the counter) of the Ministry of Health & Family Welfare has been enclosed, in which, it is stated that payment of Transport Allowance to the SAG grade officers at the rate of Rs. 7000/- plus DA, has been objected by the Director Audit on the ground that it is admissible only to those SAG officers who are declared as Head of Department or are Joint Secretary to the Government of India. Based on these observations of Audit, the Ministry, vide letter dated 7.12.2015 has instructed the field officials to comply the recommendation of the Audit. It is further stated that in OA No. 4062/2013 filed before the Principal Bench in the case of Radhacharan Shakiya and others vs. Union of India & others, it was held (Annexure-R/5) that the Transport Allowance of Rs. 7000/- plus DA is available to the field officials of the CHS and CGHS. This judgment was challenged before Hon'ble Delhi High Court and the Writ filed by the concerned employees, was dismissed vide the judgment dated 3.9.2014. Accordingly, the excess payment of Rs. 8,34,149/- was withheld from the retiral benefits of the applicant and it is as per the rules. In the counter, the judgment of the Tribunal in the case of Dr. Surendranath Pati Vs. Union of India in which the Tribunal refused to interfere, has also been relied upon by the respondents.

4. The applicant has filed the Rejoinder, reiterating the stand taken in the OA that he is entitled the benefit of the judgment of Hon'ble Apex Court in the case of **State of Punjab and others vs. Rafiq Masih (White Washer) etc. reported in 2015 AIR SCW 501**. The judgments of this Tribunal in the case of P. Vaidyanath Vs. Union of India & Ors in OA No. 295/2014 (Annexure-A/14) and Dr. B.P. Arneja Vs. Union of India, in OA No. 1059/2016, have been cited in support of the applicant's case. It is further stated that the case of Radhacharan Shakiya and others, which has been relied by the respondents is distinguishable. It has also cited the case of Dr. Surendranath Pati (supra), which is stated to be per-incurium, since it did not follow the legal precedents. The respondents withheld the full amount of Rs.8,34,149/- from the applicant's gratuity.

5. Heard learned counsels for both the sides and perused the pleadings on record. Before proceeding further to examine merit of the case, it is seen that there is some delay in filing the OA for which the applicant has filed the MA No. 161/2018 for condoning the delay. It is noticed that the respondents have not raised any objection to the MA in their pleadings, not it was raised at the time of oral submissions. Since the dispute pertains to recovery from the gratuity of a retired officer and the applicant claims that his case is covered by the judgment of Hon'ble Apex Court, I am of the opinion that the OA is required to be decided on merit. The reasons furnished for delay are considered satisfactory. Hence the MA No. 161/2018 is allowed and delay in filing the OA is condoned.

6. The question to be decided in this case is whether the applicant is entitled for the benefit of the judgment in the case of Rafiq Masih (supra). In the judgment in the case of Rafiq Masih (supra), it was held by Hon'ble Apex Court as under:-

"6. In view of the conclusions extracted hereinabove, it will be our endeavour, to lay down the parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In our considered view, the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee.

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.

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.

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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 law laid down in the above judgment would imply that while the excess payment received by an employee from the public exchequer is to be refunded, except in situations as mentioned in paragraph 12 of the judgment. These exceptions have been specified taking into account the fact that recovery of excess payment from the concerned employees would cause hardship, which will far outweigh the right of the employer to recover the excess payment.

7. In this case, the applicant was an officer with the Grade Pay of Rs. 10,000/- and was the Additional Director of the CGHS organization as stated in the letters Annexure-A/8 and A/9. It is seen from the Counter filed by the respondents that there was some confusion about the rate of the Transport Allowance to be drawn by the officers of the CGHS drawing a Grade Pay of Rs. 10,000/- and it was found by the Audit that these officers were drawing the Transport Allowance at a rate higher than the rate that would be admissible to them. Accordingly, the Ministry of Health & Family Welfare in their letter dated 19.8.2014 (Annexure-R/3 to the Counter) instructed the Additional Directors of the CGHS Cities and the letter stated as under:-

"F.No.A-27017/01/2014-CGHS-I
Government of India
Ministry of health & Family Welfare
Directorate Gen.of CGHS
(CGHS-I Section)

Nirman Bhawan, New Delhi,
Dated : 19.8.2014

To
The Additional Director
(All CGHS cities)

Subject : Transport Allowance to CHS officers posted in CGHS and drawing Transport Allowance Rs.10,000/-reg.

Sir,

As you are aware that the Transport Allowance is granted to the Central Government employees as per the rates and on the terms and conditions mentioned in the Department of Expenditure's Office Memorandum No. 21(2)/2008-E-II(B) dated 29th August, 2008. In view of the audit objection on the payment of Transport Allowance @ Rs.7000/- to the CHS Officers drawing Grade pay Rs.10,000/- and recommendation of the Director General of Audit that TA @ 3200/-+DA per month may be paid to the CHS Officers with immediate effect instead of Rs.7,000/- + DA per month as they are not provided with staff car and the excess amount paid to them may be recovered under intimation to Internal Audit HQ.

The matter received from the CGHS, South Zone and East Zone Delhi in this regard, was forwarded to CHS-II Section of the Ministry for comments. The CHS-II Section has stated that it is clear that the officers drawing grade pay of Rs.10,000/- and above cannot draw transport allowance @ Rs.7000/- if they are not covered under the stipulated provisions of staff car facility. As such, the audit objection in the matter seems justified.

You are, therefore, requested to take appropriate action in this regard taking into account the recommendation of the Director General of Audit.

Yours faithfully,
(Sd/- illegible)
(Prem Sagar)

Under Secretary to the Government of India."

8. From above, it is clear that the letter dated 19.8.2014 is an order issued by the Ministry for recovery of excess amount as pointed out by the Audit and it was addressed to the Additional Directors. The applicant was working as Additional Director, Bhubaneswar before retiring from service on 30.4.2016 as would be obvious from the copy of his representation dated 29.2.2016 (Annexure-A/6 to the OA). He, as ex-Additional Director, must have received the letter/order dated 19.8.2004 of the Ministry ordering recovery of the excess amount. What action was taken by him after receiving the order dated 19.8.2014 has not been mentioned in the OA. The applicant appeared to have acted after receipt of the letter dated 7.12.2015 (Annexure- A/5) on this issue and he submitted the representation dated 29.2.2016 to the authorities just two months before his retirement.

9. In addition to above facts, it is also noticed that the letter/order dated 19.8.2014 (Annexure-R/3 to the Counter) has not been challenged in this OA. In reply to the para 6 of the Counter referring to the Annexure-R/3 letter, the applicant in Rejoinder did not mention anything about this letter dated 19.8.2014 of the Ministry ordering recovery of the excess amount. It is also not averred by the applicant that he did not receive this letter/order dated 19.8.2014. As Additional Director, it was the responsibility of the applicant to have taken appropriate action and since he was adversely affected by this letter/order, he should have taken appropriate steps in the matter instead of waiting till February, 2016 to represent.

10. Learned counsel for the applicant had argued that the case of the applicant is squarely covered under the judgment of Rafiq Masih (supra) as the recovery has been effected after retirement of the applicant and that his case is squarely covered as per the paragraph 12(ii) of the judgment (quoted in para 6 above). I am unable to agree with this argument of learned counsel for the applicant, since as discussed in paragraphs 7 and 8 of this order, the recovery order was passed by the Ministry on 19.8.2014, prior to one year of the applicant's retirement on 30.4.2016 and no action on the aforesaid order was taken by the applicant, who was working as Additional Director, Bhubaneswar. It was the fault of the applicant as Additional Director, Bhubaneswar for not taking any action as per the order dated 19.8.2014 of the Ministry. Hence, it is clear that the case of the applicant is not covered under the stipulation in paragraph 12 (ii) of the Rafiq Masih judgment and the applicant will not be entitled for any benefit of the said judgment.

11. The cases of Dr. B.P. Arneja & others vs. Secretary, Ministry of Health & Family Welfare (in the OA No. 1059/2016 before the Principal Bench of the Tribunal) cited by the applicant in the Rejoinder, held that the case of the employees in that OA was covered by the law as laid down in the case of Rafiq Masih (supra). The facts of the present OA as discussed in the preceding paragraphs are different and in this case the judgment in the case of Rafiq Masih (supra) is inapplicable in the case of the applicant. Hence, the judgment of the Principal Bench in OA No. 1059/2016 will be of no help for the applicant's case in this OA. In the judgment in the case of Radhacharan Shakiya (supra), cited in the Counter, it was held that the officers of the CGHS with Grade Pay of Rs. 10,000/- are not entitled for the Transport Allowance at the rate of Rs. 7000/- per month. It is obvious that there has been excess payment made to the applicant on account of Transport Allowance drawn by him. Therefore, the order issued by the Ministry vide order dated 19.8.2014 for recovery of excess amount, will apply to the case of the applicant. It is noticed that the aforesaid order dated 19.8.2014 is not under challenge in this OA.

12. In the circumstances as discussed in the preceding paragraphs, no case is made out for the Tribunal to interfere in the matter. The OA, being devoid of merit, is dismissed.

(GOKUL CHANDRA PATI)
MEMBER (A)

"To
 The Additional Director
 (All CGHS cities)

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You are, therefore, requested to take appropriate action in this regard taking into account the recommendation of the Director General of Audit.

Yours faithfully,
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Under Secretary to the Government of India."