IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH: HYDERABAD

Original Application No. 21/232/2018

Date of Order: 07.03.2019

Between:

M. Hari, S/o. M. Balaiah, Group D employee,
Aged about 61 years, Occ:Retd. Bearer,
Rail Nilayam Canteen/SC,
South Central Railway, Secunderabad.

… Applicant

And

1. Union of India, rep. by the General Manager,
South Central Railway, Rail Nilayam,
III Floor, Secunderabad – 500 071.

2. The Chief Personnel Officer,
South Central Railway, Rail Nilayam,
IV Floor, Secunderabad – 500 071.

3. The Financial Advisor & Chief Accounts Officer,
South Central Railway, Rail Nilayam,
III Floor, Secunderabad – 500 071.

4. The Chief Manager (Link Branch),
State Bank of India, CPCS, I Floor,
Methodist Complex, Abids,
Opp. to Chermas Shop, Hyderabad – 500 071.

5. The Branch Manager, State Bank of India,
Prashant Nagar, Yadav Nagar, Secunderabad.

… Respondents

Counsel for the Applicant … Mr. G. Trinadha Rao, Advocate for
Mr. N. Subba Rayudu

Counsel for the Respondents … Mrs. Vijaya Lakshmi, Advocate for
Mr. T. Hanumantha Reddy, SC for Rlys

CORAM:
Hon'ble Mr. B.V. Sudhakar ... Member (Admn.)

ORAL ORDER
{As per Hon'ble Mr. B.V. Sudhakar, Member (Admn.) }

2. The OA has been filed challenging the action of the respondents in deducting an amount of Rs.1,12,191/- from his terminal dues.

3. Brief facts of the case are that the applicant joined the respondent organization as Cleaner and retired from service as a Bearer on 31.12.2017. Just prior to the retirement of the applicant, the 2nd respondent issued the impugned order dt.11.12.2017 intimating that upon review of service register of the applicant on account of his superannuation it was observed that ACP initially granted to the applicant w.e.f. 01.01.2002 duly considering his past service rendered prior to 01.04.1990 and to that effect, orders were issued on 25.07.2008. Subsequently, Railway Board has issued instructions vide letter dt. 05.08.2008, wherein it was mentioned that service rendered and promotion earned prior to 01.04.1990 by canteen employees should not be considered for financial upgradation under ACP Scheme. The pay of the applicant was therefore reviewed and overpayment of Rs.1,12,191/- was ordered to be recovered.

4. The contentions of the applicant are that he was not given any opportunity to represent against the proposed recovery. As per Serial Circular No. 75/2016, the amount should not be recovered since he is Group D employee. The applicant also states that he did not misguide or misrepresent facts to the respondents for seeking ACP benefit, which was granted by the respondents on their own. The recovery ordered is against the judgment of the Hon'ble Supreme Court in the State of Punjab Vs. Rafiq Masih in CA No. 11527/2014. The order of the respondents also violates the verdict given by this Tribunal in OA 195/2017.

5. The respondents in their reply have intimated that at the time of retirement of the applicant, the service register was reviewed and it was noticed that the

ACP was granted to the applicant w.e.f. 01.01.2002 duly considering his past service rendered prior to 01.04.1990. Orders were accordingly issued to that extent on 25.07.2008. The Railway Board issued instructions vide letter dt. 05.08.2008 advising that the service rendered and promotion earned prior to 01.04.1990 by the canteen employees shall not be considered for financial upgradation under ACP Scheme. Therefore, the pay of the applicant was reviewed and excess payment of Rs.1,12,191/- was ordered to be deducted from the settlement dues of the applicant vide order dt. 11.12.2017. Applicant was communicated about re-fixation of pay vide CPO office letter dated 18.10.2017, which was consequent to the Railway Board orders dt. 05.08.2008. Further, as per Rule 15(4) of Railway Services (Pension) Rules, 1993, it is permissible to make recovery of Government dues from the retirement, death, terminal or service gratuity even without the consent of the employee. In respect of the Hon'ble Supreme Court judgment in Rafiq Masih case relied upon by the applicant, the respondents state that, in para 8 of the judgment, Hon'ble Supreme Court has observed that if the effect of 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. The respondents claim that, in the present case, recovery is not iniquitous and it was ordered as per rules on the subject. The respondents also quoted the judgment of Hon'ble Supreme Court in the case of High Court of Punjab & Haryana & Ors. Vs. Jagdev Singh (CA No. 3500/2006) wherein it was held that in case the officer is placed on notice before making any recovery, then such payments made should be refunded. Hence, in view of this judgment and in

view of the fact that applicant was put on notice, recovery ordered is justified. The respondents also submitted that decision of this Tribunal in OA No.195/2017 has been suspended by the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in WP No.11512/2018.

6. Heard learned counsel for both sides and perused the documents as well as the material papers submitted.

7(I) The dispute is about recovery from the terminal benefits of the applicant at the time of his retirement. The order of recovery arose due to review of the service register. The recovery pertains to the orders issued on 25.07.2008 in regard to ACP benefit granted w.e.f. 01.01.2002. As per Rule 1023 of the Indian Railway Accounts Code (IRAC) - Part-1 which deals with checks to be exercised in regard to pension applications states as under:

> *"The correctness of the emoluments on the first date of the ten months period would naturally depend on the correctness of the emoluments prior to this date. However, any such check of the correctness of past emoluments should not become an occasion for an extensive examination going back into the distant past, the check should be minimum which is absolutely necessary and it should in any case not go back to a period earlier than a maximum of 24 months preceding the retirement."*

Thus, while reviewing the service register at the retirement of an official, check should be confined only to a period 24 months preceding the retirement. The provisions of IRAC are statutory in nature, which, respondents cannot overrule. The above condition in regard to making good omissions in service book at the time retirement of an employee only for a period of 24 months prior to the date of retirement, is echoed in Rule 79(b)(v) of RS (Pension) Rules, 1993 as extracted below:

"79. Stages for the completion of pension papers on superannuation

(b) Second Stage.- Making good omission in the service book.-

(v) In order to ensure that the emoluments during the last ten months of service have been correctly shown in the service book, the Head of Office may verify the correctness of emoluments only for the period of twenty-four months preceding the date of retirement of a railway servant, and not for any period prior to that date."

Further, this provision has been reinforced by the Principal Chief Personnel Officer vide his letter dt 17.10.2018. Thus, the action of the respondents in reviewing the service particulars of the applicant for a period exceeding 24 months preceding his retirement is against the statutory provisions of IRAC, etc. The Hon'ble Supreme Court in **T.Kannan and ors vs S.K. Nayyar (1991) 1 SCC 544** held that "*Action in respect of matters covered by rules should be regulated by rules*". Again in **Seighal's case (1992) (1) supp 1 SCC 304** the Hon'ble Supreme Court has stated that "*Wanton or deliberate deviation in implementation of rules should be curbed and snubbed.*" In another judgment reported in (2007) 7 SCJ 353 the Hon'ble Apex court held " *the court cannot de hors rules*". Thus, the action of the respondents in ordering recovery is against their own rules. Hon'ble Supreme Court has not taken to kindly in regard to violation as per observations referred to above.

II. Further contention of the applicant is that recovery is against the judgment of the Hon'ble Supreme Court in the State of Punjab Vs. Rafiq Masih (White Washer etc.) in CA No. 11527/2014. Pursuant to the said judgment, DOPT has issued Office Memorandum dt. 02.03.2016 wherein it has been stated as under:

"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 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.

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."

Adopting the above DOPT OM dt.02.03.2016, Railway Board issued RBE No. 72/2016 dt. 22.06.2016, which was circulated by the South Central Railway as Serial Circular No. 75/2016. Moreover, in the last pay certificate dt. 28.12.2017 issued by the office of CPO/SC it is mentioned that the sum of Rs.1,12,191/- worked out towards overpayment need not be deducted as per SC No. 75/2016.

III. The applicant retired as Group D employee and just before retirement, the impugned recovery order was issued. The case of the applicants fits into the situations at (i) to (iii) enumerated in the judgment of the Hon'ble Supreme Court wherein the recovery is impermissible in law. Thus, the case of the applicant fully covered by the judgment of the Hon'ble Apex Court. Further, it is seen that the applicant has neither misrepresented or misguided the

respondents in order to derive the benefit of ACP and it was granted by the respondents as per the prevailing rules then. This view is further fortified by a perusal of the impugned order dt. 11.12.2017 which says that orders were issued on 25.07.2008 granting ACP benefit w.e.f. 01.01.2002 duly taking the past service rendered prior to 01.04.1990 and subsequently, the Railway Board issued instruction vide letter dt. 05.08.2008 advising that service rendered and promotion earned prior to 01.04.1990 by the canteen employees shall not be considered for financial upgradation under ACP. The impugned order further says that, due to revised instructions, upon review the pay of the applicant has been revised and a corrigendum has been issued on 08.10.2017. The respondents could have reviewed the pay of the applicant immediately after issuance of instructions dt. 05.08.2008, but they did not do. Though the respondents had ample time, they did not take any steps pursuant to the order dt. 05.08.2008 till just prior to the retirement of the applicant and this is evident by their silence in the reply statement. The lapse or inaction on the part of the respondents should not make the applicant suffer, which is settled legal proposition by the Hon'ble Supreme Court. It has been held in the case of ***Nirmal Chandra Bhattacharjee v. UOI, 1991 Supp (2) SCC 363*** wherein the Apex Court has held "The mistake or delay on the part of the department should not be permitted to recoil on the appellants." Further Hon'ble Supreme Court has observed in case of *M.V. Thimmaiah vs. UPSC,* C.A. No. 5883-5991 of 2007 and UOI *vs. Sadhana Khanna*, C.A. No. 8208/01, that if there is a failure on the part of the officers to discharge their duties the incumbent should not be allowed to suffer.

IV. Hon'ble Supreme Court judgment in Susheel Kumar Singhal v Pramukh Sachiv Irrigation Department & ors reported in CA 5262 of 2008 as under:

> "7. Upon perusal of GO and the submission made by the learned counsel appearing for the appellant, it is not in dispute the appellant had retired on 31st December, 2003 and at the time of his retirement his salary was Rs.11,625 and on the basis of the said salary his pension had been fixed as Rs.9000. Admittedly, if any mistake had been committed in pay fixation, the mistake had been committed in 1986 i.e. much prior to the retirement of the appellant and therefore, by virtue of the aforestated G.O dt 16th January, 2007, neither any salary paid by mistake to the appellant could have been recovered nor pension of the appellant could have been reduced."

The IRAC Code 1023 and Rule 79(b)(v) of RS (Pension) Rules, 1993 enact the role of the GO referred to in the above judgment. Thus, the action of the respondents violates the observations of Hon'ble Supreme Court cited supra.

The applicant joined the service as Cleaner and retired as Bearer in Group D cadre. Considering his cadre, recovery of such a huge amount would definitely have adverse impact on his financial position after retirement and he would be put to hardship. After retirement, his wages would be reduced to 50% in the form of pension and normally, any employee would plan post retirement life with his retiral benefits and pension. Therefore, withholding such a huge amount would put him to severe financial stress, especially the applicant being a Group D employee. Though the respondents informed the applicant that his pay would be revised and any amount paid in excess would be recovered from the settlement dues, their action per se in ordering recovery is against the statutory rules stated above. An executive decision cannot overrule a statutory provision. Therefore, the very action of putting the applicant on notice is invalid since the basis for recovery is itself against rules and law. Therefore, the judgment of Hon'ble Supreme Court in Jagdev Singh is not applicable to the present case.

V. Lastly, it is not out of place to state that respondents in respect of another canteen employee Sri V. Krishna, Cleaner have issued an order dt.

11/12.04.2018 by the very same 2nd respondent quoting Serial Circular No. 62/2016 as under:

> "..in order to ensure that the emoluments during the last ten months of service have been correctly shown in the service book, the Head of Office may verify the correctness of emoluments only for the period of **twenty – four months** preceding the date of retirement or a railway servant, and not for any period prior to that date."

They have also referred to para 4 of the SC No. 75/2016 which has been issued pursuant to the judgment of the Hon'ble Supreme Court in Rafiq Masih case and stated that recoveries by the employers would be impermissible in law in situations namely

i) Recoveries from employees belonging to Class III and Class IV service;
ii) Recovery from retired employees who are due to retire within one year of the order of recovery
iii) Recovery from employees, when excess payment has been made for a period in excess of five years, before the order of recovery is issued.

In the said letter, it is stated that -

> "it is evident that SR has to be verified only for the period of last 24 months only prior to the retirement and not before earlier than that. Now, in the instant case, the OP resulted is from 2002 onwards (i.e. 15 years ago) and **recovery will not be in order as per the Sc No. 62/2016 and 75/2016.**
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> Xxxx
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> Now, at this stage, raising query about irregular fixation, done during 2002 may not be in order and will put the employee to financial hardship just before retirement. "

It is further mentioned in the said letter that the pay may be revised/ refixed based on verification and certification for the purpose of drawing salary and calculation of settlement dues, but not for the purpose of recovery of over-payment, if any. Further, it is mentioned that excess amount need not be recovered and the waiver of recovery has been approved by the PCPO. Thus, the respondents have waived recovery in respect of another employee who is

also a canteen employee like the applicant. Same yardstick has to be followed in respect of the applicant, lest it would amount to discrimination among similarly placed employees violating Article 14 of the Constitution of India. It has been well settled by the Hon'ble Supreme Court that a benefit should be extended to similarly placed persons.

VI. Hence, the applicant has made out a case, which fully succeeds. The action of the respondents is against their own instructions, arbitrary and illegal. Therefore, the impugned order dated 11.12.2017 issued by the 2nd respondent is hereby quashed.

VII. The respondents are directed to release the withheld amount of Rs.1,12,191/- within a period of three months from the date of receipt of copy of this order. OA is accordingly allowed, with no order as to costs.

(B.V. SUDHAKAR)
MEMBER (ADMN.)

Dated, the 7th day of March, 2019

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