CENTRAL ADMINISTRATIVE TRIBUNAL

MADRAS BENCH

DATED THIS THE 22nd DAY OF MARCH, TWO THOUSAND NINTEEN

PRESENT:

THE HON'BLE MR. T. JACOB, MEMBER (A)

OA/310/01119/2018

M. Kalyansundaram
No. 247/H/Rose Third Street
Railway Colony
Madurai 625 016. ...Applicant

-versus-

1. Union of India rep. by
General Manager
Southern Railway
Park Town, Chennai – 600 003.

2. The Divisional Personnel Officer
Southern Railway
Madurai 625 016. ...Respondents

By Advocates:

M/s. Ratio Legis for the applicant.

Mr. A. Abdul Ajees, for the respondents.

ORDER

(Pronounced by Hon'ble Mr. T. Jacob, Member (A))

This OA has been filed by the applicant under Sec.19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:-

"To call for the records related to the impugned orders

i. U/P.500/Sett./MK dated 26.04.2016 and
ii. U/P.353/OA.1329/2016 dated 04.12.2017

passed by the respondents and to quash the same and to direct the respondents to do the necessary to refund the amount so far recovered with admissible interest and to pass such other order/orders"

2. The brief facts of the case, as stated by the applicant, are as follows:-

The applicant while he was working as Track Maintainer Grade IV had applied for voluntary retirement and for appointment of his ward in terms of the LARSGESS Scheme. The voluntary retirement of the applicant was accepted and his services in Railways were terminated w.e.f. 06.08.2015. The applicant was drawing Rs.11540 + Rs. 2000 as GP in the Pay Band of Rs. 5200-20200 with GP 2000 and while arranging settlement after 6 months, a memorandum with the statement but without reasons, was issued to the applicant stating that there was fixation of pay twice on promotion in the year 1996 and there was an omission by the Personnel Department to effect a withholding of increment. His pay was reduced and revised detrimental to the applicant and that too without show cause notice and served to the applicant in the month of October 2015. Challenging this the applicant filed OA No. 1329/2016 before this Tribunal. The OA was disposed by this Tribunal by order dated 9.8.2017 with a direction to the respondents to examine the case of the

applicant in the light of the Office Memorandum of the DOPT dated 02.03.2016 and to pass a reasoned and speaking order. Accordingly the claim of the applicant was disposed by passing the impugned order dated 04.12.2017 and aggrieved by the disposal the applicant has filed the present OA.

3. The learned counsel for the applicant would submit that the Hon'ble Apex Court in the case of State of Punjab & Ors Vs. Rafiq Masih (White Washer) etc in CA No.11527 of 2014 (arising out of SLP(C) No.11684 of 2012) has categorically directed the authorities not to make recovery and the same was circulated through DOPT L.No. F. No. 18/03/2015-Esstt.(Pay-I) in which it was communicated that any waiver may be allowed with the express approval of Department of Expenditure. In the instant case the authorities without consulting the Department of Expenditure has decided the issue against the applicant which is in gross violation of the above said OM and thus the impugned recovery order is impermissible in law and contemptible one and thus liable to be quashed. It is further submitted that the impugned recovery is callous since the applicant is not responsible for such excess payment and there was no demand or intentional fraud committed by him.

4. The respondents have filed detailed reply. It is submitted that the entries in the service books of the employee are verified three years prior to the date of superannuation. In the present case the applicant's service particulars were not verified as per the schedule, since the applicant while in service had submitted application for voluntary retirement under LARSGESS Scheme at the age of 56 years. Hence the need for verification of service

records did not arise until completion of all the proceedings under the LARGESS Scheme at that point of time. Later when his service particulars were reviewed in order to rectify any mistake in pay fixation, it was found that the applicant was allowed the benefit of pay fixation twice for the same promotion on 21.06.1990 to which he was not entitled and there was an omission by the Personnel Department to effect withholding of increment due to penalty imposed against the applicant. Hence the excess payment was ordered to be recovered from the settlement dues of the applicant. Accordingly they pray for dismissal of the OA.

5. The respondents would further submit that after making recovery of over payment of Rs. 90,000/-, the applicant was paid Rs. 7,84,342/- as his settlement dues and he is entitled for the monthly pension in his revised pay. He also has gainfully employed his son in Railway under the LARSGESS Scheme. Hence the claim of the applicant citing White Washer case for refund of the over payment is not tenable inasmuch as the recovery was not made from the monthly salary or pension payable to him. Further the applicant herein was imposed with a penalty of reduction of pay and during the period he was supposed to be under the operation of the penalty, he was aware that he was receiving his salary in excess and hence the observations made above are applicable to the case of the applicant and the recovery of overpayment is valid.

6. I have carefully considered the submissions made by the rival counsel and perused the records.

7. Admittedly the applicant while working as Track Maintainer Grade IV voluntarily retired from service w.e.f. 6.8.2015. While processing the retiral benefits of the applicant, it was noticed that he was given the benefit of pay fixation twice for one promotion, one in the year 1990 and another in the year 2005 and also the penalty of reduction of pay from 3950/- to 3875/- was not effected during the year 2005. After termination of the service of the applicant w.e.f. 6.8.2015, vide Memorandum dated 17.10.2015, his pay was revised and over payment of Rs.90,000/- was recovered from his settlement dues.

8. The learned counsel for the applicant contends that no recovery could be effected from his terminal benefits after a lapse of more than 10 years without issue of show cause notice to him. The applicant is not responsible for such excess payment and there was no misrepresentation or intentional fraud committed by him. The respondents have not taken into consideration that any reduction of amount from his terminal benefits will have adverse effect on his pension. The approval of the Department of Expenditure has not been taken before effecting recovery from the settlement benefits of the applicant. Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service) are not to be effected. Further, recovery should not be effected from employees who are due to retire within one year and it cannot be made from employees when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

9. The learned counsel for the applicant would further contend that the provisions in the Indian Railway Administration and Finance 1991 provides for

necessary scrutiny by employees and the duty is cast upon the Head of Office to initiate action to show the service books to the railway servants governed by the pension rules every year and to obtain their signature for having done so. In the absence of such procedure being adopted by the respondents, they cannot now turn around and say that they have identified excess payment only at the time of voluntary retirement. This has unequivocally established the respondents callous approach in regard to the maintenance of the service register of the employees and as such, the reasons quoted in the impugned orders are not sustainable.

10. The learned counsel for the respondents would vehemently contend that the applicant herein retired from service voluntarily w.e.f. 6.8.2015 and hence the OM of the DOP&T dated 2.3.2016 is applicable only from the date of issue in 2016 and not retrospectively. Further Hence the applicant cannot claim for refund of the amount already recovered from his terminal benfits.

11. I have given my anxious consideration to the arguments of either side. This court is not in agreement with the argument of the learned counsel for the respondents. The DOP&T OM has been issued based on the Judgement of the Hon'ble Supreme Court in CA 11527/2014 in the case of State of Punjab & Ors, Vs, Rafiq Masih (White Washer etc) dated 8.12.2014. All relevant precedent cases including the cases relied upon by the respondents had been considered in the order of the Supreme Court in State of Punjab vs., Rafiq Masih and it has also been accepted by the DOP&T which had directed that such cases shall be processed as per the law laid down thereon. It was not a new law but only

a laying down of the law as it was in the light of the facts and circumstances of the cases which were taken into account and which preceded the date of the order, it could not be held that such order was inapplicable to cases where the cause of action had arisen before the date of the order.

12. Having regard to the above facts and circumstances, the only question that remains for consideration in this OA is whether the recovery from the terminal benefits of the applicant after an inordinate delay of more than 10 years is sustainable in the eye of law.

13. The Hon'ble Supreme Court in CA No.11527/2014 (arising out of SLP(C) No. 11684/2012) in the State of Punjab & Others Vs. Rafiq Masih (White Washer etc.) requires such cases to be processed in accordance with the principles contained therein which are extracted below:-

> "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:
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> (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.
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> (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.
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> (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 Court further justified its stand saying

The right to recovery 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 should 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.

14. The Hon'ble High Court of Calcutta in W.P. No.29979(W) of 2016 in the case of Shiba Rani Maity vs. The State of West Bengal with W.P.No.27562(W) of 2016 in the case of Biswanath Ghosh vs. The State of West Bengal dated 18.1.2017 has dealt with similar issue and has held as follows:-

"(7) In Shyam Babu Verma (supra) although the Hon'ble Apex Court held that the petitioners were entitled to a lower scale of pay than they actually enjoyed, yet since they received a higher scale of pay due to no fault of theirs, the Hon'ble Apex Court held that it shall only be just and proper not to recover any excess amount which had already been paid to them. In Syed Abdul Qadir (supra), the Hon'ble Apex Court observed that the relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. However, in a given case, if it is proved that the employee had knowledge that he was receiving payment in excess of what he was entitled to or in cases where the arrear is deducted or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, Court may on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. In the facts of that case, the Hon'ble Apex Court found that the excess amount that had been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. Accordingly, the Hon'ble Apex Court held that no recovery of the amount that had been paid in excess to the appellant teachers should be made.

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11.....Thus, Chandi Prasad Uniyal (supra) and Rafiq Masih (Supra) can be reconciled by reading the two judgements as laying down the proposition that even without fraud or misrepresentation on the part of an employee excess payment made to an employee can be recovered only up to one year before the retirement of the employee and not after that.

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14. In view of the aforesaid, no recovery could be made from the retiral benefits of the petitioner and the withholding of the sum of Rs.29,447/- was clearly contrary to law.

15. With regard to the question whether recovery can be effected after an inordinate delay of more than 10 years, the Hon'ble Apex Court in the case of Rafiq Masih (supra) has laid down in condition (iii) that recovery from employees is impermissible in law, when the excess payment has been made for a period in excess of five years before the order of recovery is issued. In the instant case, the benefit of pay fixation was given twice for one promotion, one in the year 1990 and another in the year 2005 and also the penalty of reduction of pay from 3950/- to 3875/- was not effected during the year 2005. The respondents without issue of any notice to the applicant have effected recovery of over payment of Rs.90,000/- from his terminal benefits on 30.10.2015 and revised order was issued to the applicant after his retirement which is not sustainable in the eye of law.

16. From the above, it is clear that the respondents have failed in their duties to maintain the service register of the applicant updated periodically and have effected recovery without following the instructions contained in the Master Circular No.5 thus paving the way for payment being made to the applicant in excess of his entitlement. I am of the considered view that the

applicant should not be made to suffer the consequences of excess payment made to him for no fault of his. The Indian Railway Administration and Finance, 1991 also provides for necessary scrutiny of the service register of the employees and the duty is cast upon the Head of Office to initiate action to show the service books to the railway servants governed by the pension rules every year and to obtain their signature for having done so. The respondents have failed to follow the above procedure and have initiated action for recovery of excess payment made to the applicant after verification of his service register on receipt of the application for voluntary retirement which is highly illegal and not sustainable in the eye of law. In the facts of this case, it is found that the excess amount that had been paid to the applicant herein is not because of any misrepresentation or fraud on his part.

17. In the conspectus of the above facts and circumstances of the case and the Judgements of the Hon'ble Apex Court (supra), the impugned order No.U/P.500/Sett./MK dated 26.04.2016 and U/P.353/OA.1329/2016 dated 04.12.2017 are hereby quashed and the respondents are directed to refund the amount .of Rs.90,000/- recovered from the terminal benefits of the applicant within a period of two months from the date of receipt of a copy of this order. However, no order as to payment of any interest claimed.

18. OA is allowed to the above extent. No costs.