

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
BENCH AT NAINITAL**

Present: Hon'ble Mr. Rajendra Singh

----- Vice Chairman (J)

Hon'ble Mr. Rajeev Gupta

-----Vice Chairman (A)

CLAIM PETITION NO. 58/NB/DB/2021

Raj Kumar Singh, aged about 61 years, s/o Sri M.B. Singh, r/o C/o Sri N.C.Kandpal, Gali No. 3-A, Shiv Vihar, Lohariyasal Malla, Haldwani, District Nainital.

.....**Petitioner**

Vs.

1. State of Uttarakhand through Secretary, Rural Works Department, Govt. of Uttarakhand, Dehradun.
2. Chief Engineer Level-I (Head of Department), Rural Works Department, Uttarakhand, Raipur Road, Tapovan Marg, Dehradun.
3. Director, Lekha Evam Haqdari, Uttarakhand, 23- Laxmi Road, Dalanwala, Dehradun.

.....**Respondents**

Present: Sri Bhagwat Mehra, Advocate, for the petitioner

Sri Kishore Kumar, A.P.O., for the State respondents

JUDGMENT

DATED: SEPTEMBER 25, 2023

Mr. Rajeev Gupta, Vice Chairman(A)

This claim petition has been filed for the following reliefs:

"A. To set-aside the impugned office order dated 22-04-2021 issued by the Respondent No. 2 (Annexure No. 2 to Compilation-1) and also set-aside the impugned letter dated 08-07-2021 issued by the Respondent No. 2 (Annexure No. 3 to Compilation-1).

B. To set-aside the Pension Payment Order dated 15-06-2021 issued by Respondent No. 3, in so far as it relates to withheld/recovery amount of Rs. 3,06,931/- from Gratuity of the petitioner (Annexure No. 1 to the Compilation No. 1)

C. To declare the action of the Respondents in revising the Pay Fixation and making the recovery from the retiral dues as well as pensionary benefits of the petitioner, as arbitrary and illegal.

D. To direct the Respondents, particularly Respondent No. 2 and 3 to forthwith release the withheld/recovered amount of Rs. 3,06,931/- from the retiral dues/Gratuity of the petitioner, alongwith the interest at a rate to be specified by this Hon'ble Tribunal.

E. To direct the Respondents, particularly Respondent No. 2 to grant all consequential benefits to the petitioner.

F. To pass any other suitable order as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.

G. To allow the claim petition with cost.”

2. The facts, in brief are that the petitioner was appointed as Junior Engineer (Civil) in the erstwhile Rural Engineering Services Department (Now renamed as Rural Works Department). After attaining the age of superannuation, he retired from the post of Executive Engineer on 31.07.2020. The pension papers of the petitioner were sent by the Respondent No. 2 to the Respondent No. 3, who vide letter dated 07.12.2020 pointed out certain deficiencies in the same and directed the Respondent No. 2 to remove the same. The respondent No. 2 vide letter dated 13.01.2021 again forwarded the proposal after removing the deficiencies. However, the Respondent No. 3 vide letter dated 23.02.2021 again directed the Respondent No. 1 to remove the defects regarding the pay fixation after grant of second promotional pay scale to the petitioner. The Respondent No. 2 vide letter dated 08.03.2021 informed the Respondent No. 3 that all defects have been removed and also stated that the pay fixation after the second promotional pay scale has been granted to the petitioner is correct. However, the Respondent No. 3 vide letter dated 09.04.2021 again directed the Respondent No. 2 to remove the defect as the pay fixation in Second Promotional Pay Scale appears to be incorrect.

In the circumstances, the petitioner was constrained to submit a letter dated 17.04.2021 to the Respondent No. 2 that if his pay fixation has been wrongly made, in that case, the excess amount may be recovered from his gratuity. This is natural for a retired employee who has not received a single penny after his retirement and does not give a license to official respondents to make wrong pay revision or any illegal recovery. The Respondent No. 2 issued an order on 22.04.2021 (Annexure no.2 to the claim petition) reducing the pay fixation of the petitioner and sent the same to the respondent no.3 vide his letter dated 13.05.2021. The respondent no.3 issued Pension Payment Order on 15.06.2021 (Annexure no. 1 to the claim petition), whereby an amount of Rs. 3,06,931/ was withheld from the Gratuity payable to the petitioner on account of alleged recovery. Against this recovery, the petitioner made a detailed representation on 05.07.2021, which was rejected by the respondent no. 2 vide his letter dated 08.07.2021 (Annexure no. 3 to the claim petition) in a very casual and sketchy manner without application of mind. No opportunity of hearing was ever given to the petitioner before revising his pay or before passing recovery order/making recovery. The petitioner also submits that the recovery could not have been made from the petitioner according to the judgment of Hon'ble Apex Court in the case of State of Punjab and others Vs. Rafiq Masih (White Washer) etc. dated 18.12.2014 reported in (2015) 4 SCC 334.

Hence the claim petition.

3. Counter Affidavit has been filed on behalf of respondent no. 2 mainly stating that the respondent no.3 had objected to the pay fixation of the petitioner after sanction of the second promotional pay scale and the petitioner vide his letter dated 17.04.2021 had requested that due to wrong pay fixation of the second promotional pay scale, the excess amount paid may be recovered from his gratuity. After the same, the Chief Engineer vide his letter dated 22.04.2021 corrected and revised the pay fixation of the second time pay scale which was sanctioned to the

petitioner on 23.08.2006. According to this pay fixation, an amount of Rs. 3, 06,931/- was found to be paid in excess to the petitioner, whose details were sent to the respondent no. 3 vide letter dated 13.05.2021. The respondent no.3 issued the pension payment order to the petitioner on 15.06.2021 and recovered the amount of Rs. 3,06,931/- from his gratuity with the consent of the petitioner. The petitioner had accepted that wrong pay fixation had been made and had consented to the recovery of excess payment from his gratuity. Therefore, in his case, the judgment of Hon'ble Apex Court in Rafiq Masih (supra) is not applicable.

4. R.A. to the above C.A. has been filed by the petitioner reiterating many averments of the claim petition and also annexing the judgment dated 20.02.2018 passed by Hon'ble High Court in WPSS No. 718 of 2016, according to which, the writ petition of the petitioner, who was holder of Class-III post was allowed and the action of the respondents for recovering the amount from her salary and gratuity was quashed and set aside and the amount so deducted was directed to be refunded.

5. C.A. ha also been filed on behalf of respondent no. 3, requesting for dismissal of the claim petition with cost and stating that the respondent no. 3 is not necessary party in the claim petition and no action is called for at the level of the respondent no. 3 in the claim petition.

6. We have heard learned Counsel for the parties and perused the record.

7. Learned Counsel for the petitioner has also drawn our attention to the judgment of this Tribunal dated 20.06.2018, passed in Claim Petition NO. 38/NB/DB/2015, Jagdish Chandra Sanwal vs. State of Uttarakhand & others, which has been attained finality in the absence of any challenge and has been complied by the State of Uttarakhand. This judgment, which also cites the judgment of Hon'ble Apex Court in the case of Refiq Masih (supra), is reproduced herein below for the sake of ready reference:-

“1. The petitioner has filed the present claim petition for seeking the following reliefs:-

“A. To set-aside the impugned rejection letter dated 27.01.2015 issued by the Respondent No. 2 (Annexure No. A-1 to Compilation-I).

B. To set-aside the impugned Pay Fixation Memo dated 9-04-2013 issued by the Respondent No. 2 (Annexure No. A-10 to Compilation-II).

C. To declare the action of the respondents in revising the Pay Fixation and making the recovery from retiral dues as well as pensionary benefits of the petitioner, as arbitrary and illegal.

D. To direct the Respondents, particularly Respondent No. 2 to forthwith release the recovered amount from the retiral dues of the petitioner, alongwith the interest at a rate to be specified by this Hon’ble Tribunal.

E. To direct the Respondents, particularly Respondent No. 2 to grant all consequential benefits to the petitioner.

F. To pass any other suitable order as this Hon’ble Tribunal may deem fit and proper in the circumstances of the case.

G. To allow the claim petition with cost.”

2.1 The petitioner was initially appointed as Pharmacist in the Medical, Health and Family Welfare Department in 1972. He was promoted to the post of Chief Pharmacist in 1996. He was further promoted to the post of In-charge Officer (Pharmacy) in 2009 and thereafter, he was promoted to the post of Deputy Director (Pharmacy) on 24.12.2011. After attaining the age of superannuation, the petitioner retired from service as Deputy Director (Pharmacy) on 30.04.2012.

2.2 The petitioner was not paid pension on time. The papers for sanction of petitioner’s pension were sent to the Director, Accounts & Entitlement, Government of Uttarakhand on 05.05.2012. The Director, Accounts & Entitlement raised objections on 06.08.2012 and informed the Medical & Health Department that pay of the petitioner was wrongly fixed from time to time and the benefits of Assured Career Progression (ACP) were also sanctioned to the petitioner in excess of his entitlement. Thereafter, the exercise to re-fix the pay of the petitioner was initiated and finally the pay of the petitioner was revised by ‘Pay Fixation Memo’ dated 09.04.2013 (Annexure: A-10) by the Director General, Medical, Health & Family Welfare, Government of Uttarakhand. As a result of re-fixation of pay of the petitioner, a recovery of Rs. 1,56,409/- was ordered. There is a letter on record written by the petitioner to the Director General, Medical, Health & Family Welfare that if there is any excess payment due to re-fixation of pay, the same may be deducted from his amount of gratuity payable at the time of retirement. The contention of the petitioner is that there was an inordinate delay in sanction of his pension, gratuity etc. and, therefore, in order to expedite the retiral benefits, he was forced upon

to write such a letter so that he could get his retiral benefits which had not been paid even after more than one year of his retirement.

2.3 Thereafter, the pension papers of the petitioner were sent by the department to the Director, Accounts and Entitlement who processed the sanction of retiral benefits and then the petitioner was paid the retiral dues after deducting the amount of Rs. 1,56,409/- from the gratuity.

2.4 As the petitioner was not satisfied by his re-fixation of pay and deduction of Rs. 1,56,409/- (Annexure A-14), he submitted a representation on 12.12.2014 (Annexure: A14) challenging the re-fixation of his pay and requested to cancel the re-fixation of pay and refund the amount of recovery made from his gratuity. The representation of the petitioner was rejected on 27.01.2015 (Annexure: A1). Hence, this claim petition.

3. The main contentions of the petitioner are that his re-fixation of pay was not made in accordance with the Government Orders; he was not given any opportunity of hearing for reduction in pay of the petitioner and the ACP; reduction in his pay from the year 1996 till his retirement on 30.04.2012 cannot be done after such a long period; the Hon'ble Supreme Court in the case of **State of Punjab and others vs. Rafiq Mashih (White washer) 2015 (4) SCC, 334** has laid down the law that no recovery can be made from the retired person and no recovery can be made if it is more than 5 years' old; and the re-fixation of his pay after more than one year after retirement without any opportunity of hearing is arbitrary and bad in the eye of law.

4. Respondents No. 1 to 4 have opposed the claim petition and it has been stated in their joint written statement that the excess amount paid to the petitioner to the tune of Rs. 1,56,409/- has been rightly deducted from his gratuity. At the time of processing pension papers of the petitioner it was found that he has been wrongly paid pay since 1996 and, therefore, after careful examination, his pay has been re-fixed in 2013 and the erroneous fixation of his pay earlier was corrected in 2013 and there is no illegality and irregularity in rectifying the mistake when it came to the knowledge of the appropriate authorities. The petitioner himself admitted that if excess payment has been made to him on account of wrong fixation, the same may be recovered by deducting the same from his gratuity. The re-fixation of petitioner's pay has been made in 2013 as per the relevant orders of the Government and, therefore, the said recovery is not arbitrary or illegal. The petitioner had full knowledge that he was paid wrong amount which was not due to him as per the Government Orders. No undue or extreme hardship has been caused to the petitioner by the recovery of amount which was not his rightful claim.

5. The petitioner has also filed rejoinder affidavit and the same averments have been reiterated in it which are stated in the claim petition.

6. We have heard learned counsel for the petitioner and learned A.P.O. on behalf of the respondents and perused the record. Both the parties have argued on the same lines which have been mentioned above in paragraphs no. 3 & 4 of this order.

7. In the case of **State of Uttarakhand through Secretary, Revenue Department, Dehradun and Others Versus State Public Services Tribunal and Another, the Hon'ble High Court of Uttarakhand at Nainital in Writ Petition No. 82 of 2009 (S/B), in which the facts are similar with the facts in case at hand, has held as under:-**

"3. The facts leading to the filing of the writ petition is, that the respondent no.2 Ram Nath Sharma was promoted as a Registrar Kanoongo on 26th March, 1990 and, thereafter, promoted as an Assistant Record Officer on 26th September, 2001. The said respondent, eventually, retired from service on 31st July, 2005. During the course of his service, the said respondent was granted a second promotional pay scale in the pay scale of Rs.8000-13,500 w.e.f. 14th August, 2000 by an order of the Collector and, based on the said order, the said respondent was receiving the promotional pay scale. On 28th March, 2003, the Additional Commissioner (Revenue) submitted a report indicating therein that the said respondent was wrongly fixed and that a sum of Rs.1,43,498/- had been paid in excess and was liable to be recovered from the said respondent. When the respondent 2 employee came to know about it, he made a representation which remained pending in the State Government and, eventually, the petitioner retired on 31st July, 2005. Since the post retiral benefits were not being released, the respondent employee gave an affidavit indicating that the excess amount may be recovered from his provident fund, gratuity, etc. It has come on record that the excess amount was recovered from his post retiral dues and the balance amount was paid to the respondent employee.

7. Having heard the learned counsel for the parties and having perused the affidavits filed in the writ petition, the court is of the opinion that the order of the Tribunal does not require any interference. We find that the second promotional pay scale was fixed by the Collector and that there was no misrepresentation or fraud played on the part of the employee. Consequently, we are of the opinion that since there was no fault on the part of the employee, the excess amount so paid to the employee could not be recovered.

11. **The contention of the learned Additional Chief Standing Counsel for the petitioners that the respondent employee himself admitted and gave an affidavit that the excess amount may be recovered and, consequently, the petitioners were justified in recovering the amount is patently erroneous. The Tribunal has considered this aspect of the matter and found that the affidavit given by the employee was under coercion and had been given so that the employee could receive his post retiral dues. On the other hand, we find that the employee had also made a representation, which remained pending and the recovery of the amount has been made without giving any notice and without giving any opportunity of hearing to the employee. In view of the aforesaid, this court does not find any error in the order passed by the Tribunal. The writ petition fails and is dismissed accordingly."**

8. Hon'ble Supreme Court in State of Punjab and Others Vs. Rafiq Masih (White Washer) etc. 2014(2) UD, 576 has laid down the law in respect of situations where "recovery" is not permissible. It would be appropriate to reproduce the following paragraphs of this landmark judgment:-

"1. Leave granted.

1. All the private respondents in the present bunch of cases, were given monetary benefits, which were in excess of their entitlement. These benefits flowed to them, consequent upon a mistake committed by the concerned competent authority, in determining the emoluments payable to them. The mistake could have occurred on account of a variety of reasons; including the grant of a status, which the concerned employee was not entitled to; or payment of salary in a higher scale, than in consonance of the right of the concerned employee; or because of a wrongful fixation of salary of the employee, consequent upon the upward revision of pay scales; or for having been granted allowances, for which the concerned employee was not authorized. The long and short of the matter is, that all the private respondents were beneficiaries of a mistake committed by the employer, and on account of the said unintentional mistake, employees were in receipt of monetary benefits, beyond their due.

2. Another essential factual component in this bunch of cases is, that the respondent-employees were not guilty of furnishing any incorrect information, which had led the concerned competent authority, to commit the mistake of making the higher payment to the employees. The payment of higher dues to the private respondents, in all these cases, was not on account of any misrepresentation made by them, nor was it on account of any fraud committed by them. Any participation of the private respondents, in the mistake committed by the employer, in extending the undeserved monetary benefits to the respondent-employees, is totally ruled out. It would therefore not be incorrect to record, that the private respondents, were as innocent as their employers, in the wrongful determination of their inflated emoluments.

3. The issue that we have been required to adjudicate is, whether all the private respondents, against whom an order of recovery (of the excess amount) has been made, should be exempted in law, from the reimbursement of the same to the employer. For the applicability of the instant order, and the conclusions recorded by us hereinafter, the ingredients depicted in the foregoing two paragraphs are essentially indispensable.

.....

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."

9. After hearing both the parties, careful perusal of record and legal position stated in preceding paragraphs, we reach the following conclusions:-

(i) Admittedly, there was no misrepresentation or fraud played on the part of the petitioner; the petitioner was not guilty of furnishing any incorrect information which led to excess payment; there was no fault of the petitioner for alleged wrong fixation of his salary; and participation of the petitioner in the mistake committed by the respondents in extending the undeserved monetary benefit to the petitioner is totally ruled out.

(ii) Admittedly, the respondents have re-fixed the salary of the petitioner w.e.f. July 1996 in 2013 after more than 15 years and found out excess payment of Rs.1,56,409/-. This cannot sustain legally in view of the law laid down by the Apex Court that the recovery is impermissible when the excess payment has been made for a period in excess of five years, before the order of recovery is issued (Paragraph 12(iii) of the judgment of the Hon'ble Supreme Court quoted in paragraph 8 of this order).

(iii) Admittedly, the respondents have issued the recovery for their mistake regarding fixation of salary of the petitioner from 1996 in 2013 after the retirement of the petitioner on 30.04.2012. This is also not sustainable in view of the law laid down by the Apex Court that the recovery is impermissible from the retired employee (paragraph 12(ii) of the judgment of the Hon'ble Supreme Court quoted in paragraph 8 of this order).

(iv) The contention on behalf of respondents that the petitioner had accepted the amount of excess payment to him and, consequently, the respondents were justified in recovering the amount is patently erroneous. The perusal of record reveals that the petitioner had no alternative and under compulsion he gave no objection for deduction so that he could receive his retiral dues. On the other hand, the petitioner made representations to refund the amount as the recovery has been made without giving any notice and without giving any opportunity of hearing to the petitioner.

(v) In view of above, the recovery of Rs.1,56,409/- is not sustainable in the eye of law and the petitioner is entitled to get refund of the same

10. For the reasons stated above, the recovery of Rs. 1,56,409/- made by the respondents by deducting the same from the gratuity of the petitioner is held illegal and the petitioner is entitled for the refund of the amount of Rs. 1,56,409/- and to that extent petition deserves to be allowed. As the matter of fixation of pay pertains to the financial expertise and the same has been done after doing a detailed exercise by the Director, Accounts and Entitlement, we would not like to interfere in it. Our order is confined to the recovery of Rs. 1,56,409/- which has been made by deducting the amount from gratuity of the petitioner.

ORDER

The claim petition is partly allowed. The respondents are directed to refund the amount of Rs. 1, 56, 409/- recovered from the petitioner by way of deduction from his gratuity within a period of three months from today. No order as to costs.”

8. The Tribunal observes the following:

(i) There is no misrepresentation or fraud played on the part of the petitioner which led to excess payment and there was no fault of the petitioner for the alleged wrong fixation of salary.

(ii) The respondents have refixed the salary of the petitioner w.e.f. 23.08.2006 vide order dated 22.04.2021 i.e. after about 15 years and worked out excess payment of Rs. 3,06,931/-. Such excess payment has been made from the month of August 2006 to October 2017, totaling into Rs. 3,06,931/-. Such recovery cannot sustain legally in view of the law laid down by the Hon’ble Apex Court in Rafiq Masih case (supra) that recovery is impermissible when the excess payment has been made for a period in excess of five years, before the order of recovery is issued [Paragraph 12(iii) of the judgment of the Hon’ le Supreme Court in Rafiq Masih case.]

(iii) The respondents have issued the recovery for their mistake regarding fixation of salary of the petitioner from August 2006 to October 2017 after the retirement of the petitioner on 31.07.2020. This is also not sustainable in view of the law laid down by the Hon’ble Apex Court that the recovery is impermissible from the retired employee [Paragraph 12(ii) of the judgment of Hon’ble Apex Court in Rafiq Masih case.]

(iv) The contention of the respondents that petitioner had accepted the wrong pay fixation and had consented to the recovery of the excess amount vide letter dated 17.04.2021 and, therefore, the respondents were justified in recovering the amount is not acceptable. The petitioner had no alternative and had given his consent under compulsion, as his pension and gratuity were not being released otherwise by the respondents.

(v) In view of the above, the recovery of Rs. 3,06,931/- is not sustainable in the eye of law and the petitioner is entitled to get refund of the same. Therefore, respondents are directed to refund the amount of Rs. 3,06,931/- recovered from the petitioner by way of deduction from his gratuity within a period of three months from today. Further delay in refund of this amount would attract interest of 8% per annum for the further period of delay.

9. With the above directions, the claim petition is disposed of. No order as to costs.

(RAJENDRA SINGH)
VICE CHAIRMAN(J)

(RAJEEV GUPTA)
VICE CHAIRMAN (A)

DATE: SEPTEMBER 25, 2023
DEHRADUN
KNP