

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN**

**WRIT PETITION NO 3541 (S/S) OF 2022
[RECLASSIFIED AND RENUMBERED AS CLAIM PETITION NO. 184/SB/2022]**

1. Ravindra Kumar, aged 43 years, s/o Late Sri Pala Singh, r/o Mangal Vihar Colony, Sunehara, Roorkee, Distt. Haridwar, Presently working at the post of Head Master, Govt. Primary School, Hallu Mazra II, Block Bhagwanpur, Distt. Haridwar.
2. Raj Kumar, aged 45 years, s/o Sri Rishipal, r/o Village Fatehullapur urf Tulpura, P.O. Biharigarh, Distt. Haridwar, Presently working as Head Master, Govt. Primary School, Hasnawala, Block Bhagwanpur, Distt. Haridwar.
3. Sushil Kumar, aged 49 years, s/o Sri Har Chand, r/o Village Nanheda Anantpur, Roorkee, Distt. Haridwar, Presently working as Head Master, Govt. Primary School, Tejjupur, Block Bhagwanpur, Distt. Haridwar.
4. Abhimanyu Kumar, aged 42 years, s/o Sri Surjeet Singh, r/o Village Dayalpur, P.O. Hallu Mazra, Roorkee, Distt. Haridwar, Presently working as Assistant Teacher, Govt. Upper Primary School, Lathardeva, Block Roorkee, Distt. Haridwar.
5. Hemlata, aged 38 years, w/o Sri Abhimanyu Kumar, r/o Village Dayalpur, P.O. Hallu Mazra, Roorkee, Distt. Haridwar, Presently working as Assistant Teacher, Govt. Upper Primary School, Mohitpur, Block Bhagwanpur, Distt. Haridwar.

.....Petitioners

WITH

**WRIT PETITION NO 3538 (S/B) OF 2018
[RECLASSIFIED AND RENUMBERED AS CLAIM PETITION NO. 181/SB/2022]**

Pradeep Kumar, s/o Sri Biram Singh, r/o Village Narsan Khurd, P.O. Gurukul Narsan District Haridwar, presently working as Assistant Teacher, Govt. Upper Primary School, Gopalpur, Block Narsan, Distt. Haridwar, and 04 others.

.....Petitioners

WITH

**WRIT PETITION NO 3539 (S/B) OF 2018
[RECLASSIFIED AND RENUMBERED AS CLAIM PETITION NO. 182/SB/2022]**

Arvind Kumar, age 40 years, s/o Sri Tej Singh Verma, r/o 456/3 Rajendra Nagar, Gali No. 10 Roorkee, Haridwar, presently working as Assistant Teacher, Govt. Upper Primary School, Dhandera, Block Narsan, Distt. Haridwar, and 03 others.

.....Petitioners

WITH

WRIT PETITION NO 3540 (S/B) OF 2018
[RECLASSIFIED AND RENUMBERED AS CLAIM PETITION NO. 183/SB/2022]

Mrs. Sanjeeta, aged 46 years, w/o Rajesh Kumar, r/o I.R.I. Colony 23/1 Roorkee, Haridwar, presently working as Assistant Teacher, Govt. Upper Primary School, Shikarpur, Block Narsan, Distt. Haridwar, and 04 others.

.....Petitioners

WITH

WRIT PETITION NO 3580 (S/B) OF 2018
[RECLASSIFIED AND RENUMBERED AS CLAIM PETITION NO. 185/SB/2022]

Mrs. Savita Sharma, aged 51 years, w/o Sri Adesh Sharma, r/o H. No. 474/3 E Shivam Vihar, Ganeshpur, Roorkee, Tehsil Haridwar, presently working as Assistant Teacher, Govt. Upper Primary School, Susadi Khurd, Block Narsan, Distt. Haridwar, and 03 others.

.....Petitioners

WITH

WRIT PETITION NO 3581 (S/B) OF 2018
[RECLASSIFIED AND RENUMBERED AS CLAIM PETITION NO. 186/SB/2022]

Sushil Kumar, aged 53 years, s/o Sri Ratan Singh, r/o Kishanpur Jamalpur, Roorkee, Distt. Haridwar, presently working as Head Master, Govt. Primary School, Bhalswagaj, Block Bhagwanpur, Distt. Haridwar, and 03 others.

.....Petitioners

WITH

WRIT PETITION NO 3588 (S/B) OF 2018
[RECLASSIFIED AND RENUMBERED AS CLAIM PETITION NO. 187/SB/2022]

Sushil Kumar, aged 49 years, s/o Sri Mahavir Singh, r/o Village Nizampur Gurkul Narsan Tehsil Roorkee, Haridwar, presently working as Assistant Teacher, Govt. Upper Primary School, Aamkheri, Block Narsan, Distt. Haridwar, and 02 others.

.....Petitioners

VS.

The State of Uttarakhand through Secretary, School Education, Civil Secretariat, Dehradun.

Director General, School Education, Directorate of School Education, Nanoorkhera, Dehradun.

Director (Primary Education), Directorate of School Education, Nanoorkhera, Dehradun.

Chief Education Officer, Distt. Haridwar.

District Basic Education Officer, Distt. Haridwar.

Deputy Block Education Officer, Block Bhagwanpur, Distt. Haridwar.

.....Respondents

Present: Ms. Neetu Singh, Advocate, for the petitioners.
Sri V.P.Devrani, A.P.O., for the respondents.

JUDGMENT

DATED: MARCH 07, 2024.

Justice U.C.Dhyani (Oral)

Since the factual matrix and law governing the field in the above noted claim petitions are the same, therefore, all the claim petitions are being decided by a common judgment and order, for the sake of brevity and convenience, with the consent of Ld. Counsel for the parties.

2. Claim Petition No. 184/SB/2022 [WPSS No. 3541/ 2018] Ravindra Kumar and others vs. State of Uttarakhand and others shall be the leading case.

3. Hon'ble High Court of Uttarakhand at Nainital has transferred the above noted writ petitions to this Tribunal *vide* order dated 17.10.2022. Order passed by Hon'ble Court in WPSS No. 3541 of 2018, on 17.10.2022, is as follows:

“The present Writ Petition has been filed by the petitioners with the following reliefs:-

(i) Issue an appropriate writ, order or direction in the nature of Certiorari to quash the impugned Order No. अर्थ-5 (क)/2129-32/वेतन निर्धारण निर्धारण/2018-19 dated 28.04.2018 (annexed as Annexure No.6 to this writ petition), issued by the respondent No. 3, in the interests of justice to petitioners.

(ii) Issue an appropriate order, Writ or directions in the nature of Mandamus directing the respondents to allow the petitioners to submit their options for fixing their Pay w.e.f. the date of their promotions as per provisions of Uttarakhand Govt. G.O. No. 27/XXVII(7) (स्प-1)/2009 dated 13.02.2009 (annexed herewith as Annexure No. 3) to meet ends of justice to the petitioner.

(iii) Issue an appropriate order, Writ or directions in the nature of Mandamus directing the respondent no. 1 to accept the recommendations of the respondent no. 3, the Director Primary Education of Uttarakhand, submitted vide the Letter No. प्राशिक्षो-दो(2)/7177/18(8)/2018-19 dated 11.07.2018 (annexed herewith as Annexure No. 8) in the interests of justice to petitioner.

(iv) Issue an appropriate order, Writ or directions in the nature of Mandamus directing the respondent no. 3 to decide the representations dated 26.06.2018 of petitioners by an speaking orders and till such decision on the representations, no recovery should be made from the petitioners.

2. Heard Mrs. Neetu Singh, the learned counsel and Mr. Vinod Joshi, the learned counsel for the petitioners and Mrs. Anjali Bhargava, the learned Additional C.S. C. for the State assisted by Mrs. Indu Sharma, the learned Brief Holder for the State.

3. Counter affidavit, filed by the State, is taken on record.

4. During the arguments, Mrs. Anjali Bhargava, the learned Additional C.S.C. for the State submitted that the present matter relates to the conditions of service of public servants, therefore, the petitioners have an alternate efficacious remedy to raise their grievances before the Uttarakhand Public Services Tribunal.

5. Mrs. Neetu Singh and Mr. Vinod Joshi, the learned counsel for the petitioners, agree to transfer the present matter to the Uttarakhand Public Services Tribunal.

6. As the disputes raised in the present writ petition can be effectively adjudicated by the Uttarakhand Public Services Tribunal, with the consent of the parties, the complete record along with the writ petition, after retaining the copies thereof, is being transmitted to the Uttarakhand Public Services Tribunal for hearing the writ petition as a claim petition in accordance with law.

7. The Uttarakhand Public Services Tribunal is also requested to consider entertaining the present matter as a claim petition taking into consideration this fact that the present matter has been pending for past four years.

8. The learned counsel appearing for the petitioners requested to extend the interim order dated 10.10.2018.

9. In the facts and circumstances of the case, till the Uttarakhand Public Services Tribunal takes cognizance of the present matter, the impugned order dated 28.04.2018 (Annexure No. 6 to the writ petition) is kept in abeyance.

10. The present Writ Petition (S/S No. 3541 of 2018) stands disposed of accordingly.”

[Emphasis supplied]

4. Writ Petition No. 3541 (SS) 2018 Ravindra Kumar and others vs. State of Uttarakhand and others, Writ Petition No. 3538 (SS) 2018, Pradeep Kumar and others vs. State of Uttarakhand and others, Writ Petition No. 3539 (SS) 2018, Arvind Kumr and others vs. State of Uttarakhand and others, Writ Petition No. 3540 (SS) 2018, Sanjeeta and others vs. State of Uttarakhand and others, Writ Petition No. 3580 (SS) 2018, Savita Sharma and others vs. State of Uttarakhand and others, Writ Petition No. 3581 (SS) 2018, Sushil Kumar and others vs. State of Uttarakhand and others and Writ Petition No. 3588 (SS) 2018, Sushil Kumar and others vs. State of Uttarakhand and others are, accordingly, reclassified and renumbered as Claim Petitions No. 184/SB/2022, 181/SB/2022, 182/SB/202, 183/SB/2022, 185/SB/2022, 186/SB/20222 and 187/SB/2022, respectively. Since the reference in this Tribunal shall be of the writ petition filed before the Hon'ble High Court, but shall be dealt with as claim petition, therefore, the claim petition shall be referred to as 'petition' and petitioner shall be referred to as 'petitioner', in the body of the judgment.

5. Two interim orders were passed by the Hon'ble High Court in the above noted petitions. *Vide* order dated 10.10.2018, Hon'ble Court passed the following order:

“....Having considered the submissions of Learned Counsel for the petitioner, it is directed that, no recovery shall be made from the petitioner pursuant to impugned order dated 28.04.2018 during the pendency of the present writ petition.....”

6. Another interim order was passed by the Hon'ble Court on 17.10.2022, which has been reproduced in para 3 of this judgment. Order dated 17.10.2022 was passed by the Hon'ble Court subsequent to filing Counter Affidavit by the State/ respondents.

7. There is no quarrel about the fact that the petitioners are Class-III employees. Their case is covered by Situation (i) of decision rendered by Hon'ble Apex Court in State of Punjab vs. Rafiq Masih, (2015) 4 SCC 334. After hearing Ld. Counsel for the parties and in view of the decision rendered in Rafiq Masih's decision (*supra*) this Tribunal, *prima facie*, is of the view that interim order dated 17.10.2022, passed by Hon'ble Court should be made absolute.

8. The Bench has been taken through various grounds, which have been mentioned in the petition by Ld. counsel for the petitioners. The Tribunal does not think it necessary to reproduce those grounds, for, they are already part of record. Relevant documents have been filed in support of the petition.

9. Petitions have been contested by the respondents. Counter Affidavit has been filed by Sri S.P.Semwal, District Education officer, Elementary Education, Haridwar. The C.A. was filed before Hon'ble High Court.

10. In Para 5 of such C.A., it has been mentioned that as per para 15 of the Govt. Order No. 395 dated 17.10.2008, the employee has to submit option in writing provided in the Form annexed as Annexure 3 to the Govt. Orders within 90 days from the date of the issuance of the Govt. Order for revision of pay scale w.e.f. 01.01.2006 and thereafter according to Para 3 of the Govt. Order No. 27 dated 13.02.2009, the option has been submitted for revision of pay scale on sanctioning promotional/ selection pay scale. Para 5 of the Govt. Order provides that the facility of submission of option for revision of pay scale is extended for further three months. The petitioners have not submitted any option, whereas the petitioners have received the arrears of salary of revision of pay scale w.e.f. 01.01.2006 according to provision of the Govt. Order No. 395. Since, according to Para 5 of the Govt. Order No. 161 dated 28.11.2017, the revision of pay scale has to be made as per the Fitment Table from the scale applicable in the 5th Pay Commission to the scale revised in 6th Pay Commission and the employee is to be granted the benefit of Fitment Table only once for the revision of pay scale. Therefore, the order dated 28.04.2018 has been issued.

11. It has also been mentioned in para 8 of the C.A. that the petitioners have been granted the arrears of revision of pay scale w.e.f. 01.01.2006 according to the provisions of the Govt. Order No. 395 dated 17.10.2008. The promotions of the petitioners have been made in the year 2008. The petitioners have been granted the benefit of Fitment Table in the revised pay scale. According to Para 15 of the Govt. Order No. 395, those Teachers who have submitted option for determination of salary according to revision of pay scale w.e.f. 01.01.2006 before the competent authority, their salary has to be

determined as per provisions of Govt. Order No. 395 dated 17.10.2008, Govt. Order No. 74 dated 01.03.2009 and Govt. Order No. 693 dated 21.01.2010. Similarly, those Teachers who have been sanctioned the selection pay scale prior to 01.01.2006 in the Pay Scale of Rs. 5000-150-8000/-, their salary according to Govt. Order No. 74 dated 01.03.2009 read with Govt. Order No. 693. dated 21.10.2021 has been fixed minimum to Rs. 17140/- according to the Fitment Table *w.e.f.* 01.01.2006.

12. In para 10 of the C.A. it has clearly been mentioned that the petitioners have not submitted any option before the competent authority. Office order dated 04.08.2022 has been filed along with C.A.

13. Ld. A.P.O. has opposed the petition on the similar lines which have been taken by the respondents in their C.A. He submitted that there is no provision to obtain option in the case of promotional pay scale and selection grade.

14. R.A. has been filed on behalf of the petitioners. The facts contained in the petition have been reiterated in the R.A. At the same time, new facts, which have emerged in the C.A., have been controverted in the R.A.

15. In para 17 of the G.O. dated 17.10.2008 (Annexure: 2), it has been mentioned that if option (in writing) of the employee is not received, then it will be presumed that the employee has opted for amended pay scale and he will be given pay as per the amended pay structure *w.e.f.* 01.01.2006. Various representations were given to the respondents, including the last one on 26.06.2018 by the petitioners, but the same have not been decided so far. This has been mentioned in para 'd' of the prayer clause of the petition.

16. **A letter has been written by Director, Primary Education, Uttarakhand to the Secretary, Primary Education, Govt, of Uttarakhand, Dehradun, on 11.07.2018 (Annexure: 8), recommending the case of the petitioners. It is pointed out by Ld. Counsel for the petitioners that no action has been taken on such recommendation. Finance Controller, School Education, Uttarakhand, has written letters to: (a) The Chief Education Officers, Uttarakhand and (b) Finance Officers, (Primary/ Secondary Education), Uttarakhand, on 06.02.2023 (Annexure: S.A.-8 to the supplementary affidavit). Mode of pay fixation has been appended to such directions. Such instructions**

issued by the Finance Controller are in accordance with the case of the petitioners. Detailed instructions given by the Finance Controller justify the case of the petitioners, which they have taken in present petition.

17. Since no decision has been taken by Respondent No.1 on such recommendation, therefore, the Tribunal is of the view that the directions should be given to Respondent No.1 to take reasoned decision on such recommendations viz: (i) letter written by Director, Primary Education, Uttarakhand to the Secretary, Primary Education, Govt, of Uttarakhand, Dehradun, on 11.07.2018 and (ii) Instructions issued by the Finance Controller, School Education, Uttarakhand, in letters written to: (a) The Chief Education Officers, Uttarakhand and (b) Finance Officers, (Primary/ Secondary Education), Uttarakhand, on 06.02.2023.

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18. So far as recovery of excess and overpayment is concerned, Hon'ble Apex Court, in a number of decisions, has discussed this issue. Hon'ble Supreme Court in Paragraphs 6, 7 & 8 of the decision rendered in *State of Punjab vs. Rafiq Masih, (2015) 4 SCC 334*, has observed as below:

"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 the 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 employee concerned. If the effect of the recovery from the employee concerned 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."

[Emphasis supplied]

19. Based on the decision, rendered by Hon'ble Apex Court in *Syed Abdul Qadir vs. State of Bihar*, (2009) 3 SCC 475 and hosts of other decisions, which were cited therein, including the decision of *B.J. Akkara vs. Union of India*, (2006) 11 SCC 709, the Hon'ble Apex Court concluded thus:

"18. 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."

[Emphasis supplied]

20. It will be pertinent to quote relevant observation of Hon'ble Apex Court made in the decision rendered in *Civil Appeal No. 7115/2010, Thomas Daniel vs. State of Kerala & others*, herein below for convenience:

"(9) This Court in a catena of decisions has consistently held that if the excess amount was not paid on account of any misrepresentation or fraud of the employee or if such excess payment was made by the employer by applying a wrong principle for

calculating the pay/allowance or on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable. This relief against the recovery is granted not because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered. This Court has further held that if in a given case, it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may on the facts and circumstances of any particular case order for recovery of amount paid in excess.”

[Emphasis supplied]

21. It will also be pertinent to reproduce relevant observations of Hon’ble Supreme Court in the decision rendered in Civil Appeal No.1985 of 2022, the State of Maharashtra and another vs. Madhukar Antu Patil and another, on 21.03.2022, herein below for convenience:

“2. That respondent no.1 herein was initially appointed on 11.05.1982 as a Technical Assistant on work charge basis and continued on the said post till absorption. By G.R. dated 26.09.1989, 25 posts of Civil Engineering Assistants were created and respondent no.1 herein was absorbed on one of the said posts. Respondent no.1 was granted the benefit of first Time Bound Promotion (for short, ‘TBP’) considering his initial period of appointment of 1982 on completion of twelve years of service and thereafter he was also granted the benefit of second TBP on completion of twenty four years of service. Respondent No.1 retired from service on 31.05.2013. After his retirement, pension proposal was forwarded to the Office of the Accountant General for grant of pension on the basis of the last pay drawn at the time of retirement.

2.1 The Office of the Accountant General raised an objection for grant of benefit of first TBP to respondent no.1 considering his date of initial appointment dated 11.05.1982, on the basis of the letter issued by Water Resources Department, Government of Maharashtra on 19.05.2004. It was found that respondent no.1 was wrongly granted the first TBP considering his initial period of appointment of 1982 and it was found that he was entitled to the benefit from the date of his absorption in the year 1989 only. Vide orders dated 06.10.2015 and 21.11.2015, his pay scale was down-graded and consequently his pension was also re-fixed.

2.2 Feeling aggrieved and dissatisfied with orders dated 06.10.2015 and 21.11.2015 down-grading his pay scale and pension, respondent no.1 approached the Tribunal by way of Original Application No. 238/2016. By judgment and order dated 25.06.2019, the Tribunal allowed the said original application and set aside orders dated 06.10.2015 and 21.11.2015 and directed the appellants herein to release the pension of respondent no.1 as per his pay scale on the date of his retirement. While passing the aforesaid order, the Tribunal observed and held that respondent no.1 was granted the first TBP considering his initial period of appointment of 1982 pursuant to the approval granted by the Government vide order dated 18.03.1998 and the subsequent approval of the Finance Department, and therefore, it cannot be said that the benefit of the first TBP was granted mistakenly. The Tribunal also observed that the services rendered by respondent no.1 on the post of Technical Assistant (for the period 11.05.1982 to 26.09.1989) cannot be wiped out from consideration while granting the benefit of first TBP.

2.3 Feeling aggrieved and dissatisfied with the judgment and order passed by the Tribunal, quashing and setting aside orders dated 06.10.2015 and 21.11.2015, re-fixing the pay scale and pension of respondent no.1, the appellants herein preferred writ petition before the High Court. By the impugned judgment and order, the High Court has dismissed the said writ petition. Hence, the present appeal.

3.

3.1 At the outset, it is required to be noted and it is not in dispute that respondent no.1 was initially appointed on 11.05.1982 as a Technical Assistant on work charge basis. It is also not in dispute that thereafter he was absorbed in the year 1989 on the newly created post of Civil Engineering Assistant, which carried a different pay scale. Therefore, when the contesting respondent was absorbed in the year 1989 on the newly created post of Civil Engineering Assistant which carried a different pay scale, he shall be entitled to the first TBP on completion of twelve years of service from the date of his absorption in the post of Civil Engineering Assistant. The services rendered by the contesting respondent as Technical Assistant on work charge basis from 11.05.1982 could not have been considered for the grant of benefit of first TBP. If the contesting respondent would have been absorbed on the same post of Technical Assistant on which he was serving on work charge basis, the position may have been different. The benefit of TBP scheme shall be applicable when an employee has worked for twelve years in the same post and in the same pay scale.

4. In the present case, as observed hereinabove, his initial appointment in the year 1982 was in the post of Technical Assistant on work charge basis, which was altogether a different post than the newly created post of Civil Engineering Assistant in which he was absorbed in the year 1989, which carried a different pay scale. Therefore, the department was right in holding that the contesting respondent was entitled to the first TBP on completion of twelve years from the date of his absorption in the year 1989 in the post of Civil Engineering Assistant. Therefore both, the High Court as well as the Tribunal have erred in observing that as the first TBP was granted on the approval of the Government and the Finance Department, subsequently the same cannot be modified and/or withdrawn. Merely because the benefit of the first TBP was granted after the approval of the Department cannot be a ground to continue the same, if ultimately it is found that the contesting respondent was entitled to the first TBP on completion of twelve years of service only from the year 1989. Therefore both, the High Court as well as the Tribunal have committed a grave error in quashing and setting aside the revision of pay scale and the revision in pension, which were on re-fixing the date of grant of first TBP from the date of his absorption in the year 1989 as Civil Engineering Assistant.

5. However, at the same time, as the grant of first TBP considering his initial period of appointment of 1982 was not due to any misrepresentation by the contesting respondent and on the contrary, the same was granted on the approval of the Government and the Finance Department and since the downward revision of the pay scale was after the retirement of the respondent, we are of the opinion that there shall not be any recovery on re-fixation of the pay scale. However, the respondent shall be entitled to the pension on the basis of the re-fixation of the pay scale on grant of first TBP from the year 1989, i.e., from the date of his absorption as Civil Engineering Assistant.

6. In view of the above and for the reasons stated above, the present appeal succeeds in part. The impugned judgment and order passed by the High Court as well as that of the Tribunal quashing and setting aside orders dated 6.10.2015 and 21.11.2015 downgrading the pay scale and pension of the contesting respondent are hereby quashed and set aside. It is observed and held that the contesting respondent shall be entitled to the first TBP on completion of twelve years from the year 1989, i.e., from the date on which he was absorbed on the post of Civil Engineering

Assistant and his pay scale and pension are to be revised accordingly. However, it is observed and directed that on re-fixation of his pay scale and pension, as observed hereinabove, there shall not be any recovery of the amount already paid to the contesting respondent, while granting the first TBP considering his initial appointment from the year 1982.

[Emphasis supplied]

22. Reliance may also be placed on the detailed observations of the Hon'ble High Court of Uttarakhand, made in the decision rendered in WPSS No. 363 of 2022 and connected petitions on 05.01.2024, as follows:

“7. Amended memo of parties be filed during the course of the day.

8. Since common questions of law and fact are involved in these writ petitions, therefore they are being heard together and are being decided by a common judgment. However, for the sake of brevity, facts of Writ Petition (S/S) No. 363 of 2022 alone are being considered and discussed.

9. Petitioners are Group-C & Group-D employees of Uttarakhand Transport Corporation. Most of them have retired from service; however, some of them are still serving. While serving the Corporation, petitioners were given benefit of Assured Career Progression Scheme under which next higher pay band/ grade pay is admissible to an employee, after putting in continuous satisfactory service for certain number of years. However, the Audit Team constituted by Finance Controller of Uttarakhand Transport Corporation, in its report dated 11.11.2020 flagged the issue of excess payment as ACP to Group-C & Group-D employees. Based on the said report, the record of all the employees was scrutinized, and it was found that excess payment has been made to large number of Group-C & Group-D employees, including the petitioners. Consequently, order for recovery of excess amount paid to such employees were passed.

10. Since the amount paid as ACP to petitioners has been ordered to be recovered by the Competent Authority in Uttarakhand Transport Corporation, therefore, they have approached this Court by filing these writ petitions.

11. Learned counsel for petitioners submit that petitioners are low paid employees of a statutory Corporation, who neither misrepresented any fact for claiming benefit of ACP nor practiced any fraud for getting the monetary benefits, which are now sought to be recovered from them, therefore, the order of recovery passed against petitioners is unsustainable. Reliance has been placed upon the law declared by Hon'ble Supreme Court in the case of State of Punjab v. Rafiq Masih, (2015) 4 SCC 334.

12. Per contra, learned counsels for Uttarakhand Transport Corporation contend that this is a case of correction of mistake, and excess payment was noticed only when the Audit Team flagged the issue of excess payment to the employees of Corporation.

13. Mr. M.C. Pant, learned counsel for petitioners in some of the writ petitions, however, submits that report of the Audit Team has been negated by coordinate Bench of this Court in WPSS No. 1593 of 2021.

14. Hon'ble Supreme Court in the case of State of Punjab v. Rafiq Masih, (2015) 4 SCC 334 has categorised cases in which recovery of excess payment, made to an employee, would be impermissible. Para no. 18 of the said judgment is reproduced below:-

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15. Hon'ble Supreme Court in the case of Thomas Daniel v. State of Kerala, 2022 SCC On Line SC 536 has held that if the excess amount was not paid on account of any misrepresentation or fraud of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order which is

subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable.

16. The guidelines issued by Hon'ble Supreme Court in the case of State of Punjab v. Rafiq Masih (*supra*) are law of the land. As per those guidelines, excess amount, if paid to Group-C & Group-D employees cannot be recovered, especially, when such employee are not at fault for such excess payment. Moreover, few petitioners are still serving and majority of the petitioners have retired, therefore, their case is also covered by Clause (ii) of the aforesaid judgment.

17. Mr. Ashish Joshi, learned counsel for respondent-corporation does not dispute that it is not a case where the employees were given excess amount as remuneration due to fraud or misrepresentation by them. Thus, it can be safely inferred that it was a mistake on the part of the Corporation as employer, therefore, petitioners, who are Group-C & Group-D employees cannot be made liable to repay the amount, which was paid to them due to mistake on the part of employer.

18. Accordingly, writ petitions are allowed and the respondent-corporation is restrained from recovering any amount, which was allegedly paid in excess to petitioners than what they were entitled to. The retiral dues, including gratuity of petitioners, if withheld for recovery of the excess payment, shall be released forthwith.”

[Emphasis supplied]

23. Hon'ble High Court of Uttarakhand has also followed Rafiq Masih's case (*supra*) in the decision rendered on 15.05.2017 in WPSB No. 229/2014, Rishi Dev Mishra vs. State of Uttarakhand.

24. Present case is squarely covered by situations no. (i) & (ii) of the decision rendered by Hon'ble Supreme Court in Rafiq Masih's case (*supra*). Those employees, who are about to retire within one year, their case is covered by situation no. (ii) of the aforesaid decision.

25. This Tribunal has already observed above that the interim orders passed by the Hon'ble High Court should be made absolute in terms of Rafiq Masih's case (*supra*) and hosts of other decisions.

26. Ld. Counsel for the parties submitted that such an order may be passed by Single Bench of the Tribunal.

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27. Petitions are disposed of by directing Respondent No.1 to take informed decision on the recommendations of - (i) Director, Primary Education, Uttarakhand to the Secretary, Primary Education, Govt. of Uttarakhand, Dehradun, on 11.07.2018 (Annexure: 8) and (ii) Instructions issued by the

Finance Controller, School Education, Uttarakhand, in letters written to: (a) The Chief Education Officers, Uttarakhand and (b) Finance Officers, (Primary/Secondary Education), Uttarakhand, on 06.02.2023, at an early date and without unreasonable delay.

Interim order dated 17.10.2022 passed by the Hon'ble High Court, is made absolute.

No order as to costs.

28. Let copies of this judgment be placed on the files of Petitions No. 181/SB/2022, Pradeep Kumar and others, 182/SB/2022, Arvind Kumr and others, 183/SB/2022, Sangeeta and others, 185/SB/2022, Savita Sharma, 186/SB/2022 Sushil Kumar and others and 187/SB/2022 Sushil Kumar and others.

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: MARCH 07, 2024
DEHRADUN

VM