

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

CLAIM PETITION NO. 38/SB/2024

Sri Deepraj Singh Nayal, aged about 62 years, s/o Late Sri Anand Singh Nayal, retired Dehradun, Uttarakhand.

.....Petitioner

vs.

1. The Secretary, Agriculture and Farmers Welfare, Govt. of Uttarakhand, Secretariat, Dehradun.
2. Finance Controller, Agriculture and Farmers Welfare Department.
3. Director of Treasury, Pension and Entitlement, 23 Laxmi Road, Dehradun.
4. Director, Horticulture Food Processing, Udhyan Bhawan Chaubatia, Ranikhet, Almora.
5. Chief Mushroom Development Officer, Office at Ashok Vihar, Lane No.3, Near Kanishka Hospital, Dehradun.

.....Respondents

Present: Sri Uttam Singh, Advocate, for the petitioner.
Sri V.P. Devrani, A.P.O. for the State Respondents.

JUDGMENT

DATED: MAY 22, 2024

Justice U.C.Dhyani (Oral)

By means of present claim petition, petitioner seeks the following reliefs:

- “(i) To set aside the impugned recovery amounting to Rs.3,36,978/- from the Earned Leave of the petitioner and refund the same along with 18% interest to the petitioner.
- (ii) To quash the impugned re-pay fixation order dated 28.04.2023 by which the respondent department has arbitrarily and malafidely passed order against the petitioner after retirement.
- (iii) Issue any other suitable order which this Hon’ble Tribunal may deem fit and proper on the basis of facts and circumstances of the case.
- (iv) Award the cost of the claim petition to the petitioner.”

2. The Chief Mushroom Development Officer has passed the impugned order dated 28.04.2023 (Annexure: A-1), whereby pay of the petitioner has been refixed. As per the enclosure to order dated 28.04.2023 (Annexure: A-1 *colly*), a sum of Rs.3,36,978/- has been recovered from the petitioner. Petitioner has retired on 31.12.2022 (Annexure: A-2).

3. Two orders, which have been passed against the petitioner, are under challenge in present claim petition. They are- (i) refixation of his pay & (ii) recovery of excess payment of Rs.3,36,978/-.

4. Ld. Counsel for the petitioner submitted that no recovery can be made from retiral dues of a Govt. Employee, in view of the decision rendered by Hon’ble Supreme Court in *State of Punjab vs. Rafiq Masih*, (2015) 4 SCC 334.

5. Ld. Counsel for the petitioner drew attention of the Bench towards Paragraphs 6, 7 & 8 of the decision rendered by Hon’ble Supreme Court in *State of Punjab vs. Rafiq Masih*, (2015) 4 SCC 334, which read 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]

6. 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 in Rafiq Masih's case (*supra*) 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]

7. Hon'ble Apex Court, in the decision rendered in *Civil Appeal No. 7115/2010, Thomas Daniel vs. State of Kerala & others*, has observed as under:

"(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.”

8. Ld. A.P.O. submitted that correct fixation of pay is permissible in view of the decision rendered by Hon’ble Supreme Court in *Civil Appeal No.1985 of 2022, the State of Maharashtra and another vs. Madhukar Antu Patil and another, on 21.03.2022*. Relevant observations of Hon’ble Court are reproduced 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]

9. Ld. Counsel for the petitioner submitted that petitioner will make a representation to the Director, Horticulture and Food Processing, Udyan Bhawan Chaubatia, Ranikhet, District Almora (Respondent No.4), who should be directed to decide the representation of the petitioner in the light of decision rendered by Hon'ble Supreme Court in State of Punjab vs. Rafiq Masih (*supra*). In reply, Ld. A.P.O. submitted that Respondent No. 4 should also be directed to decide representation of the petitioner in the light of decision rendered by Hon'ble Supreme Court in State of Maharashtra and another vs. Madhukar Antu Patil (*supra*).

10. Innocuous prayer of the petitioner is worth accepting.

11. The claim petition is disposed of, at the admission stage, with the consent of Ld. counsel for the parties, by directing Respondent No.4 to decide the representation of the petitioner, by a reasoned and speaking order, in the light of decisions rendered by Hon'ble Supreme Court in *State of Punjab vs. Rafiq Masih, (2015) 4 SCC 334 & Civil Appeal No.1985 of 2022, the State of Maharashtra and another vs. Madhukar Antu Patil and another*, without unreasonable delay, preferably within 12 weeks of presentation of certified copy of this order along with representation, enclosing the documents in support thereof. No order as to costs.

12. Rival contentions are left open.

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: MAY 22, 2024.
DEHRADUN

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