

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

Present: Hon'ble Mr. Justice U.C.Dhyani

.....Chairman

Hon'ble Capt. Alok Shekhar Tiwari

.....Member (A)

CLAIM PETITION NO. 40/NB/DB/2023

Narayan Ram, aged about 63 years, s/o Sri Mangal Ram, r/o Village Uprara
Munauli, P.O. Balgari, District Pithoragarh.

.....Petitioner

vs.

1. State of Uttarakhand through Secretary, Irrigation, Govt. of Uttarakhand, Dehradun.
2. Chief Engineer, Minor Irrigation, Dehradun.
3. Superintending Engineer, Minor Irrigation, Nainital.
4. Executive Engineer, Minor Irrigation, Divisional Office, Pithoragarh.
5. Accountant General, Uttarakhand, Dehradun.

.....Respondents

(Virtually)

Present: Sri Harish Adhikari, Advocate, for the Petitioner
Sri Kishore Kumar, A.P.O., for the Respondents no. 1 to 4
Sri Rajesh Sharma, Advocate for the respondent no. 5

JUDGMENT

DATED: AUGUST 16, 2024

Justice U.C.Dhyani (Oral)

RELIEFS

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

- (i). To issue order or direction appropriate in nature and set aside the orders dated 18.01.2021, 10.05.2021 and 19.11.2022 and declare the recovery of Rs. 6,20,821/- (Rupees Six Lakh Twenty Thousand Eight Hundred Twenty one only) from the gratuity of the petitioner is illegal, arbitrary and unjust and direct the respondents to refund the same to the petitioner forthwith along with interest 18% interest as the impugned orders are running contrary to the judgments of the Hon'ble Apex Court passed in State of Punjab vs. Rafiq Masih & others (2015) 4 SCC 334 and in the case of Thomas Daniel vs. State of Kerela and others passed

in Civil Appeal No. 7115 of 2010 decided on 02 May 2022 after calling the entire records from the respondents or in alternate pass any appropriate orders keeping in view of the facts highlighted in the body of the petition or mould the relief appropriately.

(ii) To issue order or direction appropriate in nature by directing the respondents to calculate the retiral dues of the petitioner such as Gratuity, Leave Encashment and pension on the basis of his last drawn salary and pay the same along with interest and also pay the interest on the delayed payment of Gratuity as per the provisions contained in Gratuity Act or in alternate pass any appropriate orders keeping in view of the facts highlighted in the body of the petition or mould the relief appropriately.

(ii) To issue any other order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

PETITIONER'S VERSION

2. This is a second round of litigation between the parties. Earlier, the petitioner filed Claim Petition No. 07/NB/DB/2021, which was decided by the Tribunal *vide* order dated 07.09.2022. Instead of narrating the facts of the petition again, it is better if the operative portion and relevant facts, as narrated in the decision dated 07.09.2022, are reproduced herein below for convenience:

“2.1 The petitioner was appointed as Assistant Boring Technician on 08.01.1991. He was granted the benefit of 1st Assured Career Progression (ACP) after satisfactory service of 14 years *vide* order dated 26.04.2006 issued by the respondent no. 4. The petitioner was promoted on the next higher post of Boring Technician *vide* order dated 23.11.2011 in Pay Band of Rs. 5200-20200, Grade Pay Rs. 2400. After completion of 18 years' service on 28.01.2009, the petitioner was granted 2nd ACP with Grade Pay Rs. 2800/- *vide* order dated 21.07.2012. The petitioner was given the promotional pay scale of Rs. 9300-34800, Grade Pay Rs. 4600/- *vide* order dated 19.08.2017.

2.2 The G.O. dated 03.06.2019 provides for Grade Pay of Rs. 5400 to the Junior Engineers promoted from the cadre of Assistant Boring Technician/Boring Technician.

2.3 The petitioner superannuated on 31.05.2020. On 18.01.2021 without prior notice, respondents issued a recovery of Rs. 6,20,801.00 (Rs. Six Lac Twenty Thousand Eight Hundred and One only) against the petitioner and further it has been directed that the Grade Pay of the petitioner is reduced from Rs. 4600 to Rs. 2800. Thereafter impugned orders dated 10.05.2021 and 28.05.2021 have been passed by respondent no. 4 where recovery of Rs. 4,99,547/- has been worked out. The respondents have not paid the post-retiral dues as well as other benefits of the petitioner such as T.A. Bills, Medical Bills, GIS, Gratuity and Pension.

2.4 The petitioner has received the payment of General Provident Fund and earned leave. The other post retiral dues are still unpaid by the respondents. The contention of the petitioner is that the impugned orders dated 18.01.2021, 10.05.2021 and 28.05.2021 have been passed against the petitioner after his retirement of service without

granting any opportunity of hearing. After the retirement of the petitioner, recovery of Rs. 4,99,547/- vide orders dated 10.05.2021 and 28.05.2021 is not only illegal but arbitrary also. The reduction of pay scale/Grade Pay of a retired employee/petitioner by way of impugned orders dated 18.01.2021, 10.05.2021 and 28.05.2021 is arbitrary, unreasonable, in violation of Article 14,21 and 300A of the Constitution of India.

2.5 The petitioner cannot be penalized for any action/inaction on the part of the respondents after his retirement, inasmuch as the salary and other benefits which have already been availed by the petitioner and consumed assuming it as his property, cannot be taken away by the respondents by way of an arbitrary and illegal order. Similarly situated person namely Rajender Pandey, who retired just a month before the petitioner, has been given the benefit of Grade Pay Rs. 4600/- at his retirement and consequently his pension is being computed on the basis of Grade Pay Rs. 4600/-. Before approaching this Tribunal, applicant filed a writ petition under Article 226 before Hon'ble High Court of Uttarakhand being Writ Petition (S/S) 531 of 2021 seeking the same relief which, on alternate remedy being available before the Tribunal was dismissed as withdrawn with liberty to file a claim petition vide judgment and order dated 20.04.2021.

Hence this claim petition.

3. The claim petition was admitted vide order dated 06.08.2021 by this Tribunal which also provided that the respondent department shall release admissible provisional pension to the petitioner, without unreasonable delay, as orally prayed for by learned Counsel for the petitioner.

4. Counter Affidavit was filed on behalf of respondent no. 4 (An identical Counter Affidavit has been filed later on, on behalf of respondent no.1) mainly stating that:

4.1 The petitioner gave application dated 21.02.2017 and 01.08.2017 to the answering respondent in which the petitioner made a prayer that he has completed 26 years of service and is still getting the grade pay of Rs. 2800 and further requested for the grade pay of Rs. 4600 as his similarly situated persons are getting the grade pay of Rs. 4600. While considering the said application, it was found that in all other Divisions of Minor Irrigation Department, Uttarakhand, the eligible Boring Technicians have been promoted to the post of Junior Engineer and those Boring Technicians/ Assistant Boring Technicians who were not promoted but were eligible for ACP were given the grade pay of the post of Junior Engineer of Rs. 4600 as the benefit of ACP. While considering the application of the petitioner, the answering respondent found that the petitioner had satisfactorily completed 18 years of service as Assistant Boring Technician as on 28.01.2009 and was granted second ACP as grade pay Rs. 2800/- from Grade Pay Rs. 2400/- vide order dated 21.07.2012. According to the provisions made in the G.O. no. 770 dated 06.11.2013, the employees getting grade pay of Rs. 4800/- or less, where the post of promotion is available, will be given grade pay of promotional post as promotional pay scale/financial up gradation. This G.O. came into effect from 01.11.2013. Thus the answering respondent on the basis of the fact that the same benefit of ACP was given to Shri Rajender Pandey, Boring Technician, M.I. Division, Nainital (presently retired), Shri Rajesh Kamboj, M.I., Division, Pauri (Presently retired), Shri Girish Chandra Lohani M.I. Division,

Almora allowed the benefit of ACP to the petitioner vide office order 386 dated 19.08.2017. But in the same office order, it was clearly mentioned that if in later stage any objection is raised in the fixation of pay, the amount of excess payment made will be recovered from the salary of the petitioner.

4.2 After the implementation of the abovementioned G.O., it was found that the benefit of ACP was wrongly given to Boring Technicians and the department, pursuant to the G.O. no. 277 dated 03.06.2019 in which the Government directed to recover the excess amounts paid to the Boring Technicians, the orders of recovery were issued against the abovementioned Boring Technicians for recovering the excess amount and pursuant to the recovery orders all the abovementioned Boring Technicians have deposited the excess amount taken as the grade pay of Junior Engineer as the benefit of ACP in compliance to Govt. Order no. 277 dated 03.06.2019. In paragraph no. 2 of the G.O. no. 277 dated 03.06.2019, it is mentioned that the last post of promotion under the Assistant Boring Technician cadre is Boring Technician, in view of which such Assistant Boring Technicians who have not been promoted to the post of Junior Engineer as per Junior Engineer Service Rules, 2003 are permitted Rs. 2400, Rs. 2800 and Rs. 4200 as First, Second and Third ACP respectively. Only next pay/grade pay will be admissible as MACP. The upgradation of grade pay from that of Boring Technician to the grade pay of Junior Engineer is not admissible to the petitioner as the petitioner was never promoted to the post of Junior Engineer.

4.3 The service documents of the petitioner were sent to the Finance Controller, Minor Irrigation Department, Uttarakhand for checking. The Finance Controller vide letter no. 1344 dated 28.12.2020 has pointed out that the department has wrongly fixed the pay of the petitioner and ignored the G.O. no. 277 dated 03.06.2019 and directed to rectify the mistake and also directed to recover the excess amount from the pension bills of petitioner. In compliance to the direction given by the Finance Controller, the answering respondent re-fixed the salary of the petitioner and issued the recovery order for excess amount of payment of Rs. 620801.00 vide order no. 675 dated 18.01.2021. Thereafter, the pension case of the petitioner was sent to the Chief Treasury Officer, Pithoragarh for further action. The Chief Treasury Officer vide its letter no. 680 dated 19.03.2021 and 35 dated 19.04.2021 marked error on the pension case. For redressal of the said error, the petitioner was given the benefits of third ACP from 28.01.2017 and fixation of salary was done vide office order no. 50 dated 10.05.2021. Recovery of Rs. 4,99,547.00 was estimated and to settle the post retirement dues, the case was sent to Treasury Officer for further action. The re-fixation and estimate of recovery made by respondent no. 4 was sent to the petitioner vide letter no. 73 dated 28.05.2021 (Annexure A1 of claim petition) and the petitioner was directed to present objections at the office of answering respondent. But the petitioner has not filed any objections to the order dated 28.05.2021.

4.4 Thereafter, the Chief Treasury Officer, Pithoragarh vide his letter no. 203 dated 28.07.2021 again pointed out error in the pension case of the petitioner and having the knowledge of the same the answering respondent after curing the errors again sent the pension proposal vide revised order no. 281 dated 01.08.2021 of fixation of salary by mentioning total recovery of excess amount of Rs. 6,37,622.00. It is also relevant to mention here that the department had issued recovery orders against the similarly situated persons like the petitioner who

were wrongly allowed the benefit of the grade pay of Rs. 4600 from 01.11.2013. The petitioner and other similarly situated persons had not challenged the government order dated 03.06.2019 before any forum of law. Thus, it is evident that all the affected persons accepted the Government Order no. 277 dated 03.06.2019. Thus, the recovery issued against the petitioner is just and proper and the similarly situated persons have also deposited the recovery amount and not objected the same. Hence the claim petition of the petitioner deserves to be dismissed.

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4.6 The petitioner completed 26 years of service on 28.01.2017. The employees working under Uttarakhand Government were sanctioned revised pay scale according to G.O. number 290 dated 28.12.2016. As per G.O. No. 11 dated 17.02.2017, the Government implemented modified assured career promotion scheme (MACP). According to the said G.O., the MACP was implemented from 01.01.2017 and the provisions of assured career promotion scheme implemented earlier were applicable in cases of liability upto 31.12.2016. According to the modified assured career promotion scheme, if any employee has not been promoted during his entire service period then he will be eligible to get 3 financial upgradations on completing regular and satisfactory service of 10, 20, 30 years respectively which will be calculated from date of joining after substantive appointment on the post of direct recruitment. The petitioner was given benefits of second ACP on 28.01.2009 with grade pay of Rs. 2800. After that, on completion of 10 years of regular and satisfactory service, the petitioner was given 3rd MACP on 28.01.2019.

4.7 Shri Rajender Pandey joined Minor Irrigation Department as Assistant Boring Technician on 01.07.1986 and superannuated from the post of Boring Technician subdivision Nainital on 31.01.2020. According to the provision given in the G.O. 770 dated 06.11.2013, Mr. Pandey was also given the wrong grade pay of Junior Engineer of Rs. 4600 while he was on the post of Boring Technician. The said wrong grade pay of Rs. 4600 was corrected to grade pay of Rs. 4200 and recovery of excess payment of Rs. 180288/- was made by Executive Engineer, Minor Irrigation Division Nainital vide order no. 226 dated 27.07.2020. Post retirement, Shri Pandey has submitted the amount of excess payment made to him.

4.8 The petitioner, like his colleagues, was given grade pay of Rs. 4600 and in compliance of G.O. no. 277 dated 03.06.2019 recovery of excess amount was calculated. The petitioner has not challenged the above said G.O. in this claim petition. Thus, it is evident that the petitioner has no objection to G.O. no. 277 dated 03.06.2019.

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9. The Tribunal observes that the order dated 19.08.2017 (Annexure: A5), vide which upgraded grade pay of Rs. 4600 (Grade pay of the post of Junior Engineer) was sanctioned to the petitioner, also mentioned that if in this pay fixation objection from any level is made, then the recovery of the excess payment made to the petitioner will be done from his pay. Further the G.O. dated 03.06.2019 (Annexure: A6 to the claim petition), which states that those Assistant/Technicians whose promotion has not been made on the post of Junior Engineer according to the Junior Engineers Service Rules, 2003 will get Grade Pays of Rs. 2400/-, Rs. 2800/- and Rs. 4200/- as First, Second and Third ACP

respectively and in the form of MACP only the next pay/grade pay shall be admissible, has not been objected to or challenged by the petitioner. The recovery and reduction of Grade Pay has been made only in furtherance of this G.O. The Tribunal would also refer to the judgment of Hon'ble Apex Court in Chandi Prasad Uniyal vs. State of Uttarakhand (2012)8 SCC in which it has been directed: ".....Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment." Keeping in view the fact that the order sanctioning Grade Pay of Rs. 4600 to the petitioner dated 19.08.2017 was conditional and provided for recovery of excess amount if objection is raised from any level, the Tribunal observes that the proposed recovery can be made in the case of the petitioner.

10. In point no. v. of para 47 of its judgment in the bunch of Writ Petition (S/S) no. 1595 of 2021 along with 26 other writ petitions, the Hon'ble High Court has observed the following:

point no. v of para 47.....under the normal service jurisprudence, it was expected that the respondents ought to have provided an opportunity of hearing and should have conducted an enquiry before curtailing the retiral benefits, which was payable to the retired employees, and hence, in the absence of there being any such enquiry ever conducted before taking the impugned action of curtailment of the retiral benefits, the entire action of the respondents would be bad, and that too, lastly particularly, when the extension of service benefit was as a consequence of the decision-making process taken by their own competent authorities, who had fixed the wages, out of which, the benefits has been consistently extended by the respondents and derived by the petitioners and fraud is not an aspect, which has been attributed, argued and established by document on record, against the petitioners, of wrongful extension of ACP benefits to them.

11. The Tribunal notes that the impugned order dated 28.05.2021 proposed the recovery of the excess paid amount of Rs. 4,99,547/- from the service gratuity of the petitioner, providing opportunity to the petitioner to present his case within 10 days of the receipt of the letter. However, the petitioner has not submitted any objection in response to the same. The respondents have further revised the amount of recovery as Rs. 6,37,622/- as mentioned in para 4.4 of this judgment.

12. The Tribunal holds that if the petitioner still wants to make objection against the recovery and reduction of his Grade Pay to the respondents, he should be provided an opportunity for the same. The respondents are hereby directed to again provide an opportunity of hearing to the petitioner and conduct an enquiry about his medical bills and other pending claims according to the spirit of the judgment of Hon'ble High Court in the bunch of writ petition (S/S) no. 1593 of 2021 and 26 other writ petitions. Respondents may, thereafter, pass a reasoned and speaking order finalizing his retiral benefits. The entire exercise be completed within three months of the date of production of certified copy of this order.

3. Petitioner submitted his objections/representation to the respondents pursuant to the directions of the Tribunal, which was rejected by the respondents *vide* impugned order and maintained the earlier recovery. According to the petitioner, the respondent department cannot adjust any money made as excess payment from a retired employee. It is also the submission of learned Counsel for the petitioner that petitioner was a Group-C employee and no deduction could be made from his gratuity after his superannuation in view of the decision rendered by Hon'ble Supreme Court in State of Punjab vs. Rafiq Masih & others (2015) 4 SCC 334. Learned Counsel for the petitioner further submitted that the petitioner is entitled to interest on delayed payment of gratuity in view of Payment of Gratuity Act, 1972.

COUNTER VERSION

4. C.A. has been filed by learned A.P.O. on behalf of respondent no. 1. According to the affidavit filed by Sri Jai Lal Sharma, Joint Secretary, Minor Irrigation Department, Govt. of Uttarakhand, Dehradun, the petitioner has completed 26 years of service and is getting the grade pay of Rs. 2800/-. He requested for the Grade Pay of R. 6400/-. While considering the said application, it was found that in all other divisions of the Minor Irrigation Department, the eligible Boring Technician have been promoted to the post of Junior Engineer and those Boring Technician, Assistant Boring Technician who did not get promotion, were eligible for ACP. The petitioner was accordingly given the benefit of ACP. He was given Grade Pay of Junior Engineer Rs. 4600/-.

4.1 Later on, it was found that the benefit of ACP was wrongly given to the Boring Technicians and the Govt., pursuant to the G.O. dated 03.06.2019, directed the department to recover the excess amount paid to Boring Technicians. The orders for recovery were issued. All the Boring Technicians have deposited the excess amount. Recovery was initiated against the petitioner.

4.2 The C.A. was filed on behalf of respondent no. 4 by Sri Abishek Kholia, Executive Engineer Minor Irrigation Division, Pithoragarh. It has been stated in the affidavit that the medical bills of the petitioner have already been paid. The petitioner was wrongly given excess payment, which the respondent department was bound to recover from the petitioner. ACP was wrongly given to the Boring Technician. Orders of recovery were issued against the Boring Technicians. The petitioner is not entitled to any relief and his claim petition should be dismissed.

4.3 C.A. has been filed on behalf of respondent no. 5 by Sri Kavyadeep Joshi, Sr. Deputy Accountant General (Admin.) in the office of the Accountant General (Accounts & Entitlement) Uttarakhand, Dehradun. It has been stated in the affidavit that the work relating to grant of ACP, promotion, pay revision/ fixation, pensionary benefits is done by the concerned department of the State Govt. It was on the orders of the Executive Engineer, Minor Irrigation Department, Pithoragarh that an amount of Rs. 6,20,821/-, as excess amount due to incorrect fixation of pay consequent upon ACP benefits, was recovered from the gratuity of the petitioner.

4.4 C.A. has been filed on behalf of respondent no. 2 by Sri Brijesh Kumar Tiwari, Chief Engineer & Head of the Department, Minor Irrigation Department, Uttarakhand, Dehradun. In the affidavit, he has mentioned those facts, which have been mentioned the C.A. filed on behalf of respondent no. 1.

4.5 Ld. A.P.O. also submitted that wrong fixation of pay can always be corrected in view of decision rendered by Hon'ble Supreme Court on 21.03.2022 in Civil Appeal No.1985 of 2022, State of Maharashtra and another vs. Madhukar Antu Patil and another.

4.6 Ld. A.P.O. further submitted that there is no scope of interest on the amount of gratuity thus recovered from the petitioner, inasmuch as he was wrongfully keeping this amount with him, which was not his entitlement and the Hon'ble Apex Court in Madhukar Antu

Patil's case (supra) never directed the respondent department to pay interest on the amount which was so recovered from the petitioner.

5. The questions which arise for determination of the Tribunal are:-

(i) Whether recovery of excess payment could be made from the retiral dues of a Group-C employee, like petitioner?

(ii) Whether the petitioner is entitled to interest while making refund of the excess payment, which was 'adjusted' from the petitioner?

DISCUSSION

6. The petitioner was given monetary benefit, which was in excess of his entitlement. The monetary benefits flowed to him consequent upon a mistake committed by the respondent department in determining the emoluments payable to him. The respondent department has admitted that it is a case of wrongful fixation of salary of the petitioner. The excess payment was made, for which petitioner was not entitled. Long and short of the matter is that the petitioner was in receipt of monetary benefit, beyond the due amount, on account of unintentional mistake committed by the respondent department.

7. Another essential factual component of this case is that the petitioner was not guilty of furnishing any incorrect information, which had led the respondent department to commit the mistake of making a higher payment to the petitioner. The payment of higher dues to the petitioner was not on account of any misrepresentation made by him, nor was it on account of any fraud committed by him. Any participation of the petitioner in the mistake committed by the employer, in extending the undeserved monetary benefit to the employee (petitioner), is totally ruled out. It would, therefore, not be incorrect to record, that the petitioner was as innocent as his employer, in the wrongful determination of his inflated emoluments.

The issue which is required to be adjudicated is, whether petitioner, against whom recovery (of the excess amount) has been made, should be exempted in law, from the reimbursement of the same to the employer. Merely on account of the fact that release of such monetary benefit was based on a mistaken belief at the hand of the employer, and further, because the employee (petitioner) had no role in determination of the salary, could it be legally feasible to the employee (petitioner) to assert that he should be exempted from refunding the excess amount received by him?

8. In so far as the above issues are concerned, it is necessary to keep in mind that a reference, in a similar matter, was made by the Division Bench of two Judges of Hon'ble Supreme Court in *Rakesh Kumar vs. State of Haryana*, (2014) 8 SCC 892, for consideration by larger Bench. The reference was found unnecessary and was sent back to the Division Bench of Hon'ble Apex Court for appropriate disposal, by the Bench of three Judges [*State of Punjab vs. Rafiq Masih*, (2014) 8SCC 883]. The reference, (which was made) for consideration by a larger Bench was made in view of an apparently different view expressed, on the one hand, in *Shyam Babu vs. Union of India*, (1994) 2SCC 521; *Sahib Ram vs. State of Haryana*, (1995) (Suppl) 1 SCC 18 and on the other hand in *Chandi Prasad Uniyal vs. State of Uttarakhand*, (2012) 8 SCC 417, in which the following was observed:

"14. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies

an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.”

It may be noted here that the petitioners Chandi Prasad Uniyal and others were serving as Teachers and they approached Hon'ble High Court and then Hon'ble Supreme Court against recovery of overpayment due to wrong fixation of 5th and 6th Pay Scales of Teachers/ Principals, based on the 5th Pay Commission Report.

9. In the context noted above, Hon'ble Apex Court in Paragraphs 6, 7 & 8 of the decision rendered in State of Punjab vs. Rafiq Masih, (2015) 4 SCC 334, has observed thus:

“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]

10. 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 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]

11. The parties are not in conflict on facts. Petitioner's case is squarely covered by the aforesaid decision of Hon'ble Supreme Court. Petitioner is a retired Group 'C' employee and recovery made from him would be iniquitous or harsh to such an extent that it would far outweigh the equitable balance of employees' right to recover.

12. Reference may also be had to the decisions rendered by the Hon'ble Apex Court on 02.05.2022 in Civil Appeal No. 7115 of 2010, Thomas Daniel vs. State of Kerala & others, & in Civil Appeal No. 13407/ 2014 with Civil Appeal No. 13409 of 2015, B.Radhakrishnan vs. State of Tamil Nadu on 17.11.2015, decisions rendered by Hon'ble Uttarakhand High Court on 12.04.2018 in WPSS No. 1346 of 2016, Smt. Sara Vincent vs. State of Uttarakhand

and others, in WPSS No. 1593 of 2021, Balam Singh Aswal vs. Managing Director and others and connected writ petitions on 14.06.2022 & in WPSS No. 363 of 2022 and connected petitions on 05.01.2024 and decision rendered by Hon'ble Madras High Court on 019.06.2019 in WP(MD) No. 23541/ 2015 and M.P. (MD) No. 1 of 2015, M. Janki vs. The District Treasury Officer and another, in this regard.

13. Much emphasis has been laid by Ld. A.P.O. on the undertaking given by the petitioner, arguing that the petitioner himself undertook that if there is excess payment to him, the same can be adjusted by the department in future. Such undertaking was given at the time of implementation of the recommendation of 7th Pay Commission. Petitioner retired on 31.07.2022. Deduction from the gratuity was done only after petitioner's retirement in view of G.O. dated 17.04.2015.

14. In a similar case, in claim petition No. 89/SB/2023, Teeka Ram Joshi vs. State of Uttarakhand and others, this Tribunal in its judgment/ order dated 05.01.2024, has observed as under:

"4. Today also, Ld. A.P.O. submitted that the petitioner had given consent on 22.02.2022 for adjusting the excess payment made to him from his monthly pension. Letter written by the petitioner to Sub-Treasury Officer, Ghansali, has been filed by Ld. A.P.O. with the C.A. as Annexure: CA-2. It appears that the said letter was written by the petitioner to Sub-Treasury Officer under compelling circumstances. At least, the language of Annexure: CA-2 suggests the same. Even if it be conceded for the sake of arguments that the letter dated 22.02.2022 (Annexure: CA-2) was given by the petitioner on his own volition, the fact remains that he is a retired person. Nothing has emerged, on perusal of the documents brought on record, that excess payment was made to him in his connivance with the officials of the respondent department. The same was consequent upon a mistake committed by the respondent department in determining the emoluments payable to him. The petitioner does not appear to be hand-in-glove with the officials of his department in receipt of monetary benefits beyond the due amount (more than what was rightfully due to him).

5. The effect of unintentional mistake committed by the respondent department has been discussed, among other things, by Hon'ble Supreme Court, in Paragraphs 6, 7 & 8 of the decision rendered in State of Punjab vs. Rafiq Masih, (2015) 4 SCC 334, as below:

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15. Facts of the instant case are almost identical to the facts of Teeka Ram Joshi's case (supra). Therefore, the petitioner of this case is entitled to the same relief which was given to Sri Teeka Ram Joshi.

16. There is, however, no embargo on the respondent department against correct fixation of pay even after retirement, as per the decision rendered by Hon'ble High Court of Judicature at Allahabad on 17.12.2018 in Writ -A No. 26639/2018, Smt. Hasina Begum vs. Purvanchal Vidyut Vitran Nigam Ltd, Prayagraj and 02 others [Citation- 2018:AHC:204373]. Relevant paragraphs of the judgment read as below:

"5. The Division Bench has placed reliance upon a similar case decided by them earlier of one Smt. Omwati who had filed Writ - A No. 28420 of 2016 and the Court had observed that no recovery of excess payment can be made from the writ petitioner although the respondents may correct the pension that had been wrongly fixed for future disbursement to the widow. For this conclusion arrived at by this Court reliance was placed on the Supreme Court's decision in State of Punjab and others Vs. Rafiq Masih (White Washer) and Ors., (2015) 4 SCC 334.

6. It is undisputed that some excess payment has been made to the petitioner. If some correction has been done by the respondents, they are entitled to correct and re-fix the family pension as the Supreme Court has observed in several cases that administrative mistake regarding the pay fixation or family pension can be corrected by the authorities. However, in view of the law settled by the Supreme Court in Rafiq Masih (supra) no recovery of excess payment allegedly made to the petitioner already can be done from her.

7. This writ petition is disposed off with a direction to the respondents to pay the correctly fixed pension from December, 2018 onward to the petitioner and not to make recovery of alleged excess payment already made to the petitioner due to wrong pay fixation earlier."

17. 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, has observed as below:

"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

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: No interest was given]

18. Learned Counsel for the parties submitted that a bunch of writ petitions has been decided by the Hon'ble High Court *vide* common Judgment dated 14.06.2022, in WPSS No. 1593 of 2021, Balam Singh Aswal vs. Managing Director and others and connected writ petitions, which decision has direct bearing on the fate of present petition, which was assailed by the Uttarakhand Transport Corporation, Dehradun and others in Intra-Court Appeal. Hon'ble High Court of Uttarakhand decided Special Appeal No. 245/2022, Managing Director, Uttarakhand Transport Corporation, Dehradun and others vs. Ashok Kumar Saxena and connected Special Appeals, *vide* order dated 04.04.2024, operative portion of which reads as under:

"4. These appeals are being dismissed. A direction is being given to the appellants to comply with the judgment dated 14.06.2022, within the next three months."

19. It will be apposite to reproduce the text of the judgment of the Division Bench of Hon'ble High Court herein below for convenience:

“Learned counsel for the appellant has referred to the judgment of the Hon’ble Apex Court reported in 2012 (8) SCC 417, “Chandi Prasad Uniyal and others Vs. State of Uttarakhand and others” on the preposition that if excess salary is paid to an employee due to irregular/ wrong fixation of pay, recovery can be made from the employee.

2. Learned counsel for the appellant has referred to paragraphs 8, 13 and 14 of the judgment. The Hon’ble Supreme Court in this case was examining the case of the Teachers, whose pay-scale has been wrongly fixed on the basis of the 5th Central Pay Commission. They were all working, and on account of wrong fixation of pay a recovery was being effected from them, and in this backdrop the SLP was dismissed, and it was held that recovery can be made on account of wrong fixation of pay from the working employee, and in paragraph 7 of this judgment, it has been further observed that the appellants have given undertaking itself that if they received the pay on account of wrong fixation they will return the same.

3. The question whether the teachers had received this payment in the absence of any misrepresentation or fraud cannot be made basis for not making the recovery as they were all working employees, and they have given undertaking at the time of re-fixation of the pay as per the 5th Central Pay Commission. The ratio of this judgment cannot be applied in the present case, as in the present case, all the respondents have retired from the service, and post retirement, the mistake was found in grant of the ACP. In this backdrop, the judgment referred by the learned Single Judge in paragraph 44 of the judgment of the Hon’ble Supreme Court in the case of “State of Punjab and others Vs. Rafiq Masih (White Washer) and others” has been rightly applied in allowing the writ petition. Post retirement, the recovery cannot be made only on the ground that it is public revenue and it is tax payer money.”

[Emphasis supplied]

20. 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]

21. 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]

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

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:-

.....

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. The petitioner is, therefore, entitled to refund of Rs, 6,20,821/- which was recovered from the gratuity of the petitioner without loss of reasonable time.

24. Hon'ble Supreme Court has, 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.”

25. At this stage of dictation, learned A.P.O. fairly submitted that the petitioner’s case is covered by the Rafiq Masih’s decision (*supra*).

26. The claim petition is disposed of by directing the respondent department to refund a sum of Rs. 6,20,821/-, which was recovered from the petitioner under the pretext of adjustment of excess payment from the gratuity of the petitioner after retirement, as expeditiously as possible, without unreasonable delay, but he will not be entitled to interest on the same, being ‘undeserved monetary benefit’. No order as to costs.

(CAPT. ALOK SHEKHAR TIWARI)
MEMBER (A)

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: AUGUST 16, 2024

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