

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

Present: Hon'ble Mr. Rajendra Singh,

.....Vice Chairman (J)

Hon'ble Mr. A.S.Rawat,

.....Vice Chairman (A)

CLAIM PETITION NO. 46/NB/DB/2023

Smt. Bharati Vishwakarma aged about 48 years, w/o Sri Pradeep Kumar, r/o R/24, Lala Lajpat Rai Memorial Medical College Campus, Meerut, U.P., presently posted as Head of Department (Pharmacy), Government Polytechnic, Dehradun, District Dehradun.

.....**Petitioner**

Vs.

1. State of Uttarakhand through Secretary, Technical Education Department, Government of Uttarakhand, Dehradun.
2. Director, Technical Education, Uttarakhand, Srinagar, Garhwal, District Pauri Garhwal.
3. Principal, Government Polytechnic, Dehradun, District Dehradun.
4. Accountant General, Uttarakhand, Oberoi Building, Majra, Dehradun.

.....**Respondents**

Present: Sri Bhagwat Mehra, Advocate for the petitioner
Sri Kishore Kumar, A.P.O. for the Respondent no 1,2&3
Sri Rajesh Sharma, Advocate for the respondent no. 4

JUDGMENT

DATED: SEPTEMBER 20, 2024

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

- (i) *To set aside the impugned order dated 14.11.2022 passed by the Respondent no. 1 as well as consequential impugned order dated 08.12.2022 issued by the Respondent No 3 (Annexure No. 1 and 2 respectively to the Compilation no. 1).*
- (ii) *To direct the respondents to grant all consequential benefits.*
- (iii) *To pass any other suitable order as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.*
- (iv) *To allow the claim petition with cost.*

2. The facts of the case, in brief are that the petitioner was appointed on the post of Lecturer (Pharmacy) on regular and substantive basis vide order dated 23.11.2004. She joined her duties on the said post on 30.11.2004. The erstwhile State of UP. issued a G.O. on 28.09.1998, which provides permission to candidates for postgraduate studies with full salary. In view of the "Quality Improvement Programme for Polytechnic Teachers," the Respondents permitted study leave to various teachers time to time.

2.1 The petitioner also submitted an application to the Respondent No. 3 on 28-10-2005 requesting to issue 'Experience Certificate' for appearing in the examination for Ph.D. Course. She submitted application through proper channel for the "Part time Ph.D Course" in Pharmaceutical Sciences (Pharmacology) from Andhra University, Vishakhapatnam and also requested to give her 'No objection Certificate' to pursue the Course vide letter dated 30/01/2006. The Respondent No. 1 vide letter dated 04-05-2006 granted permission to the petitioner to pursue part time Ph.D. Course from Andhra University, Vishakhapatnam and it was also provided that the petitioner will avail casual and earned leaves for the said period.

2.3 The petitioner took admission in the Ph. D. Course from the aforesaid University. Subsequently she informed the Director Technical Education through proper channel vide letter dated 19/04/2010 that she was finding it difficult to complete Ph.D by availing CL and EL, moreover she was also assigned duties of N.S.S. due to which Ph. D practical work got disturbed and there was a likelihood of cancellation of her Ph.D. registration also. On 13-04-2010, the Respondent No. 1 convened a meeting regarding the issues of Pharmacy Department in which the petitioner also participated and during meeting, the Secretary instructed to complete her research work as the research works are asset to the Department and orally instructed to apply for study.

2.4 The petitioner submitted an application on 19-04-2010 to the Respondents with a request to grant her 03 years study leave with pay w.e.f. 01-07-2010. The same was duly forwarded by the Respondent No. 3 to the Respondent No. 2 vide letter dated 21-04-2010. The State Government considered the matter and sanctioned two years Extra ordinary leave w.e.f. 01/07/2010, which was conveyed to Respondent no. 2 vide letter dated 03-06-2010. It was mentioned in the said letter that the petitioner shall be treated on duty during the said period and she will be given the regular salary.

2.5 In pursuance of the letter dated 03-06-2010, the Respondent No. 3 issued an order on 11-06-2010 and ultimately relieved the petitioner for pursuing the Ph.D. Course w.e.f. 01-07-2010 vide consequential order dated 03-06-2010. She pursued the Ph.D. Course and successfully completed the same and after submitting the thesis, she resumed her duties on 02-07-2012. The joining report was duly accepted by the Respondents and thereafter, she is continuously serving in the department with due honesty and sincerity.

2.6 It is further submitted that the petitioner was promoted to the post of HoD (Grade pay Rs 6600/-) and transferred to Govt Polytechnic Pithuwala, Dehradun vide office order dated 18/03/2021. She has completed more than 18 years of continuous service satisfactorily in the department. The next promotional post available in the cadre is of the Principal for which either 15 years service as Lecturer or 08 years service as Head of Department is needed. As such the petitioner is eligible for promotion to the next higher post of Principal.

2.7 At the instance of some persons, which have vested interests, the Respondent No. 1 has issued the impugned order dated 14-11-2022, whereby it has been directed that the regular salary/allowances paid to the petitioner for the period 01-07-2010 to 01-07-2012 (i.e. two years period in which the petitioner pursued Ph.D. Course) be recovered from the salary of the petitioner in one instalment and said

period of two years shall not be counted for any service benefit to the petitioner.

2.8 In pursuance of the aforesaid impugned order dated 14-11-2022, the Respondent No. 3 passed a consequential impugned order dated 08-12-2022 along with a calculation chart which was also annexed and the petitioner has been directed to immediately deposit an amount of Rs. 10,30,450/- in one instalment in the cash section of the Institution. The stand/reason given by the respondent no. 3 for the alleged recovery/excess payment, is totally erroneous and misconceived. The impugned action of the respondents is clearly in violation of the law declared by the Hon'ble Apex Court from time to time. The latest pronouncement by the Hon'ble Apex Court in State of Punjab and others vs. Rafiq Masih (White Washer) (2015) 4 SCC 334, clearly provides that under which and what circumstances the recovery can be made.

2.9 The aforesaid impugned orders are totally arbitrary, illegal and unreasonable and cannot be justified in the eyes of law, which have been passed in gross violation of principles of natural justice and any such order passed without following the principle of natural justice is a *void-ab-initio* and a nullity in the eyes of law. As such, the impugned order deserves to be quashed.

3. Two separate identical C.As./W.S. have been filed by learned A.P.O. on behalf of respondents, in which it has been stated that the audit of the accounts related documents of Director, Technical Education, Srinagar Garhwal from the month- 08/2011 to 07/2012 was conducted by the audit team of Comptroller and Auditor General of India (Audit), Uttarakhand, Dehradun Office from 15-08-2012 to 29-08-2012 and the amount of Rs 10.18 lakh spent on salary and allowances of Mrs. Bharti Vishwakarma, Lecturer Pharmacy, Government Polytechnic, Dehradun, for pursuing Ph.D, during 03 years paid study leave has been declared as inappropriate expenditure by the said audit team. It was noted by the audit team that

as per to the leave rules, extraordinary leave can be sanctioned only in special circumstances, when no other leave is due as per the rules or despite other leave being due, the concerned government employee applies for approval of extraordinary leave. As per rules extraordinary leave is not deducted from the leave account of the concerned employee and no leave salary is payable for the said period. After the department apprised the audit team about the approval received by the Technical Education Department of the State Government for these leaves, the approval was not accepted in the review by the audit team because as per the audit team the approval was granted against the leave rules.

3.1 Vide letter dated 14-11-2022 Secretary, Technical Education Uttarakhand Government's directed the Director, Technical Education to recover the said amount from the petitioner and consequently the concerned Principal directed the petitioner to deposit the amount of salary and allowances of the concerned leave in the state treasury. The concerned petitioner, through her letter dated 15-12-2022, requested to provide an additional time of one month for carrying out the adjustment activities of the said amount and subsequently by letter dated 05-01-2023, she submitted another letter by which she informed to amend the word "time for adjustment" with "time for reconsideration" in her earlier letter and thus her submission for depositing the said amount was amended on her part. Due to non-deposit of said amount even after a period of one month, the concerned Principal was again directed by the Directorate to take necessary action and even after several letters were sent by the concerned Principal, the referred amount was not deposited by the petitioner in the treasury. It is further to inform that on one hand no action was taken by the petitioner to deposit the said amount in the treasury till January 15, 2023, but on 10-01-2023 and on other hand a writ petition was filed before the Hon'ble High Court, Nainital against the said recovery orders, in respect of which Hon'ble High Court, Nainital vide decision dated 13-01- 2023 given the liberty to the

petitioner that the said matter may be presented before the Hon'ble Public Services Tribunal.

3.2 Regarding the matter of approval for study in the concerned matter of the petitioner, it is submitted that on 30-01-2006, a request letter was sent by the petitioner to the Director, Technical Education, Uttarakhand regarding granting her the no-objection certificate for pursuing part-time Ph.D. The matter was taken up by the department and vide letter dated May 04, 2006 of the Deputy Secretary, Technical Education, Government of Uttarakhand, the petitioner was allowed to do Ph.D on part-time basis. As the course was part time only, hence, in said letter it was also directed to avail her casual leaves etc. during the study period. It is, also clear from the petitioner's own applications as the course was to be completed as a part-time course and not as a regular course.

3.3 Thereafter, vide letter dated 19-04-2010, an application was sent by the petitioner for acceptance of three years paid study leave. In continuation of the above letter by the petitioner, Director, Technical Education, Uttarakhand, through the letter dated May 21, 2010 informed the State Government that study leave for the pursuing Ph.D was not mentioned in the concerned Government Order for granting study leaves for polytechnic teachers. Further, it was also mentioned in the said letter that under the sub rule-146 (a) of Financial Handbook Volume-2 Part-2, there is provision for extraordinary leave for two years for the investigation work That matter was considered at State Government level and thereafter a letter dated 03-06-2010 was issued by the Technical Education, Uttarakhand to allow the petitioner for paid extraordinary leave for two years. It is clear from the above that Ph.D. study was made by the petitioner for part-time course and accordingly she was given permission for part-time course, but due to not being able to complete the course even after 04 years, she requested again and as per the instructions received from the government, the petitioner was granted paid extraordinary leave for two years. It was only after the audit team's objection; action for

recovery for the said amount has been initiated by the department and she was instructed to deposit Rs 10,30,450/- in the state treasury. It is also submitted that in Civil Appeal No.-5899/2012, Special leave Petition No.-308/2011, Chandi Prasad Uniyal and others vs. State of Uttarakhand, the decision dated 17-08-2012 was given by Hon'ble Supreme Court, New Delhi, as per which the payment made to any employee/ officer in the form of additional/ excess amount is not the property of either the payer or the recipient but is the tax payer's money. Therefore, even if either of the two parties is liable for excess payment in any way, it is mandatory to return the excess amount paid. Hence, it is clear from the above submission and also in the light of the decision of the Hon'ble Apex Court in the case of Chandi Prasad Uniyal vs. State that the decision of the department to recover the amount spent on salary and allowances of the petitioner for pursuing part time Ph.D. is fully justified. The instant claim petition is devoid of merit and it expedient in the interest of justice this Hon'ble Court may be pleased to accept this counter affidavit on records and the instant claim petition is liable to be dismissed.

3.4 C.A./W.S. has been filed on behalf of respondent no. 4, stating therein that as per leave rules the extra ordinary leave can be granted on special conditions, when other kind of the leave is not due or other kind of the leave is due but the employee specifically applies for extra ordinary leave. This leave is not deductible from the leave account of the employee and for the EOL leave salary is paid. The payment of the salary to the petitioner was against the provision 85 mentioned in financial hand book Volume II (part 2 to 4 which stipulates that in such leave (Extraordinary leave) no leave salary is paid.

4. In reply, the petitioner filed R.A., in which, she has denied the contents of the C.As and has reiterated the averments made in the claim petition.

5. We have heard learned Counsel for the parties at length and perused the record carefully.

6. The learned Counsel for the petitioner has argued that the order dated 14/11/2022 of the respondents No.1 and the subsequent order dated 08/12/2022 of respondent no.3 pertaining to the recovery of the amount of the salary paid during the extra ordinary leave to pursue the Ph.D course are contrary to the order dated 3rd June 2010 issued by the respondent no.1 and the subsequent order dated 03/06/2010 by the respondent no.3 for the grant of the study leave. As the point no.4 in the letter dated 3rd June 2010 clearly mentions the admissibility of the pay to the petitioner and also that she will be considered on duty. Learned Counsel for the petitioner further pleaded that the recovery of Rs. 10,30,450/- from the petitioner cannot be made, as the recovery process has been initiated by the respondents after more than five years of the payment and such recovery is barred in view of the decision rendered by Hon'ble Supreme Court of India in Rafiq Masih's case. Moreover, the leave has been sanctioned by the respondents with the condition for payment of salary during leave period and the petitioner is not at all responsible for payment of the salary. Study leave has been sanctioned to many persons in the department, although the G.O. of 1998 is not exactly applicable in this case but the G.O. has been made applicable in many such cases where the persons were granted leave for pursuing M.Pharma Course, MBA Course etc. So, by analogy of such type of facility given to the teachers of Polytechnic, the order has been extended to the petitioner to pursue the Ph.D. Course. The penalty that she will not get any service-related benefits for the period spent on extra ordinary leave will put the petitioner in a situation where she will loose the seniority and promotion also after putting almost more than 18 years of service in the department with utmost sincerity.

7. The learned Counsel for the petitioner has further argued had the respondents informed in the beginning that the extraordinary leave will be granted with no salary to petitioner during the study period, the

applicant would have preferred not to avail the leave granted. The recovery process has been initiated by the respondents after more than five years of the payment. It is further argued that the order related to the break in service is harsh particularly after putting on more than 18 years of the service. The action of the respondents is null and void in view of the judgement of the Hon'ble Supreme Court in Rafiq Masih's case (Supra). Para 18 of which, is reproduced as below:

“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 hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:-

- (i)
- (ii)
- (iii) *Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*
- (iv)
- (v)

8. The leaned A.P.O. on behalf of the respondents no. 1 to 3 has argued that the letter dated 28th September 1998 of the erstwhile Govt. of U.P. being followed by Govt. of Uttarakhand does not have the provision for grant of study leave to pursue the Ph.D Course. He further pleaded that the grant of the extra ordinary leave by the Respondent no. 1 was in the knowledge of the petitioner and that no pay is admissible for this kind of leave. The judgement of the Hon'ble Supreme Court as mentioned above is not applicable in this case. The petitioner is a serving Class-2 Govt. employee and the recovery order passed the respondents vide letters dated 14/11/22 & 8/12/2022 do not put her in any financial hardships. The respondents submitted that the letter dated 28th September 1998 of the erstwhile Govt. of UP being followed by Govt. of Uttarakhand does not have the provision for grant of study leave to pursue the Ph.D course. The judgement of the Hon'ble Supreme Court as mentioned by the petitioner is not applicable in this case. The respondents placed reliance on the

decision rendered by Hon'ble Supreme Court in the Civil Appeal No 5899/2012 and Special leave petition No 30858/2011, Chandi Prasad Uniyal and others Vs State of Uttarakhand, for payment made to any employee officer in the form of additional payment / excess amount is not the property of the payer or the recipient but the tax payers' money. Even if either of the two parties are liable for the excess payment in any way, it is mandatory to return the excess amount paid.

9. Learned Counsel for the respondent no. 4 has argued that that grant of extraordinary leave does not entail any salary to the employee and the order dated 03/06/2010 and the subsequent order issued by the respondent no. 3 are contrary to the provision of Rule 5 mentioned in the chapter 10 of the Financial Hand Book Volume II (part 2 to 4) which stipulates that in such leave (Extra Ordinary Leave) no salary is payable.

10. After perusal of the records as well as the submissions made on behalf of the parties, it is clear that the order of extraordinary leave with salary issued by the respondents no. 1 & 3 is itself contrary to the provision of Rule 5 mentioned in the chapter 10 of the Financial Hand Book Volume II (part 2 to 4) which stipulates that in such leave (Extra Ordinary Leave) no salary is payable. The recovery orders passed by the respondents no. 1 & 3 after the anomaly pointed by the audit are correct. The petitioner being Class-II officer of the Govt. of Uttarakhand might have been knowing the provisions of the extraordinary leave that salary is not admissible for such kind of leave, but she availed the same on her volition. The order that the period spent on extraordinary leave will not be counted for any service benefits appears to be too harsh. As the petitioner has put in 18 years of service with full devotion, she deserves a lenient view.

11. In view of the above, we are of the opinion that this Tribunal should not interfere with impugned order dated 14.11.2022 passed by the Respondent no. 1 whereby the regular salary/allowances paid to the petitioner for the period 01-07-2010 to 01-07-2012 (i.e. two years

period in which the petitioner pursued Ph.D. Course) was directed to be recovered from the salary of the petitioner in one instalment and said period of two years shall not be counted for any service benefit to the petitioner and the consequential impugned order dated 08.12.2022 issued by the Respondent No 3 whereby the petitioner was directed to immediately deposit an amount of Rs. 10,30,450/- in one instalment as grant of extraordinary leave does not entail any salary to the employee and the order dated 13/06/2010 and the subsequent order issued by the respondent no. 3 are contrary to the provision of Rule 5 mentioned in the chapter 10 of the Financial Hand Book Volume II (part 2 to 4) which stipulates that in such leave (Extra Ordinary Leave), no salary is payable. In the decision rendered by Hon'ble Supreme Court in the Civil Appeal No 5899/2012 and Special leave petition No 30858/2011, Chandi Prasad Uniyal and others Vs State of Uttarakhand has held in para 16 that: *"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."*

In view of the decision of Hon'ble Supreme Court in Chandi Prasad Uniyal's case, the recovery of extra amount paid to the petitioner is justified. Hence, we find no ground to interfere the impugned orders and the claim petition is liable to be dismissed. However, for the period spent on extraordinary leave, the petitioner will be entitled to maintain seniority in service, so that her promotional prospects are not adversely affected.

ORDER

The claim petition is hereby partly dismissed for seeking relief no. (i) and partly allowed to the extent that the petitioner shall maintain the seniority in service for the period which she spent on extraordinary leave. No order as to costs.

A.S.RAWAT
VICE CHARMAN (A)

RAJENDRA SINGH
VICE CHARMAN (J)

DATED: SEPTEMBER 20, 2024
DEHRADUN
KNP