

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

Present: Hon'ble Mr. Ram Singh

----- Vice Chairman (J)

Hon'ble Mr. A. S. Nayal

-----Member (A)

**CLAIM PETITION NO. 31/NB/DB/2018**

Jagdish Chandra Joshi (Male) aged about 59 years, S/o Late Sri Devki Nandan Joshi, R/o- Cinema Line, Kharkwal Bhawan, District Pithoragarh.

.....Petitioner

**VERSUS**

1. State of Uttarakhand through Secretary, Department of Minor Irrigation, Uttarakhand, Dehradun.
2. Chief Engineer and Head of the Department of Minor Irrigation, Uttarakhand, Dehradun.
3. Superintending Engineer, Minor Irrigation Circle, Pithoragarh, Uttarakhand, Dehradun.
4. Executive Engineer, Minor Irrigation Division, Pithoragarh.

.....Respondents

Present: Sri G.D.Joshi, Ld. Counsel  
for the petitioner.

Sri V.P. Devrani, Ld. A.P.O.  
for the Respondents.

**JUDGMENT**

**DATED: AUGUST 28, 2019**

**HON'BLE MR. RAM SINGH, VICE CHAIRMAN (J)**

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

*“(i) Issue a writ, order or direction in the nature of certiorari calling for the records and quashing of the impugned order 22<sup>nd</sup> November 2017 passed by the Executive Engineer, Minor Irrigation Division, Pithoragarh directing for recovery of Rs.*

*7,91, 110.00/- from petitioner with deduction of Rs. 12000.- per month from the salary of the petitioner and remaining amount to be deducted from the Gratuity of the petitioner to be paid after his retirement, being illegally and arbitrary.*

*(ii) Issue a writ, order or direction in the nature of mandamus commanding the respondents not to deduct illegal recovery of Rs. 7,91,110/- on account of alleged excess pay and allowance as per the impugned order No. 678/10/C/Vasuli/2017 & 18 dated 22 Nov. 2017 issued by the Executive Engineer Minor Irrigation Division, Pithoragarh (Respondent No. 4) under whom the petitioner (Class III employee) has been serving for about 34 years of service and who is retiring next year i.e. 31.12.2018.*

*(iii) Issue a writ, order or direction in the nature of mandamus commanding the respondents to refund the pay and allowances already deducted from the salary of the petitioner under the Grade Pay Rs. 5400/- per month w.e.f 01.05.2017 prior to the issue of the said impugned order dated 22.11.2017, which has been sought to be quashed for being wrongful order under the grounds as stated above.*

*(iv) Issue any other suitable writ, order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case.*

*(v) Award the cost of writ petition to the petitioner."*

2. As per the contention of the petitioner, he was appointed as Amin in the respondent department on 15.02.1984, in the pay scale of Rs. 354-10-425 and was allowed pay increments till the year 2003 as per the rules.

3. After the recommendations of the 6<sup>th</sup> Pay Commission, his pay was fixed and Assured Career Progression (ACP) facility was allowed w.e.f. 01.09.2008, after completion of 10, 18 and 26 years of continuous service, in accordance with the G.O. dated 08.03.2011. As the cadre of Amin was having no promotional avenues, so three ACPs were permitted. Petitioner has contended that after completion of 10, 18 and 26 years of service, he was allowed grade pay of Rs. 2800 in the pay scale of Rs. 5200-20200 w.e.f. 15.02.2008 and the grade pay of Rs. 4200 in the pay scale of Rs. 9300-34800 w.e.f. 15.02.2010 on change of his post as Junior Assistant and after completion of 10, 18 and 26 years of

service as Amin, his grade pay was further revised with grade pay of Rs. 4600 w.e.f. 06.11.2013 and grade pay of Rs. 5400 w.e.f. 01.02.2014.

4. His another colleague, Krishan Ram, after his retirement w.e.f. 31.01.2016, sought information under RTI Act, about the emolument of the petitioner and then requested for removing the anomaly in fixing his pay and allowances, as compared to the petitioner. Then, department after finding the anomaly, issued a notice to the petitioner in May 2017, to which he submitted his reply, but the respondents finally decided to reduce the pay of petitioner to the grade pay of Rs. 2800, in place of 5400, like RTI applicant, Krishan Ram. The petitioner's reply to the notice, was totally ignored and respondent No. 3 further sent a letter dated 20.11.2017 to respondent No. 2 by mentioning parawise remarks of disagreement with the petitioner's submission. Thereafter, vide order dated 22.11.2017, the recovery order, amounting to Rs. 7,91,110/- was made on monthly basis and balance was ordered to be recovered from the gratuity to be paid to petitioner.

5. The petitioner has filed this petition on the ground that he has wrongly been denied from the benefit of the post and also contended that in view of the judgment of the Hon'ble Supreme Court in **State of Punjab vs. Rafiq Mashih & others (2015)4 SCC 334**, no such recovery can be made from the petitioner, hence, this petition was filed for the relief sought as above.

6. Respondents opposed the petition on its merit and contended that the recovery order dated 22.11.2017 was issued against the petitioner for drawing the excess salary by determining the non-admissible pay-scale and grade pay. Before issuance of such recovery order, the petitioner was provided opportunity of hearing. As per G.O. No. 589 dated 01.07.2013 by ignoring the grade pay of Rs. 2000/- and in pursuance of advice received from the Finance Department vide government letter dated 24.03.2018, the petitioner was entitled only to the grade pay of Rs. 2800 in the pay scale of Rs. 5200-20200 w.e.f.

01.07.2013 at the pay band of Rs. 9300-34800, with grade pay of Rs. 4200 hence, respondents revised the pay scale of the petitioner vide letter no. 59 dated 07.05.2018 issued by the office of the Executive Engineer, Minor Irrigation, Department, Pithoragarh (Annexure: CA 1), copy of which was sent to the petitioner and now, proposed revised recovery is determined as Rs. 5, 65, 140/- and the anomaly has been removed, as per the relevant G.O.

7. According to the respondents as the post of the petitioner as Amin was having no promotional avenues and after completion of 26 years of service on that post, he was entitled to three ACPs after a period of 10, 18 and 26 years of service and was entitled to the grade pay of Rs. 2000, 2400 and 2800. As per the revision under 6<sup>th</sup> Pay Commission, the fitment table was used for only one time thus, pay fixation of the petitioner was done in accordance with prevailing G.O., which is correct as per law and the claim of the petitioner for the grade pay of Rs. 5400, is not maintainable.

8. It has also been contended that the petitioner after completion of 26 years, was absorbed in the clerk cadre and taking the benefit of establishment desk in the department by producing wrong facts and wrong interpretation, he availed the benefit of ACP/Time Scale again. Whereas, as per the prevailing Government Orders, 3<sup>rd</sup> ACP/Time Scale, were already admitted to him in his career as Amin. Refixation of pay scale, is a normal exercise but the benefit of ACP cannot be reopened. According to the respondents, taking the benefit of establishment desk, the petitioner got more than three ACPs and wrongly obtained the sanction order of pay scale of Rs. 15600-39100 with grade pay of Rs. 5400/- from his superior authorities whereas, he was already allowed three ACPs, before change of his cadre from Amin to the cadre of Junior Clerk on his own request. After deciding the representation of the petitioner, the appropriate orders were passed and keeping in view of prevailing G.O., benefits to the petitioner were allowed as per the rules

and he was informed vide order dated 28.06.2017, and now his petition is devoid of merit and deserves to be dismissed.

9. By rejoinder affidavit, the petitioner denied the contention of the Counter Affidavit and reaffirmed the contention of the petition and raised the question that in view of the judgment of the Hon'ble Apex Court, passed in State of Punjab vs. Rafiq Mashih & others (Supra), no such recovery can be made from the petitioner now, as he is a class-III employee and has already retired from the service and his fixation was made as per the rules and he was rightfully granted grade pay of Rs. 5400.

10. We have heard both the sides and perused the record.

11. The question before the court for decision is whether the petitioner after getting the benefit of three ACPs as Amin, after change of his cadre to Junior Clerk can get further ACPs by reopening his matter again, and whether the recovery of the excess amount paid to him can be made from the petitioner now, in view of the judgment of the Hon'ble Apex Court referred to as above.

12. It is an admitted fact that the petitioner joined the services as Amin/Sheench Pal in the Irrigation Department on 15.02.1984 and he served as Amin in that department for 26 years till 23.11.2010. On account of declaration of dying cadre of Amin, he was absorbed and allowed to work as Junior Clerk. It is an admitted fact that petitioner served for a period of more than 26 years 9 months as Amin. The cadre of Amin was having no promotional post, hence, as per the G.O. and after recommendation of 6<sup>th</sup> Pay Commission, the facility of three ACPs was allowed. The petitioner was entitled for three ACPs, having grade pay of Rs. 2000, 2400 and 2800 after completion of 10, 18 and 26 years of service. According to the respondents, petitioner was entitled and was allowed all the three ACPs in his service period as Amin and the second ACP was to be allowed w.e.f. 15.02.2008 and 3<sup>rd</sup> ACP after completion of

26 years of service w.e.f. 15.02.2010. Before issuance of formal order for granting 3<sup>rd</sup> ACP, on account of dying cadre, petitioner's service was absorbed on the post of Junior Clerk. The clerical cadre is not a dying cadre and is having separate promotional posts of different pay scales.

13. The petitioner's contention has been that after change of his cadre, for grant of 3<sup>rd</sup> ACP, his case was rightfully reopened for allowing him all the three ACPs in view of his new clerical cadre, whereas, respondents have contended that 26 years of service for all 3<sup>rd</sup> ACP was already completed by him as Amin with last grade pay of Rs. 2800. Hence, even if after revision of pay, he could not be granted the facility of ACP again in the new cadre.

14. We agree with this argument of the respondents because of the fact that the facility of granting of ACP, after completion of 10, 18 and 26 years of service was already completed on the post of Amin and once, it was completed (although admitted later on), he could not claim reopening of his ACP facility again in clerical cadre because an employee in his service period, is entitled once for only three ACPs. The petitioner could not claim the benefit of ACP on other post (i.e. clerical post) when he had already completed 26 years of service as Amin.

15. Hence, in our view, the respondents were within their right to refix his pay and to assess whether any excess amount has been paid or not. Accordingly, vide order dated 07.05.2018 (Annexure: CA-1), the office order for fixing his pay was passed and as per the table (Annexure: CA-2), the amount paid was ascertained as Rs. 5,65,140/- vide letter dated 27.04.2016 (Annexure: CA-3) and the petitioner was accordingly informed about the detailed order dated 24.05.2017 (Annexure: CA-4). Learned counsel for the petitioner was unable to clarify the fact how the petitioner is entitled for more than three ACPs in his service period. We find that the petitioner wrongfully got the promotional pay scale of the post of Junior Clerk by claiming ACP of the cadre of Amin after his 10, 18 and 26 years of service period on the post of Amin. The employee

cannot be allowed to take the benefit of more than three ACPs in his life time. After completion of 26 years of service, the facility of ACP was completed during his tenure as Amin of which, it was having no promotional avenue, hence, the benefit of 3<sup>rd</sup> ACP upto the grade pay of Rs. 2800 was admissible to him. We find that the respondents have rightfully granted him the facility of 3<sup>rd</sup> ACP with grade pay of Rs. 2800, which according to the revised scale was replaced by Pay Band of Rs. 9300-34800 with grade pay of Rs. 4200 w.e.f. 01.07.2013.

16. It has also been argued that grade pay of Rs. 4200 was later on replaced by grade pay of Rs. 4600. If it is so, the petitioner is entitled for his fixation of pay accordingly. Vide order dated 07.05.2018, the pay was accordingly fixed and the petitioner has now retired in December, 2018 and as per the replacement of grade pay of Rs. 4200, with grade pay of Rs. 4600, if any, the last pay of the petitioner needs to be revised accordingly. This court finds that the petitioner is not entitled for the Grade Pay of Rs.5400 as it was admitted to him on clerical post by the previous order, which was later on set aside and to this extent, the petitioner's claim is not acceptable and he is not entitled to that grade pay of Rs. 5400.

17. Regarding the recovery of excess amount, paid to the petitioner, previously the recovery order was passed for the amount of Rs. 7,91,110 which was later on revised to Rs. 5,65,140/- by the month of April 2017. This amount needs further calculation, in view of the grade pay of Rs. 4600, if any, admissible to the petitioner.

18. Next question before the court is whether any such amount already paid to the petitioner can be recovered, in view of the judgment of the Hon'ble Supreme Court in Rafiq Mashih case (Supra), as the petitioner has claimed that he played no fraud, he is a class three employee, and now retired hence, the excess amount already paid, cannot be recovered from him.

19. Learned A.P.O. on behalf of the respondents has argued that the petitioner himself was working on establishment desk in the department and by placing wrong facts and wrong interpretation of the provisions of G.O., he persuaded his superior to grant him wrong pay with non-admissible grade pay, hence, he cannot be permitted to take the benefit of the law laid down by the Hon'ble Apex Court.

20. We have gone through the judgment and the facts of this case to decide this issue. The Hon'ble Supreme Court in the case of Rafiq Mashih (Supra) has laid down the following principles for that situation, where the government employee has been mistakenly paid in excess of their entitlement, the recovery of the same is impermissible in law in the following way:-

- (i) Recovery from the employee belonging to class-III and Class-IV,
- (ii) Recovery from the retired employees, or employees who are due to retire within one year of order of recovery,
- (iii) Recovery from employees to whom the excess payment has been made for a period in excess of five years, before order of recovery issued,
- (iv) Recovery where employee is wrongfully required to discharge duties of higher post and has been paid accordingly,
- (v) In any other case, where court concludes that recovery if effected from employee would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh equitable balance of employee's right to recover.

21. In the present case, the above four conditions are fulfilled as the petitioner was a Class-III employee, discharging the function of the post of clerk and considering that post, he was paid in excess. All the conditions are fulfilled in this case. Hence, as per the contention of the petitioner, recovery cannot be made in view of the judgment of the Hon'ble Supreme Court. The respondents have contended that the petitioner was discharging the function of the establishment clerk and he placed the wrong facts and by placing wrong interpretation of the G.O., he got the benefit. In our view, the petitioner has not concealed



any material fact, neither any fraud was played by him. The officer granting such benefit, himself was required to interpret the provisions of the G.O. correctly and nothing was concealed from him, as evident from the record, hence, it cannot be said that the employee had played a fraud or misrepresentation leading to grant of excess payment. It was the superior officer of the employer, who allowed the same. Hence, we are of the view that the petitioner is entitled to the benefit according to the principles laid down by the Hon'ble Supreme Court. However, the employer is required to settle the pension and other benefits of the petitioner as per his amended last salary, admissible to him as per the rules. The claim petition deserves to be partly allowed.

**ORDER**

The claim petition is partly allowed.

The impugned recovery order dated 22.11.2017 and the amended order for recovery dated 07.05.2018 are hereby set aside.

The prayer of the petitioner for granting him the grade pay of Rs. 5400 is not allowed.

The final salary of the petitioner and his pensionary benefits shall be decided on the basis of his last admissible salary, as per the rules within a period of four months from the date of this order.

No order as to costs.

**(A.S.NAYAL)**  
MEMBER (A)

**(RAM SINGH)**  
VICE CHAIRMAN (J)

*DATE: AUGUST 28, 2019*  
*NAINITAL*

KNP