2024:DHC:9452

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 25th November, 2024*

\+ W.P.(C) 8675/2022 & CM APPL. 66870/2023

SMT. DRAUPATI DEVI .....Petitioner

Through: Ms. Neha Rathi, Mr. Kamal Kishore and Ms. Kajal Giri, Advocates.

versus

UNION OF INDIA AND ORS. .....Respondents

Through: Ms. Garima Sachdeva, Sr. Panel Counsel with Ms. Archana Surve, Govt. Pleader and Ms. Divyanshi Maurya, Advocates for R1 and R2.

Ms. Aishwarya Malhotra and Mr. Hardik Rupal, Advocates for Mr. Mohinder J.S. Rupal, Advocate for R3 and R4.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

1. This writ petition has been preferred on behalf of the Petitioner under Article 226 of the Constitution of India for a direction to the Respondents to release an amount of Rs.9 lakhs withheld by Respondent No. 4/ Shri Guru Nanak Dev Khalsa College ('College') from the leave encashment due to Petitioner's husband Late Rajiv Kumar Gupta.

2. Facts to the extent relevant are that Petitioner's husband joined Shri Guru Teg Bahadur Khalsa (Evening) College in the Department of Mathematics. College was re-named as Shri Guru Nanak Dev Khalsa

College in the academic year 2005-2006, when it gained the status of full-fledged day College. Petitioner's husband Sh. R.K. Gupta passed away on 09.05.2021 due to COVID-19 infection and in the same month she also lost her son being infected by the same virus. Petitioner was also exposed to COVID-19 infection in May/June, 2020 and hospitalised but recovered later.

3. It is averred that on 09.06.2021, Petitioner made a representation to the Principal of the College to release the retirement benefits of her husband and furnished all requisite documents in this regard. This was followed by several reminders till January, 2022 but no payment was made till July, 2021 when only the provident fund dues were released. Petitioner received an e-mail dated 13.08.2021 from the Principal of the College informing her that the file relating to re-fixation of pay of her husband was sent to the University of Delhi and as some dues were recoverable from him, case could be processed only after the decision of the University. Additionally, College also took a stand that it did not have the funds to release the gratuity and leave encashment.

4. It is stated that in August, 2021, Petitioner was informed by the Principal of the College that a sum of Rs.9 lakhs was to be recovered from the leave encashment payable to Petitioner's husband as per University's communication since this money was an excess payment received by him from 2001 onwards. Petitioner represented once again to waive the recovery in light of the judgment of the Supreme Court in ***State of Punjab and Others v. Rafiq Masih (White Washer) and Others, (2015) 4 SCC 334*** and DoPT O.Ms. issued in this regard by Government of India. On 13.09.2021, College wrote to the University for exemption of excess recovery but there was no response. Department of Finance, University of Delhi wrote to the

Petitioner on 22.12.2021 stating that the Finance Wing of the University had no role in the management of finances of the College and the College had its own Governing Body and the Principal was the Drawing and Disbursement Officer.

5. It is stated that in response to the request of the College, University vide letter dated 03.01.2022 informed the College that waiver of the recovery was possible only with the express approval of Department of Expenditure (DoE), Government of India and directed the College to take appropriate action. On 12.01.2022, College wrote to DoE seeking permission to waive the recovery and by a separate letter dated 17.01.2022, College also requested the Dean of Colleges to forward the case of the Petitioner to Ministry of Finance. Petitioner filed RTI applications from time to time seeking information of the status of her case from the Ministry of Finance and the University. She received a letter from DoE dated 18.02.2022 *inter alia* stating that no letter had been received by them for exemption of recovery of excess amount in respect of her husband. Thereafter, Petitioner sent several letters but only to be told that the request of the College for waiver was still under consideration, compelling her to approach this Court.

6. Learned counsel for the Petitioner, at the outset, submits that the amount outstanding towards gratuity has been paid to the Petitioner and the only surviving dispute is with respect to refund of Rs.9 lakhs withheld by the College from leave encashment payable to Petitioner's husband. It is argued that till date leave encashment has not been released on the ground that excess amount was paid to her husband between 2001 to May, 2021. The stand of the University was that Petitioner's husband was not on roll as

Reader/Selection Grade as on 01.01.1996 and was thus not eligible for stepping up of his pay at Rs.14,940/- w.e.f. 19.05.2001. Recovery was initiated for the teaching faculty after approval of re-fixation by the University except in the case of 13 teachers and case of Petitioner's husband was amongst the 13. Approval of the University with respect to Sh. R.K. Gupta was received vide letter dated 16.08.2021 and since an amount of Rs.8,69,038/- was to be recovered, College vide letter dated 13.09.2021 wrote to the University to waive the recovery and in the meantime released the provident fund dues. Had the Petitioner been alive, he may have contested the excess recovery to be illegal but the University waited from 2001 till 2021 to initiate the action for recovery, which was a belated action and the approval itself was post the death of her husband.

7. Assuming for the sake of argument that the excess payment was mistakenly given, recovery cannot be effected for a period in excess of 05 years before the order of recovery is issued, as held by the Supreme Court in sub-paragraph (iii) of paragraph 18 in ***Rafiq Masih (supra).*** Reliance is also placed on sub-paragraph (v) of paragraph 18 of the judgment to urge that at this stage, it would be wholly iniquitous or harsh and arbitrary to recover the said amount looking at the fact that due to this recovery, leave encashment which is a retiral benefit has been withheld and Petitioner is already undergoing a mental trauma having lost her husband and younger son in a short span of one month in 2021.

8. Learned counsel further submits that DoPT has also issued an O.M. dated 02.03.2016, after consultation with the DoE and Department of Legal Affairs, Government of India advising Ministries/Departments to deal with issues of wrongful/excess payments made to Government Servants in

accordance with the decision of the Supreme Court in ***Rafiq Masih (supra).*** It is contended that College has consistently written to the University for exemption and waiver of recovery and University has also taken up the matter with DoE, Government of India but other than the files moving from one office to the other, no decision has been taken for waiver and a sum of Rs.9 lakhs due to the Petitioner as leave encashment benefit of her husband is lying with the College.

9. Ms. Aishwarya Malhotra, learned counsel appearing on behalf of Mr. Mohinder J.S. Rupal, Advocate for Respondents No. 3 and 4 submits that College is supporting the cause of the Petitioner and had requested the University to waive the recovery and in this context, learned counsel draws the attention of the Court to paragraph 15 of the counter affidavit wherein there is a reference to letter dated 10.02.2022 written by the College to DoE, Government of India for waiver of recovery through the Dean of Colleges, University of Delhi. However, decision is pending with the Administrative Ministry, i.e., Ministry of Education and in these circumstances, the College is not in a position to release the leave encashment amount to the extent of recovery *albeit* balance amount towards leave encashment has been released.

10. Ms. Garima Sachdeva, learned counsel appearing on behalf of Respondent Nos. 1 and 2 hands over copy of letter dated 12.11.2024 authored by the Deputy Secretary, Department of Higher Education, Government of India, stating that the Ministry has been consistently writing to the Delhi University to submit a consolidated proposal for waiver of recovery of overpayment in consultation with the College in light of DoPT O.M. dated 02.03.2016 but there has been no response and therefore, the

Ministry cannot be blamed for inaction.

11. Heard learned counsels for the parties.

12. Having gone through the writ petition and the counter affidavit filed by the College as also the several documents placed on record by the parties, in my view, this is a textbook case where the files have been moving from one department to the other without any action from 2021 till date, only to take a decision with respect to wavier of recovery of amounts allegedly paid in excess to Petitioner's husband on account of stepping up of his pay. Petitioner's husband was employed in the College as Associate Professor and was due to retire on superannuation on 28.02.2022, however, unfortunately he succumbed to COVID-19 infection. While on one hand, Petitioner is struggling to cope up with the mental trauma of having lost her husband and the younger son in a short span of one month in 2021, on the other hand, she is being made to run from pillar to post to seek release of leave encashment payable to her husband. As the documents indicate, not only the College but the University has been taking up her case for waiver/exemption of the recovery but so far, no decision has been taken. The College takes a stand that it supports the Petitioner and has recommended multiple times for waiver of recovery and the University while stating that it is for the College to take a decision has also written multiple times to DoE for a decision on the issue. The matter was processed by DoE, Government of India and sent to the Ministry of Education but if the stand of the Ministry is to be accepted, it is the University which is not sending a comprehensive proposal for waiver. This blame game extending to nearly 04 years has led to a situation where a sum of Rs.9 lakhs is lying with the College since 2021.

13. From the aforesaid chronology, it is clear as day that no decision has been taken till date on the proposal sent by the College for waiver of recovery of Rs.9 lakhs and as a result, leave encashment has been withheld from 09.05.2021, when the husband of the Petitioner expired. In the counter affidavit filed by the College, it is stated that cases of fixation of pay of all the teaching faculty in accordance with 7th CPC were sent to the University in June, 2018. Approval for fixation of pay for all teachers was received, save and except, 13 teachers and name of Petitioner's deceased husband was included in the list of 13. University vide letter dated 19.01.2021 informed that Sh. R.K. Gupta, Associate Professor was not on roll as Reader/Selection Grade as on 01.01.1996 and was not eligible for stepping up of his pay at Rs.14,940/- from 19.05.2001. It is further stated that proforma for re-fixation of his pay was sent to the University by the College on 20.07.2021 and the University granted approval for revised pay fixation vide letter dated 16.08.2021 with a direction to rectify the service book with recovery of overpayment, if any. It is thus evident that benefit of stepping up was given to Sh. R.K. Gupta w.e.f. 19.05.2001 and it was only on 16.08.2021 that approval was given for re-fixation. This action is not only belated but post the death of the Petitioner's husband and few months short of his superannuation. Naturally, Petitioner's husband could not contest this approval and the consequences that his leave encashment has been withheld and recovery is sought to be made for payments made in excess of 05 years.

14. Ordinarily, this Court would have remanded the matter back to the Ministry of Education for taking a decision but in the facts of this case and applying the law laid down by the Supreme Court in ***Rafiq Masih (supra),*** in my view, the recovery itself being impermissible in law, this exercise

would be a futility. In ***Rafiq Masih (supra),*** the Supreme Court after referring to its earlier judgment in ***Syed Abdul Qadir and Others v. State of Bihar and Others, (2009) 3 SCC 475,*** held that when an excess unauthorized payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. The logic is that it would be almost impossible for an employee to bear the financial burden of refund of payment received wrongfully for a long span of time. Therefore, if the mistake of making a wrongful payment is detected within 05 years, employer will be entitled to recover the same, however, if the payment is made for a period in excess of 05 years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of payments mistakenly made to the employee. Reference is also made to the judgment in ***Shyam Babu Verma and Others v. Union of India and Others, (1994) 2 SCC 521,*** wherein the higher pay scale was paid for a period commencing from 1973 *albeit* erroneously. The same was sought to be recovered in 1984 i.e. after a period of 11 years and in these circumstances, the Supreme Court held that the recovery was not just and proper.

15. The Supreme Court also held that while it may not be possible to postulate all situations of hardships which would govern employees on the issue of recovery where payments have mistakenly been made by employer, in excess of their entitlement but summarised few situations wherein recoveries by employers would be impermissible in law and two of those situations, in my view clearly cover the case of the Petitioner i.e. (a) when the excess payment has been made for a period in excess of 05 years, before

the order of recovery is issued; and (b) where the recovery is iniquitous or harsh or arbitrary to such an extent as would far outweigh the equitable balance of employer's right to recover. Relevant passages from the judgment are as follows:-

> ***"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.*
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> ***9.*** *The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality can be found in Articles 14 to 18 contained in Part III of the Constitution of India, dealing with "fundamental rights". These articles of the Constitution, besides assuring equality before the law and equal protection of the laws, also disallow discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracised section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39-A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "directive principles of State policy". These articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice—social, economic and political, by inter alia minimising monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.*
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> ***12.*** *Reference may first of all be made to the decision in Syed Abdul Qadir v. State of Bihar [Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475 : (2009) 1 SCC (L&S) 744] , wherein this Court recorded the following observation in para 58 : (SCC p. 491)*

> *"58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See Sahib Ram v. State of Haryana [Sahib Ram v. State of Haryana, 1995 Supp (1) SCC 18 : 1995 SCC (L&S) 248] , Shyam Babu Verma v. Union of India [Shyam Babu Verma v. Union of India, (1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121] , Union of India v. M. Bhaskar [(1996) 4 SCC 416 : 1996 SCC (L&S) 967] , V. Gangaram v. Director [(1997) 6 SCC 139 : 1997 SCC (L&S) 1652] , B.J. Akkara v. Govt. of India [B.J. Akkara v. Govt. of India, (2006) 11 SCC 709 : (2007) 1 SCC (L&S) 529] , Purshottam Lal Das v. State of Bihar [(2006) 11 SCC 492 : (2007) 1 SCC (L&S) 508] , Punjab National Bank v. Manjeet Singh [(2006) 8 SCC 647 : (2007) 1 SCC (L&S) 16] and Bihar SEB v. Bijay Bhadur [(2000) 10 SCC 99 : 2000 SCC (L&S) 394] ."*
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> *(emphasis supplied)*

***13**. First and foremost, it is pertinent to note, that this Court in its judgment in Syed Abdul Qadir case [Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475 : (2009) 1 SCC (L&S) 744] recognised, that the issue of recovery revolved on the action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorised payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference because an action is iniquitous, must really be perceived as, interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements, and a variety of sundry expenses. Based on the above consideration, we are of the view,*

that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee.

14. *In this context, reference may also be made to the decision rendered by this Court in Shyam Babu Verma v. Union of India [Shyam Babu Verma v. Union of India, (1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121] , wherein this Court observed as under : (SCC pp. 525-26, para 11)*

> *"11. Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. 1-1-1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from 1-1-1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same."*
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> *(emphasis supplied)*

It is apparent, that in Shyam Babu Verma case [Shyam Babu Verma v. Union of India, (1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121] , the higher pay scale commenced to be paid erroneously in 1973. The same was sought to be recovered in 1984 i.e. after a period of 11 years. In the aforesaid circumstances, this Court felt that the recovery after several years of the implementation of the pay scale would not be just and proper. We therefore hereby hold, recovery of excess payments discovered after five years would be iniquitous and arbitrary, and as such, violative of Article 14 of the Constitution of India.

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16. *This Court in Syed Abdul Qadir v. State of Bihar [Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475 : (2009) 1 SCC (L&S) 744] held as follows : (SCC pp. 491-92, para 59)*

> *"59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was*

a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. The learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."

(emphasis supplied)

Premised on the legal proposition considered above, namely, whether on the touchstone of equity and arbitrariness, the extract of the judgment reproduced above, culls out yet another consideration, which would make the process of recovery iniquitous and arbitrary. It is apparent from the conclusions drawn in Syed Abdul Qadir case [Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475 : (2009) 1 SCC (L&S) 744] , that recovery of excess payments, made from the employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year from the date of his retirement on superannuation.

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***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) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(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) 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."

16. In this context, I may also allude to the judgment of the Division Bench of this Court in ***MMTC Ltd. v. P.K. Das and Others, 2024 SCC OnLine Del 7314,*** where the subject matter was a recovery order with respect to some perks availed by the Respondents, allegedly in excess of their entitlements as Senior Executives of MMTC. Referring to and relying on the judgment of the Supreme Court in ***Rafiq Masih (supra),*** the Division Bench declined to interfere with the judgment of the Single Judge setting aside the decision to recover the said amounts. I may also allude to a judgment of another Division Bench of this Court in ***Mahanagar Telephone Nigam Limited (M.T.N.L.) through its Deputy Manager (P and A) v. Satya Narain Shahni, 2023 SCC OnLine Del 4819,*** where the order of the Central Administrative Tribunal was upheld. Respondent therein superannuated on 31.12.2016 and at the time of computing his retiral benefits, a certain sum was withheld on the ground of excess payment towards salary. The Tribunal quashed the recovery placing reliance on the decision in ***Rafiq Masih (supra).*** The Division Bench found no reason to interfere in the decision as

the case of the Respondent was covered by paragraph 18 of the judgment being a Group-D employee. The Court held that the judgment of the Supreme Court was a judgment in *rem* and no recovery could be made and thus, the Tribunal was justified in directing release of retiral benefits without any deduction on account of excess payment.

17. As noted above, College and University have consistently sent a proposal in favour of the Petitioner for waiver of the recovery and rightly so. The recovery on account of alleged excess payment to Petitioner's husband due to stepping up of his pay is legally impermissible as it is in excess of 05 years from the date of approval for recovery and is also iniquitous and harsh in the present case, given the aforementioned circumstances.

18. In view of the aforesaid, this writ petition is allowed holding that recovery of Rs.9 lakhs is impermissible in law in view of the judgment of the Supreme Court in ***Rafiq Masih (supra)***. College is directed to release the leave encashment dues to the Petitioner within a period six weeks from the date of receipt of this order along with interest @ 6% per annum from the date the leave encashment became due till the date of actual payment.

19. Writ petition stands disposed of along with the pending application.

JYOTI SINGH, J

NOVEMBER 25, 2024/*jg/shivam*