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

% Reserved on: 06.11.2023
Date of Decision: 23.11.2023

\+ W.P.(C) 12483/2023 & CM APPL. 49256/2023

UNION OF INDIA ..... Appellant

Through: Mr. Nitinjaya Chaudhary, Sr. Panel Counsel with Mr. Gokul Sharma, G.P. and Mr. Rahul Maurya, Advocate.

versus

DR SUCHITA NINAWE ..... Respondent

Through: Mr. Ankit Jain, Advocate

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

CAV 492/2023

Since, the Respondent through her counsel has entered appearance, the caveat stands discharged.

CM APPL. 49257/2023 (for exemption)

Allowed, subject to all just exceptions.

Accordingly, this application stands disposed of.

W.P.(C) 12483/2023

1. This writ petition has been filed by the Union of India through Department of Biotechnology, impugning the order dated 10.05.2023 passed by the Principal Bench of Central Administrative Tribunal, New Delhi ('the Tribunal') in Original Application bearing O.A. No. 2944/2022 ('the O.A.'), titled as "**Dr. Suchita Ninawe v. Union of India**", whereby the Tribunal allowed the O.A. filed by the Respondent herein challenging the Office Memorandum ('O.M.') dated 31.12.2021, to the limited extent of recovery of excess amount of Transport Allowance ('TA') from the Respondent.

1.1. The Tribunal vide impugned order set aside the said O.M. dated 31.12.2021 and directed the Petitioner herein to not recover any amount towards TA provided to the Respondent for the period from July, 2013 to August, 2017 and also, to refund the amount already recovered from her, within a period of three (3) months from the date of receipt of impugned order.

2. The Petitioner is the Department of Biotechnology under the Ministry of Science and Technology.

3. The Respondent herein is currently employed with the Petitioner department at the position of Scientist 'G'.

4. Before coming to the facts of the present case, it is pertinent to refer to the relevant O.M.s issued by the Department of Expenditure, Ministry of Finance ('DoE'), which regulate the grant of TA.

4.1. An O.M. dated 28.01.1994 was issued by the DoE, wherein the officers of rank of the Joint Secretary and above, were provided with an option to avail the facility of staff car for commuting to office and residence on prescribed payment basis.

4.2. Subsequently, an O.M. dated 03.10.1997 was issued by the DOE wherein it was provided that in case of officers of the level of Joint Secretary, who have been provided with the facility of staff car under O.M. dated 28.01.1994, may be given an option i.e., either to avail themselves of the existing facility of staff car or to switch over to the payment of TA, as admissible under these orders.

4.3. Thereafter, the DoE vide another O.M. dated 29.08.2008, modified the O.M. dated 03.10.1997 and extended the option of availing either the car facility or TA at the rate of ₹ 7,000/- per month, to the officers drawing GP of ₹ 10,000/- and ₹ 12,000/- and also those in HAG + Scale, who are entitled to the use of official car in terms of O.M. dated 28.01.1994.

5. Now adverting to the facts of this case, the Respondent herein, with the approval of Appointments Committee of the Cabinet ('ACC') on 29.06.2013, was promoted to the post of Scientist 'G' in the scale of ₹ 37,000 – 67,000 + 10,000 Grade Pay ('GP') with effect from 01.07.2013 under the Modified Flexible Complementing Scheme ('MFCS'). The Respondent herein on promotion started drawing the monthly TA of ₹ 7,000/- + Dearness Allowance i.e., w.e.f. 01.07.2013.

5.1. Since, the post of Scientist 'G' falls under the pre-revised scale of PB-4 with ₹ 10,000/- GP, the Petitioner, in view of O.M. dated 29.08.2008, extended the facility of availing either staff car or TA at the rate of ₹ 7,000/- + Dearness Allowance per month to the Respondent herein w.e.f. July, 2013.

5.2. However, the Audit team of the office of Principal Director of Audit, Scientific Departments, New Delhi, vide audit memo No. 39 dated 12.08.2016 raised an issue of over payment of TA to the Scientists/officers of the level of Joint Secretary; having GP of ₹ 10,000/- and above in the

Department and advised recovery of overpaid amount from the non-entitled officers.

5.3. In the meanwhile, the DoE vide O.M. dated 19.08.2016, issued a clarification to the effect that the officers, who are not entitled for the use of office car in terms of O.M. dated 28.01.1994 are not eligible to opt for drawing of monthly TA of ₹ 7,000/- + Dearness Allowance, even though they are drawing GP of ₹ 10,000/- in PB-4 under dynamic ACP Scheme or under the scheme of Non-Functional Upgradation (NFU).

5.4. Thus, as per the Petitioner, the Scientists akin to the Respondent herein were not entitled to receive TA. Accordingly, the office of the Principal Director of Audit on 16.09.2016 forwarded the factual statement based on the over payment of TA, incorrectly made to the Scientists 'G' of the Department. The payment of TA at a higher rate had led to over payment of ₹ 58.49 lakhs; in addition to the additional expenditure of ₹ 119.68 lakhs for hiring of taxi(s) for non-entitled officers.

5.5. The DoE subsequently on 21.09.2017 decided to extend the facility of use of official car in terms of O.M. dated 28.01.1994 or in lieu thereof, monthly TA at the rate of ₹ 15,750/- + Dearness Allowance to the Scientists 'G', promoted under the Flexible Complementing Scheme (FCS) in Senior Administrative Grade (SAG) drawing pay in Pay Level 14, with effect from 01.09.2017.

5.6. In view of the clarification issued by the DoE on 19.08.2016 and advisory of the audit team, the Petitioner decided to take action for recovery of money wherever required. A list was prepared by the Petitioner, updated on 23.01.2018, wherein all officers including Scientist 'G' and above and Statistical Advisors were included irrespective of the fact that whether they

used staff car or drew high TA. The list was further modified and a list of 27 officers (21 Scientists and 6 Statistical Officers) was prepared on 06.02.2018. In view of the DoE's subsequent decision dated 21.07.2017, the period of excess payment was limited from September, 2008 to August 2017.

5.7. As stated earlier, the said benefit of availing TA was extended to the Scientists 'G' only with effect from 01.09.2017 and therefore, the excess payment made prior to the said period was recoverable. The Petitioner however, in view of the fact that the Scientists 'G' are promoted under the Modified Flexible Complementing Scheme with approval of ACC and are the divisional heads holding higher responsibilities, decided to refer the matter to DoE with a request to grant the TA to Scientists G from the date of their promotion. However, the said proposal for waiving off recovery of the overpaid amount towards the TA was expressly turned down by DoE.

5.8. It is pertinent to note here that Supreme Court in its landmark judgement of ***State of Punjab and Ors. v. Rafiq Masih (White Washer) & Ors., (2015) 4 SCC 334***, passed on 18.12.2014, and more specifically at paragraph '18' therein, after considering all its previous decisions summarized few situations, wherein recoveries by the employer would be impermissible in law.

5.9. The Department of Personnel and Training ('DoPT') acting upon the said judgement in ***Rafiq Masih (White Washer)*** (supra) issued an O.M. dated 02.03.2016 statutorily recognizing the situations enlisted by the Supreme Court in which the recovery of excess payment shall be waived. The said O.M. directed that waiver of recovery shall be considered in five (5) situations covered by the said judgement and the said waiver will be

allowed with the express approval of DoE in terms of DoPT's O.M. dated 06.02.2014.

5.10. The DoE vide order dated 11.06.2018 observed that the case of the Respondent did not fall under any of the five (5) exceptions of the DoPT's O.M. dated 02.03.2016; and therefore, advised that recovery of the overpaid TA can be made by the Administrative Department.

5.11. The DoE vide order dated 18.02.2019 reiterated that the overpayment has been made to the Respondent from July, 2013 to August, 2017 (roughly 4 years) and since the officer will retire in the year 2026, therefore, the recovery of the overpaid TA can be made by the Administrative Department.

5.12. An order dated 25.09.2019 (1st order) was issued by the Petitioner regarding recovery of overpaid amount of TA from the Respondent. It was directed that the recovery of overpayment of TA amounting to ₹ 4,06,467/- be made in 47 monthly instalments of ₹ 8,500/- each and 48th instalment of ₹ 6,967/- from the salary of the Respondent starting from October, 2019. The Respondent made a representation for waiving off the recovery of said amount; however, the said representation was turned down by the DoE on 23.12.2019. Therefore, an order for recovery was issued again on 07.01.2020 (2nd order) on the same terms for effecting recovery starting from January, 2020.

5.13. The Respondent made a further representation for waiver of the said amount; however, the DoE rejected the said proposal again on 29.06.2021 on the ground that the Respondent is not covered in any of the five (5) exceptions under the DoPT's O.M. dated 02.03.2016.

5.14. Thereafter, the Department in furtherance of its earlier orders of recovery dated 25.09.2019 and 07.01.2020, issued an order dated 31.12.2021 (3rd order) on the same terms for effecting recovery from the salary of the Respondent starting from January, 2022 to December, 2025.

5.15. In the aforesaid facts and circumstances, the Respondent filed O.A. No. 2944/2022, inter-alia, impugning the said recovery order dated 31.12.2021 (3rd order). The Tribunal by its impugned order dated 10.05.2023 set aside the recovery order dated 31.12.2021 and directed the Petitioner herein to refund the amount already recovered from the Respondent.

Submissions of the counsel for Petitioner

6. Learned counsel for the Petitioner states that there is no dispute that the Respondent herein is ineligible and not entitled to receive TA for the period between July, 2013 to August, 2017 and the Respondent became eligible for drawing TA only with effect from 01.09.2017.

6.1. He states that therefore, recovery of amount of TA on the basis of O.M. dated 06.02.2014, which is based on the judgment of the Supreme Court in ***Chandi Prasad Uniyal & Ors. v. State of Uttarakhand & Ors., (2012) 8 SCC 417,*** passed on 17.08.2012, was permissible as no hardship would be caused to the Respondent by such recovery.

6.2. He further states that since, the amount of TA paid by the department and received by the Respondent is without authority of law, the Petitioner rightly sought to recover the said amount in accordance with the law laid down by the Supreme Court in ***Chandi Prasad Uniyal*** (supra). He states that in the present case, there is no extreme hardship which would be caused to the Respondent as the recovery was sought to be effected in instalments.

6.3. He states that similarly, the Tribunal failed to appreciate that the Petitioner was entitled to recover the excess amount of TA as per O.M. dated 02.03.2016, which has been issued on the basis of the judgement of the Supreme Court in ***Rafiq Masih (White Washer)*** (supra) as the Respondent herein is not covered by the five exceptions recognized in the said judgement. In this regard, he submits as under:-

i. The Respondent is in the SAG grade; she neither belongs to Group C or D cadre.

ii. The recovery is for the TA wrongly paid for the period July, 2013 to August, 2017, which was sought to be effected with effect from 25.09.2019. The Respondent is due to retire in the year, 2026.

iii. The recovery of excess payment is within five (5) years.

iv. The Respondent has not been wrongfully required to discharge duties of a higher post and the recovery is not on account of any payment made to her in this regard.

v. The Respondent will not suffer any extreme hardship nor such a recovery would be unfair or unjust or arbitrary.

6.4. He states that since the Respondent was neither eligible for drawing TA nor covered in the exceptions, the Petitioner rightly rejected her proposal for waiver and proceeded with the recovery. He states that the recovery order issued on 31.12.2021 is in conformity with the law laid down by the Supreme Court and the O.M.s of DoE and DoPT. He states that however, the Tribunal has irrespective proceeded to set aside the impugned order of recovery.

Submissions of counsel for Respondent

7. In reply, learned counsel for the Respondent states that there is no error in the judgment of the Tribunal. He states that the Respondent herein falls within the fifth exception recognized by the Supreme Court in ***Rafiq Masih (White Washer)*** (supra), wherein it was held that if the Court arrives at a conclusion that the recovery made from the employee is iniquitous, harsh or arbitrary then no such recovery can be effected by the employers.

7.1. He states that the issue of impermissibility of recovery of TA paid to Grade 'A' officers is no longer res integra as identical issues have been decided by this Court against the Petitioner in its judgment dated 04.09.2013 passed in W.P.(C) 5555/2013 titled as '***Union of India & Anr. v. J S Sharma & Ors.***' and judgment dated 06.01.2021 passed in W.P.(C) 23/2021 titled as '***Union of India & Anr. v. S P Singh & Ors.***'.

7.2. He states therefore, the Tribunal in the impugned order has correctly followed the law laid down by this Court in ***J S Sharma*** (supra) and rightly concluded that the recovery of TA is improper and impermissible.

Analysis and findings

8. This Court has considered the submissions of the counsel for the parties and perused the record.

9. The admitted facts arising for consideration in the present petition are as follows:

(i) The Respondent is a Senior Administrative Grade ('SAG') officer who was promoted to the post of Scientist 'G' under the Modified Flexible Complementing Scheme ('MFCS') with effect from 01.07.2013. The Respondent is an officer of the level of the Joint Secretary.

(ii) The Respondent was not entitled to draw Transport Allowance (TA) as per the prevalent OMs; however, the Petitioner with effect from 01.07.2013 mistakenly made payment of TA at ₹ 7,000/- per month to the Respondent until 31.08.2017.

(iii) The Respondent as per DoE's order dated 21.09.2017 became entitled to receive TA only with effect from 01.09.2017.

(iv) The issue of incorrect payment of TA was identified by the office of the Principal Director of Audit on 16.09.2016 i.e., within five (5) years. The overpayment to Respondent was to the tune of ₹ 4,06,467/-.

(v) The Respondent is due to retire in the year 2026.

(vi) The DoE observed that since the Respondent's case does not fall within any of the five (5) exceptions recognized in O.M. dated 02.03.2016, issued in consonance with the judgment of the Supreme Court in ***Rafiq Masih (White Washer)*** (supra), it directed the Petitioner herein to initiate recovery of the excess payment.

(vii) The DoE issued directions in this regard on 11.06.2018 and 18.02.2019.

(viii) The Petitioner issued order dated 25.09.2019 (1st order), wherein, overpayment was proposed to be recovered in 47 monthly instalments of ₹ 8,500/- each and 48th instalment of ₹ 6,967/- w.e.f. October 2019.

(ix) The Petitioner issued 2nd order dated 07.01.2020 and finally the 3rd order dated 31.12.2021 on the same terms for recovery in 48 instalments.

(x) The implementation of 1st order and 2nd order was deferred as the Respondent made representations for waiver. The DoE rejected the representations made by the Respondent on 25.09.2019 and 15.01.2020 for waiver of recovery of TA.

(xi) The 3rd order dated 31.12.2021 directed recovery of ₹ 4,06,467/- in 48 instalments starting from January 2022 and the final instalment in December 2025.

10. The Respondent impugned the said 3rd order dated 31.12.2021 before the Tribunal and it is this order, which has been set aside by the Tribunal by its impugned order.

11. The Tribunal in its impugned order noted that number of (other) Scientists who were similarly placed as the Respondent and were wrongly paid the TA, have been exempted from recovery of overpayment since they were falling within the exceptions recognized by DoPT in the O.M. dated 02.03.2016, issued in pursuance to the judgment of the Supreme Court in ***Rafiq Masih (White Washer)*** (supra).

11.1. The Tribunal returned a finding that the Respondent is not covered in the exceptions recognized by the Supreme Court in ***Rafiq Masih (White Washer)*** (supra). The relevant portion of the impugned judgment passed by the Tribunal reads as under:

> *"It has also been noted that the Hon'ble Supreme Court in State of Punjab & Others etc. v. Rafiq Masih (White Washer) etc. (Civil Appeal No. 11527/2014) did not stipulate all the situations and,* ***therefore, technically the applicant may not be covered by the conditions as she has not retired or about to retire within one year; and the period for which such allowance has been paid to the applicant was not more than five years****."*
>
> (Emphasis Supplied)

11.2. The Tribunal however, held that the said recovery of overpayment is impermissible in view of the judgment of this Court in ***J S Sharma*** (supra) wherein the Division Bench of this Court in similar facts had upheld the decision of the Tribunal disallowing the recovery of overpayment of TA to Grade 'A' officers, who were drawing pay at par with an officer of the post of Joint Secretary. The Tribunal was thus, of the view that the impermissibility of recovery of overpayment of TA is a recognised exception in view of the judgment of this Court. The relevant portion of the judgment of the Tribunal reads as under:

> *"18. The respondents have looked at only the limited situation, as indicated in their O.M. dated 02.03.2016, whereas the Hon'ble High Court of Delhi in Union of India & another v. J S Sharma (supra) have dealt with the case of similarly situated officers, who were granted Grade Pay of Rs. 10000/- under Non-Functional Upgradation Scheme and relying upon the decision of Hon'ble Supreme Court in Chandi Prasad Uniyal & others v. State of Uttarakhand & others (2012) 8 SCC 417, it was held as under: -*
> *...."*

(Emphasis Supplied)

11.3. In addition, the Tribunal held that the recovery order dated 31.12.2021 was bad in law since as per the law settled by Supreme Court, the employer is not entitled to recover payments made in excess of entitlement. The Tribunal held that this is especially so since, admittedly, there was no irregularity on the part of the Respondent herein in drawing the TA. The relevant portion of the judgment of the Tribunal reads as under:

> *"19. Apart from the technicality that the applicant does not fall in any of the situations enlisted in O.M. dated 02.03.2016, the respondents have obviously not considered the fundamental premises of law laid down by the Hon'ble Apex Court that the payments, erroneously made by the employer in excess of entitlement, cannot be recovered.*
>
> *20. It is also evidence that such TA was permitted to be drawn by the respondents and was never objected to till the audit team itself has proved*

that there was no irregularity on part of the applicant to draw the TA. In the counter affidavit, this aspect has been accepted. I have also noticed that the efforts were made specifically by the respondents to seek clarifications and recommend the case of the applicant for waiving off to DoE and DoPT in terms of O.M. dated 02.03.2016. Going by the aforementioned judgments and the settled law, the recovery of TA provided to the applicant is improper and impermissible."

(Emphasis Supplied)

12. In the opinion of this Court, the findings returned by the Tribunal at paragraphs 19 and 20 of the impugned order are contrary to the law laid down by Supreme Court in ***Chandi Prasad Uniyal*** (supra), wherein the Supreme Court held that amounts paid or received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of law. The relevant observations of the Supreme Court in this regard are as under:

"9. Shyam Babu Verma case [(1994) 2 SCC 521: 1994 SCC (L&S) 683: (1994) 27 ATC 121] was a three-Judge Bench judgment, in that case the higher pay scale was erroneously paid in the year 1973, the same was sought to be recovered in the year 1984 after a period of eleven years. The Court felt that the sudden deduction of the pay scale from Rs 330-560 to Rs 330-480 after several years of implementation of the said pay scale had not only affected financially but even the seniority of the petitioners. Under such circumstance, this Court had taken the view that it would not be just and proper to recover any excess amount paid.

13. ***We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered****. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or were on the verge of retirement or were occupying lower posts in the administrative hierarchy.*

14. ***We are concerned with the excess payment of public money which is often described as "taxpayers' money" which belongs neither to the officers who have effected overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in in such situations****. The 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 the 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 the 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.***
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> *15.* ***We are, therefore, of the considered view that except few instances pointed out in Syed Abdul Qadir case [(2009) 3 SCC 475: (2009) 1 SCC (L&S) 744] and in Col. B.J. Akkara case [(2006) 11 SCC 709: (2007) 1 SCC (L&S) 529], the excess payment made due to wrong/irregular pay fixation can always be recovered****."*

(Emphasis Supplied)

12.1. The Supreme Court in its subsequent judgment of ***Rafiq Masih (White Washer)*** (supra) reiterated that the benefit of non-recovery cannot be extended to an employee merely because he was not accessory to the mistake committed by the employer or was not guilty of furnishing any factually incorrect information, or fraud or misrepresentation. The relevant observations of the Supreme Court in this regard reads as under:

> *"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****.*
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> *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.

10. In view of the aforestated constitutional mandate, equity and good conscience in the matter of livelihood of the people of this country has to be the basis of all governmental actions. ***An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law****. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India."*

(Emphasis Supplied)

12.2. In the impugned order the Tribunal has not recorded any facts or returned a finding that the recovery of overpayment of TA from the Respondent shall cause extreme hardship of nature, which would eclipse the right of the Petitioner to recover the said overpayment. Thus, the direction of the Tribunal in setting aside the order of recovery dated 31.12.2021 does not satisfy the test applied by the Courts while not permitting recovery by the employer.

13. Pertinently, the Supreme Court in ***Rafiq Masih (White Washer)*** (supra) considered and explained the judgment of ***Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475,*** and held that if a mistake of making a wrongful payment is detected within five (5) years it would open to the employer to recover the same. The relevant extract of ***Rafiq Masih (White Washer)*** (supra) in this regard reads as under:

> *"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. ...

15. ...

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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> (Emphasis Supplied)

13.1. The recovery against the Respondent in the facts of this case is admittedly within five (5) years and there was sufficient time to Respondent's retirement (in 2026), when the recovery was first proposed in 18.02.2019. Thus, the order of recovery in the facts of this case is in consonance with the law laid down by the Supreme Court in the aforesaid judgments.

14. The Supreme Court in ***Rafiq Masih (White Washer)*** (supra) after elaborately considering the precedents set down by the Court in its judgments wherein the question of recovery was disallowed by the said Court, proceeded to summarize a few situations wherein, recoveries by the employers would be impermissible in law. The said situations are set out at paragraph 18 of ***Rafiq Masih (White Washer)*** (supra), which reads as under and has been adopted by the DoPT in its O.M. dated 02.03.2016:

> *"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."

(Emphasis Supplied)

14.1. As noted hereinabove, the Tribunal in the impugned order has returned a finding that the Respondent is not covered by the five (5) exceptions recognized by the Supreme Court in ***Rafiq Masih (White Washer)*** (supra) and therefore, is also not covered by the exceptions recognized by the DoPT in its O.M. dated 02.03.2016.

However, the Tribunal has held that recovery of overpayment of TA is not lawful as it has been recognized as an exception by the Division Bench of this Court in ***J S Sharma*** (supra).

14.2. The Respondent during the course of arguments contended that the Respondent falls within the exception no. (v) set out in the judgment of ***Rafiq Masih (White Washer)*** (supra) and contended that the recovery is iniquitous. He states that the assumption that this recovery of overpayment of TA is iniquitous has been recognized by this Court in ***J S Sharma*** (supra) which was followed by this Court in ***S P Singh*** (supra). He states that the

Tribunal has correctly followed the judgments of High Court and rightly concluded that recovery of overpayment of TA is impermissible as it is iniquitous in view of the said judgments.

15. This Court is unable to accept the aforesaid contention of the Respondent and the finding of the Tribunal that a presumption of inequity is attracted ipso-facto when the employer seeks to recover the overpayment of TA made to the employee, even though the concerned employee does not fall within the exceptions recognized by the Supreme Court in ***Rafiq Masih (White Washer)*** (supra). The Court has to return an explicit finding that the recovery will cause undue hardship to the employee as contemplated in the fifth exception. Further, the Supreme Court in the aforesaid judgment has categorically held that if the mistake of making a wrongful payment is detected within five (5) years, it would be open to the employer to recover the same from the employee.

15.1. To the same effect, the Supreme Court in ***Chandi Prasad Uniyal*** (supra) authoritatively held that if any amount is paid or received without the authority of law, then such an amount can always be recovered barring few exceptions of extreme hardships, but not as a matter of right. The Court further held that in case of overpayment, the law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

15.2. In the facts of this case, the Tribunal has not enlisted any circumstances, which in its opinion evidence that the Respondent would have suffered extreme hardship if the recovery was effected against her. Therefore, in the opinion of this Court, the Tribunal fell in error by setting aside the order for recovery dated 31.12.2021 without returning any finding

on extreme hardship or the recovery being iniquitous in view of judgment of Supreme Court in ***Rafiq Masih (White Washer)*** (supra).

16. This however bring us to the issue of judgments of Division Bench of this Court in ***J S Sharma*** (supra) and ***S P Singh*** (supra), wherein the order of the Tribunal setting aside the recovery of overpayment of TA was upheld.

17. The Division Bench in ***J S Sharma*** (supra) upheld the order of the Tribunal, setting aside the order of recovery of TA allowance in respect of Grade A officers. The Division Bench after referring to the judgment of Supreme Court in ***Syed Abdul Qadir*** (supra) and more specifically paragraph 57 and 58 therein, concluded that the case of Grade A officers falls in the exceptional category and thus, recovery is impermissible.

17.1. The said judgment of the Division Bench in ***J S Sharma*** (supra) was pronounced on 04.09.2013. However, subsequently, the Supreme Court in judgment of ***Rafiq Masih (White Washer)*** (supra), pronounced on 18.12.2014, after considering the judgment of ***Syed Abdul Qadir*** (supra) categorically held 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. In the facts of this case admittedly, the mistake of wrongful payment has been detected within 5 years.

17.2. Therefore, in view of the subsequent judgment of the Supreme Court in ***Rafiq Masih (White Washer)*** (supra), the judgment of ***J S Sharma*** (supra) is no longer a binding precedent and in the considered opinion of this Court it would be incumbent upon the Tribunal to return a finding of extreme hardship or iniquitousness caused to the employee within the meaning of exception no. five (5), before setting aside the order of recovery. There is no presumption in law that recovery of the overpayment of TA is

ipso-facto iniquitous. However, this is the effect of the judgment of the Tribunal

18. The Respondent herein has also relied upon the judgment of the Division Bench in ***S P Singh*** (supra), pronounced on 06.01.2021, wherein the Division Bench following the judgment of ***J S Sharma*** (supra) in similar facts disallowed the recovery of TA from the Chief Engineers working with CWC.

18.1. The learned counsel for the Respondent has contended that since the judgment of ***S P Singh*** (supra) has been passed by a Coordinate Bench, the same is binding on this Bench.

18.2. Pertinently, the judgment of ***S P Singh*** (supra) was not relied upon by the Tribunal in the impugned order while setting aside the order of recovery dated 31.12.2021.

18.3. However, a perusal of the said judgment dated 06.01.2021 passed in ***S P Singh*** (supra) would show that the judgment of the Supreme Court in ***Rafiq Masih (White Washer)*** (supra) was not brought to the attention of the Division Bench. In fact, the Division Bench in ***S P Singh*** (supra) dismissed the writ petition, simpliciter holding that the issue stands covered by the judgment in ***J S Sharma*** (supra) and therefore, the said Division Bench did not deliberate on this issue arising for consideration in the said proceedings.

19. We regret our inability to concur with ***S P Singh*** (supra) relied upon by the counsel for the Respondent to contend that in all circumstances, recovery of overpayment of TA to the employee is to be presumed to be iniquitous. As noted above, the attention of the Division Bench hearing ***S P Singh*** (supra) was not invited to the judgment in ***Rafiq Masih (White***

Washer) (supra). We are therefore, not bound to follow the same in view of the binding dicta of Supreme Court in ***Rafiq Masih (White Washer)*** (supra).

20. Therefore, in the facts of the present case, since none of the exceptions identified by the Supreme Court in ***Rafiq Masih (White Washer)*** (supra) are attracted and the Respondent has not brought on record any facts which would satisfy this Court that the recovery of overpayment of TA is iniquitous, we are of the considered opinion that the impugned order dated 10.05.2023 passed by the Tribunal cannot be sustained and is hereby set aside. Accordingly, the DoE's recovery order dated 31.12.2021 is hereby upheld.

21. With the aforesaid directions, the petition stands allowed and pending applications stand disposed of. No order as to cost.

MANMEET PRITAM SINGH ARORA, J

V. KAMESWAR RAO, J

NOVEMBER 23, 2023/msh