**(2020) 01 GUJ CK 0028**

**In the Gujarat High Court**

**Case No :** R/Special Civil Application No. 13588 Of 2017

Ushaben Kaushikkumar Desai APPELLANT

Vs

State Of Gujarat & 4 Other(S) RESPONDENT

**Date of Decision :** 06-01-2020

**Acts Referred:**
Gujarat Civil Services [Pension] Rules, 2002 — Rule 90, 133, 134, 134A

**Citation :** (2020) 01 GUJ CK 0028

**Hon'ble Judges :** Biren Vaishnav, J

**Bench :** Single Bench

**Advocate :** Atit D Thakore, Utkarsh Sharma

**Final Decision :** Partly Allowed

## Judgement

Biren Vaishnav, J

1. RULE. Mr.Utkarsh Sharma learned AGP waives service of rule on behalf of respondents.

2. With the consent of the parties, the petition is taken up for final hearing. The short controversy in the petition is whether the amount of family pension that had been paid to the petitioner-widow of the deceased government servant, can be recovered.

3. It is the case of the petitioner that petitioner's husband was working with the respondents and after having rendered pensionable service and having drawn the pension, he died on 01.01.2005. The widow drew family pension computed at the rate of 50% in accordance with Rule 90 of the Pension Rules.

4. Mr.Thakore learned counsel for the petitioner would submit that recovery from the pension on the ground that the excess pension was paid by mistake was unjustified, particularly in view of the decision of the Supreme Court in case of STATE OF PUNJAB & ORS VS RAFIQ MASIH (WHITE WASHER); (2015) 4 SCC 334. Mr.Thakore also relies on the decision of this Court rendered in Special Civil

Application No.20144 of 2016.

5. Mr.Utkarsh Sharma learned AGP drew my attention to the affidavit-in-reply filed on behalf of the respondents. He submitted that the petitioner is a widow of late Kaushikkumar Desai who joined service on 04.11.1968. He voluntarily retired from service on 31.07.2002. On the death of Kaushikkumar Desai on 01.01.2005, from 02.01.2005 the family pension was fixed.

6. Mr.Sharma would draw attention of this Court to Rule 90 of the Pension Rules 2002 and submit that the rate of family pension payable to the family shall be equal to 50% of the last pay drawn and the amount so admissible shall be payable from the date of death of the Government employee for a period of seven years or for a period upto the date on which the deceased Government employee would have attained the age of 65 years, if had he survived, whichever is less.

7. Pressing into service this rule, Mr.Sharma contended that looking to the birth date of the husband of the petitioner which was 26.04.1950, he would have completed 65 years of service on 26.04.2015, that the husband of the petitioner expired on 01.01.2005 and seven years were completed on 01.01.2012, therefore, according to Mr.Sharma, the petitioner was entitled to 50% of the amount as family pension upto 01.01.2012 and from 02.01.2012, she was entitled to 30% of the amount as family pension. As a result of a clerical error, the petitioner was paid an excess of Rs.2,66,302/- and therefore an amount of Rs.4,000/- was deducted per month to taken from April, 2017 to September, 2022. The last deduction would be of Rs.2302/-. He also relied on Rules 133 and 134 of the Pension Rules and justified recovery of excess payment by pressing into service Rule 134A of the Pension Rules.

8. Considering the facts on hand and particularly considering para 12 of the judgment in the case of RAFIQ MASIH (WHITE WASHER) (supra) which reads as under:

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(I) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

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

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

 

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

9. The case squarely falls within clause (v). The payment of the pension was made in excess admittedly due to the mistake of computing the amounts to which the petitioner was entitled to in view of the Rule 90 of the Pension Rules, however, the mistake was not due to any misrepresentation on part of the petitioner.

10. Therefore, the petition is partly allowed to the extent that the recovery of Rs.2,66,302/- is set aside. However, the petitioner shall be entitled to the amount of family pension hereinafter in accordance with Rule 90 of the Pension Rules.

11. Petition is disposed of accordingly. Rule is made absolute to the aforesaid extent. Direct service is permitted.