
(2018) 01 MP CK 0047
In the Madhya Pradesh High Court
Case No : 2395 of 2017

Vijay Shankar Trivedi

APPELLANT

Vs

The State of Madhya Pradesh & Others

RESPONDENT

Date of Decision : 17-01-2018

Acts Referred:

Constitution Of India, 1950 — Article 12, 14, 226
Madhya Pradesh Civil Services (Pension) Rules, 1976 — Rule 9(i), 65, 66, 66(1), 66(2)
(a), 66(2)(b), 66(2)©, 66(3)(a), 66(3)(b), 66(3)(c)

Citation : (2018) 3 MPLJ 453

Hon'ble Judges : J.K. Maheshwari

Bench : Single Bench

Advocate : Ravi M.K. Vyas, Girish Kekre

Final Decision : Allowed

Judgement

1. This petition under Article 226 of the Constitution of India has been filed by the petitioner, who is a retired Subedar (M) of the Police

Department of the Government of M.P. seeking quashment of order of recovery Annexure P-6 dated 23.11.2016 and to seek further direction to

decide representation Annexure P-7 and to grant any other relief, which may be deemed fit in the facts of the case.

2. The facts unfolded to file the present petition are that the petitioner was appointed on the post of Assistant Sub Inspector (M) as per order

Annexure P-2 dated 19.6.1982. He was promoted on the post of Account Subedar (M) as per order Annexure P-3 dated 11.7.2014. Thereafter

on attaining the age of superannuation he retired from the said post vide order Annexure P-4 dated 31.10.2016. Because the post retiral dues and

pensionary benefits of the petitioner were not settled, however, he submitted representation Annexure P-7 to respondent No. 4 to grant his legible

dues. In response thereto order of recovery Annexure P-6 dated 23.11.2016 has been passed, which is assailed in view of the judgment of the

Supreme Court in the case of State of Punjab & others Versus Rafiq Masih (White Washer) reported in 2014(4) SCC 334. It is contended that

the petitioner was a Class III employee since retired, therefore, in the light of the judgment of the Supreme Court in Rafiq Masih (supra) the

recovery from the retiral dues, as directed, is not permissible.

3. Learned counsel for the petitioner has placed reliance on a judgment of this Court in W.P. No.8791/2016 (Smt. Kapsi Bai Vs. State of M.P)

decided on 6.10.2017 inter alia contending that this Court has considered the judgment of Division Bench of the High Court of Rajasthan, Jodhpur

in Civil Special Appeal (W) No. 349/2014 (Mohammed Yusuf Versus Maharana Pratap Agriculture & Technology and another) decided on

24.11.2016 wherein the judgment of High Court of Punjab & Haryana & others Versus Jagdev Singh reported in (2016) 14 SCC 267 has been

distinguished and the case of Rafiq Masih (supra) has been relied upon. However, agreeing with the view taken by the High Court of Rajasthan,

this Court has quashed the order of recovery. In the said judgment it was observed that in W.P. No. 16633/2016 (Dr. Ashok Kumar Parashar

Versus The State of M.P.) decided on 23.6.2017, the Court has rightly observed that Rule 65 of M.P. Civil Services (Pension) Rules, 1976

(hereinafter referred to as the Pension Rules) is not applicable to retired Government servant. Reliance has also been placed on a judgment of

Division Bench of this Court in W.A. No.1232/2017 (The State of Madhya Pradesh & others Versus Chandrashwar Prasad Singh) decided on

15.12.2017 whereby the Division Bench has observed that since the employee has no option but to give undertaking so as to avail the benefit of

pay-fixation, it cannot be said to be voluntary act, thus, such undertaking cannot be made basis for sustaining the recovery. It is said that the

aforesaid judgment of Division Bench has again been relied upon by Single Bench of this Court in W.P. No. 18758/2015 (Phoolchand Patel

Versus The State of Madhya Pradesh) decided on 11.1.2018 and the order of recovery is quashed. In such circumstances, the recovery as

directed against the petitioner may be ordered to be quashed.

4. Per contra, the State Government by filing the return has inter alia not

disputed the factum regarding appointment, promotion and retirement of the petitioner. It is said that at the time of retirement while preparing the pension papers, it was found that the pay of petitioner fixed at the time of his initial appointment was incorrect, which continued till attaining the age of superannuation, however, in view of Rule 65 of the Pension Rules, the recovery of the excess amount has rightly been made. The petitioner was informed vide orders dated 5.11.2016 but he has not responded, therefore, the order of recovery dated 23.11.2016 has rightly been passed. In addition, it is said that on account of pendency of a criminal case against the petitioner, he is being paid the provisional pension. It is further submitted that the petitioner had submitted two undertakings at the time of getting the benefit of revision of pay vide Annexure R-2 for recovery of the excess amount, if any paid to him. However, looking to those undertakings, the judgment of the Supreme Court in the case of Jagdev Singh (supra) is applicable to the present case. It is further submitted that Rule 65 of the Pension Rules deals the recovery and adjustment of the Government dues and as per the said Rule, the petitioner is duty bound to clear all his dues, which were not cleared by him, therefore, also the recovery has rightly been directed.

5. After having heard learned counsel for both the parties and on perusal of the facts of the case, the moot questions arise for consideration are;

(I) Whether recovery from the petitioner, since retired, can be made vide Annexure R-1 in lieu of undertaking furnished by him as per Annexure R-

2?

(II) Whether Rule 65 of the Pension Rules would be applicable to the retired Government employee, however, the stand taken by the State

Government is justified?

6. The issue regarding recovery from the employee either in service or after attaining the age of superannuation, came for consideration before the

Supreme Court in the case of Rafiq Masih (supra) wherein the Apex Court in Para-12 has postulated certain categories and observed that the

recovery from them is impermissible. Para-12 is relevant, however, it is reproduced as thus:-

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.

7. The judgment of Rafiq Masih (supra) came for consideration in the judgment of Jagdev Singh (supra) wherein the Supreme Court in Para-10

after referring five categories, in which recovery was held to be impermissible in the case of Rafiq Masih (supra), referring Clause (ii) in Para-11

and 12 has held as under:-

11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to

whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be

required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.

12. For these reasons, the judgment of the High Court which set aside the action for recovery is unsustainable. However, we are of the view that

the recovery should be made in reasonable instalments. We direct that the recovery be made in equated monthly instalments spread over a period

of two years.

8. After the judgment of Jagdev Singh (supra), the issue came for consideration

before the Division Bench of the High Court of Rajasthan in

Mohdmmmed Yusuf (supra) wherein the Division Bench has held as under:-

In the case in hand it is not disputed that the fixation impugned were made atleast 10 years earlier i.e. from the date the respondent

University pass an order to effect recovery. It is also the position admitted that the appellants prior to their retirement were in

employment of the University on the post of Technician/Junior Mechanic, the posts is Group-C cadre and the appellants stood retired

from service much back in the year 2002. So far as the issue with regard to undertaking given by them is concerned, that cannot be

equated with the undertaking given by the Officer whose case was dealt with by the Hon"ble Apex Court in the State of Punjab &

Haryana & Ors. (supra). In the case aforesaid, the person concerned was a Civil Judge (Junior Division) and further the undertaking

given by him was in quite specific terms that any payment found to have been made in excess would be liable to be adjusted and

further that fixation of the refund made was to be used for adjustment of excess payment, if any given.

In the instant matter, the undertaking said to be given is in a proforma that simply mentions for refund of over payments, if any made,

on account of incorrect fixation. The undertaking is a part of proforma and it is well known that the persons belonging to lower posts

put signatures on such undertaking without application of mind.

In these circumstances, we are of the considered opinion that cases of the present appellants are required to be dealt with in

accordance with law laid down by the Apex Court in the case of Rafiq Masih (supra). The appeals are accordingly allowed. The

judgment impugned dated 24.2.2004 passed by the learned Single Bench is set aside. The writ petitions preferred by the petitioners

are allowed to the extent that the respondent University shall not effect any recovery from pay/pensionary benefits/post retiral benefits

or otherwise from them on account of the amount said to be paid in excess while awarding selection grades or making pay fixation.

9. In the said judgment the Court distinguished the judgment of Jagdev Singh (supra) on the pretext that if a person belong to Group- C retired

from the service and given his undertaking, which cannot be equated with the undertaking given by the Civil Judge (Junior Division), which was dealt with in the case of Jagdev Singh (supra). It was further held that the undertaking is not specific to the recovery, however, it cannot be relied upon. Thus relying upon the judgment of Rafiq Masih (supra) and setting aside the order passed by learned Single Judge, the recovery was quashed.

10. The Division Bench judgment of High Court of Rajasthan in Mohammed Yusuf (supra) has been considered by co-ordinate Bench of this Court in Kapsi Bai (supra) wherein the defence taken by the State Government regarding undertaking given by the employee was negated and the recovery was quashed.

11. The issue regarding recovery from a retired employee also came for consideration in the case of Om Prakash Verma Vs. State of M.P. & others reported in 2017(3) MPLJ 175 whereby the Single Bench of this Court quashed the recovery distinguishing the judgment of Jagdev Singh (supra) stating that the said judgment only deals proposition No. (ii) of the judgment of Rafiq Masih (supra) and do not apply for other propositions particularly to the case of Group-C and Group-D employees.

12. The Division Bench of this Court in The State of Madhya Pradesh & others Versus Chandrashwar Prasad Singh (supra) vide order dated

15.12.2017 has considered the same arguments advanced on behalf of the State Government relying upon the judgment of Jagdev Singh (supra) and the Court held as under:-

We find that the said judgment relied upon by learned counsel for the State has no applicability in the facts of the present case as the

undertaking itself is unconscionable writing obtained by the State. The employee has no option but to submit undertaking to avail the

benefit of pay-fixation. In a judgment of the Supreme Court reported as (1986) 3 SCC 136 (Central Inland Water Transport

Corporation Limited and Another v. Brojo Nath Ganguly and Another), a condition in the appointment letter that the Corporation

could terminate the services of the employees without prior notice if it was satisfied that the employee was unfit medically or was

guilty of any subordination in respect of other misconduct, was found to be

illegal. The Supreme Court held as under:-

68. We now turn to the second question which falls for determination in these Appeals, namely, whether an unconscionable term in a

contract of employment entered into with the Corporation, which is "the State" within the meaning of the expression in Article 12, is

void as being violative of Article 14. What is challenged under this head is clause (i) of Rule 9 of the said Rules. This challenge

levelled by the Respondent in each of these two Appeals succeeded in the High Court.

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78. Legislation has also interfered in many cases to prevent one party to a contract from taking undue or unfair advantage of the

other. Instances of this type of legislation are usury laws, debt relief laws and laws regulating the hours of work and conditions of

service of workmen and their unfair discharge from service, and control orders directing a party to sell a particular essential

commodity to another.

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93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will

be non-suited. The case of *A. Schroeder Music Publishing Co. Ltd. v. Macaulay* [(1974) 1 WLR 1308], however, establishes that

where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The

case may be different where the purpose of the contract is illegal or immoral. In *Kedar Nath Motani and others v. Prahlad Rai and*

others, [1960] 1 S.C.R. 861 reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title

to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after

discussing the English and Indian law on the subject, said (at page 873):

The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter

that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial

or venial, as stated by Willistone and the plaintiff is not required to rest his case upon that illegality, then public policy demands that

the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's

conduct, and he should not be allowed to circumvent the illegality by restoring to some subterfuge or by mis-stating the facts. If,

however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff

recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court,

the plea of the defendant should not prevail.

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are

contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to

public policy and require to be adjudged void.

In view of the aforesaid judgment, we find that since the employee has no option but to give undertaking so as to avail the benefit of payfixation, it

cannot be said to be voluntary act thus, such undertaking cannot be made basis for sustaining the recovery of Rs.87,354/-.

13. The said judgment has again been relied upon in the case of Phoolchand Patel (supra) by the Co-ordinate Bench of this Court quashing the

order of recovery directed against the petitioner.

14. In view of the foregoing discussion, the legal position which can be culled out is that the judgment of Jagdev Singh (supra) is a judgment on

proposition No. (ii) of the judgment of Rafiq Masih (supra). Proposition No. (ii) deals the recovery from retired Government employees or the

employees who are due to retire within one year from the order of recovery. The Division Bench of the High Court of Rajasthan in Mohammed

Yusuf (supra) distinguished the ratio of the judgment of Jagdev Singh (supra) on facts reiterated in the undertaking, if any, given by the Civil Judge,

as was the case before the Supreme Court, would not apply in the case of Group-C employees, while Division Bench of this Court in the case of

Chandrashwar Prasad Singh (supra) distinguished the same taking a view that if any undertaking has been obtained from an employee at the time

of availing the benefit of pay fixation, it cannot be said to be voluntary act on his part because the said employee was having no option except to

give such undertaking, it cannot be made the basis for sustaining the recovery. Though the Single Bench in the case of Om Prakash (supra)

distinguished the judgment of Jagdev Singh (supra) on the pretext that the petitioner is a Class III employee but in the case at hand though the

petitioner was a Class III employee now retired, therefore, this Court merely referred the said judgment to accept the analogy as taken by the High

Court of Rajasthan in the case of Mohammed Yusuf (supra) as well as by this Court in the case of in the case of Chandrashwar Prasad Singh

(supra).

15. Looking to the aforesaid legal position, it is necessary to analyze the facts of the present case. On perusal, it reveals that the State Government

vide order dated 5.11.2016 said that the petitioner is not entitled for the pay scale which was allowed to him from the initial date of appointment,

therefore, recovery to the tune of Rs.23,43,433/- along with the interest has been ordered vide order Annexure P-6 dated 23.11.2016. The

undertakings which are brought on record relates to fixation of pay at the time of pay revision; first undertaking was submitted on 21.4.1987 and

subsequent undertaking is undated. Its language indicates that the benefit of revision of pay extended to the petitioner is provisional and at the time

of its finalization, excess amount may be returned back or may be deducted from him. However, looking to the said fact the analogy drawn by

Division Bench of this Court in the case of Chandrashwar Prasad Singh (supra) aptly applies to the facts of this case because the said undertaking

was obtained from the petitioner at the time of extending the benefit of pay revision and such act of the petitioner cannot be said to be voluntary

act. In view of the said discussion distinguishing the judgment of Jagdev Singh (supra), and applying the ratio of Rafiq Masih (supra) the order of

recovery Annexure P-6 dated 23.11.2017 is hereby quashed.

16. Now reverting to question No. 2 whether Rule 65 of the Pension Rules would be applicable to the retired Government employee? In this

regard, the stand taken by the State Government is that, it would apply to the retired employee, however, recovery can be made from him. To

advert the said contention, the language engrafted in Rule 65 of the Pension

Rules is relevant, however, it is reproduced as thus:-

65. Recovery and adjustment of Government dues.- (1) It shall be the duty of every retiring Government servant to clear all Government dues

before the date of his retirement.

(2) Where a retiring Government servant does not clear the Government dues and such dues are ascertainable.-

(a) an equivalent cash deposit may be taken from him; or

(b) out of the gratuity payable to him, his nominee or legal heir, an amount equal to that recoverable on account of ascertainable Government dues

shall be deducted.

Explanation.-1. The expression ""ascertainable Government dues"" includes balance of house building or conveyance advance, arrears of rent and

other charges pertaining to occupation of Government accommodation, over-payment of pay and allowances and arrears of income -tax

deductible at source under the Income-tax Act, 1961 (No. 43 of 1961).

17. On perusal of the aforesaid, it is clear that sub-rule (1) specifies the dues of ""retiring"" Government servant while sub-rule (2) deals the deposit

or deduction from the gratuity payable to ""retiring"" Government servant, therefore, Rule 65 deals the contingency casting the duty on the ""retiring

Government servant as well as on the Government, it is nothing to do with the ""retired"" Government servant. It do not postulate the contingency

which may be made applicable after retirement of the employee.

18. Learned Government Advocate made an attempt referring Rule 66 (3)(a) of the Pension Rules to contend that the words ""retiring employee

would be deemed to be continued even after retirement upto the period of six months. After going through the entire Rule 66, it can safely be held

that Rule 66(3)(a), (b) and (c) applies to deal with a situation, after retirement of the Government employee. In case the formalities as specified in

Rule 66(1) (a) and (b) and Rule 66 (2)(a), (b) and (c) has been observed by the Government then what would be the validity period of the

undertaking and effect of the amount so deposited by such employee for the purpose of recovery of Government dues, if any from him, otherwise

as per sub-rule (4), the legal procedure which is permissible under the law can be taken. In view of the foregoing discussion repelling the argument

of of learned Government Advocate, the questions posed for answers hereinabove are decided in favour of the petitioner and against the State Government.

19. Accordingly, the inescapable conclusion which can be arrived at in the present case is the order of recovery Annexure P-6 dated 23.11.2016

issued by the Government is hereby quashed. In consequence, this petition succeeds and is hereby allowed. In the facts and circumstances of the case, parties are directed to bear their own costs.