IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 2840 of 2019

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SABIRMIYA GULAMAHEMAD GHORI

Versus

AHMEDABAD MUNICIPAL CORPORATION & 1 other(s)

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Appearance:
MR PRABHAKAR UPADYAY(1060) for the Petitioner(s) No. 1
MR HS MUNSHAW(495) for the Respondent(s) No. 1,2

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CORAM:**HONOURABLE MR. JUSTICE BIREN VAISHNAV**

Date : 07/07/2022

ORAL ORDER

1. Heard Mr. Prabhakar Upadhyay, learned advocate for the petitioner and Mr. H.S. Munshaw, learned advocate for the respondents.

2. The case of the petitioner who retired on 31.05.2015 is that the Corporation by merely issuing a statement at Annexure C to the petition recovering an amount of Rs.63,878/- from the terminal benefits of the petitioner on the ground that the higher pay-scale that was so granted to him was wrongly so granted.

3. Mr. Upadhyay, learned advocate appearing for the petitioner would draw the attention of the court to the order dated 28.09.2016 passed in Special Civil Application No. 6119 of 2015 and allied matters where in

circumstances identical to the case of the present petitioner where the recoveries were ordered from pension of the pay-scale of the amounts due to wrong fixation of pay and grant of higher pay-scales without opportunity of hearing, the court has held as under:

> **"5.** Having considered the facts in the controversy, it was to be noticed that the Scheme of higher pay-scale known as 9-18-27 was one put into practice by the State Government. The respondent Ahmedabad Municipal Transport Service functions under the Ahmedabad Municipal Corporation as its department. The Ahmedabad Municipal Corporation by Circular No.06 dated 13th May, 2002 decided to implement the 9-18-27 Scheme of the State Government for its employees with effect from 01st April, 1992. In turn, on 26th September, 2008 the Transport Committee of Ahmedabad Municipal Transport Service passed Resolution dated 26th September, 2008 to adopt policy for its employees with effect from the same date, that is 01st April, 1992.
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> **5.1** Thereafter the Finance Department of the State Government passed Resolution dated 02nd July, 2007 introducing a new policy to pay higher pay-scale to the employees on completion of 12 years and 24 years. The said policy Resolution came to be implemented from the said date, that is 02th July, 2007. Pursuant to this policy brought into play by the State Government, the Ahmedabad Municipal Corporation issued Circular No.20 dated 21st July, 2010 in which it was laid down to implement the new policy of the State Government for higher pay-scale, that is 12-24 years with effect from 02nd July, 2007, being the date of the Finance Department resolution. Thus the policy introduced by the State Government was adopted, however it was sought to be given a retrospective effect by the Ahmedabad Municipal Corporation.

5.2 It is stated on behalf of the second respondent that after the aforesaid retrospective effect given as above, the Transport Committee of the Ahmedabad Municipal Transport Service passed Resolution on 15th April, 2013. It was stated that at that time 500 employees were released the benefit of first higher pay-scale on completion of nine years of service after 02nd July, 2007, the date from which the effect was given. Out of those 500, 35 were the pension getting employees. Thereafter the second respondent appears to have issued Circulars dated 21st October, 2014, 29th November, 2014 and 30th December, 2014 seeking recovery and refund of the amount paid towards higher pay-scale on the basis of the earlier decisions. Rs.03,500/- per month came to be deducted from the employees concerned.

5.3 What clearly emerges is that policy was adopted by the Ahmedabad Municipal Corporation and on the same lines, subsequently by Ahmedabad Municipal Transport Service by passing necessary policy resolutions giving effect to the benefit of higher pay-scale by implementing the Resolution dated 02nd July, 2007 retrospectively. All those employees, either in service or retired were extended and paid the benefits arising thereby. At that time they had completed the requisite number of years and were eligible to get the higher grade pay-scale. The present petitioners were also given the said benefit with effect from 01st March, 2009. They received and continued to receive the same until and after their retirement in 2014. It was only in 2014 that recovery was enforced all of a sudden without any hearing or intimation. It is this action of recovery, is called in question.

5.4 The argument that the employees had given undertaking to refund the amount and therefore the recovery was justified, has to be stated to be rejected. The said was a general *Kabuliyat*obtained that in case excess amount was paid, the second respondent would be entitled to recover and refund would be given if asked for. Such undertaking cannot be projected as a defence-shelter to justify the recovery, which is, as discussed hereinafter, is found to be bad in law and not legal, for the reasons more than one. The

undertaking was not in the context of facts under which the recovery is now sought by the respondent authority. The policy resolution was duly passed, implemented and given effect to, and actual benefit was accorded and paid to the employees. The employees thereafter retired and continued to get the salary and pension on the basis of higher scale granted.

5.5 A mere change in policy decision, cannot be a ground to justify the recovery. The amount paid to the petitioners towards the higher pay-scale was not the result of any fraud, misrepresentation or culpability on part of any of the petitioners. In such circumstances, benefit once accorded could not have been set at naught and recovery could not have been acted upon.

5.6 Furthermore, on factual front, a clinching aspect was noticed, by virtue of which the respondent are stopped from taking the adverse action of recovery. In Circular No.20 dated 21stJuly, 2010, copy of which is produced on record of the petition, by virtue of Clause 3(8) thereof it is clarified and provided in unequivocal terms that the cases of those employees which were concluded prior to the date of Circular, that is 21st July, 2010, they would not be reopened. In reopening the cases of the petitioners and seeking to recover and deduct the amount from the pension, the authorities could have been said to be acted contrary to their own Circular and the policy. Therefore neither in law, nor on the policy decisional facts, the recovery could have been legitimised and legalised.

6. In **Syed Abdul Qadir Vs State of Bihar [(2009) 3 SCC 475]**, the Apex Court observed that relief against is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employee from hardship that will be caused to him if recovery is ordered. In paragraph 59, the Court observed, disallowing recovery of what was an excess payment in that case,

> "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....." (Para 59)

6.1 In **State of Punjab Vs Rafiq Masih [AIR 2015 SC 696]**, the Supreme Court after surveying decision on the aspect, laid down guidelines-directives in paragraph 12 of the judgment,

> "12. It is not possible to postulate all situations of hardships, 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 decision referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
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> (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service.)
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> (ii) Recovery from retired employees, or employees who are due to retire within one year, or the order of recovery.
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> (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.
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> (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 employer, 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."

6.2 The principle in **Rafiq Masih (supra)** that where employer has committed an error of paying the employee more than what was payable, recovery thereof would be harsh and inequitable in absence of any misrepresentation or fraud on part of the employee, would apply in the present case also when the employer substituted his policy resolution by another policy resolution and started to recover the amount from salary/pension on the ground that what was paid on the basis of the earlier policy resolution and the scheme was required to be treated as erroneous payment, liable to be recovered. It was observed that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result into a hardship which would outweigh the equitable balance of employers right to recover.

6.3 The relief against recovery is an equitable relief. The amount paid to the employee towards his entitlement which was due at a particular point of time and for which an employee otherwise eligible at that point of time, would have to be barred from recovery unless the receipt of the benefit for the amount was attributable to employees own conduct of the nature of fraud or misrepresentation. A recovery effected discarding the above aspects would be viewed as offending to the equality clause, therefore impermissible in law.

6.4 In **Pravinbhai Kantilal Ganatra Vs State of Gujarat** being **Special Civil Application No.12078 of 2013** decided on 04th October, 2016, this Court, dealing with similar issue of permissibility of recovery of the benefit once availed, stated the principle as under in paragraph 6.1.

> "The doctrine of equality is a dynamic and evolving concept with many dimensions. In Articles 14 to 16 of

> the Constitution, the doctrine of equality is embodied. An action of the State or its authority, ordering recovery from an employee, would be in order and would be proper so long as it is not rendered iniquitous. The action of recovery cannot be more unfair, more wrongful, more improper and more unwarranted, than the corresponding conduct of and the entitlement on part of the right of the employer to recover the amount. In other words, where the recovery would have a harsher and arbitrary effect on the employee, it would be impermissible in law."
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> (Para 6.1)

7. Keeping in view the aforesaid principles and applied to the facts of the case, it has to be held that, the recovery sought to be effected by respondent No.2 of the pay-scale already availed and paid to the petitioners, could not be allowed to retain its legality. The action is liable to be set at naught and deserves to be set aside. Besides the above, it is also not in dispute that the recovery action was not preceded by any opportunity of hearing afforded to the petitioners. Therefore the impugned action stands illegal on the sole ground of breach of natural justice. Amongst the aforesaid legal aspects, stares at the face also the factual position that in the Circular dated 21st July, 2010 whereunder the recovery was provided, clause 3(8) did contemplate clearly that those cases which were concluded would not be reopened. Thus the action on part of the respondents is contrary to their own policy decision.

8. As far as Special Civil Application No.7657 of 2015 is concerned, the decision impugned therein is rendered illegal and deserves to be set aside on all the aforesaid legal and factual grounds which per force apply as the facts and the controversy were the same.

9. In light of the aforesaid discussion, petitions deserve to be allowed, however as far as the relief for refund of the amount is concerned, it is considered appropriate that the same is first considered by the authorities upon the petitioners supplying the necessary details of their claim

with regard to the refund. The authorities shall take an appropriate decision in accordance with law.

10. In view of forgoing reasons and discussion, all the petitions are disposed of by allowing them to the extent below and as per the directions hereinbelow.

(i) Interim relief was granted by order dated 10th April, 2015 restraining the second respondent from recovering and/or deducting any amount from pension of the petitioner stands confirmed;

(ii) The respondents are permanently restrained from recovering and/or deducting any amount from the pension payable to the petitioners. There shall be no recovery from the pension amount henceforth;

(iii) As far as the prayer for refund of the amount already recovered is concerned, it is open to the petitioners to furnish details to the respondent-employer authority and the authority shall consider such request by refunding the amount recovered from pension within a reasonable time;

(iv) Special Civil Application No.7657 of 2015 is allowed by setting aside order dated 24thMarch, 2015 passed in Complaint No.01 of 2015 by the Industrial Tribunal, Ahmedabad. The aforesaid directions shall additionally govern.

All the petitions are allowed and disposed of in the terms aforesaid."

4. Challenge to the said order by way of Letters Patent Appeals also failed and the Division Bench of this court confirmed the order passed in the writ petitions vide judgement and order dated 13.09.2017.

5. In light of the decision referred to hereinabove, petition is allowed. The action of recovery of amount of Rs.63,878/- from the terminal benefits of the petitioner is quashed and set aside. The respondent corporation is directed to refund the amount of Rs.63,878/- to the petitioner within a period of ten weeks from the date of receipt of the writ of the order of this court. Direct service is permitted.

(BIREN VAISHNAV, J)

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