HIGH COURT OF JUDICATURE AT BOMBAY

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1885 OF 2018

Vilas Pandurang Markande Eknath Kutir, Flat No.5 Eknath Mhatre Nagar, Namdeo Path, Rokel Depo Lane, Dombivali (E), Dist. Thane Maharashtra	...Petitioner Original Applicant
V/s.	
1. Regional Labour Commissioner (Central) Mumbai Shram Raksha Bhavan, Shivshrushti Marg... Sion (E), Mumbai 400 022	
2. Members of the Board of Trustees of Port of Mumbai Through: The Chairman Mumbai Port Trust, Port House Shoorji Vallabhdas Marg Ballard Estate, Mumbai 400 001.	... Respondents Respondent No.1 Original Opponent

Ms. Jane Cox i/by Karishma Rao, for the Petitioner.
Mr. R. V. Govilkar, a/w Mr. D. P.Singh for respondent No.1 Union of India,
Mr. Arsh Misra i/by M.V. Kini & Co., for respondent No.2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 19st NOVEMBER, 2018.

ORAL JUDGMENT

1] Heard learned counsels for the petitioner and

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respondents.

2] Admit.

3] With the consent of learned counsel for both the parties, the petition is taken up for final hearing at the stage of admission itself.

4] This Writ Petition takes an exception to the order dated 27th November, 2017, passed by the Regional labour Commissioner (Central) Mumbai, thereby dismissing the Claim Application filed by the petitioner under Section 33-C(1) of the Industrial Disputes Act, 1947. (for short called as, "I.D.Act").

5] This Application under Section 33-C(1) of the I.D.Act, was preferred by the petitioner against respondent No.2, challenging the deduction of an amount of Rs.2,91,312.87, from his leave encashment proceeds, on account of alleged wrong fixation of pay at the time of his promotion from the Feeder post Master II Class to to Master I Class, on 16.2.1998. It was submitted by the petitioner that this deduction from his entitlement towards leave encashment proceeds is totally illegal, unjustified and erroneous, considering that the amount was payable as per service conditions /settlements arrived at between him and the respondent No.2, under Mumbai Board Trust Employees

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Leave Regulations, as modified from time to time. Moreover, such recovery was impermissible in view of the law laid down by the Apex Court, in the case of **Chandi Prasad Uniyal and others -vs- State of Uttarakhand and ors [AIR SCW 4742],** as the alleged excess payment has been made for a period in excess of five years, before the order of recovery was issued and it would be iniquitous, harsh and arbitrary to allow such recovery of the amount.

6] Respondent No.2 has resisted this application contending inter alia that the petitioner is no more in service of the respondent, No.2, the application itself is not maintainable and as the recovery of the amount is not due under a settlement or award or under the provisions of Chapter V-A and V-B, the application under Section 33-C(1) of I.D.Act, was not maintainable. Secondly, it was submitted that the pay of the petitioner was erroneously fixed on his promotion on 16.2.1998 at Rs.7810/- instead of Rs.7565/-. This irregularity in pay fixation of the petitioner was detected during the course of verification of service record of the petitioner, on his retirement. Thereafter the petitioner was given an opportunity of being heard in the matter on 2.2.2017 by the Financial Adviser and Chief Accounts Officer, wherein the entire procedure followed in the rectification of his pay was explained to the petitioner. It was also informed to the

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petitioner that as per his letter dated 30.12.2015, he had undertaken that he would refund or authorize the respondent No.2, to recover any excess amount paid to him. Accordingly, this amount of Rs.2,91,312.87, was found to be due to the respondent from the petitioner on account of payment of salary made to him, due to erroneous fixation of the pay scale and hence his application for recovery of the said amount is not at all maintainable and deserved to be dismissed.

7] The Regional Labour Commissioner, while considering the objection raised by the petitioner framed following two issues :-

i) Whether any inference could be drawn to the wage settlement dated 19/01/2010 to consider the application of the applicant under Section 33-C(1) of the Industrial Disputes Act, 1947? Whether the amount is pre-determined/decided in the wage settlement and whether the recovery application is sustainable in the eyes of law?

ii) Whether the applicant can recourse to the remedy as provided in the Industrial Disputes Act, 1947 and is there any relationship of employer and workman so as to avail the provisions of the Industrial Disputes Act, 1947?

8] While answering these two issues, it was held by the Regional Labour Commissioner that in view of Section 33-C(1) of

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I.D.Act, only where the amount is due to a workman or his legal heirs, from an employer under a settlement or an award or under the provisions of Chapter VA or Chapter VB of the I. D. Act, then only, such application can be maintainable. It was held that in the instant case, when no such money is due from the employer, under a settlement or an award or under the provisions of Chapter VA or Chapter VB of the I. D. Act, and the issue raised by the petitioner is centered around the alleged recovery of excess amount drawn by him on account of wrong pay fixation, the, application made under Section 33-C(1) of I. D. Act, is not maintainable.

9] While answering, the second issue as to, whether the applicant can take recourse to the remedy, as provided in the Industrial Disputes Act 1947, and is there any relationship of employer and workman so as to avail the provisions of the Industrial Disputes Act, 1947, the Labour Commissioner has held that as the petitioner has ceased to be an employee w.e.f. 01.01.2016, having been retired from the services of the respondent No.2 with effect from 31.12.2015, as such no formal relationship of employee and employer exists between respondent No.2 and the petitioner as on the date of availing the remedy under Section 33-C(1) of the I. D. Act, by the petitioner. Hence, it was held that the petitioner cannot avail any of

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the provisions of I. D. Act, to his advantage, after he ceases to be an employee/workman of the respondent No.2.

10] Both these findings of the Labour Commissioner are challenged in this Writ Petition by learned counsel for the petitioner, and in my considered opinion, rightly so.

11] Taking up the second issue first, as to whether for the purposes of the I.D. Act, there exists the relationship of employer and employee between the parties on the retirement of the employee?

12] For deciding this issue, definitions of the terms "workman" and the "industrial dispute" as laid down under Sections 2(s) and 2(k) of the I.D.Act, respectively, are relevant and are, therefore, reproduced as follows :-

> "2(s) **Workman,** means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purpose of any proceeding under this Act, in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person -
>
> (i) xx xx xx

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(ii) xx xx xx'

(iii) who is employed mainly in a managerial or administrative capacity, or

(iv) who, being employed in a supervisory capacity, draws wages exceeding (Ten thousand rupees) per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature". (emphasis supplied)

"2(k) **Industrial dispute** means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person".

13] According to learned counsel for respondent No.2, the definition of "workman", thus, includes only those workers who are actually in employment or who have been dismissed, discharged or retrenched in connection with, or as a consequence of the dispute or whose dismissal, discharge or retrenchment has led to that dispute.

14] Here in the case according to him, the petitioner is neither dismissed, nor discharged, nor retrenched from the service and neither is there any dispute relating to his dismissal, discharge or

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retrenchment. Therefore, as regards the petitioner, who has retired from the service, he cannot come come within the definition of "workman".

15] To substantiate his submission, learned counsel for respondent No.2 has relied upon the judgment of Calcutta High Court, in the case of **Standard Chartered Grindlays Bank Retired Employees Association and others -vs- Union of India and others, [2007 (2) L.L.N. 846];** wherein, according to him, similar issue was raised for consideration and it was held that, once retired from the service, the employee cannot be included in the definition of "workman" under Section 2(s) of the I. D. Act. As such he cannot raise any industrial dispute in terms of Section 2 (k) of the I. D. Act.

16] However, it is pertinent to note that in the said judgment, the issue involved was whether a retired workmen are entitled to be the parties to a bipartite settlement in between the employer and the workmen under the I.D. Act. In that context, it was held that though it is open for the workmen to take up the issue of any person including retired workman, because the payment of pension has a direct bearing on substantial interest of the workmen, who will enjoy such benefit after retirement, however, no retired workman can be a party

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to any dispute or different with their erstwhile employers. In that context it was held that retired workman cannot fall within the definition of "workman" as given under Section 2(s) of the I. D. Act.

17] As against it, the reference to the decision of Division Bench of this Court, in the case of **P. L. Mayekar -vs- Amichand Narayan [(1949) 55 Bom. L.R. 894],** would be more useful. In this case the argument advanced on behalf of the employer was that as the appellants were dismissed from the service prior to the Reference made by the Government, they did not fall within the definition of "workman" and no "industrial dispute" could be raised with regard to them. While rejecting this argument, it was held by the Division Bench of this Court that :-

> "Now, the definition of "workman" does not indicate that the workman must be employed at a particular moment of time. What is emphasised is that he must be employed in any industry to do any skilled or unskilled, manual or clerical work for hire or reward; in other words, the definition is intended to point out what the nature and characteristic of a person is who can be deemed to be a workman within the meaning of the Act. In our opinion, a workman as defined in this sub-section means any person who is employed at any time in an industry. If he satisfies the definition of "workman" under Section 2(s), then

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whether he can raise an industrial dispute or not must be judged by the definition of "industrial dispute" given in Section 2(k). Therefore, in order to determine whether an industrial dispute has been properly raised or referred, one must read Section 2(k) and Section 2(s) in conjunction. If, therefore, the dispute is the result of a difference between employers and workmen or an employer and a workman and that dispute is connected with regard to employment or non employment or the terms of employment or with the conditions of labour of any person, then the dispute as as such can be referred by Government under Section 10(1) (c) and in respect of which the Industrial Court can assume jurisdiction"

It was further held that:-

"In our opinion, the case of a dismissed employee who wishes to raise an industrial dispute falls directly within the definition of "workman" and it is only in cases where a workman has been dismissed pending an industrial dispute that we must look to the latter part of the definition of Section 2(s)".

18] This question, as to whether a retired employee can fall within the definition of the term "workman" was raised for consideration directly before Co-ordinate bench of this Court, in the case of **ICI India Ltd -vs Presiding Officer and ors; [1993 I CLR 753],** wherein; after referring to the earlier decision in the case of **P.**

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L. Maykear -vs- Amichand Narayan (supra), and the decision of the Hon'ble Supreme Court, in the case of **Workmen of Dimakuchi Tea Estate (Assam Chah Karmachari Sangh) -vs- Dimakuchi Tea Estate [1958 I LLJ 500],** it was categorically held that industrial dispute can legitimately arise, even after the service of the workman has come to an end and master-servant relationship has ceased. It was held that:-

> "Though both decisions were concerned with relief to a dismissed workman, the principle can be extended to the case on hand also. For the purpose of pensionary rights the pensioner or retiree would as much be as workman as any other workman whose contracts of employment are still subsisting. I am unable to accept the contention of the learned counsel for the petitioner that after retirement or demitting office the pensionary right of the retiree could be enforced only by resort to a civil suit and not by resort to the adjudicatory machinery available under the Act. If, as pointed out by this Court in *Mayekar's* case (supra) and the Supreme Court in *Dimakuchi's* case (supra), the expression "workman" used in section 2(s) applies to all workmen past, present and future, I see no difficulty in holding that, even after retirement, a retiree has the right to take recourse to the adjudicatory machinery made available under the provisions of the Act".

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19] In my considered opinion, thus, the issue as to whether the retired workman falls within the definition of section 2(s) of the I.. D. Act, is no more open for debate. As a matter of fact the issue in the present case is no more res-integra, in view of the judgment of the Apex Court in the case of **State of Punjab and others -vs- Rafiq Masih (White Washer) and ors [(2015) 4 SCC 334];** wherein the similar issue was raised pertaining to the recovery of the amount paid in excess to the employee, without any fault of on the part of employee. While deciding the same, it was held that, in cases where certain monetary benefits were wrongly extended to the employee, which were in excess of the entitlement of the employee, but those benefits flowed to him on account of the mistake committed by the competent authority concerned, and not on account of any fault on the part of the employee, in that case, the employer may be entitled to recover excess amount paid, subject to certain terms and conditions. After considering it's earlier various decisions, in paragraph No.18, the Apex Court has observed as follows :-

> "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 herein above, we may, as a ready reference, summarize the following few situations, wherein

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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 recovery."

20] Therefore, as regards the present petitioner, admittedly he belongs to class III employee. It is also not disputed that he is a retired employee. As per case of the petitioner, excess amount is alleged to have been paid to him without any fault or misrepresentation on his part. It was on account of wrong fixation of his pay scale on his promotion. The amount is paid in excess of five years way back during the period 1998 to 2015. The recovery is after

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a period of more than 18 years. Hence it would be not only iniquitous but harsh and arbitrary, especially when there was no fault on the part of the petitioner any excess amount being paid to him. It would, therefore, far outweigh equitable balance of employer's right to recovery.

21] If the above criterias as laid down in this judgment are, are applied to the present case, then it goes without saying that the case of the present petitioner squarely stands covered therein. In such situation the recovery by the employer of the excess amount paid to employee would be impermissible.

22] The submission of learned counsel for respondent is that in another judgment of the Apex Court in the case of **U.T. Chandigarh & ors -vs- Gurcharan Singh** in **Civil Appeal No.9873 of 2013 dated 01.11.22013,** the Apex Court has permitted such recovery of the excess amount paid to the employee and this judgment was not considered by the Apex Court, in the case of **State of Punjab and ors -vs- Rafiq Masih (supra).** However, as rightly submitted by learned counsel for the petitioner, even a cursory glance to the facts of the case in the case of **U.T. Chandigarh & ors -vs- Gurcharan Singh (supra),** is sufficient to show that in that case, no law, as such was laid down but having regard to the particular facts situation, recovery was allowed. In that case, respondent employee

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was appointed as a clerk by appellant Chandigadh Transport Undertaking on the quota reserved for ex-serviceman. He has exercised option in relation to his pay fixation and as a result incorrect pay had been fixed.

In that background it was held that:-

> "It was clear from the option form that the respondent had agreed to get his pay fixed as per the minimum of pay, in the pay scale of the clerk, the post to which he had been re-employed. It is pertinent to note that the respondent has been getting regular pension from the Indian Army for his past service rendered to the Indian Army. As per provisions of the Orders and aper the option exercised by the respondent, service rendered by the respondent in the Indian Army cannot be taken into account for the purpose of his pay fixation as respondent would be getting his pension and there was no any deduction from his pension or his salary on account of pension received from the Indian Army. If nothing has been deducted from the pension of the respondent, upon being re-employed and as the respondent would continue to get his pension and other benefits from the Army for his past services, in our opinion, the High Court was not right while permitting the respondent to get his higher pay fixed by taking into account the services rendered by the respondent in the Indian Army".

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23] It was, therefore, held that:-

> "Even from sound common sense, it can be seen that for the past service rendered to the Indian Army, the respondent is getting pension and other perquisites which a retired or discharged soldier is entitled to even after being re-employed. The respondent would, therefore, not have any right to get any further advantage in the nature of higher salary or a higher pay scale, especially when nothing from his salary was being deducted on account of his getting pension or perquisites from the earlier employer".

24] Hence it was held that as the respondent therein was getting double payment , the excess amount paid to him is required to be recovered, from him and hence the Tribunal was right in coming to the conclusion that the workman cannot be paid excess amount and it needs to be recovered as otherwise it would be iniquitous and harsh on the part of the employer, and secondly it would be also against common sense to permit employee to get double benefit. Therefore, it is clear that the facts of the case in the **U. T. Chandigarh and ors -vs- Gurcharan Singh (supra),** were totally different and in those particular facts, the recovery was permitted.

25] As against it, in the present case, the petitioner complies the criteria as laid down in **State of Punjab and ors -vs- Rafiq**

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Masih (supra). The recovery is of excess amount paid to the petitioner way back from 1998 to 2015. This recovery is also of a paltry sum of Rs.2,91,312.87. Hence, it is going to be definitely iniquitous, arbitrary and harsh so far as the petitioner employee is concerned. In such situation, relying on the judgment in the case of **State of Punjab and ors -vs- Rafiq Masih (supra),** it has to be held that the Labour Commissioner has committed an error in rejecting the Claim Application filed by the petitioner under Section 33-C(1) of the I. D. Act, for issuance of recovery certificate.

26] As regards the first issue, as to whether the amount is due under settlement of wage, learned counsel for the petitioner has relied upon various settlements and agreements, arrived at between the parties containing the terms as to the wages and also the encashment of leave on retirement, which make it very clear that the claim is arising out of the wage settlement between the workman and employer. In pursuance of the said settlement, as the money due is sought to be recovered, the dispute definitely falls within the scope of Section 33-C(1) of the Industrial Disputes Act. Hence the Labour Commissioner has committed an error on this score also.

27] The impugned judgment and order, therefore, passed by the Labour Commissioner cannot be sustainable in law.

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28] The Writ Petition is, thus, allowed. The impugned order is quashed and set aside. The Application filed by the Petitioner under Section 33-C(1) of the I. D. Act, is allowed. The respondent No.1 to issue recovery certificate as claimed by the petitioner.

29] The respondent No.2 is directed to make payment of the leave wages to the tune of Rs.2,91,312.87, to the petitioner within a period of one month.

[DR.SHALINI PHANSALKAR-JOSHI, J.]

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