..... PETITIONER

(BY SHRI ATUL KUMAR RAI - ADVOCATE)

AND

1. STATE OF MADHYA PRADESH THROUGH SECRETARY HOME DEPARTMENT VALLABH BHAWAN BHOPAL (M.P.)

2. SUPERINTENDENT OF POLICE BALAGHAT DISTRICT BALAGHAT (M.P.)

3. DISTRICT PENSION OFFICER BALAGHAT DISTRICT BALAGHAT (M.P.)

4. DISTRICT TREASURY OFFICER DISTRICT BALAGHAT (M.P.)

.....RESPONDENTS

(BY SHRI AMIT SETH – DEPUTY ADVOCATE GENERAL ASSISTED BY SHRI SAHIL SONKUSALE – ADVOCATE AND SHRI B.D.SINGH – DEPUTY ADVOCATE GENERAL)

Reserved on : 08.12.2023

Pronounced on : 06.03.2024

These writ appeals and writ petitions having been heard and reserved for judgment, ***Hon'ble Shri Justice Ravi Malimath, Chief Justice*** *pronounced the following:*

JUDGMENT

1. This reference arises out of the order dated 11.04.2018 passed by the Division Bench of this Court in Writ Appeal No.815 of 2017. The said order reads as under:-

> *"The learned counsel for the appellant relies upon an order passed by the Division Bench of Gwalior Bench in W.A.No.340/2017 (The State of Madhya Pradesh and Others Vs. Laxman Prasad Sharma) on 27.09.2017 whereby, it has been held that recovery on account of refixation of pay can be carried out in terms of Supreme*

Court judgment High Court of Punjab & Haryana Vs. Jagdev Singh -AIR 2016 SC 3523.

On the other hand, learned counsel for the respondent relies upon two Division Bench judgments of this Court in W.A.No.95/2017 (The State of Madhya Pradesh Vs. Madan Lal Bardele) decided on 03.04.2017 and W.A.No.1232/2017 (State of Madhya Pradesh Vs. Chandrashwar Prasad Singh) decided on15.12.2017 wherein considering the aforesaid judgment it has been held that no recovery can be affected. In fact, in the order dated 15.12.2017,this Court held that the undertaking given by an employer that employer has a right to recover the amount can not be considered a willing act and thus hit by the judgment of Supreme Court reported in(1986) 3 SCC 136 (Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another).

Thus, there is a divergent view of different Benches of this Court. Therefore, to resolve the conflict, we refer the matter to Larger Bench to consider the following questions:

1. Whether the recovery can be ordered to be affected from the pensionary benefits or from the salary in view of an undertaking or Indemnity Bond taken by the employer before the grant of benefit of pay refixation.

2. Whether the recovery on account of excess payment to an employee can be made in exercise of power conferred under Rule 65 of M.P Civil Services Pension Rules, 1976.

3. Whether the undertaking sought at the time of grant of financial benefits on account of refixation of pay is a forced undertaking and thus not enforceable in light of judgment of Supreme Court in (1986) 3 SCC 136 (Central Inland Water

Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another).

4. Any other question which is raised for decision before the Larger Bench or which the Larger Bench considers arising out of the issues canvased.

Let the papers be placed before the Chief Justice on administrative side for the constitution of the larger Bench."

Background of the Reference

2. The brief facts of the aforesaid appeal are as follows:-

(a) This writ appeal was filed being aggrieved by the order dated 17.08.2016 passed by the learned Single Judge in Writ Petition No.12950 of 2014 wherein while allowing the writ petition, the impugned order therein seeking to effect recovery from the petitioner was set aside. Aggrieved by the same, the instant appeal was filed by the State.

(b) The writ petitioner who was working as an Upper Division Teacher superannuated with effect from 30.06.2013. When the pension papers of the writ petitioner was processed, it was found that he was granted the benefit of a higher pay-scale with effect from 01.01.1986. That pursuant to the refixation of the salary with effect from 01.01.1986 to 01.07.2012, it was found that an excess payment of Rs.62,501/- was made to him. The same was sought to be recovered along with interest i.e. a total sum of Rs.1,80,142/-. When the pension papers of the writ petitioner were being processed, he had submitted an indemnity bond, in which he had given an undertaking that in case any excess payment is made to him, the same shall be recovered from his retiral dues.

(c) The learned Single Judge by his order dated 17.08.1016 was pleased to allow the writ petition and quashed the order of recovery by placing reliance on the judgment of the Hon'ble Supreme Court in the case of State of Punjab and others Vs. Rafiq Masih (White Washer) and others reported in (2015) 4 SCC 334. Challenging the said order, the instant writ appeal was filed on the ground that the writ petitioner had submitted his undertaking that in case excess payment is made to him, the same is liable to be recovered from his retiral dues. Thereafter by the aforesaid order dated 11.04.2018, the learned Division Bench noted that the Hon'ble Supreme Court in its judgment in the case of High Court of Punjab and Haryana Vs. Jagdev Singh reported in AIR 2016 SC 3523 has held that recovery on account of refixation of pay can be carried out. However, on the other hand, the two Division Benches of this Court vide order dated 03.04.2017 passed in Writ Appeal No.95 of 2017 (The State of Madhya Pradesh Vs. Madan Lal Bardele) and the order dated 15.12.2017 passed in Writ Appeal No.1232 of 2017 (State of Madhya Pradesh Vs. Chandrashwar Prasad Singh) held that the undertaking given by the employee that an employer has a right to recover the amount cannot be considered as a willful undertaking and thus was hit by the judgment of the Hon'ble Supreme Court in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another reported in (1986) 3 SCC 156. Hence, due to divergent views being expressed, the aforesaid questions have been referred for consideration to the Larger Bench.

Since various other appeals and petitions have been connected along with this appeal, we have heard learned counsels appearing in those cases also.

Contentions of the petitioners

3.(a) The learned counsels for the writ petitioners contend that no recovery can be made from a Government servant from his post retiral claims after a long lapse of time. The recovery orders have been issued at the fag end of the service career at the stage when the pension papers were being processed. The undertaking given by the employee in the form of an indemnity bond cannot be said to have been furnished by consent, but rather a compulsion on the employee in order to receive post retiral claims.

(b) That the employer should be vigilant while granting the increments and refixation of pay. Once the benefit has been extended to a Government servant, the same cannot be recovered from him. There is no misrepresentation or any fraud played by the employee in order to receive the increment or the refixation. In fact the increment or refixation has been done by the employer himself. Therefore, the recovery and that too after a long lapse of time cannot be made. The said issue has since been settled by the judgment of the Hon'ble Supreme Court in the cases of Shyam Babu Verma Vs. Union of India reported in (1994) 2 SCC 521, Sahib Ram Vs. State of Haryana reported in 1995 Supp (1) SCC 18, Chandi Prasad Uniyal Vs. State of Uttarakhand reported in (2012) 8 SCC 417, State of Punjab and Others Vs. Rafiq Masih (White Washer) and Others reported in (2015) 4 SCC 334 and State of Punjab and Others Vs. Rafiq Masih(in Reference) reported in (2014) 8 SCC 883.

(c) In a similar case as in Writ Petition No.291 of 2016 (Madan Lal Bardele Vs. State of Madhya Pradesh disposed off on 06.09.2016, by following the judgment in the case of Rafiq Masih (White Washer) (supra), the recovery order was quashed. By placing reliance on the aforesaid judgments of the Hon'ble Supreme Court, it was noticed that

the judgments passed in the cases of Chandi Prasad Uniyal (supra) and Rafiq Masih (supra) were delivered by Benches consisting of two Hon'ble Judges. However, the judgment passed by the Larger Bench of Hon'ble Supreme Court in the case of State of Punjab Vs. Rafiq Masih reported in (2014) 8 SCC 883 was taken note of and it was held that the judgment passed in the case of Chandi Prasad Uniyal (supra) does not conflict with the observations made in the other two cases namely Shyam Babu Verma (supra) and Sahib Ram (supra). The said order was challenged in Writ Appeal No.95 of 2017, which was dismissed by the order dated 03.02.2017. The same was challenged by the State in SLP(C) Diary No.34048 of 2017 by placing reliance on the judgment passed by the Hon'ble Supreme Court in the case of Jagdev Singh (supra). The SLP was dismissed by the order dated 15.09.2023. This order was considered in the referral order as aforesaid. Therefore, the order passed in the case of Madan Lal Bardele (supra) attained finality after dismissal of the aforesaid SLP.

(d) The learned counsels have placed reliance on the judgment of the Hon'ble Supreme Court passed in the case of Rafiq Masih (supra), which has been followed in a number of judgments delivered by this Court. In the said judgments, Rules 65 and 66 of the Madhya Pradesh Civil Services (Pension) Rules, 1976 (hereinafter to be referred to as "the Rules of 1976") were taken into consideration. Reliance was also placed on the order passed in the case of State of Madhya Pradesh Vs. Akhilesh Kumar Pandey in Writ Appeal No.649 of 2016 dated 15.11.2016 wherein the recovery order was quashed.

(e) It was contended that rule 65 of the Rules of 1976 is applicable to a Government employee who is retiring or is on the verge of retirement but has not yet retired. Reliance was placed on the judgment of this Court

in the case of H.S. Nanjundiah Vs. State of Madhya Pradesh reported in (1986) 2 LLJ 76 wherein it was held in para 5 as follows:-

> *"5. .... It does not apply to a retired Government servant. The word "retiring Government servant" is significant in its connotation. Rule 65 does not use the term retired Government servant. The action therefore, contemplated by Section 65 is in respect of a Government servant who is retiring, or is on the verge of retirement but has not actually retired. Similarly, same is the case so far as duty of a retiring Government servant is concerned, it is not attributable to a retired Government servant. In the instant case it cannot be said that the petitioner failed in his duty....."*

(f) It was further contended that rule 65 of the Rules of 1976 is applicable only to an employee who is in service and not to one who has retired. The language used therein refers to a retiring Government servant and therefore, has to be considered as such.

(g) It was contended that various guidelines were laid down by the Hon'ble Supreme Court in the case of Rafiq Masih (supra). One such guideline was with reference to the recovery from a Government employee. The same was referred for consideration to a Larger Bench of the Hon'ble Supreme Court. The Larger Bench of the Hon'ble Supreme Court in the case of Rafiq Masih reported in (2014) 8 SCC 883 held that the law laid down in Chandi Prasad Uniyal (supra) is not in conflict with the observations made by the Hon'ble Supreme Court in the case of Shyam Babu Verma (supra) and Sahib Ram (supra). A direction was issued in exercise of the power of the Hon'ble Supreme Court under Article 142 of the Constitution of India. However in the subsequent decision, the Hon'ble Supreme Court in exercise of the power under Article 136 of the Constitution of India has laid down the law. Therefore, both are on different footings. Therefore, after recording a finding that

there is no conflict in the views expressed in the said judgments, the Hon'ble Supreme Court declined to answer the reference and the cases were sent back for disposal before the respective Benches.

(h) The learned counsels have also brought to the notice of this Court the order passed by the High Court of Rajasthan at Jodhpur in the case of Mohammed Yusuf Vs. Maharana Pratap Agriculture and Technology University, Civil Special Appeal (W) No.349 of 2004 decided on 24.11.2016 wherein it was held that the judgment in Rafiq Masih (supra) is required to be taken into consideration and consequently the recovery order was quashed. Similar was the view of the Gauhati High Court in the case of Durgeshwar Dutta Vs. State of Assam and others in the order dated 27.09.2021 passed in WP(C) No.7355 of 2019 as well as the order of the High Court of Chhattishgarh at Bilaspur in the case of Shankar Narayan Chakrawarty Vs State of Chhattisgarh and others, WP(S) No.9716 of 2019 dated 30.01.2020. Reliance was also placed on the judgment of the Hon'ble Supreme Court in the case of Thomas Daniel Vs. State of Kerala reported in 2022 SCC Online SC 536 which again followed the judgment in the case of Rafiq Masih (supra).

(i) It was further contended that the Hon'ble Supreme Court in the case of Jagdev Singh (supra) has not disturbed the propositions which were framed in the case of Rafiq Masih (White Washer) (supra) reported (2015) 4 SCC 334 except to the extent of proposition No.(ii) wherein it was observed that *"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"*. In the said case, the officer had furnished an undertaking while opting for the revised pay scale and therefore he was bound by the same. Under those circumstances, it was observed that the employer has a right to make

recovery in equated monthly installments spread over two years. The other propositions namely (i), (iii), (iv) and (v) were not disturbed.

Contentions of the State

4.(a) Shri Amit Seth, learned Deputy Advocate General appearing for the State denied the contentions of the petitioners. He contended that the employer has a right to seek recovery in pursuance to Rule 65 of the Rules of 1976. The judgments passed in the case of Shyam Babu Verma (supra), Sahib Ram (supra) and Rafiq Masih (supra) are judgments passed in pursuance to the power exercised by the Hon'ble Supreme Court under Article 142 of the Constitution of India. Therefore, it cannot be considered as a law laid down by the Hon'ble Supreme Court. Law with regard to recovery has been laid down by the Hon'ble Supreme Court in the case of Chandi Prasad Uniyal (supra) under Article 136 of the Constitution of India. When the judgment in the case of Rafiq Masih was referred to a Larger Bench, the Larger Bench have observed that Article 136 of the Constitution of India is a corrective jurisdiction that vests discretion in the Supreme Court to settle the law. It was clearly held that the law laid down in the case of Chandi Prasad Uiyal (supra) does not conflict with the observations made by the Hon'ble Supreme Court in the other two cases namely that of Shyam Babu Verma (supra) and Sahib Ram (supra).

(b) Reliance was placed on para 7 of the judgment of the Larger Bench in the case of Rafiq Masih (supra) which reads as follows:-

> *"7. In Chandi Prasad Uniyal case [(2012) 8 SCC 417 : (2012) 4 SCC (Cri) 450], a specific issue was raised and canvassed. The issue was whether the appellant therein can retain the amount received on the basis of irregular/wrong pay fixation in the absence of any misrepresentation or fraud on his part. The Court after taking into consideration the*

various decisions of this Court had come to the conclusion that even if by mistake of the employer the amount is paid to the employee and on a later date if the employer after proper determination of the same discovers that the excess payment is made by mistake or negligence, the excess payment so made could be recovered. While holding so this Court observed at paras 14 and 16 as under: (SCC p. 423)

> "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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> 16. The appellants in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However, we order

> that excess payment made be recovered from the appellant's salary in twelve equal monthly instalments…."

(c) It is contended that the question to be answered is whether excess money which has been paid by a bonafide mistake of the employer is liable to be recovered or not. While considering the various situations that would arise, it was held that any amount which was paid or received without authority of law could always be recovered excluding certain exceptions such as extreme hardship. However, the recovery cannot be denied as a matter of right. The employee has an obligation to repay the amount since otherwise it would amount to unjust enrichment. Therefore, who has played the fraud or who has misinterpreted would be of no consequence. The judgments in the cases of Sahib Ram (supra) and Rafiq Masih (supra) have been passed in exercise of the power under Article 142 of the Constitution of India and which cannot be treated as a law or as a precedent.

(d) It is further contended that the Rules of 1976 govern the service conditions and entitlement of an employee with regard to pension. Rule 65 deals with recovery and adjustment of Government dues. It is the duty of a retiring Government servant to clear all governmental dues before the date of his retirement. The said rule was not taken into consideration by the Hon'ble Supreme Court in the case of Rafiq Masih (supra). A Government servant is required to furnish an undertaking prior to finalization of post retiral claims. In case it is found that excess payment has been made, the employee is duty bound to refund the excess payment. By placing reliance on the judgment in the case of Chandi Prasad Uniyal (supra), it is contended that taxpayers' money cannot be misutilised in such a manner. The excess payment which has been made to an employee is neither the money which belongs to the employee or

the employer. The employee is not entitled to retain the said amount without any authority of law. The judgment passed in the case of Shyam Babu Verma (supra), Sahib Ram (supra) and Rafiq Masih (supra) are based on equity and judicial discretion and therefore cannot be held to be binding precedents. Once the rule provides for recovery from a Government servant, the same has to be enforced in order to seek recovery.

(e) When revision of pay or extension of benefit of increments are granted, a large number of employees are involved. As a precautionary measure, the employees are asked to furnish an undertaking to the aforesaid effect. Furnishing of an undertaking is provided for in Rule 66 of the Rules of 1976. Reliance is placed on the Madhya Pradesh Pay Revision Rules, 2017 (hereinafter referred to as "the Rules of 2017") wherein a Circular dated 22.07.2017 was issued by the Finance Department, State of Madhya Pradesh which has a statutory binding on the employees. Clause 11(1) of the said Circular indicates that at the time of extending the benefits in pursuance to revision of pay, a provision has been made for taking an undertaking from the Government servant to the effect that in case excess payment is made, he will refund the same. Therefore, once an employee furnishes an undertaking, he has to comply with the same and to refund the excess payment.

(f) The question of an undertaking was considered by the Hon'ble Supreme Court in the case of Jagdev Singh (supra) wherein the judgment passed by the Hon'ble Supreme Court in the case of Rafiq Masih (supra) reported in (2015) 4 SCC 334 was distinguished. The Hon'ble Supreme Court while disposing of the matter observed that the principle enunciated in proposition no.(ii) namely recovery from retired employees, or employees who are due to retire within one year of the

order of recovery, would not apply in the situation wherein an undertaking has been furnished by an employee.

(g) At what point of time an undertaking has been furnished is a matter to be considered on a case to case basis depending on the facts and circumstances involved. There cannot be any fixed proposition to hold that no recovery can ever be made from a Government servant. Since there is a provision of making recovery from post retiral claims pursuant to the Rules of 1976 as well as the Circular dated 22.07.2017 then it cannot be said that no recovery can be made. Therefore, the judgment of the Hon'ble Supreme Court in the case of Central Inland Water Transport Corpn. Vs. Brojo Nath Ganguly reported in (1986) 3 SCC 156 is not applicable to the questions involved in the present reference since the same deals with different facts and circumstances. The case therein was that of termination of an employee and not with respect to excess payment that has been made to him. Therefore, the Question No.3 which has been referred to hereinabove does not require to be answered. Reliance is also placed on Section 72 of the Indian Contract Act to the effect that once an undertaking is furnished by a Government servant, he is bound by such an undertaking.

(h) It is further contended that in certain cases when an undertaking was not given initially but on the subsequent refixation of pay, the undertaking was submitted then at least so far as a subsequent refixation is concerned, the excess amount paid to an employee is liable to be recovered.

Consideration by the Court

5. We shall first take up the consideration of Question No.2 since the furnishing of an indemnity bond is covered under Question no.1.

Rules 65 and 66 of the Rules of 1976 read as follows:-

"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).*

66. Furnishing of surety by retiring Government servant. - (1) (a) If any of the Government dues (other than those referred to in Rule 65 remain unrealised and unassessed for any reasons, the retiring Government servant may be asked to furnish in Form 8 a surety of a suitable permanent Government servant, holding a pensionable post.

(b) If the surety furnished by him is found acceptable the grant of his pension and gratuity shall not be delayed.

(2)(a) If the retiring Government servant is unable or unwilling to furnish a surety, a suitable cash deposit may be taken from him, or such portion of gratuity payable to him as may be considered sufficient may be held over till the outstanding dues are assessed and adjusted.

(b) The cash deposit to be taken or the amount of gratuity to be withheld shall not exceed the estimated amount of the outstanding dues plus twenty-five per cent thereof.

(c) Where it is not possible to estimate the approximate amount recoverable from the retiring Government servant

the amount of deposit to be taken or the portion of gratuity to be withheld shall be limited to ten per cent of the amount of gratuity or one thousand rupees, whichever is less.

(3)(a) Efforts shall be made to assess and adjust the recoverable Government dues within a period ***not exceeding six months from the date of retirement*** *of the Government servant and, if no claim is made on Government account against the Government servant within such a period it shall be presumed that no Government claim excluding claim of house rent and water charges is outstanding against him.*

(b) The Government dues as assessed shall be adjusted against the cash deposit or the amount withheld from the gratuity and the balance, if any, shall be released to the retired Government servant after the expiry of the period referred to in clause (a).

(c) Where a pensioner has furnished a surety, the surety shall be released after the expiry of the period referred to in clause (a) provided the dues assessed up to that time have been recovered.

(4) The Government dues which remain unrealised within the period referred to in clause (a) of sub-rule (3) and such other dues, the claim for which is received after that period, shall be recoverable from the retired Government servant through legal procedure :

Provided that in respect of house rent and water charges, the amount, if any, the claim for which is received after the period of 12 months from the date of retirement of the Government servant shall not be recoverable from the retired Government servant."

6.(a) An Act or a Rule requires to be read as it is. The intention of the legislature has to be considered while reading the said Act or Rule. The interpretation of an Act or Rule is based on the intention of the law maker to promulgate the same. The Hon'ble Supreme Court in the case of

Jugalkishore Saraf Vs. Raw Cotton Co. Ltd. reported in 1955 SCC OnLine SC 26 in para 6 held as follows:-

> *6. ...The cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the court may adopt the same. But if no such alternative construction is possible, the court must adopt the ordinary rule of literal interpretation....."*

(b) The Constitution Bench of the Hon'ble Supreme Court in the case of S.P.Gupta Vs. Union of India reported in 1981 Supp SCC 87 held in paras 199 and 200 as follows:-

> ***"**199**.** But there is one principle on which there is complete unanimity of all the courts in the world and this is that where the words or the language used in a statute are clear and cloudless, plain, simple and explicit unclouded and unobscured, intelligible and pointed so as to admit of no ambiguity, vagueness, uncertainty or equivocation, there is absolutely no room for deriving support from external aids. In such cases, the statute should be interpreted on the face of the language itself without adding, subtracting or omitting words therefrom.*
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> *200**.** It is equally well settled that it is not the duty of the court to import words which have been omitted deliberately or intentionally in order to fill up a gap or supply omissions to fit in with the ideology or concept of the Judge concerned. The words and the language used must be given their natural meaning and interpreted in their ordinary and popular sense."*

(c) The Constitution Bench of the Hon'ble Supreme Court in the case of Jaishri Laxmanrao Patil Vs. State of Maharashtra reported in (2021) 8 SCC 1 held in para 113 as follows:-

"113. In examining provisions of the Constitution, courts should adopt the primary rule, and give effect to the plain meaning of the expressions; this rule can be departed, only when there are ambiguities. In Kuldip Nayar v. Union of India [Kuldip Nayar v. Union of India, (2006) 7 SCC 1] after quoting from G. Narayanaswami v. G. Pannerselvam [G. Narayanaswami v. G. Pannerselvam, (1972) 3 SCC 717], this Court held that :

> "201. … We endorse and reiterate the view taken in the abovequoted paragraph of the judgment. It may be desirable to give a broad and generous construction to the Constitutional provisions, but while doing so the rule of "plain meaning" or "literal" interpretation, which remains "the primary rule", has also to be kept in mind. In fact the rule of "literal construction" is the safe rule unless the language used is contradictory, ambiguous, or leads really to absurd results."

7.(a) Rule 65 of the Rules of 1976 indicates "every retiring Government servant". The same would therefore imply that it does not include a retired Government servant. The interpretation of the same was considered in the case of Vijay Shankar Trivedi Vs. State of Madhya Pradesh reported in 2018 (3) MPLJ 453 wherein it was held in paras 17 and 18 as follows:-

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

(b) Sub-rule 3(a) of Rule 66 of the Rules of 1976 provides that efforts should be made to adjust the Government dues not exceeding six months from the date of retirement, failing which it shall be presumed that no Government dues are recoverable except house rent and water charges. Therefore, the rules provide for an entire mechanism to be followed. The authorities are required to follow the same. There cannot be any deviation from the same.

8. The learned counsel for the State has submitted that the judgment in the case of Chandi Prasad Uniyal (supra) should be applied since it was passed in exercise of the power conferred under Article 136 of the Constitution of India. However, the judgments in the cases of Shyam Babu Verma (supra), Sahib Ram (supra) and Rafiq Masih (supra) have been passed in exercise of power under Article 142 of the Constitution of India. The judgment in the case of Rafiq Masih (supra) was referred to a Larger Bench wherein the scope of Articles 136, 141 and 142 of the Constitution of India was discussed. It was held that the directions issued by the Hon'ble Supreme Court under Articles 136 and 141 of the Constitution of India are declaration of law and that the directions issued in the peculiar facts and circumstances to do complete justice under

Article 142 of the Constitution of India cannot be considered as declaration of law. The orders passed under Article 142 of the Constitution of India are based on equity with an object to do complete justice in the matter. The Hon'ble Supreme Court took note of the fact that the judgments in the case of Shyam Babu Verma (supra) and Sahib Ram (supra) have been passed in pursuance to Article 142 of the Constitution of India to do complete justice in the matter.

9. In the case of Chandi Prasad Uniyal (supra), the Hon'ble Supreme Court held in para 11 to 15 as follows:-

> *"11. We may in this respect refer to the judgment of a two-Judge Bench of this Court in Col. B.J. Akkara case (2006) 11 SCC 709 where this Court after referring to Shyam Babu Verma case (1994) 2 SCC 521, Sahib Ram case [1995 Supp (1) SCC 18] and a few other decisions held as follows: (Col. B.J. Akkara case (2006) 11 SCC 709)*
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> > "28. Such relief, restraining recovery back of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

12. Later, a three-Judge Bench in Syed Abdul Qadir case [(2009) 3 SCC 475], after referring to Shyam Babu Verma [(1994) 2 SCC 521], Col. B.J. Akkara [(2006) 11 SCC 709], etc. restrained the department from recovery of excess amount paid, but held as follows: (Syed Abdul Qadir case [(2009) 3 SCC 475]

> "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. 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 added*)

We may point out that in Syed Abdul Qadir case [(2009) 3 SCC 475] such a direction was given keeping in view the peculiar facts and circumstances of that case since the beneficiaries had either retired or were on the verge of retirement and so as to avoid any hardship to them.

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.

15. We are, therefore, of the considered view that except few instances pointed out in Syed Abdul Qadir case [(2009) 3 SCC 475] and in Col. B.J. Akkara case [(2006) 11 SCC 709], the excess payment made due to wrong/irregular pay fixation can always be recovered".

10. The aforesaid judgment was declared to be a good law. The subsequent judgment in the case of Rafiq Masih (supra) would indicate that a Government servant is not entitled to retain any payment made to him in excess of which he is entitled to. He is duty bound to refund the same, since the same is a taxpayers' money, which neither belongs to the

officers or to the recipients. The excess payment made to a Government servant could be as a result of bonafide mistake on the part of the employer or vice versa or may even be a mutual mistake. However the employee cannot retain the excess payment as a matter of right since the same would amount to unjust enrichment. In so holding, the Hon'ble Supreme Court took note of the judgments passed in the cases of Syed Abdul Qadir reported in (2009) 3 SCC 475 and Col.B.J.Akkara reported in (2006) 11 SCC 709. In the case of Syed Abdul Qadir (supra), the dispute arose with respect to pay-fixation on promotion as regulated by FR 2-C (since deleted) or FR 22(I)(a)(1) or FR 22(I)(a)(2). While holding that the fixation is to be done according to FR 22(I)(a)(2), the question regarding excess payment made to the employees could be permitted to be recovered by the Government was also considered. It was held in paras 58 and 59 as follows:-

> *"58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See Sahib Ram v. State of Haryana 1995 Supp (1) SCC 18 , Shyam Babu Verma v. Union of India (1994) 2 SCC 521 , Union of India v. M. Bhaskar (1996) 4 SCC 416 , V. Gangaram v. Director (1997) 6 SCC 139, Col. B.J. Akkara (Retd.) v. Govt. of India (2006) 11 SCC 709 , Purshottam Lal Das v. State of Bihar (2006) 11 SCC 492, Punjab National Bank v. Manjeet Singh (2006) 8 SCC 647 and Bihar SEB v. Bijay Bhadur (2000) 10 SCC 99.*
>
> *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. 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."

The aforesaid judgment would clearly indicate that certain exceptions were carved out with respect to the recovery from a retiring or a retired Government servant.

11. In the case of Chandi Prasad Uniyal (supra), it was held that except a few instances as pointed out in the Syed Abdul Qadri's case (supra) and Col.B.J. Akkara's case (supra), the excess payment made due to a wrong or irregular pay fixation could always be recovered. The Larger Bench of the Hon'ble Supreme Court in the case of Rafiq Masih reported in (2014) 8 SCC 883 upheld the judgment passed in the case of Chandi Prasad Uniyal (supra).

12. For all the aforesaid reasons, the Question No.2 is answered by holding that an employer has a right to recover the amount of excess payment made to a retiring Government servant in exercise of the power conferred under Rules 65 and 66 of the Rules of 1976 subject to the fact as to at what stage the recovery is directed to be made. No recovery can

be made from a retired Government employee in view of judgment of the Hon'ble Supreme Court in Syed Abdul Qadir's case.

With regard to Question No.1

13. With regard to an undertaking to be given by an employee, the State have issued a Circular dated 22.07.2017 wherein the relevant clause 11(1) reads as follows:-

> "11(1) त्रुटिपूर्ण वेतन नियतन के कारण अधिक भुगतान वसूलनीय होगा। अतः कार्यालय प्रमुख सभी शासकीय सेवकों को स्पष्ट कर दें कि पुनरीक्षित वेतनमान में नियत वेतन, अंतिम नहीं है और संभागीय संयुक्त संचालक, कोष, लेखा एवं पेंशन के वेतन नियतन दल द्वारा की गई जांच के प्रकाश में बदलने की संभावना है। अतः यदि कोई अधिक भुगतान होता है तो वह शासकीय सेवक को पश्चातवर्ती भुगतान की जाने वाली किसी भी राशि से वसूला जाएगा। इस आशय का लिखित वचनपत्र (Undertaking) प्रत्येक शासकीय सेवक से अवशेष राशि के भुगतान करने के पूर्व प्राप्त होने पर ही अवशेष राशि का भुगतान किया जाए। वचनपत्र (Undertaking) का नमूना प्रपत्र – तीन संलग्न है।"

14. From a perusal of the extract of the aforesaid Circular, it is clear that in case of excess payment made to a Government servant, the same is always liable to be recovered from the subsequent payment which is to be made to him. It is further observed that an undertaking is required to be furnished by a Government servant prior to the disbursement of the arrears of pay revision to him. It is mandatory on the part of the Government servant to furnish such an undertaking. Only on the undertaking being furnished, the amount towards revision of pay could be given to him. The aforesaid proposition was considered by the Hon'ble Supreme Court in the case of Jagdev Singh (supra). While dealing with proposition no.(ii) which was framed in the case of Rafiq Masih reported in (2015) 4 SCC 334 wherein it was held in paras 10 and 11 as follows:-

"10. In State of Punjab v. Rafiq Masih, (2015) 4 SCC 334 this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer would be impermissible in law : (SCC pp. 334-35)

(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.

(emphasis supplied)

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."

Therefore, a Government servant should be put to notice at the first instance when the payment is made to him. The Hon'ble Supreme Court

in the aforesaid judgment has not interfered with the propositions laid down in the case of Rafiq Masih (White Washer) (supra).

15. The Hon'ble Supreme Court in the case of Rafiq Masih (supra) considered the various judgments on the issue. Therefore, the argument of the State that the judgment in the case of Chandi Prasad Uniyal (supra) as well as the Madhya Pradesh Civil Services (Pension) Rules, 1976 were not considered in the case of Rafiq Masih (supra) may not be correct. The judgment delivered in the case of Syed Abdul Qadir (supra) was also followed in the case of Chandi Prasad Uniyal (supra) wherein in para 15 of the judgment, the Hon'ble Supreme Court has directed not to effect recovery in exceptional cases as pointed out in Syed Abdul Qadri's case and Col. B.J. Akkara's case.

16. Rule 49 of the Rules of 1976 deals with preparation of the list of Government servants who are due for retirement. Rule 57 of the Rules of 1976 deals with preparation of the pension papers, which reads as follows:-

> *"57: Preparation of pension papers.- (1) Every Head of Office shall undertake the work of preparing pension papers in Form 6-B two years before the date on which a Government servant is due to retire on superannuation, or on the date on which he proceeds on leave preparatory to retirement whichever is earlier".*

Therefore, it indicates that every Head of Office shall undertake the work of preparing pension papers in Form 6-B two years before the date on which a Government servant is due to retire on superannuation, or on the date on which he proceeds on leave preparatory to retirement whichever is earlier.

17. Rule 59 of the Rules of 1976 deals with completion and forwarding of pension papers to audit officer, which reads as under:-

> *"59. Completion and forwarding of pension papers to audit officer.-(1) On reaching the state i.e. 13 months before the date of retirement, the Head of Office shall take up the actual work of preparation of pension papers in Form 6-A and Form 6-B. Head of the Office shall send Form 6-A and 6-B (including Indemnity Bond enclosed with Form 6-A) along with requisite service record to the concerned Joint Director, Treasuries, Accounts and Pension, Treasury Officer, as the case may be, before 6 months of the retirement of Government servant, any deficiency or imperfection or omission which still remains in the service record shall be ignored at this stage and the qualifying service shall be proceeded with on the basis of entries in the service record, whatever the degree of perfection to which it might have been possible to bring them by the time.*
>
> *2(a) The Head of Office shall send Form 6-B to the Audit Officer 12 months before retirement date with a covering memo, in Form 7 along with service book, service roll duly completed and up to date and any other documents relied upon for the verification of service claimed in such a manner that they can be conveniently consulted.*
>
> *(b) The Head of Office shall retain one copy of each of the above Forms for his office record.*
>
> *(3) Where payment is desired in another circle of audit, the Head of Office shall send in duplicate Form 6-B to the Audit Officer."*

18. Rule 60 of the Rules of 1976 reads as follows:-

> *"60. Intimation to audit officer regarding any event having a bearing on pension.- (1) If, after the pension papers have been forwarded to the Audit Officer, any event occurs which has a bearing on the amount of pension admissible, the fact shall be promptly reported to the Audit Officer by the Head*

of Office. If no such report is received within a week from the date of retirement, Audit Officer shall assume that there has occurred no such event.

(2) The Head of Office shall furnish to the Audit Officer, at least one and a half months before the date of retirement of the Government servant, the following particulars, namely :-

(a) Government dues recoverable out of the gratuity before payment is authorised that is to say-

(i) contribution towards contributory family pension, if applicable;

(ii) Government dues which have been ascertained and assessed;

(b) amount of gratuity to be held over for adjustment of Government dues which have not been assessed so far :

Provided that the Head of Office shall not be required to withhold an amount of gratuity for adjustment of Government dues which have not been assessed, if under Rule 65 the Government servant has made a cash deposit or furnished a surety of a permanent Government servant."

19. Rule 63 of the Rules of 1976 reads thus :

"63. Authorization of final pension and gratuity by the Audit Officer. - (1) On receipt of pension papers referred to in Rule 59 the Audit Officer shall apply the requisite checks, record his audit enfacement on Form 6-B and assess the amount of final pension and gratuity not later than 2 months in advance of date of retirement :

Provided that if the Audit Officer is, for any reason, unable to assess the amount aforesaid, he shall communicate the fact to the Head of Office.

(2) (a) If the pension is payable in his circle of audit, the Audit Officer shall prepare the Pension Payment Order including order of payment of D.C.R. Gratuity one month in advance of the date of retirement.

(b) The payment of pension shall be effective from the date the Government servant ceased to be borne on the establishment.

(c) The amount of pension paid by Head of Office as anticipatory pension shall be adjusted against the arrears of final pension.

(3) The Audit Officer shall authorise the payment of gratuity after adjusting the amount if any, outstanding against the retired Government servant and the amount paid as anticipatory gratuity. If such gratuity is payable in his circle of audit, the Audit Officer shall prepare an order for its payment.

(4) If the Government servant has opted for receiving the payment of balance of the gratuity from the Head of Office, the Audit Officer shall issue the necessary authority in this behalf under intimation to the Government servant and the Treasury Officer indicating the amount, if any, which the Head of Office shall adjust before making payment to the Government servant along with the amount paid by him as anticipatory gratuity.

(5) The fact of the issue of the Pension Payment Order and order for the payment of the gratuity shall be promptly reported to the Head of Office and the pension papers which are no longer required shall be returned to him.

(6) The Audit Officer may authorise the payment of balances of the gratuity even during the period of the currency of anticipatory pension, provided the amount of gratuity has been finally assessed and no recovery of Government dues is outstanding against the retired Government servant.

(7) If the final pension and gratuity are payable in another circle of audit, the Audit Officer shall obtain information of the amount of anticipatory pension/gratuity paid by the Head of Office and send a copy of Form 6-B alongwith the audit enfacement and the last pay certificate, if received to the

Audit Officer of that circle who shall prepare the Pension Payment Order and the orders for the payment of gratuity:

Provided that the adjustment of anticipatory pension/gratuity drawn and disbursed by the Head of Office shall be made by the Audit Officer in whose circle the payment of anticipatory pension/gratuity was made.

(8) If the amount of anticipatory pension drawn and disbursed by the Head of Office is found to be in excess of the final pension assessed by the Audit Officer it shall be open to the Audit Officer to adjust the excess amount out of the balance of the gratuity, if any, or recover the excess amount by short payments of pension payable in future.

(9) If the amount of anticipatory gratuity disbursed by the Head of Office proves to be in excess of the amount finally assessed by the Audit Officer, the gratuitant shall not be required to refund the excess."

20. The aforesaid rules would indicate that there is a mechanism which is provided to consider the cases of the Government servants who are due to retire. The proceedings have to be initiated at least two years prior to retirement. None of the Rules deal with the fact that proceedings have to be initiated for recovery of excess amount from a retired Government servant. The aforesaid Rules cast a duty on the employer to complete the proceedings dealing with the preparation of the list of Government servants due for retirement till finalization of their pension papers. Rule 59 of the Rules of 1976 deals with actual work of preparation of pension papers. Rule 63 of the Rules of 1976 further casts a duty on the employer including the audit officer to complete the proceedings prior to two months from the date of retirement.

21. However, the aforesaid requirements of law have not been complied with in the case at hand. It is probably for this reason that there

is no mentioning of words "retired Government servant" in Rule 65 which deals with recovery and adjustment of Government dues. Rule 65 as extracted hereinabove deals with "ascertainable Government dues" which includes excess payment of pay and allowances. These excess payments are recoverable from the Government servant prior to his retirement since Rule 65(1) specifies that it shall be the duty of every retiring Government servant to clear all Government dues before the date of his retirement. The dues towards excess payment and allowances are recoverable from a retiring Government servant. It is an established principle of law that if the statute provides for a particular thing to be done in a particular manner then it has to be done in that manner alone and in no other manner. The Hon'ble Supreme Court in the case of Chandra Kishore Jha Vs. Mahavir Prasad reported in (1999) 8 SCC 266 held in para 17 as follows:-

> *"17. ... It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage : Nazir Ahmad v. King Emperor [(1935-36) 63 IA 372 : AIR 1936 PC 253 (2)], Rao Shiv Bahadur Singh v. State of V.P. [AIR 1954 SC 322 : 1954 SCR 1098], State of U.P. v. Singhara Singh [AIR 1964 SC 358 : (1964) 1 SCWR 57].) ..."*

22. The Hon'ble Supreme Court in the case of Cherukuri Mani Vs. State of Andhra Pradesh reported in (2015) 13 SCC 722 held in para 14 as follows:-

> *"14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure……"*

23. The Hon'ble Supreme Court in the case of Union of India v. Mahendra Singh reported in 2022 SCC OnLine SC 909 held in para 16 as follows:-

> *"16. The said principle has been followed by this Court in Cherukuri Mani v. Chief Secretary, Government of Andhra Pradesh [(2015) 13 SCC 722] wherein this Court held as under:*
>
> > "14. Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure ……."

24. Therefore, Rules 65 and 66 of the Rules of 1976 do not call for any other interpretation than what it has been stated therein. They are required to be applied as per the Rules.

25. For the aforesaid reasons, there cannot be any dispute with regard to the fact that the recovery can be made from a Government servant in pursuance to Rule 65 of the Rules of 1976. However, the recovery can be made subject to the propositions as laid down by the Hon'ble Supreme Court in the case of Chandi Prasad Uniyal (supra) and Syed Abdul Qadir (supra). Therefore, every case has to be considered on its own peculiar facts namely at what stage an undertaking was furnished by a Government servant. In most of the cases where the State has effected recovery from the Government servants it is at the fag end of the service career or in some cases even after they have retired from service. The recovery is directed to be made towards the excess payment made at the time of refixation of pay which took place decades earlier. At the time of retirement, a retiring Government servant is required to furnish an undertaking in the form of an indemnity bond that he will repay the

excess payment that has been made to him during his service. In the absence of furnishing such an undertaking, his post retiral claims cannot be decided and would not be cleared. The same is covered by the provisions of Rules 65 and 66 of the Rules of 1976.

26. The guidelines would indicate that an undertaking has to be furnished by the employee to the effect that he will refund the excess payment made to him. It is only on furnishing of such an undertaking, the payment towards revision of pay would be made to him. Therefore, this goes to indicate that an undertaking is required to be furnished at the time when the revision of pay has taken place. The same is also reflected in the judgment in the case of Jagdev Singh (supra). Therefore, the undertaking which is being furnished at the time of extending the benefits of revision of pay to an employee is required to be taken note of. The indemnity bond in the form of an undertaking furnished at the fag end of service career cannot be said to be an undertaking for which the recovery of excess payment which has been made decades ago could become effective. The judgment of the Larger Bench of the Hon'ble Supreme Court in the case of Syed Abdul Qadir (supra) has to be followed. Prior to initiating recovery, exceptional circumstances as pointed out in the aforesaid case are also required to be considered.

27. Hence for all these reasons, we answer the Question No.1 to the effect that recovery can be ordered to be effected from the pensionary benefits or from the salary in view of the undertaking or indemnity bond given by the employee at the stage when the grant of benefit of pay refixation is made.

With regard to Question No.3

28. With regard to Question No.3, whether an undertaking furnished on account of the refixation of pay is a forced undertaking and is not enforceable, the Hon'ble Supreme Court in the case of Central Inland Water Transport Corporation Limited (supra) in para 91 has held as follows :-

> *"91. Is a contract of the type mentioned above to be adjudged voidable or void? If it was induced by undue influence, then under Section 19-A of the Indian Contract Act, it would be voidable. It is, however, rarely that contracts of the types to which the principle formulated by us above applies are induced by undue influence as defined by Section 16(1) of the Indian Contract Act, even though at times they are between parties one of whom holds a real or apparent authority over the other. In the vast majority of cases, however, such contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality of bargaining power. Such contracts will not fall within the four corners of the definition of "undue influence" given in Section 16(1). Further, the majority of such contracts are in a standard or prescribed form or consist of a set of rules. They are not contracts between individuals containing terms meant for those individuals alone. Contracts in prescribed or standard forms or which embody a set of rules as part of the contract are entered into by the party with superior bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable, are injurious to the public interest. To say that such a contract is only voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to court to have the contract adjudged voidable. This would only result in multiplicity of litigation which no court should encourage and would also not be in the public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void. ...."*

29. A similar issue was considered by the High Court of Gujarat in the case of Shitanshu Shekhar Manoharlal vs State of Gujarat in P/STA/18840/2014 vide order dated 12th April, 2019 wherein it was held in para 17 as follows:-

> *"17. As per Section 19A of the Indian Contract Act, when the consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Subsection (1) of Section 16 defines "undue influence" to the effect that a contract is said to be induced by the "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. Subsection (2) of Section 16 further inter alia provides that a person is deemed to be in a position to dominate the will of another, where he holds a real or apparent authority over the other. At this juncture, it would be also relevant to refer to Sections 23 of the Contract Act. Section 23 states that the consideration or object of an agreement is lawful, unless inter alia the Court regards it as opposed to public policy. It also provides that every agreement of which the object or consideration is unlawful, is void."*

30. The Division Bench of this Court in the case of State of Madhya Pradesh and others v. Chandrashwar Prasad Singh : Writ Appeal No.1232 of 2017 decided on 15.12.2017 held that since an employee had no option but to give an undertaking so as to avail the benefit of pay fixation, it cannot be said to be a voluntary act. Therefore, such an undertaking cannot be made the basis of sustaining the recovery.

31.(a) The Hon'ble Supreme Court in the case of Balmer Lawrie & Company Limited Vs. Partha Sarathi Sen Roy and others reported in

(2013) 8 SCC 345 considering the inequality of the bargaining power of the State has observed as under:-

> *"30. Where the actions of an employer bear public character and contain an element of public interest, as regards the offers made by him, including the terms and conditions mentioned in an appropriate table, which invite the public to enter into contract, such a matter does not relegate to a pure and simple private law dispute, without the insignia of any public element whatsoever. Where an unfair and untenable, or an irrational clause in a contract, is also unjust, the same is amenable to judicial review. The Constitution provides for achieving social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and equal protection of the law. Thus, it is necessary to strike down an unfair and unreasonable contract, or an unfair or unreasonable clause in a contract, that has been entered into by parties who do not enjoy equal bargaining power, and are hence hit by Section 23 of the Contract Act, and where such a condition or provision becomes unconscionable, unfair, unreasonable and further, is against public policy. Where inequality of bargaining power is the result of great disparity between the economic strengths of the contracting parties, the aforesaid principle would automatically apply for the reason that, freedom of contract must be founded on the basis of equality of bargaining power between such contracting parties, and even though ad idem is assumed, applicability of standard form of contract is the rule. Consent or consensus ad idem as regards the weaker party may therefore, be entirely absent. Thus, the existence of equal bargaining power between parties becomes largely an illusion. The State itself, or a State instrumentality cannot impose unconstitutional conditions in statutory rules/regulations vis-à-vis its employees in order to terminate the services of its permanent employees in accordance with such terms and conditions. (Vide Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103 : AIR 1986 SC 1571], DTC v. Mazdoor Congress [1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213: AIR 1991 SC 101,*

LIC [LIC v. Consumer Education and Research Centre, (1995) 5 SCC 482 : AIR 1995 SC 1811], K.C. Sharma v. Delhi Stock Exchange [(2005) 4 SCC 4 : 2005 SCC (L&S) 496 : AIR 2005 SC 2884] and Punjab National Bank v. Astamija Dash [(2008) 14 SCC 370 : (2009) 1 SCC (L&S) 673 : AIR 2008 SC 3182].)"

(b) Party to a contract with a higher bargaining power usually tends to draw contractual terms favouring self. However when a dispute arises, the tendency is to rely on those terms which were primarily prejudicial to the interest of the party with a lower bargaining power. In the instant case the undertaking sought at the time of grant of financial benefits on account of refixation of pay is a forced undertaking as the employees had no option but to sign on it.

(c) The principles aforesaid have been reiterated by the Apex Court in Balmer Lawrie and Co. Ltd. (supra) clarifying that since the actions of public bodies bear public character and contain an element of public interest, it is necessary to strike down unconscionable, unfair and unreasonable clauses in a contract that has been entered into by parties who do not enjoy equal bargaining power as violative of Article 14 of the Constitution of India. It was also held by the Apex Court in the said case that such clauses would be hit by Section 23 of the Contract Act, since it goes against public policy.

32. The learned Deputy Advocate General places reliance on Section 72 of the Indian Contract Act, 1872 to contend that a person to whom the money has been paid by mistake or under coercion must repay or return it. Section 72 of the Indian Contract Act, 1872 reads as follows:-

"72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.-A person to whom

money has been paid, or anything delivered, by mistake or under coercion, must repay or return it"

33. Section 2(h) of the Indian Contract Act, 1872 defines 'contract' as follows:-

"2(h): An agreement enforceable by law is a contract."

It implies that the consent and willingness to enter into a contract should be voluntary. However in the present facts, the undertaking given by the Government servant at the time of refixation of pay is made mandatory. The language used in the Circular dated 22.07.2017 clearly indicates that until and unless such an undertaking is furnished, no amount towards refixation could be extended to him. Therefore, the same cannot be termed as a voluntary undertaking furnished by him. Such kind of undertaking is given by the employee since non-furnishing of undertaking would deny him the benefit of revision of pay. Therefore, it cannot be said that the same would amount to any contract between the employee and the employer. Therefore, the contention of the State by placing reliance on Section 72 of the Indian Contract Act, 1872 cannot be accepted.

34. The said issue was considered by the Hon'ble Supreme Court in the aforesaid judgment in case of Central Inland Water Transport Corporation Limited (supra). It was held that the employer should not be allowed to take advantage of its position. Therefore, the condition of furnishing an undertaking cannot be forced upon a Government servant. However, if a Government servant is willing to furnish an undertaking then the situation would be otherwise. Therefore in all those cases where the Government servants have furnished an undertaking willingly at the time when the benefits of revision of pay have been extended to them, in such an event, they are bound by the undertaking and not otherwise.

Compelling undertaking cannot result in the recovery from a Government servant. Therefore, the Question No.3 is accordingly answered.

Answers to the questions referred

35.(a) Question No.1 is answered by holding that recovery can be effected from the pensionary benefits or from the salary based on the undertaking or the indemnity bond given by the employee before the grant of benefit of pay refixation. The question of hardship of a Government servant has to be taken note of in pursuance to the judgment passed by the Larger Bench of the Hon'ble Supreme Court in the case of Syed Abdul Qadir (supra). The time period as fixed in the case of Rafiq Masih (supra) reported in (2015) 4 SCC 334 requires to be followed. Conversely an undertaking given at the stage of payment of retiral dues with reference to the refixation of pay or increments done decades ago cannot be enforced.

(b) Question No.2 is answered by holding that recovery can be made towards the excess payment made in terms of Rules 65 and 66 of the Rules of 1976 provided that the entire procedures as contemplated in Chapter VIII of the Rules of 1976 are followed by the employer. However, no recovery can be made in pursuance to Rule 65 of the Rules of 1976 towards revision of pay which has been extended to a Government servant much earlier. In such cases, recovery can be made in terms of the answer to Question No.1.

(c) Question No.3 is answered by holding that the undertaking given by the employee at the time of grant of financial benefits on account of refixation of pay is a forced undertaking and is

therefore not enforceable in the light of the judgment of the Hon'ble Supreme Court in the case of Central Inland Water Transport Corporation Limited (supra) unless the undertaking is given voluntarily.

36. The questions for reference having hereinabove being answered, Writ Appeal No.815 of 2017 is directed to be listed for consideration before the appropriate Bench. The connected writ appeals and writ petitions be placed before the respective Courts for necessary orders.

(RAVI MALIMATH)
CHIEF JUSTICE

(VISHAL MISHRA)
JUDGE

(P. K. AGRAWAL)
JUDGE

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