

**HIGH COURT OF JAMMU AND KASHMIR AT JAMMU**

SWP No.1300/2012

**Date of order:**03.08.2017

Tej Krishan Bhat

Vs.

State & ors.

**Coram:**

***Hon'ble Mr. Justice B. S. Walia, Judge***

**Appearing counsel:**

For Petitioner (s) : Mr. Abhinav Sharma, Advocate.

For Respondent(s): Mr. M. P. Gupta, Advocate.

i/ Whether to be approved for reporting : Yes/No.  
in Digest/Journal

ii/ Whether to be approved for reporting : Yes/No.  
in Press/Media.

**Oral:**

**1.** Learned counsel for the respondents states that the objections already filed by him be permitted to be adopted as Counter. **Ordered accordingly.**

**2.** Prayer in the instant writ petition is for quashing order (Annexure-E) bearing No.R-III/HR/GKS/1183 dated 20.01.2012 passed by respondent No.2 as also for the issuance of a writ, order or direction in the nature of mandamus directing the respondents to allow the petitioner to mark his attendance and to pay the petitioner unpaid salary w.e.f. January, 2012 and also to pay the future salary on month to month basis.

**3.** Brief facts of the case leading to the filing of the instant writ petition are that vide order (Annexure-E) dated 20.01.2012, the petitioner was issued a notice dated 20.01.2012 with regard to his unauthorized

absence from duty w.e.f. 01.02.2011 and mentioning therein that despite notice, he had failed to report for duty even after expiry of time granted, therefore, it was deemed that he had voluntarily retired from service w.e.f. 01.02.2011. In the aforementioned background, the petitioner was called upon to pay to the Bank within 15 days of the date of notice, 14 days/one month's pay and allowance in lieu of notice, failing which the Bank would be constrained to file a suit for recovery of the same without prejudice to its right to set off the same against terminal dues and any other amount that may be due to him towards satisfaction of the amount, he was required to pay to the Bank.

**4.** Learned counsel for the petitioner has contended that the petitioner was released salary upto the month of December, 2011 as is evident from pay slip for the month of December, 2011, mentioning therein the leave balance as on 27.02.2012 and further mentioning therein that in case, the PAN Card of the petitioner was missing/wrong/invalid then the salary would not be processed and paid w.e.f. January, 2012.

**5.** *Per contra*, learned counsel for the respondent/Bank has contended that the salary to the petitioner for the period w.e.f. 01.02.2011 till 31<sup>st</sup> December, 2011 was

erroneously paid whereas the petitioner had been absenting from duty. This aspect of the matter has been highlighted in the context of MP No.01/2017 by reference to Annexure-R-1 i.e. Letter No.R-III/Staff/020 dated 24.04.2013 mentioning therein that the petitioner had attained superannuation on 31.03.2013 and his provident fund/balance amount/gratuity amount had been sanctioned by LHO Chandigarh for disbursal but the petitioner had not submitted mandatory receipts despite repeated requests and that the department had to appropriate the salary erroneously credited to his Salary Account by HRMS Department for the period w.e.f. 01.02.2011 till 31.12.2011 which had been treated as extraordinary leave on loss of pay by the competent authority as the employee had remained absent from duty for a long time w.e.f. 01.02.2011 to 09.09.2012 and salary had been erroneously credited into his account for the period w.e.f. 01.02.2011 to 31.12.2011 for which AGM Law and AGM (HR) has opined that the salary was not payable.

**6.** On the basis of inter-departmental communication (during the pendency of the writ petition), decision was taken to recover the amount of net salary, deduction amount, provident fund contribution etc. credited to the

employee's account erroneously for the period w.e.f. 01.02.2011 till 31.12.2011 from the terminal benefits of the employee.

**7.** The sole argument of learned counsel for the petitioner is that admittedly the petitioner had been paid salary for the period upto 31.12.2011 and that in case any amount for the said period was to be deducted from the benefits due and payable to the petitioner on account of his superannuation then the same could be done only after compliance with the principles of natural justice and not otherwise, for it was always open to the petitioner to show that in case any amount was sought to be deducted on account of unauthorized absence, the absence was not intentional and in the circumstances, not willful.

**8.** That apart, learned counsel for the petitioner contends that the claim is for release of salary for the period w.e.f. 01.01.2012 to September, 2012. Learned counsel for the respondents on the other hand states that admittedly the petitioner rejoined in September, 2012 after submitting an application (Annexure-R-3) dated 10.09.2012 addressed to the Regional Manager, SBI, R.H.C., Jammu for permission to be allowed to join office on 10.09.2012 as he was ill earlier. Learned counsel for

the respondents contends that the petitioner had been absenting w.e.f. 01.02.2011 and joined service only on 10.09.2012.

**9.** Be as it may, in case the petitioner is to be proceeded against for unauthorized absence, the same could have been done only after compliance with the principles of natural justice and giving opportunity of hearing to the petitioner. Learned counsel for the petitioner contended that once the petitioner had been allowed to join duty unequivocally without any condition then in that situation, it was not open to the respondent to deny salary to the petitioner on account of alleged unauthorized absence. More so, in view of the fact that during the pendency of the writ petition, the petitioner had retired from service on 31.03.2013.

**10.** Be as it may, the stand of the learned counsel for the respondent is of the petitioner having been unauthorizedly absent and the payment having been made to him for the period of his unauthorized absence in advertently.

**11.** Learned counsel for the petitioner further refers to the decision of the Hon'ble Supreme Court in **State of Punjab & ors. Etc. vs. Rafiq Masih (White Washer) Etc.** to contend that in terms thereof, even if some payment

has been inadvertently made to a Class-III/IV employees, which is not attributable to fraud or misrepresentation played by the petitioner, then in that eventuality, it is not open to the respondent to recover the payment made. Relevant extract of the judgment is reproduced hereunder:-

*“28. Such relief, restraining back recovery 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.”*

*A perusal of the aforesaid observations made by this Court in Col. B.J. Akkara's case (supra) reveals a reiteration of the legal position recorded in the earlier judgments rendered by this Court, inasmuch as, it was again affirmed, that the right to recover would be sustainable so long as the same was not iniquitous or arbitrary. In the observation extracted above, this Court also recorded, that recovery from employees in lower rung of service, would result in extreme hardship to them. The apparent explanation for the aforesaid conclusion is, that employees in lower rung of service would spend their entire earnings in the upkeep and welfare of their family, and if such excess payment is allowed to be recovered from them, it would cause them far more hardship, than the reciprocal gains to the employer. We are therefore satisfied in concluding, that such recovery from employees belonging to the lower rungs (i.e., Class-III and Class-IV - sometimes denoted as Group 'C' and Group 'D') of service, should not be subjected to the ordeal of any recovery, even though they were beneficiaries of receiving higher emoluments, than were due to them. Such recovery would be iniquitous and arbitrary and therefore would also breach the mandate contained in [Article 14](#) of the Constitution of India.”*

**12.** No doubt, as per the stand of the respondent, the petitioner remained unauthorizedly absent w.e.f. 01.01.2011 till he moved an application for being allowed to join duty on 10.09.2012. In between upto December, 2011, the petitioner was released the salary also. The same has not been pointed out by learned counsel for the respondents to have been on account of any fraud or misrepresentation attributable to the petitioner. Thereafter, the petitioner was allowed to join duty w.e.f. 10.09.2012 and thereafter paid salary. However, now the petitioner has been denied salary for the period January, 2012 to September, 2012. The fact remains that the petitioner joined duty only on 10.09.2012 while as per law laid down by the Hon'ble Supreme Court in Rafiq Masih's case (supra), recovery cannot be effected where the amount has been paid without any fraud or misrepresentation attributable to the petitioner particularly in the case of Class-III/IV employees. In such circumstances, ordinarily recovery is not to be made from the employee concerned where no fraud or overt act is attributable to the employee concerned or where the employee receives the excess payment without knowledge that the payment received was in excess of what was due or had been wrongly paid or where the error was detected

or corrected within a short time of wrong payment. However, for the period w.e.f. 01.01.2012 till 09.09.2012, the petitioner has not been paid salary admittedly on the ground that he did not work for the period in question. The petitioner has not been able to show that he worked for the period in question. Likewise, the respondents have claimed that the petitioner absented from duty w.e.f. 01.02.2011 till 31.12.2011 but was paid salary erroneously for that period. Once the petitioner has not worked for the period in question, it cannot be said that the petitioner received the payment of the salary in the belief that he was entitled to the same or that it had been correctly paid to him. Since it is a question involving payment from public funds, it is open to the respondents to take action in the matter but only after compliance with the Principles of Natural Justice. The decision with regard to recovery of the amount inadvertently stated to have been paid to the petitioner for the period 01.02.2011 to 31.12.2011 as also entitlement of payment for the period January 2012 to September 2012 be taken only after compliance with the Principles of Natural Justice and after giving an opportunity of hearing. Needful be done within a period of three months from the date of receipt of certified copy of this order.



With the aforementioned directions, writ petition is  
**disposed of.**

**(B. S. Walia)**  
**Judge**

**Jammu**  
03.08.2017  
Ram Murti