**IN THE HIGH COURT OF HIMACHAL PRADESH
AT SHIMLA**

CWPOA No: 6071 of 2020
Decided on: 1st January, 2025

Mahesh Dutt Sharma

...Petitioner

Versus

State of Himachal Pradesh and Others

...Respondents

Coram:

Hon'ble Mr. Justice Ranjan Sharma, Judge

[1] *Whether approved for reporting? Yes*

For the petitioner: Mr. Aditya Kaushal, Advocate.

For the respondents: Mr. Vishav Deep Sharma, Additional Advocate General for respondents No. 1 and 2-State.

Mr. Shivom Vashista, Advocate for respondent No.3

Ranjan Sharma, Judge

Petitioner-Mahesh Dutt Sharma, a retiree, has come up before this Court, seeking the following reliefs:-

> "i). That the respondents may kindly be directed to release the remaining amount of Rs. 3, 34, 709/- as leave encashment to the applicant alongwith upto date interest.

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[1] *Whether reporters of Local Papers may be allowed to see the judgment?*

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ii) That the respondents may also be directed to place the applicant in higher pay scale after completion of 16 years of service as executive officer under Assured Career Progression Scheme from due date i.e. 01.01.2014.

iii) That the respondent may also be directed to re-fix the pension of the applicant on the last basic pay plus allowances drawn by him.

iv) That the arrear re-fixation may kindly be released with interest from the date due."

2. At the very outset, learned counsel for the petitioner states on Instructions that he does not presses the relief Nos. (iii) and (iv) for refixation of pay and the refixation of pension in the instant proceedings with liberty to pursue the same separately hereinafter. **[Statement Taken on Record].**

FACTUAL MATRIX:-

3. Case set by Mr. Aditya Kaushal, Learned Counsel is that the petitioner joined service as Clerk in Notified Area Committee, Jawalamukhi [Kangra] in the year 1977. He was promoted as an Assistant Secretary in the year 1982 and then as Secretary in 1984. In pursuance to orders dated 24.11.1997, (Annexure A-1), the petitioner was promoted as an

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Executive Officer in pay scale of Rs. 7000-10980 on 28.11.1997 and after the completion of 8 years of service, the petitioner was given the higher pay scale of Rs 7220-10980 w.e.f. 28.11.2005 [Annexure A-3]. It is averred that though the Respondent No.3-Municipal Council Jawalamukhi had passed a Resolution on 23.12.2013 [Annexure A-7] approving to give the next /higher grade pay of Rs 7440 under ACP Scheme on completion of 16 years of service as an Executive Officer on 28.11.2013 but this benefit which was due from 1.1.2014 was not given. The petitioner retired from service as Executive Officer in Municipal Council Jawalamukhi on 30.04.2016.

3(i). In the above backdrop, *the first grievance* of the petitioner is that upon superannuation on 30.04.2016, though a total amount of Rs. 6,95,330/- was due and payable to him as leave encashment but an amount of Rs. 3,34,709/- was withheld and the same has not been not released as yet. The

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second grievance of petitioner is that in pursuance to orders dated 24.11.1997, Annexure A-1, the petitioner joined as Executive Officer on 28.11.1993 and he completed 16 years of service as Executive Officer on 27.11.2013 and upon completion of this service, the petitioner became eligible and entitled to be placed in higher grade pay under the Assured Career Progression Scheme w.e.f. 01.01.2014 but the benefit of ACP on completion of 16 years has also not been released to the petitioner as yet. Thus, the prayer is made for releasing the unpaid amount of Leave Encashment of Rs.3,34,709/- *and for* release of Assured Career Progression Scheme on completion of 16 years of service as Executive Officer w.e.f. 01.01.2014 under the applicable ACP Schemes with all benefits.

PROCEEDINGS BEFORE STATE ADMINISTRATIVE TRIBUNAL:

4. Petitioner filed OA(D) No. 71 of 2018 before the State Administrative Tribunal when, notices were

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issued to the respondents.

STAND OF RESPONDENT NO. 3 IN REPLY-AFFIDAVIT:

5. Pursuant to the issuance of notice, the Respondent No.3-Municipal Council Jawalamukhi filed a Reply-Affidavit dated 25.07.2018, through Executive Officer Municipal Council Jawalamukhi.

5(i). In Para 3 of Reply-Affidavit, the Respondent No.3, has not disputed the factual matrix of the case. It is borne out from the Reply-Affidavit that the petitioner retired from service as Executive Officer on 30.04.2016. It is averred in Reply-Affidavit that in terms of *Vr. No.11 of 9/2016, an Audit* was conducted by Local Audit, who submitted an Audit Report [Annexure R-3/I] pointing out that an amount of Rs. 3,34,709/- on account of wrong fixation of pay from 01.01.2013 upto the date of retirement on April 2016 was recovered from Leave Encashment of the petitioner. Perusal of letter dated 12.12.2016 [Annexure R/I Colly], reveals that on directions given

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by Respondent No. 2 on 30.06.2016 [Annexure R-3/2], the audit was conducted on 3.12.2016 and based on Audit Report, erroneous higher pay of Rs. 3,34,709/- stands recovered from Leave Encashment of petitioner in the month of September, 2016 vide Voucher No 11 of 9/2016. The above averments have been spelt out by Respondent No.3, in Para 6(ix) of Reply Affidavit, which reads as under:-

Preliminary Submissions:

"2. That as per Para 20 of the Audit Report, it emerged that on 01.01.2002, the basic pay of the applicant was fixed as Rs.8650 and after one year i.e. 01.01.2003 he got Rs.8925 as his basic salary. But inadvertently it was fixed as Rs.9200 instead of Rs. 8925 and the same continued to be drawn wrongly in the account of the applicant and the same was rectified and corrected accordingly in view of the Audit report.

3. That as stated above per Audit Report for the period 4/2012 to 3/2014 the matter was corrected and settled **and recovery of an amount of Rs. 3,34,709/- has been made from his leave encashment vide Vr. No.11 of 9/2016 whch was duly verified. This was also done in view of the Memo No. UDH(B)(10)1613/16-8256 -61 dated 30.06.2016 issued by the Director Urban Development of H.P.** with a copy thereof to the applicant. The copy of Inspection Note of the Additional Director Local Audit Department and letter dated 30.06.2016 are annexed as Annexure R-

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3/1 and Annexure R-3/2.

Reply on Merits:

3. Para 3 of the application lacks material particulars hence denied in toto. It is denied that the applicant is aggrieved on the part of action of the replying respondent. The applicant has no prima facie case and locus standi in his favour. However as submitted in para 3 of the preliminary submission as per Audit Report for the period 4/2012 to 3/2014 the matter was corrected and settled and **recovery of an amount of Rs.3,34,709/- has been made from his leave encashment vice Vr. No.11 of 9/2016 which was duly verified**.

6(x) That the contents of this sub para of the para no.6 of the application are incorrect hence denied. It is incorrect that the applicant was entitled to a sum of Rs.6,95,330/- as leave encashment. In fact, the amount of Rs.3,34,709/- drawn in excess by the applicant w.e.f. Jan 2003 to April 2016 was ordered to be recovered from his dues and was recovered vide Vr. No.11 of 9/16. This amount was rightly recovered in view of the Audit inspection/report as annexed at Annexure R-3/1 and R-3/2 above."

5(ii). So far *as second claim* it is averred that the petitioner was promoted as Executive Officer on 24.11.1997, Annexure A-1 and he completed 16 years' service as Executive Officer on 27.11.2013 and was entitled for release of next higher pay under

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Assured Career Progression Scheme w.e.f. 01.01.2014 as recommended vide Resolution dated 23.12.2013, *Annexure A-7*, but the only response given by the Respondent No.3 is that the resolution of Municipal Council cannot confer ACP upon the petitioner, as it is admissible on the basis of existing instructions issued by State Government. The operative part of the reply-affidavit reads as under:-

> "6.(vii) That the contents of this sub para of the para no.6 of the application are a matter of record hence need no comments. It is submitted here that applicant has got two ACPs, first in the year 1997 and the second in the year 2005.
>
> 6.(xvi) That the contents of sub para of the para 6 of the application are wrong and denied. **The resolution of the Municipal Council cannot confer ACP upon the applicant as it is admissible on the basis of existing instructions of the Government."**

In the backdrop of above averments, the respondents had tried to justify recovery of excess pay from the Leave Encashment and in not releasing ACP benefits due on completion of 16 years of service w.e.f. 01.01.2014.

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STAND OF RESPONDENTS NO. 1 AND 2-STATE AUTHORITIES IN REPLY- AFFIDAVIT

6. Respondents No 1 and 2 have filed a joint Reply-Affidavit dated 09.10.2018 of Director Urban Development Himachal Pradesh. Para 2 of Preliminary Submissions of Reply-Affidavit are pari-materia to the stand taken by respondent No.3 in reply-affidavit, stating that an amount of Rs. 3,34,709/- which was due and payable towards Leave Encashment has been recovered vide Para 20 of Audit Report on account of wrong pay-fixation, which has now been recovered from the petitioner. The operative part of the reply-affidavit reads:

> "2. That as perused from the order dated 30-06-2016 placed at Annexure R- 2/1, the pension of the Applicant has rightly been calculated on the basis of fixation made by the Respondent No. 3 i.e. Municipal Council, Jawalamukhi in the service Book maintained by the ibid Municipal Council. However, *it is relevant to submit here that on the basis of observation made in para 20 of the Audit Report for the period 4/2012 to 3/2014, excess payment made/recorded towards wrong fixation of pay of the Applicant stand recovered by the respondent No.3 from his leave encashment vide voucher No. 11 of 9/2016, as perused from the Annexure (R-3/1)*

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placed with the reply filed by the Respondent No. 3 and the replying Respondent has no role at any stage to recover the excess payment amounting to Rs. 3,34,709/- (Three lakh, thirty four thousand seven hundred and Nine only) made on account of salary, **except for issuing communication dated 30-06- 2016 in response to Audit para No.20 for the period 9/2012 to 3/2014 with the intention to settle the ibid audit para.**

3. That in reply to this para, it is submitted that as narrated in para 3 of the preliminary submission, **recovery amounting to Rs. 3,34,709/- was made by the Respondent No.3 on the basis of observation made in audit para 20 for the period 4/2012 to 3/2014**, as perused from the record as well as reply filed by the Respondent No. 3. However, **admissible and due benefits of Assured Carrier Progression Scheme stand released by the Respondent No.3** as perused from the reply filed by the Respondent No. 3."

X to xvi That in reply to these sub- paras, it is submitted that the contents of the same stand replied by the Respondent No. 3 and averments made there in may be read as part and parcel of reply filed by the replying Respondent.

So far as the claim of petitioner for release of ACP on completion of 16 years service as Executive Officer w.e.f. 01.01.2014, perusal of Para 6 (x) to (xvi) does not deal with averments/claim with respect

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to ACP. Meaning thereby, that no specific denial has been carved out with respect to the claim for ACP in the reply, except that the due ACP stands released to the petitioner by the Respondent No.3-Municipal Council, Jawalamukhi.

REPLY BY WAY OF REJOINDER(S):

7. Petitioner has filed separate rejoinder(s) reiterating the stand/claim made in the writ petition and by negating/controverting the stand taken in the Reply-Affidavit(s).

8. Heard, Mr. Aditya Kaushal, Learned Counsel for the petitioner, Mr. Vishav Deep Sharma, Learned State Counsel for the respondents No. 1 and 2 and Mr. Shivom Vashishat, Advocate, for respondent No.3.

9. Before proceeding to analyze the claim of the petitioner, the *question for determination* is:

> **Whether the respondents could recover alleged excess salary-pay and allowances from Leave Encashment, merely on the basis of an audit conducted leading to an Audit/Inspection Note after the retirement of the petitioner ?**

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STATUTORY PROVISIONS:

10. Before proceedings to analyze the claim and rival contentions, it is necessary to have a recap of Rule 39 of the CCS (Leave) Rules, as applicable to employees of Respondents-State, reads as under:-

> "39. Leave/Cash payment in lieu of leave beyond the date of retirement, compulsory retirement or quitting of service:-
>
> (1) Not relevant.
>
> 2(a) **Where a Government servant retires on attaining the normal age prescribed for retirement under the terms and conditions governing his service, the authority competent to grant leave shall, *suo motu*, issue an order granting cash equivalent of leave salary for both earned leave and half pay leave, if any, at the credit of the Government servant on the date of his retirement subject to a maximum of 300 days;**
>
> **3) The authority competent to grant leave may withhold whole or part of cash equivalent of earned leave in the case of a Government servant who retires from service on attaining the age of retirement while under suspension or while disciplinary or criminal proceedings are pending against him, if in the view of such authority there is a possibility of some money becoming recoverable from him on conclusion of the proceedings against him. On conclusion of the proceedings, he will become eligible to the amount so withheld after adjustment of Government dues, if any."**

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ANALYSIS:

11. Taking into account the entirety of the facts and circumstances and the factual matrix as borne out from the writ petition and the averments made in the Reply-Affidavits and reiteration of stand in rejoinders, this Court is of the considered view, that the action of Respondents 1 to 3, in recovering an amount of Rs. 3,34,709/- from Leave Encashment of petitioner vide Voucher No.11 in September 2016, on account of pay wrongly and erroneously fixed and disbursed to the petitioner, deserves to be set aside, *for the following reasons*:

NON-COMPLIANCE OF PRINCIPLES OF NATURAL JUSTICE VITIATES RECOVERY :

11(i). Petitioner initially joined service as a Clerk in Respondents-Department in 1977. He was promoted as Executive Officer on 24.11.1997, Annexure A-1. He retired on attaining the age of superannuation on 30.04.2016. Once the petitioner stood retired from

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service on 30.4.2016 then, respondents could not affect recovery of wrongfully disbursed pay and allowances for period from April 2012 to March 2014 from the Leave Encashment on account of erroneous fixation and disbursal of an amount of Rs 3,34,709/-, in September 2016 [as in Annexure R-3/1 Colly]; but without issuing a prior notice *and* without affording a personal hearing to the petitioner. Action of the State Authorities in resorting to such recovery has certainly visited the petitioner with civil consequences resulting in pecuniary loss to the petitioner. The impugned recovery, ordered in September 2016 vide Annexure R-3/I Colly, by giving a complete go-bye to minimum requirements of natural justice cannot be permitted to operate to the prejudice/disadvantage of petitioner and thus the impugned recovery being illegal and arbitrary stands vitiated.

SUO MOTU ACQUIRED AND RIGHT OF LEAVE ENCASHMENT ON RETIREMENT CANNOT BE CURTAILED OR RESTRICTED OR TAKEN AWAY ON BASIS OF AN AUDIT OR INSPECTION NOTE AFTER RETIREMENT:

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11(ii). Petitioner retired from service on 30.4.2016 and upon retirement, the petitioner acquired a right to receive Leave Encashment upto a maximum of 300 days of unutilized Earned Leave in his leave account, in terms of Rule 39(2) (a) of Central Civil Services [Leave] Rules, 1972, which read as under:-

> "39. Leave/Cash payment in lieu of leave beyond the date of retirement, compulsory retirement or quitting of service:-
>
> 2(a) **Where a Government servant retires on attaining the normal age prescribed for retirement under the terms and conditions governing his service, the authority competent to grant leave shall, *suo motu*, issue an order granting cash equivalent of leave salary for both earned leave and half pay leave, if any, at the credit of the Government servant on the date of his retirement subject to a maximum of 300 days;"**

In above backdrop, once on the date of retirement on 30.04.2016, the petitioner acquired a suo-motu legal and vested right to receive the Leave Encashment for a maximum upto 300 days in credit in terms of Rule 39 (2) (a) of CCS [Leave] Rules, 1972. The Respondents cannot deprive or curtail

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or take away the accrued right of the petitioner to receive his leave encashment in an unreasonable and arbitrary manner and that too without affording a personal hearing and without issuing a prior notice and without giving an opportunity to petitioner to submit an explanation against proposed action and also without considering an explanation submitted thereto, merely on the basis of an Audit Para or an Audit Inspection Note of September, 2016 after the petitioner stood retired on 30.04.2016. The accrued and vested right to receive leave encashment, suo-motu on retirement, can neither be permitted to be curtailed or restricted or taken away, merely on the basis of an Audit conducted or as Audit/Inspection Note of September 2016, when, the petitioner stood retired from service in April 2016 and therefore, the impugned recovery ordered/affected after having retired is uncalled for and is set-aside.

ABSENCE OF ANY OF THE THREE PRE-CONDITIONS/EVENTUALITIES IN RULE 39 (3) OF

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LEAVE RULES VITIATES RECOVERY MADE FROM LEAVE ENCASHMENT:

11(iii). In order to deal with the question, as to whether Leave Encashment amount of Rs 3,34,709/- which had accrued and had become payable suo-motu on retirement on 30.4.2016 under Rule 39 of the CCS [Leave] Rules, 1972 could be recovered after retirement, is necessary to refer to Rule 39(3) of the CCS Rules [Leave], reads as under:-

> **39. Leave/Cash payment in lieu of leave beyond the date of retirement, compulsory retirement or quitting of service:**
>
> (1). ...not relevant...
> (2).(a)(b) ...not relevant...
>
> **(3).** The authority competent to grant leave **may withhold whole or part of cash equivalent of earned leave** in the case of a Government servant who retires from service on attaining the age of retirement **while under suspension or while disciplinary or criminal proceedings are pending against him, if in the view of such authority there is a possibility of some money becoming recoverable from him** on conclusion of the proceedings against him. On conclusion of the proceedings, he will become eligible to the amount so withheld after adjustment of Government dues, if any."

Perusal of Rule 39 (3) provides that the leave encashment suo-motu due on retirement could

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be withheld, wholly or in part against an employee. Scanning of Rule 39(3) of Leave Rules enumerates that leave sanctioning authority-employer can withhold leave encashment when, an employee on retirement was (i) under suspension or (ii) the departmental or criminal proceedings were pending and (iii) if there was possibility of some money becoming recoverable on conclusion of the proceedings. In the instant case, it is not in dispute that the petitioner retired from service on 30.4.2016 after rendering an unblemished service. On the date of retirement, the petitioner was not under suspension and neither any departmental nor criminal proceedings were pending against the petitioner, in which there was any possibility of some money becoming recoverable on conclusion of these proceedings. *Even separate Reply-Affidavit filed by the respondents 1 and 2 and respondent No. 3,* do not indicate that at the time of retirement of the petitioner on 30.4.2016, the petitioner was under suspension

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or any departmental or criminal proceedings were pending against him, in which, there was possibility of some amount becoming recoverable on conclusion of these proceedings. In the instant case, since *none of the three pre-conditions or eventualities mandated /spelt out in* Rules 39 (3) of the CCS [Leave] Rules existed, on the date of retirement of the petitioner therefore, the action of State Authorities-Respondents in withholding or curtailing or restricting or taking away the accrued and vested right of petitioner to receive Leave Encashment, by resorting to the recovery of Rs 3,34,709/-, on account of wrong or erroneous pay fixed/disbursed during service. Besides, this the overpayment of pay and allowances, if any, being govt dues under the applicable pension rules are recoverable from Gratuity and that too after associating an employee at different stages of ascertaining such govt dues, if any. On the other hand, recovery from Leave Encashment can be affected, under Rule 39

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of CCS (Leave) Rules, only on fulfilment of any of the three eventualities/pre-conditions spelt out in said rule against the petitioner. Absence of any of three situations/eventualities/pre-conditions is good enough to render the impugned recovery made from the Leave Encashment dehors the intent and mandate of Rule 39 (3) of CCS (Leave) Rules is quashed and set-aside.

RECOVERY FROM RETIREE IMPERMISSIBLE AS PER LAW:

11(iv). Besides the above, the matter needs to be examined into from another angle also. The petitioner retired on 30.4.2016 and out of the total amount of Leave Encashment of Rs. 6,95,330/- an amount of Rs. 3,34,709/- has been withheld or recovered in month of September 2016 [Annexure R-3/I Colly], on account of excess pay and allowances erroneously released to the petitioner. Pertinently, the petitioner had attained the status of a retiree on 30.04.2016 therefore, the orders affecting recovery of Leave

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Encashment from the petitioner, a retiree, in the month of September 2016 is contrary to the mandate of the Hon'ble Supreme Court in State of Punjab and others versus **Rafiq Masih, (White Washer), (2015) 4 SCC 334.** Thus, the action of the State Authorities in affecting *recovery from the petitioner, a retired employee is contrary to* ***Para 18 (ii),*** in the case of **Rafiq Masih (infra)** and thus, the impugned recovery cannot be permitted to operate to the disadvantage of petitioner.

RECOVERY INABSENCE OF MISREPRESENTATION OR FRAUD: CONTRARY TO LAW:

11(v). Even a perusal of the Reply-Affidavits admit that the recovery has been made from the Leave Encashment so as to settle the excess payment of pay and allowances erroneously fixed. The Reply Affidavits do not indicate that the petitioner had misrepresented or had committed fraud due to which alleged excess payment was released. Thus, once the petitioner had neither misrepresented anything nor

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was not a party to any fraud leading to the release of excess payment of pay and allowances, though erroneously, then, in these circumstances, the recovery affected from Leave Encashment after retirement is inequitable, arbitrary, harsh, and the same cannot be permitted to operate against the petitioner being contrary to the *mandate in* ***Para 18 (v)*** *in the case of* ***Rafiq Masih*** *(infra).*

In this context, reference is made to the judgment passed by the Hon'ble Supreme Court in **State of Punjab and others** versus **Rafiq Masih (White Washer), (2015) 4 SCC 334**, pointing out situations, where the recovery from employee, including retired employee was impermissible, which reads as under:-

> "18. *(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*

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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."

RECOVERY DUE TO WRONG INTERPRETATION OR UNDERSTANDING OF RULES - IMPERMISSIBLE:

11(vi). In **Civil Appeal No.7115 of 2010**, titled **Thomas Daniel** versus **State of Kerala and Others**, decided on 02.05.2022, the Hon'ble Supreme Court deprecated the practice of effecting recovery when, excess payment has been paid to a retiree due to mis-interpretation of the Rules, in the following terms:-

12. **"In Syed Abdul Qadir and Others v. State of Bihar** and Others, excess payment was sought to be recovered which was made to the appellants-teachers on account of mistake and wrong interpretation of prevailing Bihar Nationalised Secondary School (Service

Conditions) Rules, 1983. The appellants therein contended that even if it were to be held that the appellants were not entitled to the benefit of additional increment on promotion, the excess amount should not be recovered from them, it having been paid without any misrepresentation or fraud on their part. The Court held that the appellants cannot be held responsible in such a situation and recovery of the excess payment should not be ordered, especially when the employee has subsequently retired. **The court observed that in general parlance, recovery is prohibited by courts where there exists no misrepresentation or fraud on the part of the employee and when the excess payment has been made by applying a wrong interpretation/ understanding of a Rule or Order.** It was held thus:

"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

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> 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."

14. Coming to the facts of the present case, **it is not contended before us that on account of the misrepresentation or fraud played by the appellant, the excess amounts have been paid.** The appellant has retired on 31.03.1999. In fact, the case of the respondents is **that excess payment was made due to a mistake in interpreting Kerala Service Rules** which was subsequently pointed out by the Accountant General.

16. In the result, the appeal succeeds and is accordingly allowed. The judgment and order of the Division Bench dated 02.03.2009 and also of the learned Single Judge of the High Court dated 05.01.2006 impugned herein, and the order dated 26.06.2000 passed by the Public Redressal Complaint Cell of the Chief Minister of Kerala and the recovery Notice dated 09.10.1997 are hereby set aside. There shall be no order as to costs."

11(vii). While dealing with a similar fact-situation, the Hon'ble Supreme Court in **Jagdish Prasad Singh vs State of Bihar and Others, 2024 SCC OnLine SC 1909**, decided on 08.08.2024, has deprecated recovery made from employee on wrong understanding of applicable Rules/ Scheme in the following terms :-

"22. Similarly, this Court in **ITC Limited** v. State of Uttar Pradesh, held as under :-

> "108. We may give an example from service jurisprudence, where aprinciple of

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> equity is frequently invoked to give relief to an employee in somewhat similar circumstances. Where the pay or other emoluments due to an employee is determined and paid by the employer, and subsequently the employer finds, **(usually on audit verification) that on account of wrong understanding of the applicable rules by the officers implementing the rules, excess payment is made, courts have recognized the need to give limited relief in regard to recovery of past excess payments, to reduce hardship** to the innocent employees, who benefited from such wrong interpretation."

25. The Government Resolution dated 8th February, 1999 to be specific, the highlighted portion supra is amenable to the interpretation that it protects the status and pay of those employees who had received their time bound promotions prior to 31st December, 1995. As a consequence, the Secretary concerned, while rejecting the representation clearly misinterpreted and misapplied the said Resolution to the detriment of the appellant.

26. The learned Single Judge as well as the Division Bench of the High Court of Patna also seem to have fallen in the error. In addition thereto, we are of the view that any step of reduction in the pay scale and **recovery from a Government employee would tantamount to a punitive action because the same has drastic civil as well as evil consequences**. Thus, no such action could have been taken against the appellant, more particularly, because he had been promoted as an ADSO, while drawing the pay scale of Rs.6500-10500 applicable to the post, way back on 10th March, 1991 and **had also superannuated** eight years ago

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> before the recovery notice dated 15th April, 2009 was issued. The impugned action directing reduction of pay scale and recovery of the excess amount is grossly arbitrary and illegal and also suffers from the vice of non-adherence to the principles of natural justice and hence, the same cannot be sustained.
>
> 27. The order dated 8th October, 2009 passed by the State Government directing reduction in the pay scale of the appellant from Rs.6500-10500 to Rs. 5500-9000 w.e.f. 1st January, 1996 and directing recovery of the excess amount from him is grossly illegal and arbitrary and is hereby quashed and set aside. The impugned order dated 27th August, 2012 passed by the Division Bench of the High Court does not stand to scrutiny and is hereby quashed. Therefore, the appellant shall continue to receive the pension in accordance with the pay scale of Rs.6500-10500."

RECOVERY ON ACCOUNT OF WRONG EXECUTION /IMPLEMENTATION OF THE SCHEMES-ORDER IMPERMISSIBLE:

11(viii). The Hon'ble Supreme Court in **SLP (C) No. 8015 of 2022**, titled **Union of India and others** versus **N.M. Raut and others** in [Civil Appeal No._____ of 2024], decided on 12.12.2024, has also deprecated the action of an employer in resorting to recovery of financial benefits erroneously extended against the retirees or those who are retiring within one year,

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in the following terms:-

> "22. We are informed that, in the present case, **the Government of India had implemented and executed the MACPS by granting benefits to the respondents and, later on, recoveries were initiated. many of the employees may have retired,** in terms of the decision of this Court in "State of Punjab and Others vs. Rafiq Masih (White Washer) and Others, **we deem it appropriate to direct that the Union of India will not effect any recovery of arrears from the retirees or those who are retiring within one year from the date of pronouncement of this judgment.**
>
> 25. **Where recoveries have been made from the retirees, the same shall be refunded**. However, in the case of serving employees, where recoveries have been made, the same need not be refunded."

RECOVERY CONTRARY TO RULE 11 AND 16 OF CCS (CCA) RULES:

11(ix). Learned State Counsel contends that recovery from Leave Encashment has been affected due to excess pay granted to the petitioner, which was detected during audit and based on this, the amount was recovered as per the audit-Inspection.

The above contention of Learned State Counsel is misconceived for the reason, that the leave

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encashment is a salary, accruing as pay and allowances for the unutilized earned leave. This benefit is extendable to an employee, in recognition of the service rendered without availing leave, despite its admissibility. Thus, once the leave encashment of the petitioner is his salary, accruing as pay and allowances, then, as per Rule 11 of the CCS (CCA) Rules, the recovery from pay of the whole or part of any pecuniary loss caused to the Government by negligence or breach of orders can be imposed by way of penalty. As per these rules, the recovery of pay has been recognized and categorized as minor penalty. In this background, the provision of Rule 11 reads as under:

> **11. <u>Penalties</u>**
>
> The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a Government servant, namely:-
>
> **<u>Minor Penalties:</u>**
>
> (i) .....Not relevant.....
> (ii) .....Not relevant....
> **(iii). recovery from his pay of the whole or part of any pecuniary loss caused by him to the Government by negligence or breach of orders;**

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(iii) (a)& (iv) ....Not relevant...

Major Penalties—
(v) to (ix) ...Not relevant....

16. Procedure for imposing minor penalties

(1) Subject to the provisions of sub-rule (5) of rule 15, no order imposing on a Government servant any of the penalties specified in clause (i) to (iv) of Rule 11 shall be made except after-

(a) **informing the Government servant in writing of the proposal to take action against him and of the imputations of misconduct or misbehavior on which it is proposed to be taken**, and giving him reasonable opportunity of making such representation as he may wish to make against the proposal;

(b) **holding an inquiry in the manner** laid down in sub-rules (3) to (24) of rule 14, in every case in which the disciplinary authority is of the opinion that such inquiry is necessary;

(c) **taking the representation, if any, submitted by the Government servant under clause (a) and the record of inquiry, if any, held under** clause (b) into consideration;

(d) consulting the Commission where such consultation is necessary. The Disciplinary Authority shall forward or cause to be forwarded a copy of the advice of the Commission to the Government servant, who shall be required to submit, if he so desires, his written representation or submission on the advice of the Commission, to the Disciplinary Authority within fifteen days; and

(e) **recording a finding** on each imputation or misconduct or misbehavior.

(f) (1-A) Notwithstanding anything contained in

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> clause (b) of sub-rule (1), if in a case it is proposed after considering the representation, if any, made by the Government servant under clause (a) of that sub-rule, to withhold increments of pay and such withholding of increments is likely to affect adversely the amount of pension payable to the Government servant or to withhold increments of pay for a period exceeding three years or to withhold increments of pay with cumulative effect for any period, an inquiry shall be held in the manner laid down in sub-rules (3) to (24) of Rule 14, before making any order imposing on the Government servant any such penalty.
>
> (2) .....Not relevant....

In the background of Rule 11 & 16 of CCS (CCA) Rules, the action of the State Authorities in affecting recovery of pay, which was erroneously granted/extended to the petitioner from his Leave Encashment amounts to imposing a penalty against the petitioner. Such imposition of penalty could not be imposed against the petitioner *without fulfilling the twin pre-conditions of Rule 11(iii) of the Rules*, which expressly provides that the recovery from pay could only be effected, in case, “any pecuniary loss was caused by the petitioner to the Government by negligence” or by “breach of orders”. In the

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instant case, nothing has been placed on record by the State Authorities to establish that the recovery was affected due to any pecuniary loss caused to the Government either by negligence or breach of orders issued by Government. Further, the aforesaid recovery, being a recognized penalty under the CCS (CCA) Rules could not be affected without complying with the mandate of Rule 16 of CCS (CCA) Rules i.e. without issuing a memorandum of imputation, misconduct or misbehavior and without giving an opportunity of representation to the petitioner. This Rule further provides that the inquiry needs to be conducted by the disciplinary authority, in case, such holding of inquiry becomes necessary [when, the facts are disputed]. Non-fulfilment of any of the twin pre-conditions of Rule 11, by the State Authorities and the further non-compliance of Rule 16 vitiates the Impugned recovery. Nothing has been placed on record assert that the State Authorities have affected

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recovery of pay from the Leave Encashment of the petitioner after complying with the mandate of Rules 11 & 16 (supra). In these circumstances, the recovery of pay erroneously released to the petitioner from his Leave Encashment in defiance of Rules and in these circumstances, the recovery affected is declared illegal and is set-aside and resultantly, the recovery made from Leave Encashment is liable to be refunded to the petitioner, in facts of instant case.

MANDATE OF THIS COURT NEGATING RECOVERY:

12. A Coordinate Bench of this Court, in **CWPOA No. 4088 of 2020**, titled **Dilbag Singh** versus **State of Himachal Pradesh and others, decided on 2.7. 2024**, has quashed an order of recovery made from an employee, when, the excess or wrongful pay and allowances were extended without any fault attributable to him, in the following terms:-

> "17. Since, **the petitioner has superannuated from the service and it is not the case of the respondents that the petitioner has mis-represented to the Department, to get the monetary benefit, as such, his case**

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securely falls in Clause (ii) of para 35 of the judgment, passed by this Court, in **S.S. Chaudhary's** case (supra).

19. The Hon'ble Supreme Court in another recent pronouncement in **'M.P. Medical Officers Association versus State of Madhya Pradesh and others', reported in 2022 (12) SCALE 451,** in para-5, has held, as under:-

> *"5. It is not in dispute that the members of the appellant association, who were serving as Specialists, Dental Specialists and officers in the specialist's cadre got the benefits under the circular dated 23.05.2009. It was the Department/State, who issued the circular dated 23.05.2009 and paid the benefits under the circular dated 23.05.2009 to the members of the appellant association, which subsequently came to be withdrawn by the State in the year 2012.* ***Therefore, as such, there was neither any misrepresentation on the part of the concerned employees – members of the appellant association nor can the mistake be attributed to them. The mistake, if any, can be said to be that of the Department/State****, who issued the circular dated 23.05.2009 under which the members of the association were given certain benefits till the same was withdrawn in the year 2012. Therefore, in the peculiar facts and circumstances of the case, the State was not justified in ordering recovery of the excess amount paid along with the interest. It is true that stricto sensu, the decision of this Court in the case of State of Punjab and others Vs. Rafiq Masih, (2015) 4 SCC 334 may not be applicable. However, at the same time, as observed hereinabove, and in the facts and*

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> *circumstances of the case, the State was not justified in ordering recovery of the excess amount paid with interest, more particularly, when it is reported that some of the doctors /dentists-members of the association have retired on attaining the age of superannuation and the recovery shall be from their pension/pensionary benefits. However, at the same time, their pay fixation and the pension shall have to be as per the order dated 26.08.2008."*
>
> 21. Consequently, the petition is allowed and the impugned order, dated 12th August, 2016 (Annexure A-1), is ordered to be quashed and set aside, **with a direction to the respondents to release the due and admissible retiral benefits, in favour of the petitioner**, within two months, from today, failing which, the respondents are liable to pay the said amount, along with interest @ 9% per annum, from the date, when, it becomes due.

12(i). While dealing with a similar fact-situation, the Impugned recovery was set-aside by this Court in **CWPOA No. 1777 of 2019**, **Sukh Dev versus State of Himachal Pradesh and another**, decided on 24.10.2024 in the following terms:

> 10(iii). Recovery from an employee could not be affected without affording a personal hearing to an employee before passing the adversial orders before visiting the petitioner with **civil consequences** which was not complied with, in the instant case. In addition to this, recovery from pay of an employee, is a **recognized penalty, under Sub Rule (iii) of**

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Rule 11 of the CCS (CCA) Rules [as is applicable to employees of Respondent No.2-Corporation] and the **recovery could not be effected without complying with the mandate of Rules 16** of CCS (CCA) Rules i.e. without informing the petitioner of the proposed action; and without disclosing the imputations of misconduct or misbehavior on which such action is proposed; and without giving him a reasonable opportunity to submit a representation against the proposed action of recovery and without considering the representation by recording a finding on each imputation or misconduct or misbehavior (when the facts were not in dispute) ; and in case, the allegations were disputed/ denied necessitating an inquiry then to hold an inquiry before passing impugned recovery orders. In the instant case, the Respondents have neither pointed out nor placed on record any material to show that the **respondents have complied with the mandate of Rule 16 of the Rules and absence of compliance of Rules,** vitiates the Impugned Order of Recovery issued by the Respondents against the petitioner.

10(iv). After having joined Government service or the service under the Respondent-Corporation on 30.12.1997, the conditions of service are to be regulated by service rules including the CCS (CCA) Rules. **Recovery from pay can be affected only in case, the twin pre-conditions were satisfied** i.e. firstly, the act of the petitioner had led to pecuniary loss to the Government and secondly, such pecuniary loss ought to be a result of negligence or breach of orders. In the instant case, respondents have been able to point out that the petitioner was guilty of negligence or breach of orders resulting in pecuniary loss to the Respondents either due to negligence or breach of orders

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> therefrom. In these circumstances, the Impugned Order of Recovery dated 18.04.2013, Annexure P-11, fails to satisfy the pre-conditions for ordering recovery under Rule 11 and 16 of CCS (CCA) Rules and therefore, the Impugned recovery cannot stand the test of judicial scrutiny and is accordingly set-aside.

In the backdrop of mandate of law in **Rafiq Masih, Thomas Daniel, N.M. Raut** (supra), the Hon'ble Apex Court has mandated that no such recovery should be affected from a retired employee alike the petitioner. Further the recovery has been effected dehors the mandate of Articles 14 and 16 of the Constitution of India. Recovery has visited the petitioner with civil consequences in violation of the principles of natural justice. Recovery could not be affected, when, the higher pay and allowances were given by the respondents without any mis-representation or fraud by petitioner. Even, *recovery from Leave Encashment could not be ordered/affected when, neither of the three pre-requirements of Rule 39 of CCS [Leave] Rules existed on the date of the*

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retirement on 30.4.2016. Meaning thereby, that once the petitioner was not under suspension or neither any department or criminal proceedings were pending against the petitioner, in which, on conclusion of these proceedings, there was possibility of some money becoming recoverable. In the instant case, once none of these eventualities existed, therefore, the recovery could not have been affected from the petitioner. The petitioner superannuated from service on 30.04.2016 and upon superannuation a suo-motu right had accrued to the petitioner under Rule 39(3) of CCS (Leave) Rules for receiving the salary i.e. pay and allowances for the unutilized earned leave. The *right to receive the salary accruing as Leave Encashment being a property under Article 300-A, can neither be withheld nor denied by the respondent without any authority of law, on the basis of a mere audit report or inspection note* {conducted or was prepared} behind the back of the petitioner on the date of

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retirement. An Audit conducted, leading to an Audit Para or an Inspection Note dated 9/2016 [Annexure R-3/I Colly], can neither be made the basis nor can it be relied upon for affecting recovery from Leave Encashment. In these circumstances, this Court is of the considered view, that withholding of Leave Encashment of Rs.3,34,709/- [Annexure R-3/I, Colly] in facts of instant case, is without any authority of law. Pertinently though the fixation of pay fell within the domain of Respondents 1 to 3 and the petitioner had no role in the matter then, in these circumstances, the action of the State Authorities in recovering the amount of excess pay or the pay erroneously granted/released, amounts to penalizing the petitioner without any fault attributable to him. *Permitting the State Authorities to recover the excess pay or the pay erroneously released shall certainly amount to giving leverage to the authorities for its inactions or wrong doings and shall amount to*

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legalizing its illegality or validating its inaction or slackness. Thus, the Impugned recovery made from the Leave Encashment of the petitioner, being dehors the Leave Rules and being otherwise harsh, oppressive, iniquitous and being contrary to the mandate of law in **Rafiq Masih, Tomas Daniel, Jagdish Parshad and N.M. Raut (supra)** cannot pass the test of judicial scrutiny. Accordingly, the action of State Authorities in affecting recovery of wrong or erroneously fixed and released pay and allowances to the petitioner from his Leave Encashment, is quashed and set aside.

CLAIM FOR ACPS:

13. Now, coming to the *second claim* of the petitioner for Assured Career Progression Scheme as Executive Officer, on completion of 16 years of service w.e.f. 01.01.2014, respondent No.3 has not denied the entitlement of the petitioner towards ACP. In Para 6 (xvi) of the Reply-Affidavit filed by respondent No.3, the only stand taken is that a resolution of

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Municipal Council cannot confer the benefit of ACP upon the applicant (petitioner herein), as the same is admissible on the basis of existing Instructions of the Government. However, a perusal of Reply-Affidavit (s), of the State Authorities nowhere, suggests that the petitioner is neither eligible nor is he entitled to ACP benefits on completion of 16 years of service as Executive Officer w.e.f. 1.1.2014. Thus, once it is not the case of respondents that the petitioner is not eligible or he does not fulfill or does not comes within the ambit of required bench- mark so as to consider him for grant of ACP benefits. In above backdrop, it is undisputed that the State Authorities notified the ACP Scheme on 15.12.1998 for giving an increment so as to raise the basic pay to next level on completion of 16 years service in a cadre {which provided for benefits on completion of 8-16-24-32 years of service} and after revision of pay scales, the State Authorities notified the New-

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Modified ACP Scheme on 9.8.2012 applicable w.e.f. 27.8.2009 which provided for giving next-higher grade pay on completion of 4-9-14 years of service in a cadre}, subject to fulfilment of conditions in the said scheme. Both these ACP Schemes mandated that the grant or non-grant of ACP is to be tested by applying the same procedure, which is applicable in case of promotion. Even, it is not the case of the Respondents 1 to 3 that the petitioner is not eligible or he does not have the requisite bench mark entitling him for consideration or is in any manner not entitled to this benefits in terms of the ACPS of 1998 or ACPS of 2012 therefore, the non-consideration of the case of the petitioner for ACPS due on completion of 16 years under Old ACPS or after 14 years under New-Modified ACPS {whichever is due under applicable Scheme(s) has resulted in financial loss, by depriving him of higher pay fixation during service and the benefits of the same for higher-revised retiral benefits.

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Accordingly, the claim of petitioner for considering him for ACP on completion of 16 years of service as Executive Officer w.e.f. 01.01.2014 or on completion of 14 years of service w.e.f. 1.1.2012 in terms of Modified-New Scheme dated 28.08.2012 [whichever is applicable and is also more beneficial} carries weight. Accordingly, in view of the above discussion, the Respondents are mandated to consider the case of petitioner for grant of ACPS in terms of applicable ACP Schemes and upon finding the petitioner entitled for the same, admissible benefits be extended to the petitioner. Ordered accordingly.

INTEREST ON DELAYED RELEASE OF RETIRAL BENEFITS:

14. The three Judges of the Hon'ble Supreme Court has affirmed that the Leave Encashment is a payment of salary, relatable to pay and allowances, in lieu of the admissible leave not availed by an employee on the date of retirement in **State of Rajasthan and another versus Senior Higher Secondary School,**

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Lachhmangarh and others, (2005) 10 SCC 346, in the following terms:

> "16. From the aforesaid Rules, regulating leave, it is clear that benefit of encashment of leave is nothing but payment of salary for the leave not availed by an employee and which is to his credit.
>
> 17. For the aforesaid additional reason, the conclusion reached by the High Court is supportable that **leave encashment is part of "salary" and covered in the wider expression "scales of pay and allowances"** used in Section 29 of the Act which has to be read and understood with the definition of the word "salary" contained in Section 2(r) of the Act."

14(i). The Hon'ble Supreme Court in **Civil Appeal No. 1698 of 2022**, titled **Dr. A. Selvaraj** versus **C.B.M. College and Others**, decided on 04.03.2022 held as under:-

> "4. Having heard learned counsel for the respective parties, we are of the opinion that as there was a **delay in making the payment of retirement benefits and settling the dues for which the appellant employee is not at all responsible, he is entitled to the interest on the delayed payment**. Even the Division Bench of the High Court has also observed in the impugned judgment and order that the appellant is entitled to the interest on the delayed payment. However, there is an inter se dispute between the Secretary, Management and the Government as

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> to who is responsible for the delay in making the payment to the appellant and therefore, he has been denied the interest on delayed payment though entitled to. It is to be noted that as such pursuant to the interim order dated 09.08.2021, the Government did conduct an enquiry and fastened the liability on the college and observed that the former Secretary, Shri C.M. Ramaraj was responsible for the delay in disbursal of the terminal benefits to the original writ petitioner. In that view of the matter, subject to the further final order that may be passed by the Government, the College/ Management is first liable to pay the interest on the delayed payment of retirement dues subject to the final decision, which may be taken by the Government, after hearing the Management and the former Secretary. However, because of the **inter se dispute between the Management, Secretary and the Government on who is responsible for the delay in making the payment and/or settling the dues, the retired employee should not be made to suffer for no fault of his."**

14(ii). The High Court of Bombay has mandated in **2024 SCC Online Bom 1253,** titled **Dattaram Atmaram Sawant and another** versus **Vidharbha Konkan Gramin Bank,** through its Chairman, decided on May 2, 2024, :

> "17. Once **there is no such specific regulation that takes away the accrued right to encash privilege leave on resignation, then without there being any specific**

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regulation, the right already accrued cannot be forfeited. Though Regulation 67 states that all leave shall lapse, it does not mean the right already accrued for encashment will lapse.

23. Thus, it is declared that the **Petitioners are entitled to leave encashment as prayed for. The Respondent- Bank is directed to calculate the amounts payable towards encashment to the Petitioners along with interest at the rate of 6% per annum** and pay the same to the Petitioners within six weeks from today. Rule is made absolute in above terms."

CONCLUSION AND DIRECTIONS:

15. In view of the above discussion and for the reasons recorded hereinabove, the instant petition is allowed, in the following terms:-

(i). Action of the State Authorities, including Respondent no 3 in withholding and in affecting recovery of Rs 3,34,709/- from Leave Encashment due on retirement on 30.4.2016, due to erroneous fixation of pay and its release ; merely on the basis of an Audit and Audit Note as in Voucher No. 11 of September 2016 and communication dated 12.12.2006 vide [Annexure R-3/1] being without any authority of Law, is quashed and set aside ;

(ii). Respondents are directed to refund the recovered amount of Leave Encashment as in direction no (i) supra, alongwith interest @ 6% per annum from the date it became due upon his retirement on 01.05.2016 till realization ;

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(iii). The State Authorities are mandated to consider the case of petitioner for grant of ACP benefit on completion of 16 years as Executive Officer w.e.f. 1.01.2014 under ACP Scheme dated 15.12.1998 or completion of 14 years of service as such other under re-casted /Modified-New ACPs dated 28.09.2012 [whichever is beneficial]; in-accordance with law;

(iv). Upon consideration, in case, petitioner is held entitled to ACP as in (iii) above ; the benefit of pay fixation and such admissible higher pay be released during service and benefit of same thereafter for all revised retiral benefits to the petitioner with all consequential benefits;

(v). Respondents are mandated to comply with the above directions within a period of six weeks from the date of receipt of certified/ downloaded copy of this judgement;

(vi). Parties to bear respective costs.

In aforesaid terms, instant petition and all the pending miscellaneous application(s), if any, shall also stand disposed of, accordingly.

(Ranjan Sharma)
Judge

January 01, 2025
(himani)