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'Whitewashing' the Law of Recovery – An analysis of State of Punjab v. Rafiq Masih (2015) 4 SCC 334

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ABSTRACT

Guilt in any way – through fraud, misrepresentation or foul play, has often been the touchstone to assess the liability of a person and for consequent imposition of punishment. But what happens when a person, for no fault of his, gets unjustly enriched and simultaneously causes a severe dent on the public exchequer? As the law stands now, he is immune from an order of recovery on satisfaction of certain conditions, in addition to his own innocence. But this might not always result in an equitable judgment, much less a legally sustainable decision. The case which rules the field in this aspect is the 2015 Apex Court decision of Rafiq Masih, which from the following analysis would seem to be a decision per incuriam and not sustainable for several other reasons. The present endeavour is to bring out these glaring errors, which have not been appreciated by any Court thus far.

INTRODUCTION

The idea of recovery basically implies the process of retrieval or getting back. For the sake of the present discussion, we shall limit the term recovery to mean - an administrative measure employed by the State/employer to recover/retrieve excess payments made to employees, to prevent their unjust enrichment and to prevent depletion of the State exchequer.

As far as service jurisprudence is concerned, the landmark judgment of the two-member Bench of the Apex Court in State of Punjab and Ors. v. Rafiq Masih[1] (henceforth referred to as the 2015 Rafiq Masih) holds a preeminent position in matters of recovery. The case provides a comprehensive compilation of precedents and finally lists out circumstances when it would be iniquitous to issue an order of recovery. Through the analysis that follows however, it will be proved that the decision is not sustainable as it is against the decision of a higher Bench and is therefore *per incuriam.* Further, the ratio of the case is based on a flawed logic, i.e. it primarily grants an equitable remedy and hence cannot be taken to be a valid precedent for the purpose of application of the principle of *stare decisis*.

FACTS OF THE CASE

The 2015 Rafiq Masih case, more commonly known as the 'Whitewasher case' essentially dealt with several appeals raising the same issue - of receipt of money by employees, who in these cases were whitewashers, in excess of their rightful entitlements; and whether recovery could be ordered from these employees of the same. These cases were all clubbed together and to be heard by the Division Bench. However, on appreciating the fact that there were multifarious opinions on the idea of recovery, as seen in several cases presented before the Bench, the Division Bench referred the matter to a three-member Bench. Thus in State of Punjab and Others v. Rafiq Masih[2], the reference case, the three-member Bench then analysed all the precedents on the matter and held that there was in fact no incongruence in the ideas expressed by the various allegedly inconsistent judgments referred to in 2015 Rafiq Masih. The difference lay in the fact that some of them were equity based judgments and others were in accordance with what 'ought to be'[3] the law of the land. The Division Bench though apparently relying on the directions of the three-member Bench, provided a judgment which did not capture the essence of the analysis made by the three-member Bench. The Division Bench proceeded to lay down five conditions under which no recovery could

[1](2015) 4 SCC 334

[2] (2014) 8 SCC 883

[3] The primary flaw in the interpretation to the case lies in the fact that in 2015 Rafiq Masih, the Court could not and should not have attempted to lay down what ought to be the law by deviating from the clarification provided by the Full Bench in 2014 Rafiq Masih

be ordered by the parent institution of an employee who had been 'unjustly enriched'. It basically says that even if an employee has received money which is not rightfully his, he can retain it, provided the conditions mentioned therein are satisfied. In other words, it specifically draws out four circumstances wherein there is a complete proscription on ordering recovery and further leaves it open for the Courts to consider the merit of each case before issuing appropriate orders. Based on the analysis of several precedents, the Court identified the following circumstances under which recovery is prohibited:

i. Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

ii. Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

iii. Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

iv. Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

v. In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."[4]

Granted, some of the conditions envisaged in 2015 Rafiq Masih are genuine and deserve consideration, but the question remains, whether the grant of any concessions, let alone the ones laid down in the case, would lead to complete manipulation of the proposition and would hence ultimately become counterproductive.

The Court rested its argument on the idea of it being 'inequitable' to demand repayment of money from employees in the above instances. As a rule of law country, equity definitely plays an important role as far as judicial thinking and reasoning is concerned. But can such equity based decisions be taken as valid precedent? Despite the noble and altruistic intention of the judiciary in the present case, would it truly be wise to list out exemptions which can easily be taken advantage of, especially when the money involved belongs to the public exchequer? Is the ruling of the Division Bench truly based on legal justification or equitable consideration? Through the following

[4] *Supra* note 1 at 345 and 346

analysis, an attempt has been made to answer the above questions and to show that the decision in the landmark 'Whitewasher case' is in fact flawed for many reasons and cannot sustain in the eye of the law.

ANALYSING THE WHITEWASHER CASE

To frame the issue in a single sentence : if an employee is, for reasons for which he is not to blame, granted an excess payment and then years later the amount is demanded to be paid back, will he have to return it or is there some limitation, prohibition or restriction on the recovery of the amount.

In the beginning, the idea was that no recovery could be made if the employee himself was not at fault[5]. The Apex Court based on a utopian notion of welfare and equity, was disinclined to order recovery when the employee himself was innocent. As the years progressed, the Courts developed more conditions under which recovery could not be made, all of which culminated in the 2015 Rafiq Masih, wherein five grounds were categorically laid down, which paved the way for all subsequent cases on the subject.[6] This principle was however not set in stone. There were peppered opinions from the Apex Court and certain High Courts which strove to distinguish this line of reasoning on the ground that the money in question was public money and that it ought to be recovered, no matter the person responsible or the delay involved.

The moot question therefore is whether the law of the land in this respect, is the one explained by the three member Bench in 2014 Rafiq Masih or the direction issued by the two member Bench in 2015 Rafiq Masih. Though a *prima facie* reading of 2015 Rafiq Masih would show that it is in tune with 2014 Rafiq Masih, it would appear from the following reasoning that the position adopted in the 2015 Rafiq Masih is absolutely wrong, incorrect and perverse to the idea of equity and justice. Simply put, it is argued that giving a blanket exemption from recovery tantamounts to condoning of malafide acts, especially when they can be effectively and colourably done. So where then does the *sentinel on the qui vive* stand if all it can do is watch helplessly as the State exchequer gets depleted? There are several justifications one can offer to uphold the sanctity of the 2015 Rafiq Masih, but there are several others which show that it poses a threat to the sanctity of the

[5] See the opinion of N.P. Singh, J. in Shyam Babu Verma and Ors. v. Union of India and Ors.(1994) 2 SCC 521. It is one of the first cases of import on the subject and was also the subject matter of the reference made by the Division Bench to the three-Member Bench.

[6] In a catena of decisions that followed the courts have been eager to follow the 2015 Rafiq Masih pronouncement: Rajkumar Bhagat v. State of Jharkand (2017) 3 AIR Jhar 579; Prem Kumar Gupta v. Nagar Parishad 2015 SCCOnLine Pat 8497; Dwarika Nath Pandey v. State of Jharkand 2017 SccOnLine Jhar 1474. The case has been blindly followed in several decisions that followed.

public trust and a mockery on the face of justice. The following points will elucidate why the 2015 Rafiq Masih is infact bad in law.

Before going into the quint essential details, it will be ideal to first state two fundamental principles of law:

1. The decision of a higher Bench is binding on a lower Bench[7]; and

2. Law laid down under articles 141 or 136 of the Constitution is the law of the land and is binding on all lower courts, whereas pronouncements under article 142 are applicable *in personam* and are so made merely 'to meet the ends of justice'.

The application of these principles, along with the following reasons will illustrate why the judgment in 2015 Rafiq Masih is legally flawed.

PER INCURIAM: A DECISION RENDERED WITHOUT CONSIDERING THE RELEVANT LAW OR PRECEDENT

Though the decision of the two-member Bench in 2015 Rafiq Masih could be considered as a binding declaration under article 141 of the Constitution *arguendo*, there are conditions under which even such a declaration can be fallacious, for example, if they are rendered without considering valid precedents, especially those pronounced by a larger Bench. The 2015 Rafiq Masih, it would seem, is hit by such a handicap. In 2015 Rafiq Masih, the Supreme Court had not properly appreciated the answers furnished by the Full Bench of the Apex Court in reference in the 2014 decision of Rafiq Masih. The 2014 Rafiq Masih is a reference case for authoritative pronouncement on the apparent differences of opinion expressed in, Shyam Babu Varma v. Union of India[8] and Sahib Ram v. State of Haryana[9]on the one hand and Chandi Prasad Uniyal v. State of Uttarakhand[10] on the other. The issue was therefore referred to the three-member Bench by the two-member Bench stating thus:

> "In view of an apparent difference of views expressed … we are of the view that the remaining special leave petitions should be placed before a Bench of three Judges.."

The position in the three cases above can be summarised as follows:

[7]This is one of the basic principles of common law. The decision of a higher bench is binding on a lower bench in the hierarchy. It further implies that the decisions of a bench with higher number of members is binding on bench with fewer members, i.e. a judgment of a three member or higher bench is binding on a division bench and so on and so forth.

[8]1994 SCC (2) 521

[9] 1995 Suppl. (1) SCC 18

[10] (2012) 8 SCC 417

In Shyam Babu Verma[11], the Apex Court, while observing that the petitioners therein are not entitled to the higher pay scales, had come to the conclusion that since the amount had already been paid to the petitioners, for no fault of theirs, the said amount shall not be recovered by the respondent, Union of India.[12]As noted above, initially the primary concern of the judiciary was whether the employee himself had approached the Court with stained hands. If not, the Court found no reason to order recovery against him. In Sahib Ram[13] also, the Supreme Court observed that the excess payment was not on account of any misrepresentation made by the appellant, but by a mistake committed by the Principal/employer. Here again, the employee himself was innocent. In a peculiar fact situation of that nature, the Court was pleased to observe that the amount already paid to the appellant need not be recovered. It is pertinent to note at this stage that these are decisions rendered by the Court in special consideration of the fact circumstances, and not as a general proposition of law to be applied to all cases. Considering these two judgments, the three-member Bench of the Apex Court in 2014 Rafiq Masih observed thus:

> "In our considered view, the observations made by the Court not to recover the excess amount paid to the appellant therein were in exercise of its extraordinary powers under Article 142 of the Constitution of India which vest the power in this Court to pass equitable orders in the ends of justice."[14](*sic*)

In Chandi Prasad Uniyal[15]this issue was again 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 Division Bench of the Supreme Court, after taking into consideration the various decisions in this regard, 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 as under:

> "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

[11]*Supra* note 8
[12] It is pertinent to note at this stage that the reasoning offered by the Apex Court in Shyam Babu's and Sahib Ram's case. They are both decisions rendered by the Court in special consideration of the fact circumstances, and not as a general proposition of law to be applied to all cases.
[13]*Supra* note 9
[14]*Supra* note 2 at 888
[15]*Supra* note 10

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".[16](*sic*)

Analysing these judgments, the three-member Bench concluded in reference as follows:

"In our view, the law laid down in Chandi Prasad Uniyal's case, in no way conflicts with the observations made in the other two cases. In those decisions, directions were issued in exercise of the powers of this Court under Article 142 of the Constitution, but in the subsequent decision this Court under Article 136 of the Constitution, in laying down the law had dismissed the petition of the employee. This Court in a number of cases had battled with tracing the contours of the provision in Articles 136 and 142 of the Constitution of India. Distinctively, although the words employed under the two aforesaid provisions speak of the powers of this Court, the former vest a plenary jurisdiction in the Supreme Court in the matter of entertaining and hearing of appeals by granting special leave against any judgment or order made by a court or tribunal in any cause or matter. The powers are plenary to the extent that they are paramount to the limitations under the specific provisions for appeal contained in the Constitution or other laws. Article 142 of the Constitution of India, on the other hand is a step ahead of the powers envisaged under Article 136 of the Constitution of India. It is the exercise of jurisdiction to pass such enforceable decree or order as is necessary for doing 'complete justice' in any cause or matter."[17](*sic*)

The decision was thus clear and categorical – (a) there was no clash between the decisions under consideration by the Court viz. Chandi Prasad Uniyal on the one side and Sahib Ram and Shyam

[16] *Supra* note 10 at 423
[17] *Supra* note 2 at 889

Babu Verma on the other, (b) judgments in Sahib Ram and Shyam Babu Verma were rendered by the powers conferred by article142 of the Constitution, to meet the ends of justice, (c) judgment in Chandi Prasad Uniyal was delivered by virtue of the powers conferred by article 136, which would constitute a binding precedent.

However, without appreciating the quintessence of the judgment in reference, the Division Bench, while purportedly accepting the judgment, framed the above mentioned conditions which clearly go against the clarifications provided by the three-member Bench. The clarification stated that the decision in Uniyals's case had settled the issue and that was what ought to be the law of the land. The other decisions were delivered to merely meet the ends of justice, under the factual circumstances therein and therefore cannot have universal application. Under such circumstances, there can be no justification for the *volte-face* adopted by the Division Bench in their decision, from the unambiguous decision offered by the three-member Bench. This would tantamount to violating the decision of the three-member Bench, i.e. without considering the reasoning provided by the higher Bench, which would clearly put it within the definition of a decision that has become *per incuriam*.

EQUITY BASED DECISION – NOT BINDING AS PRECEDENT

While distinguishing the scope of the law laid down under articles 141 or 136 of the Constitution of India and the directions issued under article 142 of the Constitution of India, the three member Bench of the Apex Court in 2014 Rafiq Masih had elucidated that article 142 is a supplementary power which can by no stretch of imagination supplant the substantive provisions of law or be considered to be binding as the law laid down under article 141 of the Constitution[18]. It was also stated that article 142 is a law which favours equity; if so, the courts can rely on equity only to the extent that there is no law prohibiting them from doing so, and when there is no direct violation of the public trust or detrimental impact on the public interest[19]. To hold otherwise would be a vacuous attempt.

After a detailed analysis, of the law laid down in Uniyal's case and the directions issued in Shyam Babu Verma and Sahib Ram, the three-member Bench answered the reference thus:

> " Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no

[18] *Supra* note 2 at 890

[19] This idea was clearly expressed as early as in 1963 by the Apex Court in Prem Chand Garg v. Excise Commissioner, AIR (1963) SC 996

conflict in the views expressed in the first two judgments (1994) 2 SCC (Shyam Babu Verma), 1995 Supp (1) SCC 18 (Sahib Ram) and the latter judgment (2012) 8 SCC 417 (Chandi Prasad Uniyal)."[20](*sic*)

It is thus evident that decisions rendered under article142 cannot be weighed on the same scales as those under article 136. The Court further clarifies that "there is no conflict in the decisions", meaning that but for the differing factual circumstances, the underlying principle is the same or ought to be the same in all the three cases. The powers under article142 are to be used sparingly to meet the ends of justice, to achieve an equitable goal, to ameliorate the difficulties of the poor and downtrodden and such other equitable actors that the judiciary can consider at its discretion.[21]Such were the instances seen in the decisions of Sahib Ram and Shyam Babu Verma. Noting these precedents and other cases which arose in the appeals, the Division Bench in 2015 Rafiq Masih postulated that recovery could not be ordered under the five conditions stated above. Two issues arise under such circumstances:

1. The decision in 2015 Rafiq Masih interpreted the judgment in reference (2014 Rafiq Masih) to mean that the ratio in Shyam Babu and Sahib Ram were also correct and that recovery could not be ordered under such circumstances. The Court therefore listed out factors similar to the ones in these cases wherein recovery ought not to be ordered. But this is in fact wrong. The decision in 2014 Rafiq Masih clearly states that these are decisions under article142 which do not have the same authoritative value as a binding precedent rendered under articles 136 or 141. Thus the 2015 Rafiq Masih had erroneously declared that recovery is not meant to be made under such circumstances and had enlisted several conditions, all of which fall within the motherly embrace of the law of equity, but nowhere else, especially not statutory law in the strict sense, which is the law of the land.

2. The judgment is in itself an equitable decision taking into consideration the circumstances of the appellants therein and relying on cases like Sahib Ram and Shyam Babu to hold that recovery cannot be made under such circumstances. Therefore, the decision in 2015 Rafiq Masih is also clearly rendered under the powers conferred by article 142 thereby making it ineligible to be considered blindly as a valid precedent. Moreover, the fifth condition wherein recovery ought not to be made clearly states "...other factors which would be iniquitous or harsh...and would far outweigh the equitable balance" ought to be acknowledged. The

[20]*Supra* note 17.

[21] Such views have been expressed by various Benches of the Apex Court right from the nine member Bench in Naresh Mirajkar v. State of Maharashtra (1966) 3 SCR 744 to the seven member Bench in A.R. Antulay v. R.S. Nayak (1988) 2 SCC 602, which was reiterated and finally settled in Bar Association v. Union of India (1998) 4 SCC 409.

judgment thus explicitly makes reference to the idea of an equitable decision and thus there can be no doubt that this is also a case which tries to ensure that equity is meted out to the employees and is thus a decision rendered under article 142; and it has been unequivocally held by several benches that such decisions are not binding in law.

From the above discussion, it is conclusive that the 2015 Rafiq Masih is also an equitable judgment and therefore cannot be hailed as the touchstone when it comes to the question of recovery.

THE CONDITIONS LAID THEREIN CAN EASILY BE MANIPULATED

As noted above, the Court in 2015 Rafiq Masih laid down four specific situations wherein recovery ought not to be made and further widened the discretionary power of the Courts by stating in the fifth point, that any event which the court deems iniquitous shall also be a situation wherein recovery ought not to be made.

An introspection of the five exemptions granted in the 2015 judgment will show the glaring miscalculation committed by the judiciary. They are directions that are easily capable of being misused and hence cannot have a universal application. But, being directions issued by the Apex Court, the same has been blindly followed[22] without ascertaining whether it is in tune with the three-member Bench decision. The law which endeavoured for a just, fair and equitable result should not be convoluted to aid the needs of those who seek to violate it for their own unlawful enrichment.

The first of those is that recovery ought not to be made from employees belonging to Class III and Class IV (or Group C and D). How would giving such a blanket guarantee, benefit anyone? As already noted, this is the people's money; it belongs neither to the employer, nor the employee. As and when the State realises that excess payment has been made, it is duty bound as the trustee of the public exchequer, to ensure that such amounts are recovered. Just because the employee belongs to the lower rungs of the hierarchy, that cannot and should not be allowed to work in his favour. If that is the case, then what is there to prevent an illegal act by employees in these levels, aimed directly at misappropriating and keeping for themselves this money? If no recovery can be made, then the fear of a disciplinary proceeding alone will not be sufficient to hinder them from attempting such feats, especially if the pay out from such misappropriation far outweighs the consequences that can follow. The Court may have taken a humanitarian approach in 2015 Rafiq Masih but the above noted practical difficulty, though it may seem silly or even ludicrous, is one that cannot be ruled out.

[22] *Supra* note 6

The second was that recovery ought not to be made from the retired employees, or the employees who are due to retire within one year. This safety measure again makes no practical sense. Granted that the pensioners who only get paid about half of the last pay drawn may not be financially capable of making repayments of the excess amounts drawn, but can true justice be achieved by letting such people go scot free despite the State being made aware of the situation? Shouldn't there be some minimal restrictions or safeguards against such practices? The notion of complete impunity to employees at the fag end of the career is risible, for how is the State going to ensure that these employees will not proactively make attempts to embezzle the State money, especially at the fag end. Unlike the first instance where the individual continues to be an employee, as soon as the employee leaves employment on superannuation, the employer-employee ties cease to exist and it will be even harder to recover excess amounts paid. Therefore, an absolute prohibition on recovery at the fag end of the carrier can also prove to be counterproductive, not just to the institution, but also to the State in general.

The third situation that has been exempted by the 2015 Rafiq Masih is recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued. Without much elaboration, it can easily be surmised that this condition is no better than the other two and is prone to being manipulated by deviants. This condition is subject to the same set of issues that have been noted above.

The fourth is 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. This ground seems more genuine and logical than the others. If the employee has been made to discharge the duties required of a higher post, then there can be no justification is demanding recovery, provided the employee himself does nothing to fraudulently aid the process. However, stringent measures are to be maintained to ensure that such reckless acts do not take place at the instance of the State. But, to simply state that recovery cannot be made in all such instances would lead to irreversible damage and would make little sense. As noted above in Uniyal's case, even if it is the employer's fault, that alone will not justify a complete ban on recovery. Granted, this is a grave flaw on the part of the State, but the issue here is that this is public money and even the State has a very limited latitude of authority to act. It would also be advisable to isolate the person responsible for such thoughtlessness and irresponsibility. Some scheme has to be implemented by the State to remedy this situation.

Finally, the court has ventured to say that recovery cannot be made in any other case, where the Court is of the opinion that it would be iniquitous or harsh or arbitrary to order recovery. The underlying issue the Court has tried to bring out here is the balance of equities, between the

employees burdened with having to pay an enormous sum of money as against an employer who has accidentally made an excess payment.

Unfortunately the equation is not as simple as the Court makes it out to be. There are two important variables that need to figure into this equation to make it balanced. One would be the status of the money in question - the fact that the money in question is the tax payer's money; it is public money that cannot at any cost be squandered away. Secondly, the role of the State as the trustee. The State has a solemn duty to protect this money and to do all it can to recover or shield it from being misused or depleted. If these factors are also included, the balance would definitely tip in favour of the employer, unless there are such overwhelming circumstances which would make it impossible or downright heinous to order recovery.

Thus all the conditions specified in the 2015 Rafiq Masih seems to be fraught with lacunae, each more gaping than the previous. There seem to be no practical reasoning to granting such a wide untethered immunity to certain classes.

THE PATH AHEAD

There seems to be no practical reasoning for such a decision in the 2015 Rafiq Masih. By virtue of the order of the Apex Court in 2015 Rafiq Masih, an unreasonable, illegal and unjust burden has been imposed upon the State and its instrumentalities to condone and suffer increasingly heavy burdens, merely due to a mistake on the administrative side. The monetary implication on the State exchequer is one that cannot be ignored. Very often, this manipulation is carried out specifically by Group C and Group D employees for the simple reason that they have now acquired impunity after the judgment of the division Bench in 2015 Rafiq Masih. There also have been several instances where a blind eye was turned by one of the employees within the institution who may even have colluded with the employee in question, just so that the alleged employee may fall within the exemptions laid down in 2015 Rafiq Masih. Moreover malpractices towards the fag end of the carrier have also increased due to the exemption granted by the division Bench in 2015 Rafiq Masih. This pitiable state of affairs is a direct result of the misinterpretation made to the noble ideals set out in Uniyal's case and 2014 Rafiq Masih.

The fact remains that there can be no principle which gives such a broad domain of exemptions especially when it is the public money at stake. This was also noted by the Apex Court in Israil Khan's case[23]wherein the Apex Court stated that there is no principle that excess payment made to employees should not be recovered by the employer.[24] The court also noted that if in case there

[23]*Registrar Cooperative Societies, Haryana v. Israil Khan*(2010) 1 SCC 440

[24]Though this observation was made by the Apex Court, here again, on special consideration recovery was not allowed.

is such a decision, it may have been done to avoid undue hardship to the employees and under no other circumstances. This would clearly encompass the decisions rendered under article 142 of the Constitution. Unfortunately, this decision was also not appreciated by the Division Bench in 2015 Rafiq Masih.

THE TRUE BALANCE OF EQUITIES

PUBLIC TRUST DOCTRINE

The true version as set out by the Apex Court in Uniyal's case had pronounced the judgment in tune with the public trust doctrine, which basically postulates that the money in the State exchequer is held by the State as a trustee, on behalf of the people of the country. There could thus be no justification for letting the employee keep the money that has been incorrectly paid to him. The judiciary as an essential limb of the State cannot, and should not condone such acts. The primary duty of a welfare State is to safeguard and maintain the well-being of the people of the State. Anything that comes in the way of this fundamental duty is to be nipped at the bud. There is however a flip side to this. An employee, who for no fault of his, was paid an extra some of money, is unexpectedly ordered to pay back the excess sums. This can come as true shock to any individual, both mentally and financially. Thus, an overarching duty has to be cast on the State to ensure that such incidents do not occur to begin with and a moral obligation has to be cast upon the employee to inform any variation or discrepancies in his pay.

UTILITARIAN V. SOCIALISTIC APPROACH

To thus balance out these inequities is truly a hard task. One way could be to rely on the primordial Benthamite utilitarian theory, which is inclined to the happiness of the greatest number. If the balance is thus to be tipped in favour of the greatest number, there would be no doubt, recovery will have to be made. But then again, a more liberal and social approach would prefer to tip the scales in favour of the working class/employees who may be unable to bear the burden of paying back the sum of excess money. A midway approach can thus be adopted.

THE MID WAY

Despite the tenure of the employee, his age or status, recovery ought to be ordered in all cases. That has to be the fundamental rule and any compromise of this fundamental principle would be truly iniquitous. However, if the recovery is ordered after a long period, or if it tends to be too burdensome, some kind of limit can be set by the Courts, i.e. recovery of the excess amounts received during the past three or five years, foresaking the rest of the amount, ought to be made. This will ensure justice to the plebeian and alleviate some of the burden on the employee. In other words, a complete ban on recovery will be inequitable and an order of complete recovery will be too cumbersome. What is necessary is a new approach; one that appreciates the plight of the

employee, while at the same time respects the importance of the role of the State and the duty of the State.

In addition to this, it would greatly benefit the State machinery to implement stringent checks to ensure this never happens in the first place. As is often said, prevention is infact better than cure. Therefore, if the State machinery imposes better checks within the institution to monitor such mistakes, such issues can be addressed and settled more efficiently. There should also be mechanism to impose liability upon any person within the institution found responsible for aiding such acts. Even carelessness or accidental mistake cannot be just reason in such cases as the stakes are significantly higher than in the case of ordinary administrative errors, and the employees ought to take greater responsibility for their actions. Deterrence has to be fundamental principle and this alone will dissuade persons from acting recklessly or engaging in them voluntarily. This is the only way to move away from such illogical atavism.

CONCLUSION

One clear and unequivocal conclusion that can be drawn from the above discussion is that the directions in the 2015 Rafiq Masih are not in tune with the clarification issued in reference by the three-member Bench in 2014 Rafiq Masih. In fact, that which need not/should not have been followed and which is not binding in nature, has been issued as directions by the Division Bench in 2015 Rafiq Masih. Thus the judgment in 2015 Rafiq Masih is not in consonance with the clarifications and answers given by the three-member Bench and hence, these directions can only be treated as *per incuriam*.

The basic principle involved is that any amount received by a person which in excess of his rightful dues is to be held by him as a mere trustee and he has no legal right to it. Whenever it is demanded back, he is obligated to return/refund the amount to the rightful owners. Thus even the employee himself acquires the status of trustee and not owner of the excess amounts.

The instances highlighted in 2015 Rafiq Masih, in which recovery ought to be denied were based on extraneous considerations specific to those cases. Therefore devising a set of rules which will guarantee acquittal or freedom despite the irregularity is nothing short of aiding the miscreant. Thus the decision in 2015 Rafiq Masih cannot be treated or accepted as the law of the land under article141 of the Constitution of India. The said decision is infact *per incuriam* and what is binding on the legal fraternity is the answer given by the three member Bench in 2014 Rafiq Masih. Following 2014 Rafiq Masih, it can be stated without any trace of doubt that the blanket impunity granted to the different classes specified in 2015 Rafiq Masih - to Group C and Group D

employees, restriction to the excess payments made within a period of one year prior to date of retirement, ceiling on the continued wrong payment for five years or more etc. is not the law of the land and cannot be applied blindly and each case will have to be considered on its own merit.

It is apparent that the ultimate objective of the imperatives in the 2015 Rafiq Masih was to ameliorate the difficulties of the lower grade of employees and struggling employees and not to provide a *carte blanche* right to go scot free after ineligible payments had been received. It is important to note that this is public money, which should rightfully be utilised for the benefit of the people of the country. To allow ineligible persons to retain public money released to them by a mere accident or administrative callousness, will not only prove to be unjust, but wholly inequitable, not just to the State machinery, but also to the people of the nation as well. The time has come for the judiciary to act as the harbinger of justice and equity and set right this inconsistency and finally lay down a just, fair and equitable principle.

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