

W.P(MD)No.23004 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18-09-2026

CORAM

THE HONOURABLE MR.JUSTICE RAJNISH PATHIYIL

WP(MD) NO. 23004 of 2017

{CNR: HCMD011237752017}



Case QR

and

W.M.P(MD)No.19331 of 2017

R.Janakar

.... Petitioner

Vs

1.The Secretary,  
TANGEDCO,  
No.144, Anna Salai,  
Chennai.

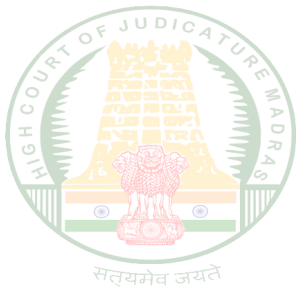
2.The Superintending Engineer,  
TANGEDCO,  
Karur Electricity Distribution Circle,  
Karur.

3.The Deputy Chief Internal Audit Officer,  
Board Office Audit Branch,  
TANGEDCO, Thennur, Trichy.

..... Respondents

Prayer: To issue a Writ of Certiorarified Mandamus calling for the records pertaining to the order passed by the 2nd respondent in his proceedings in Ku.A.No.065/Nee.Pee3/Udha2/Ko.Thani/2017 dated 10.03.2017 and quash the same and direct the respondents to refund the amount and re-fix the scale of pay fixed as per the proceedings in B.P.(FB) No.59 dated 18.07.1998.

|                |                       |
|----------------|-----------------------|
| For Petitioner | : Mr.V.Panneer Selvam |
| For R1 & R3    | : Mr.B.Ramanathan     |
| For R2         | : Mr.S.Arivalagan     |



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## **ORDER**

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The petitioner seeks the issuance of a Writ of Certiorarified Mandamus to quash the order dated 10.03.2017, whereby recovery was effected from the petitioner in respect of certain incentives paid to the petitioner for acquiring higher educational qualifications.

2. The petitioner was initially appointed as a Technical Assistant on 13.04.1987 and thereafter passed all the departmental tests, including the Account Test. In 1996, he obtained a B.E. degree and, consequently, was posted as an Assistant Engineer on 31.03.1998. His pay was also refixed in accordance with the regulations then in force. While the petitioner was continuing in service, the respondent Board issued proceedings in B.P. (FB) No. 59, Secretariat Branch, dated 18.07.1998, fixing the scales of pay for various officers with effect from 01.12.1996. The petitioner claims that he was entitled to the benefit of the said proceedings. Accordingly, by order dated 07.08.1998, his pay was fixed with effect from 31.03.1998. He continued to receive the said benefit thereafter, and the said pay fixation was also approved by the Board Audit. According to the petitioner, wage revision takes place once every four years. The next wage revision, which was due thereafter, was introduced on



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16.10.2005 vide Board Proceedings No. 221, retrospectively with effect from 01.12.2002. Thereafter, further wage revisions were effected in the years 2009 and 2014.

3. It is the case of the petitioner that, after a lapse of 16 years from the date of implementation of Board Proceedings No.59, dated 18.07.1998, the third respondent raised objections regarding the fixation of pay vide Slip No.25, dated 21.02.2015. The petitioner states that the second respondent addressed a communication to the Chief Engineer (Personnel), Chennai, requesting that the audit objections be dropped. The second respondent also addressed a communication to the third respondent requesting that the said audit objections be dropped. However, without considering the explanation furnished by the second respondent in respect of the petitioner, the very same objections were once again raised, compelling the petitioner to submit a detailed representation to the second respondent. In turn, the second respondent addressed another communication to the third respondent, requesting that the audit objections be dropped. As there was no response despite several representations, the second respondent once again addressed a communication to the third respondent, pointing out that the audit objections appeared to have been raised without

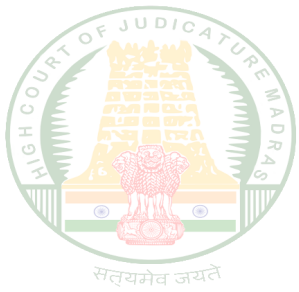


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proper application of mind. While so situated, the second respondent himself passed an order dated 10.03.2017 directing recovery and re-fixation, referring to the audit objections dated 21.02.2015, 21.04.2016, and 08.02.2017. The said order of recovery and re-fixation is impugned in the present writ petition.

4. The grounds urged by the petitioner are that the impugned order has been passed after a lapse of 16 years from the date of fixation of his pay. His pay was fixed on 18.07.1998, whereas the order directing recovery was passed only on 10.03.2017. He would submit that there was no misrepresentation on his part. He would further refer to Audit Slip No. 25 dated 21.02.2015, which refers to a letter dated 09.04.1999. However, the said letter has not seen the light of day, and even the request made under the Right to Information Act did not elicit any response.

5. He would submit that the recovery and re-fixation are patently illegal and contrary to the law laid down by the Hon'ble Supreme Court in various judgments. He would finally rest his submissions by referring to the judgment of the Hon'ble Supreme Court in *State of Punjab and Others v. Rafiq Masih (White Washer)*, reported in (2015) 4 SCC 334. The relevant portion of the judgment is extracted hereunder:



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*"18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:*

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

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

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

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

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



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Citing the above judgment, he would submit that the petitioner's case is squarely covered by paragraphs 18(iii) and 18(iv) thereof and that such recovery would be inequitable. He, therefore, seeks the quashing of the impugned order.

6. The second respondent has filed a counter-affidavit and submits that the audit objections raised by the third respondent resulted in the recovery effected from the petitioner. It is further submitted that a case in Crime No. 1 of 2014 is pending against the petitioner before the Vigilance and Anti-Corruption Department. The petitioner was suspended from service and was subsequently granted subsistence allowance. Thereafter, he was reinstated in service as an Assistant Executive Engineer. Though the petitioner was due to retire from service on 31.05.2025, he was not permitted to retire on account of the pendency of the Vigilance case and the departmental proceedings.

7. The learned counsel for the respondents would refer to the judgment of the Hon'ble Supreme Court in ***Chandi Prasad Uniyal v. State of Uttarakhand***, reported in (2012) 8 SCC 417, and would further submit that the judgment in ***State of Punjab & Others v. Rafiq Masih (White Washer)*** reported in (2015) 4 SCC 334, is not applicable to the petitioner, as he is a Group-II officer, whereas



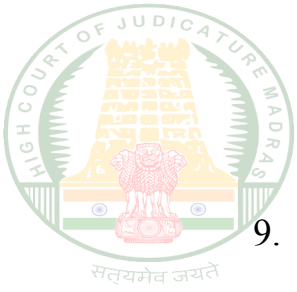
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the said judgment applies only to employees belonging to Class III and Class IV categories.

8. The learned counsel appearing for the petitioner would further submit that recovery from the subsistence allowance is wholly impermissible. In support of his submission, he has placed reliance upon the judgment of this Court dated 25.01.2012 in ***The Secretary, Indian Council of Agricultural Research, New Delhi v. R. Natarajan and another***, in W.P. Nos. 9637 and 9638 of 2010. The relevant portion of the said judgment is extracted hereunder:

*“8. It is a settled principle of law that receiving Subsistence Allowance during the period of suspension is a fundamental right. Therefore, the order dated 01.11.2007 with regard to recovery of Subsistence Allowance paid during the period of suspension is set aside.”*

Citing the above said judgment, he would submit that receiving subsistence allowance during the period of suspension is a fundamental right and hence prays for setting aside the order.

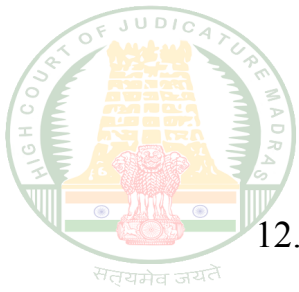


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9. The petitioner would further contend that he was under prolonged suspension for a period of five years and was surviving solely on the subsistence allowance. He would submit that the recovery of any amount from the subsistence allowance, apart from being contrary to law, was also inequitable. He was already facing prosecution and departmental proceedings and was receiving only subsistence allowance during the period of suspension. Therefore, he would contend that the recovery effected during the period of suspension, at least, ought to be set aside. The matter may, accordingly, be remitted to the competent authorities to consider whether the re-fixation of pay would, in the facts and circumstances of the case, warrant any recovery.

10. I have considered the submissions made by the petitioner and the respondents and perused the judgments cited by the learned counsel.

11. The order impugned in this writ petition directs re-fixation of the petitioner's pay and it also directs the recovery of the amounts paid to him in excess. These two directions do not stand on the same footing and this order deals with them separately.



12. As the argument on both sides proceeded upon the five situations summarised in paragraph 18 of **Rafiq Masih (referred supra)**, it is necessary at the outset to clarify the manner in which the judgment is to be applied. The Hon'ble Supreme Court did not lay down a code. The principle from which those situations are drawn is stated earlier in the same judgment, i.e., an action of the state ordering recovery from an employee is in order so long as it is not rendered iniquitous, and that the recovery would be iniquitous when its effect upon the employee would be more unfair and more wrongful, than conversely when the corresponding right of the employer to recover the amount is affected. The relevant paragraph from the **Rafiq Masih (referred supra)** is extracted hereunder:

*“8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the concerned employee. If the effect of the recovery from the concerned employee would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the*



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amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.”

13. The question of protection against recovery does not arise at all unless two anterior conditions are satisfied. The gateway provisions were first laid down in **Col. B.J. Akkara (Retd.) v. Government of India, (2006) 11 SCC 709** was reaffirmed by an Hon'ble three Judges Bench of the Supreme Court in **Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475** and applied again in **Thomas Daniel v. State of Kerala, 2022 SCC OnLine SC 536**, and has since been followed, i.e., the relief against recovery is granted only

(1) when the excess payment was not made on account of any misrepresentation or fraud on the part of the employee, and

(2) when such excess payment was made by the employer by applying a wrong principle for calculating the pay or allowance, or on the basis of a particular interpretation of a rule or order which is subsequently found to be erroneous.

The two conditions are cumulative and constitute the gateway criteria to be



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considered for the protection. Unless both are satisfied, the occasion to examine the five situations in *Rafiq Masih* (referred supra) does not arise at all. These decisions also state that where the Court can infer that an employee had knowledge or ought to have had knowledge that the payment was in excess of what was due, then recovery shall be sustained by the Court.

14. Both the gateway conditions are satisfied in the present case. The pay of the petitioner was fixed by order dated 07.08.1998 in purported implementation of B.P. (FB) No. 59, Secretariat Branch, dated 18.07.1998, and that fixation was thereafter approved by the Board Audit. The impugned order contains no allegation of misrepresentation or fraud against the petitioner, and no such allegation was made across the bar.

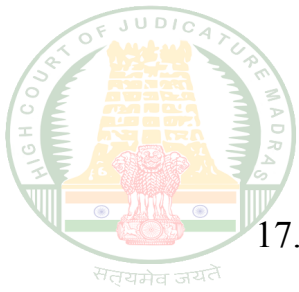
15. I am unable to countenance the submission of the Respondents that the judgment in *Rafiq Masih* (referred supra) has no application to the petitioner altogether, he being a Group-II officer. Of the five situations summarised in paragraph 18 of the judgment, it is only the first situation that is defined by reference to the class or group to which the employee belongs. The remaining four are cast in general terms and carry no such qualification. If the protection



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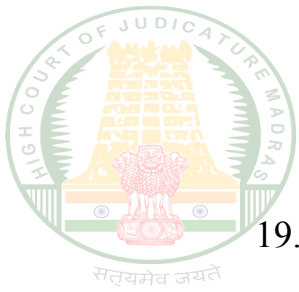
were confined to employees of Class III and Class IV service, there would have been no occasion for the Hon'ble Supreme Court to enumerate the other four situations at all, and situations (ii) to (v) would be rendered otiose. Such relief has not been withheld from an officer merely by reason of his class as also borne out by the judgment of the Hon'ble Supreme Court in **Col. B.J. Akkara (Retd.) v. Government of India, (2006) 11 SCC 709**, where the protection was extended to the retired commissioned officers of the Armed Forces. The class of the employee is no doubt a relevant factor, principally because it may bear upon whether the employee knew or ought to have known that the payment received was in excess of what was due. However, it is not a threshold which excludes an officer above Class III from the protection altogether.

16. The reliance placed by the respondents on **Chandi Prasad Uniyal v. State of Uttarakhand, (2012) 8 SCC 417**, does not carry the matter further. What the judgment established is that the employee has no vested right to retain what was never due to him and that recovery is not barred merely because there was no fraud or misrepresentation. The restraint upon recovery is not by a matter of right that is vested in the employee but only upon the iniquity of the recovery and the question in the present case is whether recovery was iniquitous.



17. The pay of the petitioner was fixed on 07.08.1998 and the order of recovery came to be passed only on 10.03.2017, nearly nineteen years later. The audit objection which set the process in motion was raised on 21.02.2015, about sixteen years after the fixation, by which time the petitioner's pay had passed through successive revisions in the years 2005, 2009 and 2014. The case falls squarely within situation (iii) of paragraph 18 of **Rafiq Masih (referred supra)**, which holds recovery impermissible where the excess payment has been made for a period in excess of five years before the order of recovery is issued.

18. The second respondent, who is the very officer who ultimately passed the impugned order, had himself addressed the third respondent on more than one occasion seeking that the audit objections be dropped, and had gone so far as to record that the objections appeared to have been raised without proper application of mind. The explanation so furnished was never considered. Further, Audit Slip No. 25 dated 21.02.2015 proceeds upon a letter dated 09.04.1999 which has not been placed before this Court, and which was not furnished to the petitioner even in answer to an application made under the Right to Information Act, 2005. An order of recovery passed after a lapse of nineteen years and resting upon a document withheld from the employee, cannot be allowed to stand.

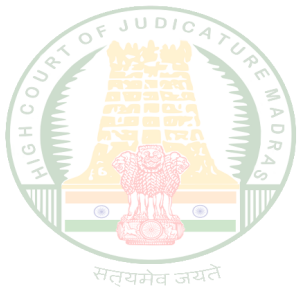


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19. Moreover, the petitioner was under suspension for about five years and was in receipt of subsistence allowance alone during that period.

Subsistence allowance is paid to enable a suspended employee to maintain himself and his family while he is kept out of duty, and it is not an amount out of which the employer may satisfy its own claims. The recovery effected from the subsistence allowance of the petitioner was therefore impermissible, quite apart from the grounds already set out and would be iniquitous and far outweigh the right of the employer to recover as summarised in situation (v) of **Rafiq Masih (referred supra)**.

20. The petitioner's prayer to direct the respondents to re-fix the scale of pay does not stand on the same footing and I am unable to grant that relief. The line of authority beginning with **Shyam Babu Verma v. Union of India, (1994) 2 SCC 521**, proceeds upon a clear distinction between the correction of an erroneous fixation of pay and the recovery of the amounts already drawn under it. An employer is not disabled from correcting an error in fixation once it comes to notice. No compelling case has been made out by the petitioner proving that the re-fixation of pay that was done to be erroneous. The re-fixation directed by the impugned order will accordingly stand, and will operate prospectively.



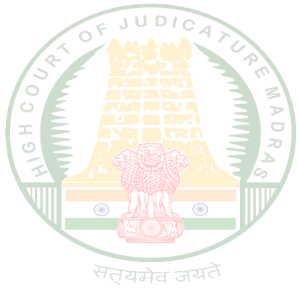
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21. In the result, the writ petition is partly allowed. The proceedings of the second respondent in Ku.A.No.065/Nee.Pee3/Udha2/Ko.Thani/2017, dated 10.03.2017, are quashed in so far as they direct recovery of the amount already paid to the petitioner, and the respondents are directed to refund to the petitioner the amount that was already recovered in pursuance thereof, within a period of twelve weeks from the date of receipt of a copy of this order. The re-fixation of the petitioner's pay effected by the said proceedings shall stand and shall operate prospectively. No Costs. Consequently, the connected miscellaneous petition is closed.

**18.09.2026**

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**RAJNISH PATHIYIL, J.**

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