* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) No. 3876/2013

% **11th February, 2015**

DR. R. KANNAN ..... Petitioner

Through: Mr.Subhash Mishra, Advocate.

versus

UNION OF INDIA & ANR. ..... Respondents

Through: Mr.Rajesh Gogna, Advocate for R-1.
Mr.D.K.Nag, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. By this writ petition filed under Article 226 of the Constitution of India, the petitioner who was a Whole Time Member (Actuary) of the respondent no.2/Insurance Regulatory and Development Authority, seeks quashing of the demand/recovery notice dated 18.2.2012 issued by the respondent no.2 for an amount of Rs.30,84,355/-. The demand/recovery notice was issued because as per the respondent no.2 the petitioner was not entitled to actuarial allowance of Rs.65,000/- per month from the date of his appointment on 18.12.2006 till it was paid for October 2010, and thus the total amount of Rs.30,84,355/- should not have been paid/granted to the petitioner as actuarial allowance.

2. The petitioner argues before this Court that the petitioner was being paid in terms of the past practice whereby actuarial allowance was being paid to the Whole Time Members (Actuary) of the respondent no.2. Example is given of one Mr.P.A.Balasubramanian who was given such allowance as stated in the letter dated 26.2.2004 of the respondent no.2. The petitioner also relies upon the general circular dated 13.12.2005 issued by the respondent no.2 whereby the actuarial allowance was increased from a sum of Rs.10,000/- to a sum of Rs.65,000/- per month. It is further claimed that the petitioner having not stated any wrong facts and the petitioner having received the actuarial allowance in terms of the past precedent and the circular of the respondent no.2 dated 13.12.2005, the demand/recovery which is now sought to be made from the petitioner of the sum of Rs.30,84,355/- in terms of the impugned notice dated 18.2.2012 is illegal and liable to be quashed.

3. It is undisputed that the appointment of the petitioner is a statutory appointment which is made in terms of Section 4 of the Insurance Regulatory and Development Authority of India Act, 1999 (hereinafter referred to as 'the Act'). Section 4 of the Act talks of appointment of the Whole Time Members including a Whole Time Member of Actuarial Science. The remunerations which are payable under the Act are subject to

statutory provisions inasmuch as there is applicable the Insurance Regulatory and Development Authority (Salary and Allowance payable to, and other Terms and Conditions of Service of Chairperson and other Members) Rules, 2000 (hereinafter referred to as '2000 Rules'), and as amended w.e.f 01.12.2008 whereby the new Rule 3 was substituted in place of the old rule and thereby monthly lump-sum payment to be made to the Whole Time Member was increased to 2.50 lacs per month. There are other provisions also as per the amended Rules dealing with the position of payment of dearness allowance and other allowances in terms of Rule 5 when the Whole Time Member does not opt for the higher pay package as per Rule 3. Therefore, the appointment of the petitioner is a statutory appointment under the Act and payment of salary and other allowances are governed by the statutory provisions being the 2000 Rules as amended w.e.f 01.12.2008. In the said Act and the 2000 Rules, there is no provision for payment of monthly actuarial allowance to a Whole Time Member (Actuary) of the respondent no.2, much less of a huge amount of Rs.65,000/- per month. Therefore, the petitioner cannot take in aid any statutory provision for seeking payment of the actuarial allowance of Rs.65,000/- per month, although the petitioner's appointment is a statutory appointment and governed by the said Act and the 2000 Rules.

4. Even the appointment letter of the petitioner gives the petitioner a consolidated salary and this becomes clear from the office order of the respondent no.2 dated 09.1.2007, and which reads as under:-

" OFFICE ORDER/110/2006-07

> Consequent to appointment of Sh.R.Kannan as a Manager of the Authority and on assumption of his charge on 18th December, 2006, Sh.R.Kannan's pay has been fixed at Rs.24500 in the pay scale of Rs. 22400-525-24500 with effect from the date of assumption of his charge.
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> This issues with the approval of the Chairman."

5. The note dated 04.1.2007 with respect to pay fixation of the petitioner at a lump-sum amount on his appointment as a Whole Time Member (Actuary) reads as under:-

> " **Sub: Pay fixation of Sh. R.Kanna, Member/RI**
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> Sh. R.Kannan has joined the Authority as a whole time Member on 18th Dec, 06. His appointment is in the pay scale of Rs.22400-525-24500. His pay as Member IRDA is proposed to be fixed at the maximum of the scale i.e Rs.24500 as on 18.12.06 as per the pay calculation sheet placed in the file Sh. Kannan has intimated that he is not drawing any pension from RBI. The pay has been proposed to be fixed based on the papers submitted by Mr.Kannan, we are obtaining separate relevant papers from RBI.
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> 2. Regarding transport, he will be provided the facility as per the decision of the Authority's 44th meeting held on 23rd March 01.
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> 3. He shall occupy the flat, now presently occupied by Sh. P.A. Balasubramanian.
>
> 4. Submitted for approval please"

6. Therefore, not only there is no statutory provision for the petitioner to claim actuarial allowance, even the terms of the appointment of the petitioner do not provide for monthly actuarial allowance.

7(i) Let us now therefore examine the issue as to the effect of the past precedent of payment having been made by the respondent no.2 to one Mr.P.A.Balasubramanian, who was also a Whole Time Member (Actuary) of the respondent no.2, and also that there is a circular of the respondent no.2 dated 13.12.2005 which enhances the monetary actuarial allowance from Rs.10,000/- to Rs.65,000/- per month. I will also in this regard have to examine the ratio of the recent judgment of the Supreme Court in the case of ***State of Punjab & Others etc. Vs. Rafiq Masih (White Washer) etc.*** in Civil Appeal No.11527/2014 decided on 18.12.2014.

(ii) On examining the issue it is found that merely because there is a past practice, and which is illegal because it has no statutory/legal backing [including because of issuance by the respondent no.2 of the circular dated 13.12.2005], the same would not mean that the petitioner was entitled to the monetary actuarial allowance of Rs.65,000/- per month from 18.12.2006 to 31.10.2010. This is because of two reasons. Firstly, if the petitioner is allowed to have the monetary benefit of actuarial allowance, then it would in

fact amount to deliberately violating the statutory provisions being the 2000 Rules as amended w.e.f 01.12.2008, and this Court therefore cannot order that actuarial allowance be paid and the statutory provisions be violated. Once the statutory provisions occupy the field, and which provisions specifically limit and provide the only allowances which are payable to the Whole Time Members (Actuary) of the respondent no.2, this Court if it passes a judgment by allowing the payment of actuarial allowance as claimed by the petitioner, then it would mean that this Court is asked to violate the law and which this Court cannot do.

(iii) The second reason for denying the relief claimed by the petitioner is that Article 14 of the Constitution of India is a positive concept and it cannot be invoked to enforce an illegality. Once there is no provision for payment of monetary actuarial allowance in terms of the relevant/applicable statutory provisions, merely because in the past wrongly one Whole Time Member Sh.P.A.Balasubramanian was given the actuarial allowance and that the respondent no.2 has passed a circular dated 13.12.2005, cannot mean that this Court should give its imprimatur to an illegal act of giving actuarial allowance, although the same is beyond the provisions of law. Therefore, Article 14 of the Constitution of India cannot be invoked by the petitioner to cause enforcement of an illegality.

8. In fact, a reference to the counter-affidavits filed by the respondents shows that the office of the Comptroller and Auditor General (CAG) took up a specific objection as to the illegal allowances being paid by the respondent no.2 to its various members and this report of CAG was brought to the notice of the Chairman of the respondent no.2. Vide letter dated 03.12.2010 of the Government of India, Ministry of Finance, the Government made it abundantly clear that the actuarial allowance provided to members ranging from Rs.10,000/- to Rs.65,000/- is wholly illegal being beyond the provisions of the Act and the 2000 Rules which only allow payment of a lump-sum amount of Rs.2.50 lacs per month and, that too, without the facility of a house and a car i.e a sum of Rs.2.50 lacs per month is a lump-sum package which is not subject to any further additions. I may note that before this letter of Ministry of Finance dated 03.12.2010 was issued, the issue of payment of actuarial allowance was already alive before the CAG and the respondent no.2, because the CAG had looked into this matter from 2008 itself.

9. Therefore, the conclusions which emerge are that the petitioner was neither statutorily nor contractually entitled to payment of the monetary actuarial allowance of Rs.65,000/- per month, and the payment of such monetary actuarial allowance was therefore illegal and could not have been

paid to the petitioner, and therefore the respondent no.2 is entitled to recovery of the huge amount of Rs.30,84,355/- from the petitioner.

10. The last aspect to be considered is whether the petitioner can derive any benefit of the ratio of the recent judgment of the Supreme Court in the case of ***Rafiq Masih (supra)***, and which contains observations and directions as and when as against a government employee recoveries cannot be made for the reason that their payment is received without any act of concealment by any of such government employee when he received payments from the employer/government. The relevant observations of the judgment in ***Rafiq Masih (supra)*** are contained in para nos. 11 & 12, and which paras read as under:-

> "11. For the above determination, we shall refer to some precedents of this Court wherein the question of recovery of the excess amount paid to employees, came up for consideration, and this Court disallowed the same. These are situations, in which High Courts all over the country, repeatedly and regularly set aside orders of recovery made on the expressed parameters.
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> (i). Reference may first of all be made to the decision in Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475, wherein this Court recorded the following observation in paragraph 58:
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> "58. <u>The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered.</u> But, if in a given case, it is proved that the employee had knowledge that the

> payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See Sahib Ram v. State of Haryana, 1995 Supp. (1) SCC 18,Shyam Babu Verma v. Union of India, (1994) 2 SCC 521, Union of India v. M. Bhaskar, (1996) 4 SCC 416, V. Ganga Ram v. Director, (1997) 6 SCC 139, Col. B.J. Akkara (Retd.) v. Govt. of India,(2006) 11 SCC 709, Purshottam Lal Das v. State of Bihar, (2006) 11 SCC 492, Punjab National Bank v. Manjeet Singh, (2006) 8 SCC 647 and Bihar SEB v. Bijay Bahadur, (2000) 10 SCC 99."
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> (emphasis is ours)

First and foremost, it is pertinent to note, that this Court in its judgment in Syed Abdul Qadir's case (supra) recognized, that the issue of recovery revolved on the action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorised payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference because an action is iniquitous, must really be perceived as, interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements, and a variety of sundry expenses. Based on the above consideration,

we are of the view, that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee. In this context, reference may also be made to the decision rendered by this Court in Shyam Babu Verma v. Union of India (1994) 2 SCC 521, wherein this Court observed as under:

12. 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 herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

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

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

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

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

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

(underlining added)

11(i). In my opinion, the sub-para (ii) of para 12 quoted above has necessarily to be read with para 11 quoted above of the judgment which provides that if excess unauthorized payment is discovered and re-payment is claimed within five years from the period from which it is made, then in such circumstances it is not iniquitous for the government to ask for recovery of the payments made. I may also note that there is no inequity against the petitioner for the reason that the petitioner is not a small government employee but the appointment of the petitioner is to a very important post of a Whole Time Member (Actuary) of a statutory body, IRDA, and the petitioner therefore cannot be equated with ordinary government employees. Also, in my opinion, the judgment in ***Rafiq Masih (supra)*** deals with the government employees and not the statutory appointments which are governed by the statutory provisions/rules, inasmuch as the judgment in the case of ***Rafiq Masih (supra)*** does not lay down that even the statutory appointments made under the Acts of the Parliament are thus governed by the specific statutory provisions with respect to the monetary emoluments, yet the statutory provisions can be overlooked and recoveries cannot be effected of payments illegally made from high-placed persons such as the petitioner who occupied a very important statutory post.

(ii) In any case, admittedly since in the present case an illegal payment was deducted within five years, therefore in terms of the ratio of the judgment in the case of ***Rafiq Masih (supra)***, the respondent no.2 is entitled to recover the excess unauthorized payment.

12(i). In fact, in my opinion, the respondents are also justified in arguing that the petitioner at no point of time after the payment of actuarial allowance was stopped after October 2010 ever wrote any letter objecting or complaining to the respondent no.2 that the action of the respondent no.2 is illegal. On the contrary, the petitioner himself vide his letter dated 21.2.2012 told the respondent no.2 that the excess amount paid on account of actuarial allowance to the petitioner towards actuarial allowance during his tenure in IRDA can be recovered from his Provident Fund balances.

(ii) Though the petitioner claims that this letter was written under duress, however, there is nothing before me to substantiate that there was any duress on the petitioner especially because the petitioner is an extremely educated person, and therefore he would have written this letter knowing that he was in the first place not at all entitled to the actuarial allowance of Rs.65,000/- per month. The petitioner therefore accepted the fact that he was not entitled to the actuarial allowance of Rs.65,000/- per month which was illegal in

nature as it was not permissible under the statutory provisions relating to the petitioner or even the contractual terms of appointment of the petitioner. The petitioner therefore now cannot walk away from his letter dated 21.2.2012.

13. I may state that the counsel for the petitioner did seek to place reliance upon Section 7 of the Act which states that the salaries and allowances of a member of IRDA will not be varied to his disadvantage after appointment, however, the provision of Section 7 of the Act has necessarily to be read with respect to what are the legal payments and legal entitlements under the 2000 Rules and only which payment cannot be varied to his disadvantage after appointment. The provision of Section 7 of the Act surely can in no way be said to extend to illegal payments which are not covered under the said Act or 2000 Rules.

14. In view of the above, I do not find any merit in this petition and the same is therefore dismissed. No costs.

FEBRUARY 11, 2015 **VALMIKI J. MEHTA, J**
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