

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3557 OF 2013

1. Vishnu Pandurang Rampure
Age 54 years, Occ. Service
R/o Lond Tal and Dist. Osmanabad.

2. Moiddin Bashumiya Shaikh,
Age 55 years, Occ. Service
R/o at Near Shivaji Nagar
Water Tank, Murud,
Taluka and Dist. Latur.

3. Mahadeo Tukaram Kumbhar
Age 57 years, Occ. Service
R/o Bhoom, Tq. Bhoom,
Dist. Osmanabad.

4. Dagadu Dattu Bhat,
Age 57 years, Occ. Service,
R/o at Balaji Nagar, Tq. Omerga,
District Osmanabad.

..Petitioners

Versus

1. The State of Maharashtra
Through its Secretary
Gram Vikas Development
Department, Mumbai 32.

2. The Additional Divisional
Commissioner, Aurangabad.

3. The Chief Executive Officer,
Zilla Parishad, Osmanabad.

4. The Executive Engineer,
Zilla Parishad, Osmanabad.

..Respondents

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Advocate for Petitioners : Shri Bhumkar Vishwnath R.
AGP for Respondents 1 & 2 : Shri Sangle S.G.
Advocate for Respondents 3 & 4 : Shri Ghute S.B.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: September 22, 2015
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ORAL JUDGMENT :-

1. Heard.
2. Rule.
3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.
4. The petitioners are aggrieved by the order dated 15.9.2012 passed by respondent No.3 Chief Executive Officer and the impugned order dated 12.4.2013 passed by the second respondent - Additional Divisional Commissioner, in Appeal No.107 of 2012.
5. The petitioners are four in numbers. Retirement age of the petitioners is 58 years. Petitioner No.1 is presently 57 years' old. Petitioner Nos. 2 and 4 are to retire within a short period of a month or two. Petitioner No.3 has already retired during the pendency of this petition.
6. All these petitioners were appointed on the post of Sweepers (Swachchak) in 1982. By an order dated 23.5.1984, they were absorbed on Converted Regular Establishment (CRT) and were allotted pay scales with effect from 1.4.1983. It is not disputed that from 20.2.1985, the petitioners who have driving licenses, were appointed as Drivers for 11 months only on ad-hoc basis. They continued to work as Drivers on ad-hoc basis for the past about 29-30 years.

7. The petitioners have pointed out a Government Resolution dated 8.6.1995, by which, employees like the petitioners, upon completion of 12 years on regular employment would be eligible for promotional avenues and corresponding pay scales. It is further pointed out that by the order dated 28.12.1999, the petitioners were allotted higher pay scale in the light of their completion of 15 years in employment.

8. The respondent No.3 had issued the order dated 3.12.2011 by which the petitioners were reverted to their original positions as sweepers. This order dated 3.12.2011 was initially challenged before this Court in Writ Petition No.9787 of 2011. By its order dated 21.6.2012, this Court directed the petitioners to appear before respondent No.3. Hearing was contemplated and hence the petition was disposed off.

9. Paragraph Nos.4 to 7 of the order dated 21.6.2012, passed by this Court (Division Bench), read as under:-

"4] Impugned order shows that the petitioner, who was working as Cleaner has been treated as equivalent to "Attendant" and as "Attendant", after 12 years, is given pay scale of the post of "Havildar" that pay scale has been found applicable even to the petitioner. Because of this reason, extension of higher pay scale of Rs.3050-4590 to the petitioner is found erroneous.

5] This court, as on 19.12.2011, stayed only the recovery. In this situation, interest of justice can be met with, by permitting

employer - respondent No.2 and 3 to bring down the pay scale of petitioner to Rs.2160-4000, and to extend an opportunity of hearing before effecting any recovery. The petitioner shall also be heard on the question of correctness of pay scale of Rs.2160-4000 being extended to him.

6] The petitioner shall appear before the C.E.O. On 24/7/2012 and the CEO shall thereafter decide, whether it is necessary to bring down the pay scale from Rs.3050-4590 to Rs. 2160-4000. Independently, he will also find out whether, it is necessary to recall the order of recovery on that count. This exercise be completed within further period of 3 months. If the petitioner is found entitled to pay scale of Rs.3050-4590, his earlier salary in that pay scale shall be restored and necessary arrears shall be paid to him within one month. If he is found to be not eligible to that pay scale, the question of recovery shall be decided in accordance with law by the CEO. The petitioner is free to challenge the orders of the CEO, if it is found adverse by him.

7] With these directions, we dispose of the petition. No costs."

10. Subsequently, considering the submissions of the petitioners, respondent No.3 has rejected their appeals by order dated 15.9.2012. The respondent No.2 - appellate authority has dismissed their appeals by order dated 12.4.2013.

11. The basic grievance of the petitioners is that since they have worked as drivers continuously by issuance of several 11 months orders, they were entitled to regularization on the said positions. However, it is conceded that the petitioners have not resorted to any legal remedies for seeking

regularization as drivers in the service of respondent No.3.

12. The petitioners contend that they had not resorted to any fraudulent act or mis-representation or any manipulation with the intent and object of earning higher pay scales. It is stated that respondent No.3, considering the fact that the petitioners were working as Drivers from 1985 onwards, has by itself granted a pay scale to the petitioners, which was equivalent to the regular Drivers by following the principle of “equal pay for equal work”.

13. Shri Bhumkar has strenuously contended that the respondents have themselves sanctioned the pay scale for such duration in which the petitioners worked as Drivers. Having utilized their services as Drivers, the respondents cannot be permitted to seek a recovery of payment made to the petitioners after 26 years on the pretext of having erroneously paid excess amounts. He, therefore, prays for quashing and setting aside the impugned orders passed by the respondents.

14. Learned Advocate on behalf of respondents 3 and 4 has strenuously canvassed that the principle of legitimate expectation would not apply to the case of the petitioners, since they were made aware of their 11 months appointments, which were purely on temporary / ad-hoc basis. They could neither expect nor demand regularization on the said position. Since regular drivers were not available and the petitioners had driving licenses, they were engaged on temporary basis.

15. He further submits that though the petitioners worked as Drivers, they were not entitled to higher pay scales. It was out of oversight and inadvertence that they were given higher pay scale equivalent to the pay scale available for Drivers. At best, they could have been entitled for the pay scale of Hawaldar, after completing 12 years in regular employment in the light of the Government Resolution dated 8.6.1994. It is in this backdrop, that the excess payment made to them is sought to be recovered.

16. Shri Ghute has relied upon the judgment of the Apex Court in the case of Chandi Prasad Uniyal Vs. State of Uttarakhand and others [2012 AIR SCW 4742], to contend that the issues like fraud, mis-representation and manipulation is not the only criteria for seeking recovery of excess payment. If excess payment has been made by mistake or oversight, the said amount can be recovered.

17. He has also relied upon the following judgments to contend that the powers of the High Court in its supervisory jurisdiction are not to be exercised as if the High Court is dealing with the matter like a Court of Appeal.

- (i) Abdul Razak Vs. Mangesh Rajaram Wagale - AIR 2010 SC (Supp) 661,
- (ii) Mohan Amba Prasad Vs. Bhaskar Balwant Aher - AIR 200 SC 931,
- (iii) Babhutmal Raichand Oswal Vs. Laxmibai R. Tarte - AIR 1975 SC 1297,
- (iv) State of Haryana Vs. Manoj Kumar - AIR 2010 SC 1779,
- (v) S.P. Deshmukh Vs. Shah Nihal Chand - AIR 1977 SC 1985,
- (vi) M/s India Pipe Fitting Co. Vs. Fakruddin M.A. Baker - AIR 1978 SC 45 &
- (vii) Natha Singh Vs. Financial Commissioner - AIR 1976 SC 1053.

18. I have considered the submissions of the learned Advocates.

19. By order dated 3.12.2011, respondent No.3 has directed the cancellation of the earlier order granting pay scale to the petitioners on the ground that they were entitled to the pay scale of Hawaldar and not to the higher pay scale that was awarded to them by the order dated 28.12.1999. Having challenged the said order before respondent No.3, it is pointed out that the pay scale falling in the band of Rs.2610-60-2910-65-3300-70-4000 was available to the petitioners and not the higher pay scale of Rs. 3050-75-3950-80- 4590.

20. It appears that the petitioners were entitled for the pay scale of Hawaldar had they continued to work as Sweepers for 12 continuous years. They were taken on regular establishment with effect from 1.4.1983. From 1985, by the first order dated 22.2.1985, they have consistently worked on the position of Drivers on the strength of appointment orders for 11 months. It could safely be concluded that till the impugned order dated 3.12.2011 was passed, the petitioners were working as Drivers for 26 consecutive years. This aspect has not been disputed by the respondent establishment. This is one factor, which I am taking into account, while concluding that respondents 3 and 4 deserve to be precluded from seeking recovery of the purported excess money paid to the petitioners.

21. The Additional Divisional Commissioner - respondent No.2 has also

concluded that respondent No.3 has drawn an appropriate conclusion of directing recovery of amounts by setting aside the order dated 28.12.1999 granting higher pay scale.

22. It cannot be overlooked that the petitioners have been discharging duties as Drivers on ad-hoc basis. It also cannot be overlooked that the respondent establishment did not prescribe any particular allowance to be paid to the petitioners as long as they performed their duties as Drivers on ad-hoc basis. Work as Drivers has been extracted by the respondent - establishment in the last 26 or more years.

23. In the above backdrop, it needs to be considered as to whether the respondent - establishment can be permitted to say that the order dated 28.12.1999, which was passed about 12 years ago, was wrongly issued and that too without taking into account the fact that the petitioners were working as Drivers. The order dated 3.12.2011 is apparently based on the presumption that the petitioners are working as Sweepers and hence were entitled for a higher pay scale available to Hawaldar. It has not been considered by the authorities that the petitioners were working as Drivers all throughout and hence were granted the pay scale by order dated 28.12.1999 for the duration that they worked as drivers.

24. The respondent - establishment has relied upon paragraph Nos. 16 and 17 from the judgment of the Apex Court in the case of Chandi Prasad (supra), which read as under:-

“16. We are concerned with the excess payment of public money which is often described as “tax payers money” which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. 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 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 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.

17. We are, therefore, of the considered view that except few instances pointed out in Syed Abdul Qadir case (supra) and in Col. B.J. Akkara (retd.) case (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered.”

25. I am of the view that the said judgment would not be applicable to the instant case, since the pay-fixation had resulted in over payment to the concerned employees who were teachers. It was not the case of the appellants that they had worked on a higher position as like in this case.

26. The Apex Court has recently considered a similar issue in the case of State of Punjab and others Vs. Rafiq Masih (White Washer) etc. [(2015) 4 SCC 334]. It would be apposite to produce paragraph 12 of the Apex Court in the case of State of Punjab and others Vs. Rafiq Masih (White Washer) etc. [(2015) 4 SCC 334], which reads 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.”*

The case of the petitioners squarely falls in categories (i), (ii), (iii) and (iv). It would, therefore, be too harsh to recover excess payments from 1999 till 2011.

27. Nevertheless, the view taken by the Apex Court in the cases of Chandi Prasad (supra) and State of Punjab (supra), to the extent of carving out an exception of extreme hardship as a ground for prohibiting / barring recovery of excess amount, could be said to be applicable to the case of the petitioners. One amongst the four petitioners has already retired. Two amongst them would be retiring in the immediate future and one petitioner would be retiring in less than a year's time.

28. Considering the above facts and after having worked for more than 26 years as Drivers and having been allotted the pay scale in 1999, would be a sufficient ground to restrain the respondent / establishment from recovering excess money from the petitioners in the light of the observations of the Apex Court in paragraphs 12 and 13 of the the case of Chandi Prasad (supra).

29. In so far as the contention of the petitioners is concerned, that having worked continuously as Drivers on temporary basis would entitle them to continue as Drivers as a matter of right as well as on account of legitimate expectation is concerned, I do not find that the said contention is sustainable. An ad-hoc appointee, knowing fully well that he is appointed

on temporary basis in view of the absence of a regular and qualified employee, cannot have any right to seek continuance on the said post. The contention of the petitioners to this extent is, therefore, rejected.

30. In the light of the above, this petition is partly allowed. The impugned orders dated 3.12.2011, 15.9.2012 and 12.4.2013 are set aside only to the extent of directing recovery from the petitioners. The said orders to the extent of directing that the petitioners would work as Sweepers, are sustained. So also, the direction issued by respondent No.3 by order dated 3.12.2011 that the petitioners shall be entitled for the pay scale of Hawaldar is also sustained.

31. In the event, the petitioners on account of their seniority and having worked as Drivers for long duration, are entitled for any promotion in accordance with the Rules / Circulars / Government Resolutions applicable to them, the respondent - establishment shall consider their cases on their own merits.

32. Rule is, therefore, made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)

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