IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD.

WRIT PETITION NO. 9246 OF 2014
WITH
CIVIL APPLICATION NO.15149/2015
IN
WP/9246/2014

Shinde Balasaheb Sonaji,
age 64 years, occu. Pensioner,
Matruchaya Housing Society,
Undirgaon, Post Haregaon,
Dist. Ahmednagar. **..PETITIONER.**

VERSUS

1. The State of Maharashtra,
through Secretary,
Education Department,
Mantralaya, Mumbai -32.

2. The Accountant General,
Accounts & Entitlements – I
Pratishtha Bhavan (Old CGO Building),
101, Maharshi Karve Marg,
Mumbai 400 020.

3. The Education Officer,
Primary, Zilla Parishad,
Ahmednagar.

4. Catholoc Marathi Shala,
Tilaknagar, Tq. Rahata,
Dist. Ahemadnagar,
through : The Head Master. **..RESPONDENTS.**

...

Advocate for Petitioner : Mr.Dhongade Suresh D.
AGP for Respondents: Mr.S.D. Kaldate.

Advocate for Respondent 2 : Mr.Kulkarni Bhushan B.
...

CORAM : S.S. SHINDE & P.R. BORA, JJ.

Dated: 26th FEBRUARY, 2016.

ORAL JUDGMENT: (PER SHINDE,J)

1. Rule. Rule is made returnable forthwith. By consent of the parties, taken up for final hearing.

2. Heard learned Counsel for the parties, perused pleadings in the petition, annexures thereto, including copies of the communication received by the petitioner from the Office of the Accountant General, Nagpur, which are placed on record by the petitioner. Upon careful perusal of the letter written by the Deputy Accountant General and Public Information Officer dated 20th June, 2014 addressed to the petitioner, it is mentioned that, service period of the petitioner from 1st June, 1992 to 21st December, 2001 is required to be treated as break period and accordingly, employer of the petitioner was asked to submit reply / clarification in that respect. The relevant portion of the said

letter reads, thus:

> " As per rule 47 of MCS (Pension) 1982 interruption in the service entails forfeiture of past service. Accordingly, regarding counting of period of absence from 01/06/1992 to 21/12/2001 as break period it is stated that this office had already communicated your department and asked for clarification regarding counting of break period. However the reply is still awaited from the department."

3. It appears that, the petitioner herein instituted Regular Civil Suit No.155/93 and sought a declaration that the order of transfer is illegal and without authority. Upon perusal of the documents placed on record, it appears that, the said suit was decreed and being aggrieved, respondents preferred first appeal, which was allowed. Being aggrieved thereby, the petitioner preferred Second Appeal No.408 of 1999 (*Shri Balasaheb s/o Sonaji Shinde Vs. 1 St. Teresa Church, Harigaon, at Harigaon, Tq. Shrirampur and Ors*.) The said second appeal was heard finally and decided on 21st December, 2001. The operative part of the said judgment reads, thus:

> "7. In view of the consensus made hereinabove, I pass the following order:

(i) The Second Appeal stands dismissed.

(ii) The appellant shall join the duties as primary school teacher in P.J.S.S. School at Kendal within a period of one week from today.

(iii) The appellant shall be entitled to continuity of service together with all incidental and ancillary benefits flowing therefrom.

(iv) The appellant shall not be entitled to receive the back wages for the period from 25.04.1992 till he joins the duty.

(v) There shall be no order as to costs."

4. Upon careful perusal of the Clause (iii) of the said operative part of judgment dated 21st December, 2001 in Second Appeal No.408 of 1999, it is abundantly clear that in no uncertain words, the High Court ordered that, the appellant shall be entitled to continuity of service together with all incidental and ancillary benefits flowing therefrom. The period which was under consideration in the said Second Appeal was the period from the order of transfer / Institution of Suit till the second appeal was decided. Therefore, it was not open for the office of the Accountant General to hold that, as per Rule 47 of MCS (Pension) 1982 interruption in the service entails forfeiture of past service and therefore, while counting period of absence from

01/06/1992 to 21/12/2001, the same be treated as break period in the service and accordingly the petitioner is entailed to receive the benefits. In fact, the said observation in the impugned communication dated 20th June, 2014 addressed by the Deputy Accountant General & Public Information Officer directly runs contrary to the clause (iii) of the operative order of the judgment dated 21st December, 2001 in Second Appeal No.408 of 1999. The office of the Accountant General was bound to act as per the directions issued by the High Court in the aforesaid judgment passed in the said second appeal and it was not permissible for the said authority to take a different view than to grant continuity of service as ordered by the High Court, for the aforesaid period.

5. At this stage, the learned Counsel for the petitioner, relying upon the contents of the Civil Application, submits that, the amount of Rs.2,37,093/- be ordered to be refunded to the petitioner with interest.

We have also considered the controversy involved in the petition keeping in view the fact that, the petitioner stood retired as an Assistant Teacher on 31st May, 2008. Admittedly, the post which was occupied at the time of retirement was class III. The Supreme Court in case of State of ***Punjab and others etc. v. Rafiq Masih (White Washer) etc.***[1], observed in para 12, thus:

> "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

1 AIR 2015 SC 696;

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."

6 In the light of above, the impugned communication issued by the Office of the Accountant General addressed to the petitioner and also the parent department of the petitioner, observing that, the period from 01/06/1992 to 21/12/2001 should be treated as break in service of the petitioner, is quashed and set aside.

We are not inclined to accept the prayer of the petitioner for payment of interest. However, we direct the respondents to refund the amount of Rs.2,37,093/- to the petitioner, as expeditiously as possible; however, within eight weeks from today. Needless to observe that, in case, the said amount is not paid within the period of eight weeks from today, on expiry of the said period, the respondents shall pay 9% interest on the said amount till the same is actually paid to the petitioner.

Petition as also the civil application are allowed in above terms. Rule made absolute, accordingly with no order as to costs.

(P.R. BORA, J.) **(S.S. SHINDE, J.)**

Kadam/*