

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**BENCH AT AURANGABAD****WRIT PETITION NO. 11204 OF 2015
WITH WP/11180/2015 WITH WP/11181/2015 WITH
WP/11196/2015**

MUKUND DATTOPANT PATHAK
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

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Advocate for Petitioners : Mr. Sapkal V.D.
AGP for Respondent/State : Mr. D.R. Kale
Advocate for Respondents : Ms. Deshpande Geeta L.,
Mr. A.B. Gaikwad, Mr. S.V. Kshirsagar h/f Mr. M.A.
Deshpande and Mr. U.B. Bondar

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

Dated: February 29, 2016

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PER COURT :-

Heard the learned counsel appearing for the petitioners and the learned counsel appearing for the respective respondents.

2. These Petitions take exception to the impugned orders, ordering recovery of the amount paid to the petitioners on account of pay fixation by the Respondents.

3. The learned counsel appearing for the petitioners invited our attention to the pleadings in the

Petition, annexures thereto and the judgments of the Bombay High Court bench at Nagpur in the cases of (i) **Narendra Namdeorao Gedam V/s Zilla Parishad Amravati and anr**, in Writ Petition No. 5182 of 2012 decided on 30th January, 2014, (ii) **Gulabrao Bapurao Thakre and others V/s Divisional Commissioner, Amravati and anr**, in Writ Petition Nos. 1495 of 2014 and other connected matters, decided on 12th August, 2014, (iii) **Ramkrushna S/o Bhikaji Thakre and others V/s The Zilla Parishad, Buldhana and others** in Writ Petition no. 4915 of 2012, decided on 19th September, 2013 and (iv) **Padmakar Panjabrao Maskey V/s The Chief Executive Officer and others**, in Writ Petition No. 4882 of 2012 and other connected matters, decided on 12th December, 2012, and also the judgment of the Supreme Court in the case of **State of Punjab and others etc V/s Rafiq Masih (White Washer) etc,**¹ and submits that, there was correct pay fixation, the impugned orders are passed after retirement of the petitioners, and the amount is recovered, which is impermissible. Therefore, he submits that, the Petitions

1 AIR 2015 S.C. 696

deserve to be allowed.

4. On the other hand, the learned counsel appearing for the Respondent – Zilla Parishad, relying upon the letter issued on 18th December, 2007, and letter dated 28th September, 2008, submits that, the petitioners were not entitled for the monetary benefits extended to them on account of wrong pay fixation, since they did not complete 12 years service at the relevant time. Secondly, immediately the order dated 18.12.2007 was corrected, and the petitioners were informed not to withdraw the amount, which was disbursed on the basis of wrong pay fixation. Therefore, relying upon the contents of the said letters and the Government Resolution dated 28th July, 2014, issued by the Rural Development Department, Government of Maharashtra, Mumbai, he submits that, the Petitions may not be entertained.

5. We have given careful consideration to the rival submissions advanced by the learned counsel appearing for the parties. With their able assistance, we have carefully perused the pleadings in the Petitions, annexures thereto

and the judgments of the Bombay High Court bench at Nagpur, and the Supreme Court in the case of **State of Punjab (supra)**, placed on record by the learned counsel appearing for the petitioners with the memo of the Writ Petitions. In the case of Narendra (supra), the Division Bench at Nagpur considered the entitlement of the petitioner therein to the pay scale of Junior Engineer after completion of 12 years service. It appears that, the petitioner therein was initially appointed on 23rd January, 1987 as Mistri (Grade I) with Zilla Parishad, Amravati. Thereafter, in the year 2006, the posts of Mistri (Grade I) and (Grade II) were abolished by the State Government and all employees were absorbed on the newly created posts of Civil Engineer Assistant. According to the petitioner therein, in view of communication dated 22nd June, 2007 such employees who were working as Mistri (Grade I) were entitled to the pay scale of Junior Engineer on completion of 12 years service. Keeping in view the facts of that case and the contentions raised therein by the petitioners and the Respondents, the Division Bench in para 8 of the judgment reached to the conclusion that, the petitioner therein was entitled to the pay scale of Junior Engineer on completion of

12 years service on the post of Mistri (Grade I). Therefore, the exclusion of the name of the petitioner therein from the list referred in communication dated 16th February, 2013, is therefore held illegal. In the facts of that case, the petitioner therein on reaching the age of superannuation retired on 31st January, 2009. The Division Bench at Nagpur allowed the Petition and held that, the petitioner therein is entitled to the pay scale of Junior Engineer upon completion of 12 years service on the post of Mistri (Grade I), and accordingly, revision of pension payable to the petitioner was ordered and also the Respondents therein were directed to pay the arrears payable to the petitioner on account of difference of salary and difference of pension in accordance with the decision in the said Writ Petition.

6. In the present case, the petitioners have placed on record the order dated 18th December, 2007 at Exhibit 'B' of the compilation of the Writ Petition, wherein the names of all the petitioners have been shown and the dates of initial appointments have been mentioned. If we compare the dates of appointment of the petitioners in Writ Petition No. 5182 of 2012 decided by the Division Bench at Nagur

and in the present petitions, it appears that, the petitioner therein was appointed in the year 1987, however, in the present Petitions, the petitioners have been appointed prior to the year 1987. Therefore, the present petitioners stand on better footing than the petitioner in the said Writ Petition, in as much as, the present petitioners were appointed in the year 1980-82, and they were initially working as Mistri (Grade I) and Mukadam. Admittedly on attaining the age of 45 years, the exemption from appearing for professional examination was granted in favour of the petitioners. Therefore, if the facts of the present case, vis-a-vis, the facts in the Writ Petition decided by the Division Bench at Nagpur are compared, it will have to be held that, the facts are very close; rather, the petitioners herein have been appointed earlier to the petitioner in the said Writ Petition.

7. The learned counsel appearing for the petitioners has also invited our attention to the judgment of the Division bench at Nagpur dated 19th September, 2013 in Writ Petition No. 4915 of 2012 (Ramkrushna S/o Bhikaji Thakre and others V/s The Zilla Parishad, Buldhana and others), wherein there was challenge to the orders passed by

the Zilla Parishad withdrawing the higher pay scales, which were granted to the petitioners therein. The Division Bench, after considering the arguments of the parties to the Petition, allowed the said Petition. In para 12 of the said judgment, it is observed that, if the benefits granted upon completion of 12 years of service in the cadre of Mistry Grade-I, Mistry Grade-II, Muster Clerk, Time Keeper, Draftsman, Tracer etc and exemption granted on attaining age of 45 years, was well within the powers of the Respondents, and therefore, the impugned orders assailed therein withdrawing the higher pay scale were quashed and set aside.

8. Yet in another unreported judgment in the case of Padmakar Panjabrao Maskey V/s The Chief Executive Officer and others, similar controversy, like arisen in this Petitions, has been considered by the Division bench in group of Writ Petitions and in similar set of facts, the Division Bench keeping in view the factual matrix involved in the said case and the judgments of the Apex Court in the case of Chandi Prasad Uniyal and others and Sayed Abdul Qadir and others, in para 8 reached to the following

conclusion :-

“8. In this factual background, the Apex Court upheld recovery from the employees on the ground that they were not entitled to retain the excess amount. The facts in the present case are more nearer as in the case of Syed Abdul Qadir and Others (cited supra). Apart from that, the judgment in the case of Syed Abdul Qadir and Others is delivered by the three Hon'ble Judges of the Apex Court whereas the judgment in the case of Chandi Prasad Uniyal and Others is delivered by the two Hon'ble Judges of the Apex Court. As such, the view as expressed by the Bench of three Hon'ble Judges of the Apex Court will be binding on this Court. In that view of the matter, we find that, the impugned recovery is not sustainable in law. Rule is therefore, made absolute in terms of prayer clause (I) of the instant petitions.

If the amount is already deducted by the Zilla Parishad/respondent, the same shall be refunded to the petitioners within a period of three months from today.”

Accordingly, the impugned orders therein, by which the recovery of amount on refixation of pay, came to

be set aside thereby giving directions to the Respondent – Zilla Parishad to refund the recovered amount to the petitioners within a period of three months from passing the said order.

9. Keeping in view, the aforementioned expositions of the Bombay High Court bench at Nagpur, and also the judgment of the Supreme Court in the case of State of Punjab and others (supra), we are inclined to allow the Writ Petitions. Para No.12 from judgment of the State of Punjab (supra) reads 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 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."

10. Admittedly in the present case, the petitioners in Writ Petition No. 11196/2015, 11180/2015 and 11191/2015 stood retired on 31.05.2009, 31.03.2008, 31.03.2015 respectively. The petitioner In Writ Petition

No.11204 of 2015 stood retired on 28th February, 2011. Therefore, the cases of the petitioners in the aforementioned three Writ Petitions would be covered by clause (i) and (ii). Even the petitioner in Writ Petition No. 11204 of 2015, his case is covered in clause (i) of the said clause.

11. In the light of discussion in foregoing paragraphs, the Petitions are allowed. The Respondent – Zilla Parishad is directed to refund the amount recovered from the petitioners within three months from today. In case, the amount is not refunded within 12 weeks from today, thereafter the petitioners would be entitled for the interest at the rate of 9% p.a.

12. All Writ petitions are allowed in above terms. Rule made absolute to the above extent. Writ Petitions stand disposed off.

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

(**S.S. SHINDE, J.**)

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