IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4616 OF 2016

Smt. Jayshree Trimbak Takalkar,
Age: 60 years, Occup: Pensioner,
R/o. Gangapur Tq. Gangapur
Dist. Aurangabad. .. Petitioner

VS.

1) The Chief Executive Officer,
Zila Parishad, Aurangabad.

2) The District Health Officer,
Zilla Parishad, Aurangabad. .. Respondents

Mr. D. R. Irale Patil, Advocate for the petitioner.
Mr. Dilip Patil Bankar, Advocate for respondents No.1 & 2.

WITH

WRIT PETITION NO. 4624 OF 2016

Smt. Shobha Ramesh Patil,
Age: 59 years, Occup: Pensioner,
R/o. Jadhavwadi, Near T-Point,
Aurangabad Tq. and Dist. Aurangabad. .. Petitioner

VS.

1) The Chief Executive Officer,
Zila Parishad, Aurangabad.

2) The District Health Officer,
Zilla Parishad, Aurangabad. .. Respondents

Mr. D. R. Irale Patil, Advocate for the petitioner.
Mr. Dilip Patil Bankar, Advocate for respondents No.1 & 2.

CORAM : S. V. GANGAPURWALA &
SMT. VIBHA KANKANWADI. JJ.

Date of reserving
the Judgment : 03rd November, 2017.

Date of pronouncing
the Judgment : 22nd December, 2017.

ORAL JUDGMENT (Per Smt. Vibha Kankanwadi. J.)

1. Rule. Rule made returnable forthwith and heard learned advocates for the parties appearing finally, by consent.

2. The question of recovery of amount from retirement benefits of a Class- III and Class – IV employee of the Government, after their retirement was the subject matter in many cases. Some of the cases have been decided by this Court and law has been crystallized by Apex Court. In spite of the same, the subject matter is cropping up again and again. In this case also the same subject matter is involved. Both the petitioners have invoked the jurisdiction of this Court under Article 14, 16 and 226 of the Constitution of India in

order to challenge the recovery of amount from the gratuity amount, under the orders of respondent No.2.

3. Both the petitioners, after passing the training of Auxiliary Nurse Midwife were appointed on that post. The petitioner in Writ Petition No. 4616 of 2016 came to be appointed with Zilla Parishad, Aurangabad on 07-02-1989 and she joined duty on 14-02-1989. Whereas petitioner in Writ Petition No. 4624 of 2016, came to be appointed on 24-01-1983 at Primary Health Center, Jarandi Tq. Soygaon Dist. Aurangabad. The services of petitioner in Writ Petition No. 4616 of 2016 came to be regularized under the order dated 25-07-1991. Though she was having a break of two days, it was converted into admissible leave. Thereafter, both the petitioners have undergone the training of Lady Health Visitor for a period of six months, and thereafter, they got the pay-scale for the said cadre. Thereafter, their pay-scale got increased in view of 5th pay commission and 6th pay commission. Both the petitioners have retired on attaining the age of superannuation on 30-04-2014 and 31-07-2014 respectively. After their retirement, the pension papers were transmitted for issuing appropriate order of payment of pension, gratuity and commutation. The respondent No.2 has passed an order on 06-01-2016 and 21-02-

2014 respectively for re-fixation of the pension and recovery of excess amount. Amount of Rs.3,49,562/- was proposed to be recovered from petitioner in Writ Petition No.4616 of 2016 and amount of Rs.2,47,016/- was proposed to be recovered from petitioner in Writ Petition No.4624 of 2016. Thereafter, said amount has been recovered from their amount due from gratuity. The reason that was given by the respondent is that, the benefit of time bound promotional pay-scale has been wrongly given to the petitioners.

4. After the affidavit-in-reply has been filed on behalf of respondents, the petitioners have amended the petition and they have challenged the impugned orders of recovery as well as the revised pay fixation done by the respondent No.2 or officers connected to respondent No.2.

5. In both the matters affidavit-in-reply has been filed by Dr. Dattatraya Bhagwatrao Gholap on behalf of respondents No.1 and 2. In both the matters the admission regarding appointment of petitioners has been given and it has been stated that the date of entry of the petitioners in service has been wrongly considered. It has been stated that, the time bound promotion after twelve years ought not to have been given on the date on which it has been in fact given.

Further at the time of fixation of pay, when the 5th pay commission was granted from 01-01-1996, the basic for fixation of the respective petitioners was wrongly taken because there was wrong committed initially. So also the said wrong figure continued while fixing the pay of the petitioners while granting benefits under 6th pay commission. It has been stated that, as regards fixation of pay-scale as per 5th pay commission, an interim order was passed in Writ Petition No.2258 of 1993, the pay of all the concerned persons was fixed taking into consideration that interim order, however ultimately the said writ petition came to be dismissed. After the meetings with the union of Auxiliary Nurse Midwife/ Lady Health Visitor employees, in relation to the excess payment of the pay to them were considered and the letter was issued to correct the pay-scale to the Taluka Health Officer. It was decided that the excess amount should be recovered in equal installments. Therefore, whatever pay was fixed, came to be corrected subsequently. Reliance has been placed on Rule 132 of Maharashtra Civil Service (Pension) Rules 1982, which cast a duty on the head of the office to ascertain and assess the Government dues payable by the Government servants due for retirement. Taking into consideration the re-fixation of the pay in respect of the present petitioners, the said excess amount has been recovered, and thereafter, the no dues certificate was issued to the petitioners. It has been also stated that, the recovery is not arbitrary and illegal. The petitioner is duty bound to refund the said amount, which was paid in excess.

6. It has been vehemently argued on behalf of the petitioners that, it has been wrongly mentioned in the affidavit-in-reply that, the completion of 12 year's period for considering the time bound promotion has to be reckoned from the date of completion of training. In fact, it should be from the date of appointment. Therefore, it does not lie in the mouth of the respondent that, pay was wrongly fixed by giving time bound scale, then as per 5th pay commission and consequently further fixation as per 6th pay commission has been incorrectly made. Further he relied on the decision in ***State of Punjab and others Vs. Rafiq Masih (White Washer) and others, 2015 (4), Supreme Court Cases 334***, wherein the decision in ***Syed Abdul Qadir Vs. State of Bihar, 2009 (3) Supreme Court Cases 475*** was followed and exception have been carved out for recovery of payments.

7. Further reliance has been placed on the decision of this Court in ***Mukund Dattopant Pathak Vs. The State of Maharashtra and others,*** *Writ Petition No.11204 of 2015 with connected petitions,*

decided on 29th February 2016, and ***Dr. Gorakh Kashinath Solanki Vs. The State of Maharashtra and others****, Writ Petition No.6919 of 2012, decided on 12th February 2014*.

8. Per contra, it has been argued on behalf of the respondents that, any amount paid / received, without authority of law can always be recovered; barring few exceptions of extreme hardships. Exemption from recovery can not be claimed as a matter of right. This has been held in ***Chandi Prasad Uniyan and Ors. Vs. State of Uttarakhand and Ors., AIR 2012 Supreme Court 2951***. The Apex Court has held that, "even the excess payment made to teachers/ principals due to wrong pay fixation is liable to be recovered. Recovery of excess paid public money cannot be limited only to cases of fraud or misrepresentation. This may be the result of mistakes committed by the employee". Here in this case, a wrong date was considered for giving time bound promotion scale which cannot be said to be error of the employee. Further in view of the interim order granted by this Court (Nagpur Bench), the further scale was given but the ultimate result of the said case i.e. Writ Petition No.2258 of 1993 was in favour of the Government, and therefore, whatever excess payment was made, the Government is entitle to recover.

Reliance has also been placed on the decision in **High Court of *Punjab and Haryana and Others Vs. Jagdev Singh*,** decided by *Apex Court in Civil Appeal No.3500 of 2006 on July 29, 2016*. Further reliance has also been placed on the decision of this Court in *Writ Petition No.6191 of 2016,* ***Dr. Ravindra Shamrao Darunte Vs. The State of Maharashtra and others***, decided on *10th March, 2017*.

9. It is not in dispute that, the petitioners; after passing S.S.C. came to be selected as Auxiliary Nurse Midwife**.** The petitioner in Writ Petition No. 4616 of 2016 joined her services on 07-02-1989 whereas the petitioner in 4624 of 2016 joined her services on 24-01-1983. They were sent for training for six months, and thereafter, they have joined their regular duties. The pay scale after completion of their training was revised on 01-07-1993 and 01-10-1988 respectively. Thereafter, the 5th pay commission was made applicable; in which the policy was framed to provide time bound promotional pay scale to its employees who had completed 12 years of service but were not given benefit of promotion. The rules in that respect have been framed. The petitioner in Writ Petition No.4616 of 2016 was given the benefit with effect from 14-02-2001, whereas as regards petitioner in Writ Petition No.4624 of 2016 was given promotion on 12-12-1994. Now it is the

say of the respondents No.1 and 2 that, the 12 years period for time bound promotion scale ought to have been reckoned from the date of completion of training. It appears to be against the Government Resolution. The intention behind framing the said policy was to overcome the stagnation and therefore it ought to be from the date of appointment and not from the date of completion of training.

10. Respondents have contended that as the fixation of the pay was wrongly done, when it was fixed after 12 years of service; the wrong was carried forward when the pay was fixed when 6^{th} pay commission was implemented. Respondents have relied on Rule 132 of the Maharashtra Civil Service (Pension) Rules, 1982, which cast a duty on the head of the office to ascertain and assess the Government dues, payable by Government servant due for retirement; but that assessment or re-assessment should be as per the rules as well as the law laid down. That does not mean that a sweeping right has been conferred. It has not been shown by the respondents that, there is compliance of Rule 134 (a) of Maharashtra Civil Service (Pension) Rules 1982. Reasonable opportunity was not given to the petitioners to show cause as to why the amount due should not be recovered from them. Under such circumstances Rule 132 cannot be read in isolation

from the requirements that have been contemplated under Rule 134 (a) of Maharashtra Civil Service (Pension) Rules 1982. In fact, there was opportunity each time when further fixation was done, for the respondent to correct mistake if at all it is there. However, the respondents have tried to correct the alleged mistake almost at the retirement of both the petitioners. Now after so many years i.e. 13 -14 years, it could not have been revised or re-fixed by the respondents without giving an opportunity to the petitioners. There is no dispute regarding the fact that the re-fixation of withdrawing the higher pay scale granted to the petitioners, was without giving hearing to them. It is not the case of the respondents that the grant of higher pay scale to petitioners was a result of a fraud or misrepresentation on the part of petitioners. That means the impugned order has been passed by the respondents unilaterally and in violation of principals of natural justice. In ***Bhagwan Shukla v/s. Union of India & others*** reported in ***AIR 1994 SC 2480*** the Hon'ble Supreme Court observed that if basic pay of any employee is reduced with retrospective effect and employee was not granted opportunity to show cause, in such circumstances, there would be flagrant violation of the principles of natural justice and order of reducing pay was set aside.

11. Another aspect is that, the petitioners are the employees from Class-III / Grade -III. In ***State of Punjab and others Vs. Rafiq Masih (White Washer) and others, (2015) 4 Supreme Court Cases 334*** it has been observed that, “orders passed by the State as employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover”. The law on this point has been summarized as follows ;

> *“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."

12. Petitioners are dependent on their pension. Petitioners would be required to take care of their needs, medical expenses etc. Now the said amount has been reduced only because of the impugned order. Pension is a right of an employee, who puts long tenure of service. The impugned order would put petitioners to hardship, that too which contemplates recovery of excess amount of about 13 years. In the above-said case of ***Rafiq Masih*** it has been held that the Court must weigh the hardship faced by the employee with any hardship that the employer may face and arrive at a conclusion as to whose hardship would be more. If we apply the said theory, then it is obvious that the hardship that the petitioners would face far outweigh the hardship faced by the State Government. Following observations from ***Rafiq Masih's*** case are important.

"7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.

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 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.

9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality, can be found in Articles 14 to 18, contained in Part III *of the Constitution of India, dealing with "Fundamental Rights". These Articles of the Constitution, besides assuring equality before the law and equal protection of the laws; also disallow, discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracized section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "Directive Principles of State Policy". These Articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice - social, economic and political, by inter alia minimizing monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.*

10. In view of the afore-stated constitutional mandate, equity and good conscience, in the matter of livelihood of the people of this country, has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent, that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 142 of *the Constitution of India.*

The recovery by the employers were held to be impermissible in law in situations those have been enumerated of paragraph No.18 of ***Rafiq Masih's*** case (Supra). The case of the petitioners squarely falls within clause (i), (ii), (iii) and (v) of para No.18 of the said case.

13. Further in ***Shyam Babu Verma and Ors. v/s. Union of India*** reported in **(1994) 2 SCC 521**, the Hon'ble Supreme Court has held that since the petitioners received the higher scale due to no fault of theirs, it shall only be just and proper not to recover any excess amount already paid to them.

14. Even in the case of ***Chandi Prasad Uniyal and Ors. Vs. State of Uttarakhand and Ors.,*** (supra) though it has been held that, the recovery can be ordered; but the Apex Court accepted that such recovery is barring few exceptions. It has been observed as follows ;

> *"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.*

Therefore, it cannot be said that any contrary view was taken by the Apex Court. In paragraph No.14, the Apex Court has taken a note of the directions given in ***2009 (3) Supreme Court Cases 475*** i.e. ***Syed Abdul Qadir's*** case. When the interim order was passed by this Court (Nagpur Bench) in Writ Petition No. 2258 of 1993 and the Government Resolution regarding fixation of pay was issued; the Government has given a further pay scale in pursuance to the said order. Though in the said writ petition it has been held that, the demand of treating Lady Health Visitor (L.H.V.)/ Health Assistant

(Female) as equivalent to Nurse Midwife is misconceived and cannot be sustained, and therefore, the orders dated 7th April 1993 and 9th July 1993 rectifying the error committed by the Zilla Parishad earlier were held to be sustainable. However it is to be noted that, no order as regards recovery was passed. Though the Government was aware about granting of further pay scale in view of interim order, no prayer was made in that petition by the Government in respect of recovery. A similar situation arose in the case in Writ Petition No.6919 of 2012 before this Court; wherein the basis for effecting recovery was stated to be a decision rendered by the Division Bench of this Court in Writ Petition No.2750 of 1990 decided on 21-06-2009. In the said case it was observed that, the Division Bench in that proceeding had not directed or in any way suggested the respondents to take steps for recovering the amount or revised the pay of the employees extended in the year 1984. Therefore, it was held that, the case of the petitioner squarely falls within the exceptions carved out in the matter of ***Syed Abdul Qadir***. Here also the case of the petitioners is well within the exceptions carved out in the matter of ***Syed Abdul Qadir***.

15. The petitioners case is based on the equal footing of the other matters which have been cited by the learned counsel for the

petitioners. The case cited by the respondents bearing ***Civil Appeal No.3500 of 2006*** by Apex Court in ***High Court Punjab and Haryana and others Vs. Jagdev Singh***, is based on different facts, the petitioner therein was a Class-I employee (Civil Judge, Junior Division) and then was promoted as Additional Civil Judge, therefore definitely he was not within the exceptions. Further though in that case as well as in the present case, an undertaking was given by the petitioners yet the undertaking given by the present petitioners was subject to the legal proposition that has been laid down in ***Rafiq Masih's*** case. This was the exact view taken in Writ Petition No.6191 of 2016 by this Court when the petitioner therein was also not found to be a Class -III or Class -IV employee, therefore the view taken in those cases cannot be made applicable to the present case.

16. Taking into consideration the above discussion, definitely the step taken by the respondents for re-fixation of the pay-scale of the petitioners after about 13 years or more without hearing petitioners and thereafter recovery and actually deducting it from the gratuity cannot be upheld. As per the procedure laid down in Rule 134 (a) of the Maharashtra Civil Service (Pension) Rules 1982, ought to have been given to the petitioners herein, and therefore, now we would

inclined to give an opportunity to the respondents to re-fix the pay of the petitioners after giving them an opportunity. This is a fit case where the writ jurisdiction of this Court under Article 226 and 227 deserves to be invoked. For the aforesaid reasons writ petitions deserve to be allowed. Hence, following order.

ORDER

1) Both the Writ Petitions are hereby allowed.

2) Order passed by Medical Officer, PHC Bhendala, Tq. Gangapur as a compliance of order passed on 27-09-2013 by respondent No. 2 is hereby quashed and set aside.

3) Order passed by Medical Officer, PHC Panwadod (Bk.), Tq. Sillod as a compliance of order passed on 17-03-2003 and 27-09-2013 by respondent No. 2 and 3 is hereby quashed and set aside.

4) The order issued by respondent on 06-01-2016 bearing No. ZPA/Health/EST-4/14/119 in Writ Petition No.4616 of 2016 and the order No. ZPA/Health/EST-4/ 14/ 8146 dated 05-12-2014 issued by respondent No.2 are

hereby quashed and set aside.

5) The respondents are directed to repay the respective amounts to respective petitioners which have been already deducted in pursuance to the said order within a period of six (6) months from today.

6) The respondents are at liberty to re-fix the pay of both the petitioners after giving them opportunity.

7) Rule accordingly made absolute. There shall be no order as to costs.

[SMT. VIBHA KANKANWADI]	**[S. V. GANGAPURWALA]**
JUDGE	**JUDGE**

vjg/-.