

Ladda (P.S.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 10424 of 2013.

Shri Vasant Dada Rasal ..Petitioner.
Vs
The State of Maharashtra & Anr ..Respondents.

Mr V.A. Gangal, Senior Counsel a/with Mr Anup N. Deshmukh
i/by Mr Ashok Tukaram Gade for the petitioner.
Mr P.G. Sawant, A.G.P. for the Respondents (State).

**CORAM : R.M. BORDE &
A.S.GADKARI, JJ.**

DATE : 17th JANUARY, 2017.

P.C.

- 1) Heard.
- 2) Rule. Rule is made returnable forthwith. The respondents waive service. By consent of parties, the petition is taken up for final hearing at the admission stage.
- 3) Initially, the petitioner was inducted as “Noting Assistant” on 25th April, 1973 in the employment by the State

of Maharashtra through Employment Exchange. The petitioner was appointed from Open Category though the petitioner belongs to Hindu Koli which has been notified as Special Backward Class. It is the contention of the petitioner that after directing removal of area restriction in terms of Scheduled Castes and Scheduled Tribes (Amendment) Act, 1976, the petitioner tendered application to the Competent Authority and obtained a Tribe Certificate certifying that he belongs to "Mahadev Koli" Caste. The petitioner, on the basis of the Tribe Certificate, claimed promotional benefits. While in the employment, the petitioner was first promoted on 25/9/1980 and the promotion was as against the seat reserved for Scheduled Tribes Category. The petitioner, was thereafter promoted to the post of Superintendent in the year 1995. The petitioner thereafter had been promoted as a Controller of Examinations by an order dated 22/7/1996 as against reserved post prescribed for Scheduled Tribes Category. It is the contention of the petitioner that in the year 2001 the post of Deputy Director (Administration) in the office of the Director, Directorate of Art, M.S., Mumbai,

was filled in through the Maharashtra Public Service Commission (M.P.S.C.). The petitioner also tendered an application to the M.P.S.C. for claiming appointment by a nomination to the post of the Deputy Director of Art. The petitioner was declared successful in the selection process and came to be appointed as Deputy Director of Art. It is the contention of the petitioner that in the year 2004 he was directed by the Respondent No.1 to submit validation order in respect of his caste certificate certifying that he belongs to Mahadev Koli Scheduled Tribe. The petitioner made a statement before the Caste Scrutiny Committee that he belongs to "Koli", Special Backward Category and relinquished his claim as belonging to "Mahadev Koli" Scheduled Tribe. On the basis of the statement made by the petitioner, the caste certificate issued to him as belonging to "Mahadev Koli" Scheduled Tribe was directed to be invalidated by the Caste Scrutiny Committee.

4) Since the certificate issued to the petitioner as belonging to "Mahadev Koli" was invalidated by the Caste Scrutiny Committee, the Respondent No.1 proceeded to take

action against him. The petitioner was due to retire on attaining age of superannuation on 31.5.2006. However, two days prior to his prescribed date of superannuation /retirement, the respondent No.1 issued order directing recovery of amount allegedly paid wrongfully to him by virtue of his occupying promotional post on the basis of reservation. It was the contention of the respondent State that the petitioner wrongfully gained promotion claiming himself to be member belonging to Scheduled Tribe Category. The certificate issued to the petitioner as belonging to Scheduled Tribe category (Mahadev Koli Tribe) has been invalidated by the Caste Scrutiny Committee and as such the benefits secured by him on the basis of the Tribe Certificate, which is invalidated, deserve to be withdrawn. A Criminal Complaint also came to be filed against the petitioner in respect of presentation of a false caste certificate within contemplation of provisions of the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification

of) Caste Certificate Act, 2000. It is the contention of the petitioner that he has been acquitted of the charge levelled against him in the criminal proceedings.

5) The petitioner retired on attaining age of superannuation on 31.5.2006. The petitioner raised challenge to the order passed by the Respondent No.1 directing recovery of amount by presenting Original Application to the Maharashtra Administrative Tribunal (for short "the MAT"). The Original Application No. 106 of 2010 tendered by the petitioner came to be allowed on 3/9/2010. It may be noted at this stage that while directing recovery of amount on account of alleged wrongful gain received by the petitioner, falsely representing himself as a member of the Scheduled Tribe Category, the services of the petitioner were also directed to be terminated. Both the orders directing recovery of amount as well as the order of termination were set aside by the MAT. After retirement of the petitioner and after the decision by the MAT in Original Application tendered by the petitioner, the respondents have issued two

orders dated 2/11/2012 and 20/12/2012. The respondents have directed recovery of amount allegedly paid to the petitioner in excess of his entitlement. It is also further directed that the petitioner shall not be held eligible to receive the pensionary benefits. Both the orders issued by the State were matter of challenge in Original Application No. 77 of 2013 decided by the Maharashtra Administrative Tribunal, Mumbai on 1/10/2013. The Tribunal dismissed the O.A. and confirmed the action of the State Government. It is recorded in the judgment delivered by the MAT that it cannot be ascertained as to whether the termination of services of the applicant (the present petitioner) by an order dated 4.1.2010 was challenged or only the order of recovery of amount was challenged by the petitioner in earlier proceedings. It is further observed that as O.A. No. 379 of 2011 was withdrawn by the petitioner; whereunder, the order dated 4.1.2010 terminating services of the petitioner was matter of challenge, he cannot be permitted to raise the same challenge in the guise of challenging the orders dated 2.11.2012 and 20.2.2012. The observations made by the MAT in the order

impugned appears to be misconceived. On 4.1.2010 the respondent issued an order directing termination of services of the petitioner with effect from 18/7/2005 and has also further issued directions for recovery of the amount allegedly paid to the petitioner in excess of his entitlement. The order passed by the State Government on 4.1.2010 was a matter of challenge in O.A. No. 106 of 2010 presented by the petitioner. The O.A. came to be decided on 3.9.2010. The Tribunal found the order of directing termination of the services of the petitioner to be unsustainable and as such the said order has been quashed and set aside. So far as the direction contained in the order dated 4.1.2010 issued by the State Government in respect of recovery of the amount allegedly paid in excess of the entitlement of the petitioner is concerned, it was noticed that the said order has been issued by the State without extending opportunity of hearing to the petitioner. The MAT as such kept the liberty of the respondents open to take action as per rules after giving an opportunity of hearing to the petitioner and to pass appropriate order if deemed necessary. It does appear that the State Government

exercising the liberty granted by the Tribunal has issued two orders i.e. 2/11/2012 and 20/12/2012 directing the recovery of amount allegedly paid to the petitioner in excess of his entitlement.

6) It must be noted that there is no controversy as regards the factum that the petitioner has actually worked on the promotional post until the date of his retirement. Since the petitioner has rendered services to the State Government, he is entitled to claim salary for the period during which he has worked. The allegations that the petitioner has played fraud by securing employment on the basis of false caste certificate, is unsustainable. The Criminal Prosecution initiated against the petitioner for securing a false caste certificate and taking benefit on the basis of such certificate has ended in acquittal of the petitioner. Even otherwise, the petitioner claimed himself to be a member of Special Backward Category which aspect is not controverted. The induction of the petitioner in the employment was as a open category candidate. The promotion gained by him during the course of employment claiming himself to be the member of a

reserved category i.e. Scheduled Tribe, until the year 2001 is protected in view of the Policy adopted by the State Government as well as in view of the judgment of the Full Bench in the case of **Arun Sonone Vs. State of Maharashtra & Ors** reported in **2015 (1) Mh.L.J. 457**. There is no allegation in respect of fabrication of record or commission of fraud in securing the Tribe certificate, nor it is alleged that the petitioner has relied upon fabricated record for substantiating his claim before Scrutiny Committee. There are no such findings recorded by the Scrutiny Committee in the order directing invalidation of the caste certificate. The distinction has to be made in respect of obtaining a false certificate by misrepresentation or by placing reliance on the fraudulent record and the simplicitor order of the Caste Scrutiny Committee directing invalidation of the caste certificate. In the instant matter, there is no material to arrive at a conclusion that the petitioner has committed fraud or has relied upon fabricated record to substantiate his claim of belonging to Scheduled Tribe Category. The petitioner has voluntarily relinquished his

claim and benefits in the matter of employment or promotion awarded to him upto 28th November, 2000 shall remain unaffected in view of decision of the Supreme Court in Milind's case.

7) In the matter of *Arun Sonone*, (*supra*) the Full Bench has observed in paragraph 66 of the Judgment as quoted below :-

“66. In view of the law, which we have laid down, the relief of protection of service after invalidation of caste claim can be granted by the High Court on the basis of the judgment of the Hon'ble Supreme Court in the cases of *Kavita Solunke v. State of Maharashtra* and others, reported in 2012(8) SCC 430, and *Shalini v. New English High School Association* and others, reported in (2013)16 SCC 526. The manner and the extent to which such protection is to be made available, is laid down as under :

(a) The appointments or promotions made up to 15-6-1995 in public employment on the basis of the Caste Certificates against a post reserved for any of the backward class categories, stand protected in terms of the Government Resolutions dated 15-6-1995 and 30-6-2004 and shall not be disturbed, and the appointments that have become final between 15-6-1995 and 28-11-2000 shall remain unaffected in view of the decision of the Apex Court in Milind's case.

(b) The grant of protection in terms of the Government Resolutions dated 15-6-1995 and 30-6-2004 and the decision in Milind's case, shall be subject to the following conditions :

(i) that upon verification by the Scrutiny Committee, the Caste Certificate produced to secure an appointment, is not found to be false or fraudulent,

(ii) that the appointee shall not take any advantage in terms of the promotion or otherwise after 28-11-2000 solely on the basis of his claim as a candidate belonging to any of the backward class categories, in respect of which his claim is invalidated by the Scrutiny Committee, and

(iii) that it shall be permissible for the Competent Authority to withdraw the benefits or promotions obtained after 28-11-2000 as a candidate belonging to backward class category for which the claim has been rejected.

(c) Any appointments that have become final against a post reserved for any of the categories of backward class on the basis of the production of Caste Certificate without incorporating a specific condition in the order of appointment that it is subject to production of caste validity certificate after 28-11-2000 and before coming into force of the said Act on 18-10-2001 shall also remain protected subject to the conditions mentioned in clause (b) of para 64.

(d) After coming into force of the said Act on 18-10-2001, no benefit or appointment can be obtained or secured in any public

employment against a post reserved for any of the backward class categories merely on the basis of the production of a caste certificate and without producing a caste validity certificate from the Scrutiny Committee. Such appointments are not protected and shall be liable to be cancelled immediately upon rejection of the caste claim by the Scrutiny Committee.”

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8) In Paragraph No. 72 of the Judgment, the Full Bench has observed that there cannot be any straitjacket formula laid down either to refuse or grant protection in the employment either at the initial stage or at the promotional stage. The approach has to be practical and pragmatic rather than technical and pedantic keeping in view the object and purpose of the Constitution in providing the benefits and concessions to a particular category of Backward Class. The Court has to strike the balance between the conflicting claims of genuine candidates, who are denied the benefits meant for them and other persons, who honestly and genuinely believe and claim themselves to be belonging to a particular category for whom the concessions and benefits are meant. The Court will have to consider the facts and circumstances of each case to decide whether the protection is to be granted or refused

and if it is to be granted, up to what stage and extent.

9) Considering the parameters laid down by the Full Bench, we are of the view that the petitioner who has secured the benefits in the matter of promotion as a candidate belonging to reserved category (Scheduled Tribe) prior to 2000 and since it is observed that while claiming such benefit there is no record to indicate nor there is any finding recorded by the Caste Scrutiny Committee or any other Forum that the petitioner has indulged in fraudulent act and/or had relied upon the fabricated documents while claiming the service benefits, those cannot be withdrawn. As has been recorded earlier, since the petitioner has rendered services and actually worked on promotional post he is entitled to claim the salary of promotional post and no recovery from salary already drawn by the petitioner can be permitted. The Hon'ble Supreme Court in the matter of **State of Punjab & Ors Vs. Rafiq Masih (White Washer) & Ors** reported in **(2015) 4 SCC 334** has laid down the principles governing recovery of amount paid in excess of entitlement without any fault of employee.

Paragraph No.18 of the judgment as quoted below :

“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”.

A direction contained in Paragraph 18 (iv) records “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,” would be impermissible.

10) In view of the judgment in the matter of *State of Punjab Vs. Rafiq Masih* (supra) as well as considering the ratio of the Judgment of the Full Bench in the matter of *Arun Sonone* (supra) recovery of amount as directed by the State Government under communication dated 2/11/2012 and 20/12/2012 is impermissible. The petitioner is entitled to claim pensionary benefits accruable to him. In any case,

pensionary benefits received by the petitioner cannot be withheld; for the reasons set out as above. The orders impugned in this petition dated 2/11/2012 and 20/12/2012 are therefore quashed and set aside.

11) As a consequence of setting aside the orders passed by the State Government, as referred to above, the order dated 1/10/2013 passed by the MAT, dismissing the Original Application No. 77 of 2013 tendered by the petitioner, is also quashed and set aside.

12) Rule is accordingly made absolute. No costs.

(A.S. GADKARI,J)

(R.M. BORDE, J.)