

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

WRIT PETITION NO. 5198 OF 2013

Vijay Sambrao Bharati
Age 62 years, Occu. Pensioner,
R/o. Anand Nagar, Yogeshwari
Complex, Flat No. 5,
Nanded.

....Petitioner.

Versus

1. The State of Maharashtra
Through Secretary,
Water Supply Department,
Mantralaya, Mumbai.
2. The Member Secretary,
Maharashtra Jeevan Pradhikaran
4th Floor, Express Towers,
Nariman Point-21, Mumbai.
3. The Chief Engineer,
Maharashtra Jeevan Pradhikaran
Regional Officer, Thane.
4. The Superintendent Engineer,
Maharashtra Jeevan Pradhikaran
Circle, Workshop Corner
Opp. Shinchan Bhavan,
Nanded - 431605.

....Respondents.

Mr. D.R. Irale-Patil, Advocate for petitioner.

Mrs. D.S. Jape, AGP for respondent Nos. 1 to 3.

Mr. D.P. Bakshi, Advocate for respondent No. 4.

WITH
CONTEMPT PETITION NO. 311 OF 2014
IN
WRIT PETITION NO. 5198 OF 2013

Smt. Vijay s/o. Sambrao Bharti,
Age 62 years, Occu. Pensioner,

R/o. Anandnagar, Yogeshwari
Complex, Flat No. 5, Nanded,
Tq. District Nanded.

....Petitioner.

Versus

1. The State of Maharashtra
Through Secretary,
Water Supply Department,
Mantralay, Mumbai - 32.
2. Shriamti Soniya Sethi
The Member Secretary,
Maharashtra Jivan Pradhikar,
4th Floor Express Towers,
Nariman Point, 21, Mumbai.
3. Hemant Landge,
Chief Engineer,
Maharashtra Jivan Pradhikar,
Regional Office, Thane.
4. Lolapod,
Superintending Engineer,
Maharashtra Jivan Pradhikar
Circle, Workshop Corner,
Opp. Sinchan Bhavan,
Nanded 431605.

....Respondents.

Mr. D.R. Irale-Patil, Advocate for petitioner.

Mrs. D.S. Jape, AGP for respondent No. 1/State.

Mr. D.P. Bakshi, Advocate for respondent No. 2.

**CORAM : T.V. NALAWADE AND
SUNIL K. KOTWAL, JJ.
RESERVED ON : 04/04/2018
PRONOUNCED ON : 17/04/2018**

JUDGMENT : [PER T.V. NALAWADE, J.]

- 1) The writ petition is filed under Articles 226, 14 and 16 of

the Constitution of India to challenge the order of respondent employer by which the pay which was fixed on the date of retirement is changed to reduce it and accordingly, pension payable to the petitioner is reduced. The order also involves recovery of excess amount paid to the petitioner. Direction is claimed against the respondent employer to see that the previous pay fixed at the time of retirement is restored and pension is given accordingly and the relief of injunction is claimed to prevent the respondent for recovery of excess amount. The contempt petition is filed by contenting that the order which can be said to be of interim nature made in Writ Petition No. 5198/2013 is not intentionally complied with by the respondent employer. Both the sides are heard.

2) In short, the facts leading to the institution of the writ petition can be stated as follows : -

The petitioner had joined the respondent department of the Government as Junior Engineer. He was given the promotion to the post of Deputy Engineer on 29.6.1991. As per the eligibility conditions for confirmation on the post of Deputy Engineer, it was necessary for the petitioner to pass professional examination which included many subjects. The time was also given for passing this test as three years. The petitioner did not pass such test. The Superintending Engineer made order in the year 2004 to the effect

that exemption was given to the petitioner from passing the professional examination which was requirement for getting confirmation on the post of Deputy Engineer. Though the order was made to see that the increments granted after three years of the date of promotion are withdrawn, infact it was not done and this order was treated as order of confirmation and exemption to professional examination.

3) It is the case of the petitioner that as per the Rules made by the respondent department, after completion of 45 years, it was not necessary for him to pass the professional examination and so, in the year 1996 when he completed 45 years of age, anyhow he was entitled to get the post of Deputy Engineer. It is the contention of the petitioner that due to these circumstances, it cannot be said that the order made by Superintending Engineer on 20.7.2004 giving exemption to the petitioner from passing aforesaid examination was illegal. It is his case that subsequently, he got promotion to the post of Executive Engineer in the year 2004 itself and he retired due to superannuation as Executive Engineer on 31.7.2009.

4) The submissions made by both the sides and record show that due to the order made by Superintending Engineer on

20.7.2004, it was presumed that the petitioner had become Deputy Engineer on 29.6.1991 and due to that as per the seniority fixed, he got the post of Executive Engineer on 11.8.2004. As he retired as Executive Engineer and as all the increments were released to him in the scale of Deputy Engineer right from 1991, he was given benefit of the Pay Commission Reports of 1996 and 2006 and accordingly his pay was fixed at the time of retirement on the post of Executive Engineer. Accordingly, his pension was fixed as Rs.16,575/-.

5) It is specific case of respondent department that it was mistake of Superintending Engineer and even when the petitioner could not have been confirmed on the post of Deputy Engineer due to the circumstance like not passing professional examination, exemption was granted by the Superintending Engineer and due to that subsequent benefits were also given to the petitioner. It is the contention of the respondent department that as per the Building and Construction Manual (B & C) which is applicable to respondent department (made applicable with effect from 31.8.1987) and as per Rules 1 and 2 of Schedule I of those Rules, if an employee gets the post of Deputy Engineer before completing 40 years of age, he needs to pass the professional examination in all the subjects including account subject. Other subjects are technical in nature. The attention of this Court was drawn to those Rules and those Rules

are as per such contentions made by the respondent. Those Rules show that if an employee gets the post of Deputy Engineer by way of promotion between his age of 40 to 45 years, he needs to pass the professional examination in accounts subject only. The Rules show that only an employee, who gets promotion to the post of Deputy Engineer after completion of 45 years, need not appear for professional examination. In the present matter in view of the date of birth of the petitioner which is available and the date of promotion which is available, the petitioner got the post of Deputy Engineer, he got the promotion before 40 years of the age. Due to aforesaid Rules and circumstances, the contention of the respondent department is that the petitioner ought to have passed the professional examination in all the subjects within three years and only after that he could have been confirmed on the post of Deputy Engineer. Rule 1 (c) shows that if Deputy Engineer does not pass professional examination within three years, he cannot be considered for confirmation in that cadre. Thus, the employee like present petitioner needs to pass professional examination first and only after that he can be confirmed in the cadre of Deputy Engineer, he can get his seniority fixed in that cadre and then, he will be entitled to get the post of Executive Engineer. Further, for becoming Executive Engineer, it is necessary to pass the professional examination. In view of these circumstances, it can be said that only due to the

exemption granted by the Superintending Engineer in favour of petitioner on 20.7.2004, he got the promotion to the post of Executive Engineer on 11.8.2004. It needs to be kept in mind that the examination which was to be passed by the petitioner is professional examination and not of the departmental examination of which reference is made by the petitioner in his petition.

6) It is the case of the petitioner that the professional examinations were not held and he was not called to appear for the examinations and so, he cannot be blamed for not passing the said examination within three years. This contention is not at all acceptable. The particulars of professional examinations conducted are given and they show that in the years 1993, 1994, 1995 and 1996 such examinations were held and subsequently, also those examinations were held. The petitioner never applied for appearing in the said examinations. As per the contentions and the result, it can be said that all the officers who had appeared for the said examinations had applied for appearing in the said examinations. It is not that all the officers who had appeared had passed the examinations. In the year 1993 out of 22 officers, 3 failed in examination, in 1994 out of 19 officers 6 failed in examination, in 1995 out of 20 officers 8 failed in examination and in 1996 out of 27 officers 6 failed in examination. These circumstances show that it

was not that easy to pass in the examination and there is circumstance that petitioner never appeared for those examinations. These circumstances cannot be ignored as the petitioner got all the benefits without passing these examinations when as per the Rules, he could not have got even increments after 1996 due to not passing of such examination.

7) The petitioner has made one more contention that no show cause notice was issued to him before refixation of pay. It appears that after filing of the present proceeding, a notice was issued on 12.8.2013 in which reference of departmental circular dated 24.9.2007 was made and it was informed to the petitioner that the order made by Superintending Engineer on 20.7.2004 could not have been passed and the order was cancelled. This order of cancellation was made on 12.9.2013 and by making amendment in the proceeding, the said order is also challenged in the present proceeding. In view of the Rules mentioned above, this Court has no hesitation to observe that the Superintending Engineer had no jurisdiction, power to pass such order in favour of the petitioner in the year 2004. The circumstances that the order came to be passed on 20.7.2004 and he got the promotion to the post of Executive Engineer within one month show that in anticipation of such promotion the order came to be passed and without that order, the

petitioner could not have got the post of Executive Engineer. Due to these circumstances, it cannot be said that the petitioner is innocent person and behind his back, the order dated 20.7.2004 was passed.

8) In view of the aforesaid circumstances and the Rules, the question now arises as to whether the aforesaid mischief or mistake could have been corrected by respondent department and the pay could have been refixed. On this point, the learned counsel for the petitioner placed reliance on the ratio laid down in the case reported as **2014 (4) ALL MR 909 (S.C.) [Sushil Kumar Singhal Vs. Pramukh Sachiv Irrigation Department & Ors.]**. In that case, the employee had retired in the year 2003 and in the year 2005, the mistake in pay fixation which was committed in the year 1996 was noticed and then the steps were taken to correct the mistake. However, there was one more circumstance that the in one subsequent Government Resolution of Uttarakhand Government dated 16.1.2007 it had made it clear that the mistake committed within 34 months prior to the date of retirement can only be corrected and the mistake which is committed prior to that period cannot be corrected. These circumstances were taken in to account by the Apex Court and it was held that the Government was not entitled to reduce the pay and the Accountant General could not have refixed the pension. Thus, the facts of the reported case were

totally different. The present matter does not involve mere mistake in fixation of pay, but there is clear possibility of mischief and due to that mischief, promotion was given to the present petitioner and many increments were released.

9) In the present matter, though the order under challenge amounts to virtually reversion of the present petitioner, for the practical purpose the order involves reducing the pay fixed for pension purpose. Maharashtra Civil Services (Pension) Amendment Rules 2007 are applicable to respondent department. The relevant pension Rule is as under :-

"8. Rule 134-A of the Pension Rules, 1982, reads as under :-

"134-A-Recovery and adjustment of excess amount paid – If in the case of a Government servant, who has retired or has been allowed to retire,

(i) it is found that due to any reason whatsoever an excess amount has been paid to him during the period of his service including service rendered upon reemployment after retirement, or

(ii) any amount is found to be payable by the pensioner during such period and which has not

been paid by or recovered from him, or

(iii) it is found the amount of licence fee and any other dues pertaining to Government accommodation is recoverable from him for the occupation of the Government accommodation after the retirement.

then the excess amount so paid, the amount so found payable or recoverable shall be recovered from the amount of pension sanctioned to him:

Provided that, the Government shall give a reasonable opportunity to the pensioner to show cause as to why the amount due should not be recovered from him:

Provided further that, the amount found due may be recovered from the pensioner in installment so that the amount of pension is not reduced below the minimum fixed by Government."

The above mentioned Rule also empowers to the Government to recover the excess amount paid to the Government servant, because of wrong pay fixation or otherwise. The petitioner has totally failed to make out a case for getting exemption from applicability of this Rule to him. This Court has no hesitation to observe that this Rule enables the respondent to make the correction and even recover the amount in the matter like present one.

10) The learned counsel for petitioner placed reliance on the observations made in some cases by the Apex Court and this Court. Reliance was placed on the cases reported as **(2009) 3 SCC 475 [Syed Abdul Qadir and Ors. Vs. State of Bihar and Ors.]** and **Writ Petition No. 11228/2015 [Dr. Nivruti s/o. Baliram Kalyan Vs. The State of Maharashtra and Ors.]** decided by this Court on 21.12.2015. By using the observations made in these cases, the learned counsel for the petitioner submitted that if the mistake is committed in fixation of pay and the employee has not contributed in that mistake, then the excess amount paid cannot be recovered. It is true that there are some cases in which the Apex Court and this Court prevented the employer from recovering the excess amount paid, but those were Class III and Class IV employees. Further, it is settled law that even such employees cannot say that they have right to get the pay which was fixed on the date of retirement due to mistake. In many cases, this Court and Apex Court prevented the department from making recovery of excess payment mainly on the ground of equity. Thus, no right as such is vested in such employees to get benefit of mistake atleast in future.

11) In the case reported as **2012 AIR SCW 4742 [Chandi**

Prasad Uniyal and Ors. Vs. State of Uttarakhand and Ors.], the Apex Court referred provision of section 72 of the Contract Act and has made observations which are relevant for the present purpose and the observations are as under :-

"15. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy.

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 (2009 AIR SCW 1871) (supra) and in Col. B.J. Akkara (Retd.) case (2006 AIR SCW 5252) (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered.

18. Appellants in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However, we order the excess payment made be recovered from the appellant's salary in twelve equal monthly installments starting from October 2012. The appeal stands

dismissed with no order as to costs. IA Nos.2 and 3 are disposed of."

12) In the case reported as **2006 AIR SCW 5325 [Purushottam Lal Das and Ors. Vs. The State of Bihar and Ors.]**, when promotions were illegally given and after realising the mistake the employees were reverted back to the original posts the order of reversion was maintained by the Apex Court. The Apex Court, however, found that the employees were not at fault for such mistake and they had actually worked on promotional posts, so the Apex Court prevented the employer to recover the excess amount paid. Thus, one thing is clear that the mistake like the present one can always be corrected. The question which remains is the entitlement of the employer to recover the excess amount paid. On that also, it is already observed that only on the ground of equity, Court can protect such employees and that is also on condition that employee had not played any part in the mistake and they were innocent about it.

13) In the present matter, the petitioner had joined the respondent department as Class II employee and he reached up to Class I post. Only due to the order made in the year 2004 by the Superintending Engineer he could get the post of Executive Engineer.

As per the Rules, he could not have been confirmed even on the post of Deputy Engineer and after 1996 he could not have got increments even in the scale of Deputy Engineer. The petitioner, who retired as Class I Officer got the benefit of the order of year 2004 and the other relevant circumstances about the order are also mentioned. The employee of such Class, Class I and Class II Officers are expected to be above board. Such employees are not expected to accept the benefit of orders which they know are illegal. Thus, even if it is presumed that the petitioner had not played active role in getting the order of 2004 from Superintending Engineer, he ought not to have accepted the promotion to the post of Executive Engineer and he ought to have informed to the department that due to aforesaid circumstances, he was not entitled to get that post. However, the record shows that he continued to get increments even after 1996, he got the order of exemption in the year 2004 and on that basis he got the post of Executive Engineer. Due to all these circumstances, this Court holds that petitioner was not innocent person and he had hand in the order of 2004. Thus, there are peculiar circumstances in the present case due to which not only the order made of refixing the pay needs to be upheld, but also the order of recovery of excess payment made against the petitioner needs to be upheld. Unless that that is done, atleast in Government Departments and Government Corporations such mischiefs cannot

be stopped. In the result, the Writ Petition stands dismissed. Interim relief, if any, already granted stands vacated. Rule stands discharged in Writ Petition. The Contempt Petition stands dismissed.

[SUNIL K. KOTWAL, J.]

[T.V. NALAWADE, J.]

SSC/