

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1765 OF 2015

Maruti Tukaram Bagawe & Ors.	...Petitioners
Versus	
State of Maharashtra & Anr.	...Respondents

Ms Amita Toongar i/b. Mr. N. V. Kalantri for Petitioners
Mr. C. P. Yadav – AGP for State – Respondent No. 1.

**CORAM: SMT. V. K. TAHILRAMANI, Acting C. J. &
M. S. SONAK, J.**

DATE : 18 JUNE 2018

ORAL JUDGMENT :

1] Heard the learned counsel for the petitioners and the learned AGP for the respondent no. 1 – State.

2] Rule. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

3] The challenge in this petition is to the judgment and order dated 4th December 2014 made by the Maharashtra Administrative Tribunal (MAT) dismissing petitioners'

Original Application No. 161 of 2009 seeking following reliefs :

“(a) This Hon'ble Tribunal be pleased to hold and declare that the impugned Government Resolution dated 11.09.2008 and the consequential order dated 11.11.2008 at Exhibit 'A' & Exhibit 'B' respectively as unconstitutional, illegal and bad in law and both be quashed and set aside, with consequential benefits in favour of the Petitioners.

(b) Pending the hearing and final disposal of the present Original Application, this Hon'ble Tribunal be pleased to pass an order staying the operation of the impugned Government Resolution dated 11.09.2008, so also operation of the order dated 11.11.2008.

(c) Pending the hearing and final disposal of the present Original Application, the Respondents, its agents and/or servants be restrained from taking any further step with a view to recover the alleged excess payment, on the strength of order dated 11.11.2008.

(d) Costs be provided for.

(e) Pass any other or such order as this Hon'ble Tribunal may deem and proper in the facts and circumstances of the present case.”

4] Ms Toongar, the learned counsel for the petitioners submits that the petitioners on completion of 12 years regular service as junior clerks were quite correctly granted benefit of the pay scale of deputy accountants in terms of GR dated 26th October 2004. She submits that the GR dated 26th October 2004 was wrongly struck down by the

MAT in Original Application No. 936 of 2005. Therefore, at the instance of the petitioners, the judgment and order of the MAT in Original Application No. 936 of 2005 was set aside by this Court. Ms Toongar submits that in these circumstances the respondents were not entitled to issue GR dated 11th September 2008 purporting to withdraw GR dated 26th October 2004 from its inception or with retrospective effect.

5] Ms Toongar submits that in terms of the recruitment rules treasury clerks, both junior clerks as well as senior clerks who have completed 12 years of regular service and who have cleared the prescribed examination are eligible for promotion to the posts of deputy accountant. She submits that since the post of deputy accountant is the next promotional post of junior clerks, the GR dated 26th October 2004 had quite correctly directed the award of scale of deputy accountants to those junior clerks who have passed the prescribed examination and completed 12 years regular service as junior clerks. She points out that there was nothing wrong in the GR dated 26th October 2004 so as to warrant its withdrawal by subsequent GR dated 11th

September 2008.

6] Without prejudice, Ms Toongar submits that there was absolutely no justification for withdrawing the GR dated 26th October 2004 with retrospective effect and on such basis ordering recovery from the pay of the petitioners. She submits that the petitioners are Group 'C' employees and there is not even an allegation of any misrepresentation or fraud against the petitioners. She submits that the MAT, has incorrectly followed the decision of the Hon'ble Supreme Court in the case of ***Chandiprasad Uniyal vs. State of Uttrakhand [2012 (6) Mh.L.J. 498]*** when the facts of the said case were quite distinguishable. In any case, Ms Toongar submits that the MAT was required to follow the later ruling of the Hon'ble Supreme Court in ***State of Punjab & Ors. vs. Rafiq Masih (White Washer) (2014) 8 SCC 883***. Therefore, Ms Toongar, in the alternate submits that recovery of pay at the stage prior to 11th September 2008 is *ex facie* illegal, null and void.

7] Mr. C. P. Yadav, the learned AGP for the respondent no. 1 - State submits that there was a serious anomaly in the

GR dated 26th October 2004, in terms of which, both senior clerks as well as junior clerks were treated at par. He submits that this Court, in its orders dated 26th August 2008 and 5th December 2009 disposing of writ petition no. 946 of 2007 instituted by the petitioners themselves had granted the State liberty to independently consider the issue as to whether GR dated 26th October 2004 needs to be withdrawn or not. Taking into consideration the obvious anomalies, the State, by GR dated 11th September 2008 withdrew GR dated 26th October 2004 from its inception as, the GR, had practiced discrimination as between junior clerks and senior clerks by awarding them the same TBPS scale after completion of 12 years service in their respective grades. Mr. Yadav submits that the State was entitled to take such a policy decision and there is absolutely no illegality or unconstitutionality in GR dated 11th September 2008. He submits that since the petitioners had given undertakings to this Court in the previous petitions, that they would refund the amounts received by them in terms of GR dated 26th October 2004, even though, the GR dated 26th October 2004 had been withdrawn by GR dated 11th September 2008, the petitioners cannot now complain of

recoveries. Mr. Yadav relies upon decision of the Hon'ble Supreme Court in ***High Court of Punjab and Haryana & Ors. vs. Jagdev Singh (2016) 14 SCC 267*** to submit that parties who have given solemn undertakings cannot complain of recoveries in pursuance of such undertakings.

8] Rival contentions now fall for our determination.

9] Ordinarily, matters relating to award of appropriate scales under Time Bound Progression Scheme or Assured Career Progression Schemes, are matters of policy and therefore, the scope of judicial review is extremely limited. Earlier, the State, vide GR dated 26th October 2004 had virtually clubbed junior clerks and senior clerks into one class and offered them the pay scale of deputy accountants upon completion of 12 years of service in their respective grades.

10] The MAT, in Original Application No. 936 of 2005 instituted by the senior clerks had in fact struck down the GR dated 26th October 2004. However, this Court in writ petition no. 946 of 2007 instituted by the petitioners herein,

made a *prima facie* observation that the MAT may not have been justified in striking down the GR dated 26th October 2004 because such GR had not even been challenged by the senior clerks. In order dated 26th August 2008 in which such *prima facie* observations were made, however, this Court, granted the Government liberty to consider and take a final decision on whether the Government seeks to withdraw the GR dated 26th October 2004.

11] In pursuance of the liberty so granted, the Government issued GR dated 11th September 2008 in order to withdraw GR dated 26th October 2004 from its inception. Writ petition no. 946 of 2007 was disposed of by this court by order dated 5th December 2009 after taking cognizance of GR dated 11th September 2008 by which the earlier GR dated 26th October 2004 was withdrawn by the State. The MAT's order in Original Application No. 936 of 2005 was set aside by this Court and the matter was remanded to MAT to consider the petitioners' Original Application afresh in the light of the changed circumstances. This Court, also made it clear that if any benefits had already been granted to the petitioners, then, they shall not be withdrawn until the

petitioners Original Application is finally disposed of by the MAT.

12] MAT has quite correctly held that the petitioners have failed to make out any case to interfere with the GR dated 11th September 2008 primarily because the decision is in the realm of policy and further, the decision was for purpose of setting right the anomaly which had arisen in GR dated 26th October 2004. Admittedly, the junior clerks and the senior clerks follow each other in the hierarchy of posts. The pay-scales of junior clerks and senior clerks are also not the same. In such circumstances, if the State, as a matter of policy, resolves that the junior clerks upon completion of 12 years regular service in the cadre get the benefit of pay scale of senior clerks and the senior clerks in turn, upon completion of 12 years regular service in the grade get the pay scale of deputy accountants, it cannot be said that such decision of the State Government is arbitrary or unconstitutional. Therefore, we see no good reasons to interfere with the impugned judgment and order to the extent, it upholds the GR dated 11th September 2008.

13] However, we agree with Ms Toongar that the MAT was not justified in permitting the respondents State to effect recoveries of the benefits paid to the petitioners between the period 26th October 2004 and 11th September 2010. The MAT, has relied upon *Chandiprasad Uniyal* (supra). However, ruling in *Chandiprasad Uniyal* (supra) has been further explained in *Rafiq Masih* (supra). In the later ruling the following principles have been laid down by the Hon'ble Supreme Court in matters of recovery where payments have been mistakenly made by the employer, in excess of the entitlement of the employees. The principles are set out in paragraph 18 which reads 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 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 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."

14] In the present matter, it is not even the case of the respondents that the petitioners have secured excess benefits on the basis of any misrepresentation or fraud on their part. Such benefits were awarded to the petitioners on the basis of GR dated 26th October 2004, which was holding the field upto 11th September 2008 when it was withdrawn, though, from its inception. There is also no dispute that the petitioners are class III or group 'C' employees and therefore, in terms of the aforesaid principle recovery from them would be impermissible.

15] The petitioners, had indeed given undertakings in this Court in the matter of recoveries. However, the undertakings state that if this Court upholds GR dated 11th

September 2008, then, the petitioners, will agree to the recovery of the benefits which they may have secured despite GR dated 11th September 2008. Although, we are upholding the validity of GR dated 11th September 2008, according to us, in matters of recovery, such GR cannot be applied retrospectively. This means that the respondents can recover such of the benefits from the petitioners as have been received by the petitioners post 11th September 2008. However, applying the principles of *Rafiq Masih* (supra), the respondents are required to be restrained from recovering the benefits received by the petitioners prior to 11th September 2008. The ruling in *Jagdev Singh* (supra) is clearly distinguishable because, in the said case, there was no issue of any retrospective application of executive instructions. The respondent before the Hon'ble Supreme Court had been clearly put to notice that if the payment towards salary was adjudicated as excess payment, then, he would be liable to refund the same.

16] For all the aforesaid reasons, we partly allow this petition and dispose it of with the following order :

(A) The impugned judgment and order to the extent it upholds the GR dated 11th September 2008 is upheld;

(B) However, the direction in the impugned judgment and order for recovery of the excess payments is modified. The Respondents shall accordingly be at liberty to recover excess payments made to the petitioners after 11th September 2008, by way of monthly instalments but the respondents are restrained from effecting recovery or benefits secured by the petitioners prior to 11th September 2008;

(C) Rule is made partly absolute in the aforesaid terms.

(D) There shall be no order as to costs.

(E) All concerned to act on basis of authenticated copy 6666666666 of this order.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)