IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13315 OF 2017

Donald Daniel Ferreira .. Petitioner
Versus
Municipal Corporation of Gr.
Mumbai and ors .. Respondents

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Mr.Rahul G. Walia for the petitioner.
Mr.Pradeep patil for the respondents

CORAM: B.R. GAVAI &
SMT.BHARATI H.DANGRE,JJ.

DATED : 20th APRIL 2018

ORAL JUDGMENT:- (Per Bharati Dangre,J)

1 Rule. Rule made returnable forthwith.

2 Heard by consent.

3 The petitioner has approached this Court, praying for quashing and setting aside the impugned action and the order of re-fixation and recovery of his salary already drawn as 'Head Teacher' and further praying for refund of the recovered retiral dues. By the impugned order dated 29th December 2016, direction is issued to the respondent no.9 to recover overpayment made to the petitioner for a period of 4

years 11 months. The said order is assailed on the ground that the amount is sought to be recovered after a considerable lapse of time from the date of retirement, and therefore, it cannot be sustained.

4 The petitioner was initially appointed as a Teacher in the respondent no.9 school with effect from 1/8/1990 and subsequently was appointed as "Head Teacher" from 2nd September 1996. The appointment of the petitioner was approved by the competent authority i.e. the Superintendent, Private Primary School, Education Department, MCGM. On 29th February 2016, the petitioner retired on attaining the age of superannuation. The petitioner was paid his regular salary and revised pay scales from time to time. There was no dispute ever raised by the respondent authorities in regard to his appointment as a Head Teacher and he was also paid the salary attached to the said post till his superannuation. Further, the yearly account and audit statement concerning the salary of the concerned staff, including the petitioner and other teachers of the school, have been forwarded to the Accounts department on year to year basis and at no point of time, any shortcomings or irregularity was reported.

On his superannuation, with effect from 29th December 2016, the petitioner was entitled for his retiral dues as per the last pay drawn by him on the date of his retirement. However, he was not paid his retiral dues and only a meager amount of Rs.5,940/- per month came to be released in favour of the petitioner with effect from 1/1/2017. However, no amount has been paid from the month of March 2016 to December 2016 towards his pensionary benefits. All the papers relating to pension were already forwarded by the management of the school in which the petitioner is working to the Education Department of the MCGM six months prior to the retirement. The petitioner was running pillar to post for availing the pensionary benefits, when all of a sudden the impugned communication came to be issued, stating that the petitioner was overpaid for a period of 4 years and 11 months and a recovery is to be effected. The recovery is calculated approximately to the tune of Rs.6,00,000/- (Rupees Six lakhs). The petitioner was shocked to receive the said communication when there was no issue about the post on which he was appointed, and it was duly approved by the respondent authorities. Being aggrieved by the said action, the petitioner has approached this Hon'ble Court seeking relief of his pensionary benefits.

Learned counsel for the petitioner would submit that recovery of the petitioner of an amount, after approximately period of two years of his retirement, is highly arbitrary and high handed. He would submit that while issuing the said order, no opportunity was afforded to the petitioner to show any cause and petitioner had a legitimate expectation that at the fag end of his career, he would be enjoying the pensionary benefits due to him for which he is now held to be disentitled. The learned counsel for the petitioner places reliance on the judgment of the Hon'ble Apex Court in case of ***State of Punjab and Haryana and ors Vs. Rafiq Masiha (White Washer***)[1], to advance his submission that the recovery of the amount paid in excess without fault of the recipient should be avoided and the learned counsel would submit that the same is impermissible.

5 Advocate Shri Pradeep Patil, learned counsel for the respondent would submit that since an amount was paid in excess to the petitioner to which he was not found to be entitled, the Corporation was justified in recovering the said excess amount before releasing his pensionary benefits.

On consideration of the rival claim of the parties, it can be seen that the respondents are attempting to effect recovery of over payment from the petitioner for a period of 4 years 11 months on the basis of an order of the DMC (Education) dated 13/9/2017. The copy of the letter dated 13th September 2017 or the decision has not been placed on record by the respondent authorities. The petitioner has been held to be entitled for an adhoc pension of Rs.5940/- which is credited to the account of the petitioner from 1st February

1 (2015)4 SCC 334

2017. No steps have been taken for release of pensionary benefits to the petitioner from 1/3/2016 to 31/12/2016. It can be seen that the petitioner was regularly paid his salary on the post of Head Teacher from 2/9/2016 and there was no suspicion ever raised about his appointment or his capacity to hold the said post. He retired on 29/2/2016 and his pension file was submitted to the Dy. E.O and subsequently to the Accounts Department. It appears that the Accounts Department then raised the following queries :

(a) approval of Additional Division of Std II
(b) teaching experience of 5 years as Assistant Teacher.

6 The Accounts Department then on referring to some circular and grant-in-aid Code book specifically Rule No.34(3)(1)A expressed that the petitioner did not possess the qualification for promotion to the post of Head Teacher. It can however be seen that the said justification, whatsoever cannot be accepted at a point of time when two years have elapsed, since the petitioner has retired and the said objection appears to have been raised much after the petitioner has superannuated and at time of fixing of his pensionary benefits. The petitioner has discharged his duties as Head Teacher and superannuated on attaining age of superannuation. In this backdrop, it would be necessary to refer to the judgment of the Apex Court in ***State of Punjab***

and Haryana Vs.Rafiq Masiha wherein the Hon'ble Apex Court has observed thus in para 7 and 18.

> 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 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. 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.
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> 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:
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> (i) Recovery from the employees belonging to Class III and Class IV service (for 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.
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> (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.
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> (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.
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> (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.

7 In such circumstances, the recovery against the petitioner falling within clause (2) of para 18 of the judgment of Their Lordships and so also in para 3, the impugned action of the respondents is not sustainable and is liable to be set aside. The petitioner is held to be entitled for regular pension and release of his pensionary benefits by taking into his service rendered to the respondents till the date of his superannuation i.e. 29th February 2016.

8 The respondent is directed to calculate the pension due to the petitioner and release the same in favour of the petitioner along with the arrears of pension. The respondents are also directed to pay pensionary benefits within a period of three months along with other post retiral benefits to which the petitioner is entitled as per the service conditions applicable to him.

Writ Petition is allowed.

Rule is made absolute forthwith in the aforesaid terms.

(SMT.BHARATI H. DANGRE,J) **(B.R. GAVAI, J)**

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