

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.

WRIT PETITION NO. 3928 OF 2018

Premchand S/o. Nathu Patil,
Age : 57 years, Occu. Service,
R/o. Pravin Apartment, Plot No. 129,
Block No. 1, Adarsh Nagar, Jalgaon,
District Jalgaon.

.... Petitioner

Versus

1. The State of Maharashtra,
though the Secretary,
School Education Department,
Mantralaya, Mumbai.
 2. The Deputy Director of Education
and Chairman Task Force,
Nashik Division, Nashik.
 3. The Accounts Officer,
Education Department, Jalgaon.
 4. The Education Officer (Secondary),
Zilla Parishad, Jalgaon.
 5. Jalgaon Zilla Maratha Vidya Prasarak
Cooperative Samaj Ltd., Jalgaon,
through its Chairman
Near the Sessions Court, Jalgaon.
 6. Smt. S. D. Sonawane,
Age : 50 years, Occu. Service as the Principal,
Adhyapak Vidyalaya (Men),
Premises of Nutan Maratha College,
Jalgaon, Tq. & Dist. Jalgaon.
- Respondents

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Shri. Avishkar S. Shelke, Advocate for the petitioner
Shri. P. K. Lakhotiya, AGP for respondent/State
Shri. Naseem R. Shaikh, Advocate for respondent No. 6

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**CORAM : S. V. GANGAPURWALA
AND
A. M. DHAVALA, JJ.**

DATE OF RESERVING THE JUDGMENT : 5TH APRIL, 2019
DATE OF PRONOUNCING THE JUDGMENT : 2ND MAY, 2019

JUDGMENT [PER A. M. DHAVALA, J.] :-

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties and taken up for final disposal at admission stage.

2. The petitioner assails the order of respondent No. 2/Dy. Director of Education dt. 18.08.2016 and the order of Principal, College of Education (respondent No. 6) dt. 04.07.2017 whereby his pay and pay scale were reduced and direction for recovery of excess payment made to him was passed.

3. Certain facts are not in dispute.

(a) The petitioner was B.A. B.Ed. and was appointed as Assistant Teacher on 16.06.1989 in Secondary School in respondent No. 5 / Institute in pay scale of Rs. 1400-2600. His appointment was approved and confirmed with effect from 16.06.1989 and 01.09.1992, respectively.

- (b) In 1996, his pay scale was fixed as per 5th Pay Commission as Rs. 5500-175-9000/-. On 16.06.2001, the petitioner completed 12 years of service and the Management granted him benefit of time bound/first ACPS with effect from 16.06.2001. By order dt. 12.04.2008, his pay was fixed at same pay of Rs. 6900 but in the pay scale of Rs. 6500-200-10500 as on 16.06.2001 with next increment on 01.06.2002 (Rs. 7100).
- (c) On 12.06.2009, 6th Pay Commission was made applicable with effect from 01.01.2006. That time the petitioner was drawing basic pay of Rs. 7700 and vittalabdhi was Rs. 13976/-. By order dt. 12.09.2011, as per Corrigendum dt. 13.08.2009, his pay was fixed at Rs. 15600-39100 with Grade Pay of Rs. 5400. Meanwhile, he was transferred from Secondary School to Jr. College on 16.09.2006 and he was given the same pay scale with salary of Rs. 15600 with Grade Pay of Rs. 5400/- from 16.09.2006 as well. This order was under challenge. Meanwhile he had passed M.Ed. In May-2006.

- (d) The Accounts Officer issued a general letter dt. 28.11.2013 to the Principal of College of Education (Adhyapak Vidyalaya) and informed that the petitioner was not entitled for the scale of Rs. 15600-39100 with Grade Pay of Rs. 5400/- and the teachers transferred to College of Education were not entitled to pay protection and therefore transfers could not be effected to College of Education (Adhyapak Vidyalaya) without their consent. It was also informed that, the exemption was granted from possessing basic eligibility by teachers of College of Education who were appointed prior to 1998 and the teachers appointed from 1998 to 09.01.2001 were given time to acquire requisite qualification before June – 2007 at their own expense. It was also clarified that, the teachers working in College of Education were entitled to senior pay scale of Rs. 15600-39100 with Grade Pay of Rs. 5400/- only if they had worked for 12 years as a teacher in College of Education wherein the basic pay scale was Rs. 9300-34800 with Grade Pay of Rs. 4600/-.
- (e) Pursuant to the directions, respondent No. 6 issued notice to the petitioner dt. 16.03.2016 and called his say. The

petitioner submitted his say dt. 27.04.2016 claiming that he was B.A. M.Ed. With 55% marks in B.A. B.Ed. Exam and 54.84% marks in M.Ed. which was to be rounded off to 55%. Besides, he was given ACPS benefit before joining college of Education and therefore he was entitled for the scale given to him. The Accounts Officer passed order dt. 18.08.2016 and reduced the pay scale of the petitioner to Rs. 9300-34800 with Grade Pay of Rs. 4400/- from 01.01.2006 and same pay scale with grade pay of Rs. 4600/- from 16.09.2006 the date on which he was transferred to College of Education. It was observed, (a) though as per NCTE, the Lecturer in College of Education was required to have 55% marks in M.Ed., as per letter of Directorate of Maharashtra State Council of Educational Research and Training, 55% marks condition was applicable to B.Ed. and not for M.Ed. (b) The petitioner had not served in the basic pay scale of Lecturer in College of Education for 12 years and therefore he was not entitled for the higher pay scale awarded to him.

- (f) By order dt. 07.04.2017, respondent No. 6 implemented this order and directed recovery of excess amount of Rs.

4,21,041/- paid to the petitioner to be recovered in monthly installments of Rs. 15,494/-. Hence, this petition.

4. Shri. Avishkar Shelke, the learned counsel for the petitioner argued two points namely;

(i) The petitioner was a double graduate trained teacher. Entry No. 115A introduced in the 6th Pay Commission on 13.08.2009 was applicable and he was entitled for salary of Rs. 15600-39100 with Grade Pay Rs. 5400/-.

(ii) Besides, the petitioner had completed 12 years of service and was given ACP Scheme's benefit in the Secondary School. The scale in Secondary School and teachers in College of Education was the same as per 5th Pay Commission and therefore the benefit of ACPS should be given to him even on the post of Lecturer in College of Education. He relies on Rule 41(5)(b) (iii) of the Maharashtra Employees of Private Schools (Conditions of Service) Ruls, 1981 and the phrase 'the same stage of pay as their existing pay' appearing therein. He relied on the judgment of this Court in the case of Sanjay Yashwantrao Nannaware vs. State of Maharashtra and Ors (Writ

Petition No. 4339 of 2016) with connected matters decided on 10.01.2019 to submit that he was entitled for pay protection. He also relied on the judgment of Apex Court in Union of India vs Hansoli Devi reported in AIR. 2002 SC 3240 to submit that the petitioner is entitled for pay protection as well as protection to the stage of pay meaning thereby the pay scale of senior teacher.

5. Per contra, as per affidavit of the respondents, Shri. P. K. Lakhotiya, learned Assistant Government Pleader for the State argued that, the petitioner had not served for 12 years on the basic pay of Lecturer in College of Education and therefore he was not entitled for senior scale of Lecturer in College of Education. He may be entitled for pay protection but not for promotion. He placed reliance on the judgment of this Court in case of Vidya Vikas Samiti, Paratwada Vs. Presiding Officer, School Tribunal, Amravati Division reported in 1998(2) Bom. C. R. 769.

6. We have carefully considered the submissions made by both the parties. In the light of arguments advanced, we observe as follows.

7. The petitioner was given time bound/first ACPS as on 16.06.2001 and that time he was drawing salary of Rs. 5500-175-9000. His pay was fixed on 16.06.2001 in the pay scale of Rs. 6500-200-10500. This pay fixation is not under challenge.

8. 6th Pay Commission was made applicable from 01.01.2006. It is well settled that, the pay was to be fixed as per the equivalent scales given in the 6th Pay Commission. The scale equivalent to the scale of Rs. 6500-200-10500 in 5th Pay Commission was Rs. 9300-34800 with Grade Pay Rs. 4400 in secondary school and therefore as on 01.01.2006, the petitioner was entitled for pay fixation in the scale of Rs. 9300-34800 with Grade Pay of Rs. 4400/- as per Entry No. 38/40.

9. In May-2006, the petitioner passed M.Ed. Thereafter, the Management has transferred the petitioner on 16.09.2006 from Secondary School to the College of Education (Adhyapak Vidyalaya).

10. Though some objections are made regarding the eligibility of the petitioner, the petitioner has passed M.Ed. Examination which is the qualification required and thereafter his appointment has been approved by the Education Department. Thus the petitioner

possessed the necessary qualification on 16.09.2006 and his appointment has also been approved. Transfer of the petitioner from secondary school to college of education was approved by respondent No.2 and would be governed by section 41(5)(b)(iii) of MEPS Rules, which reads as under:

“(iii) Their pay in the Junior College of Education shall be fixed at the same stage of pay as per their existing pay or at the minimum of the scale of pay in the junior college of Education, whichever is higher.”

11. The pay of the petitioner is fixed as per the 6th Pay Commission as referred to herein above in the pay scale of Rs. 9300-34800 with Grade Pay of Rs. 4400. Now at the time of transfer, the previous pay of the petitioner in 5th Pay Commission is irrelevant. His new pay will have to be fixed as per the pay scale provided for teachers in College of Education.

12. As rightly argued by learned Assistant Government Pleader, the petitioner is entitled for only pay protection and not for promotion. The ACPS given to the petitioner while serving in Secondary School has enhanced his pay scale in the 5th Pay Commission and its benefit was given by way of protection in 6th Pay Commission. The benefit of 1st ACPS cannot be again given to the petitioner in the pay scale of teachers in College of Education. The teachers in College of Education are taking different pay scales. The

basic pay scale is Rs. 9300-34800 with Grade Pay of Rs. 4600 for double graduates.

13. The petitioner is B.A. M.Ed. It has not been disputed before us that he was treated as double graduate (पदवीत्तर पदवीधर) with B.Ed. Initially, 6th Pay Commission was made applicable by Government Resolution dt. 12.06.2009. That time the petitioner's pay fixation was governed by Entry No. 115, which provided pay scale of trained graduate teacher at Rs. 9300-34800 with Grade Pay of Rs. 4400. We find no substance in the contention of learned advocate for the petitioner that, stage of pay means the senior scale granted to the petitioner in Secondary School. The stage of pay means the basic pay reached by the petitioner, as on that day in view of the annual increments received. That is to be protected and not the senior scale. The stage of pay does not mean senior scale.

14. The Entry No. 102 provides scale of Rs. 9300-34800 with Grade Pay of Rs. 4600 for teachers with post graduate degree in second class with B.Ed. (Qualified). The respondents have given this pay scale to the petitioner and it is not disputed that he was entitled for pay scale of teachers with post graduate degree.

15. By Corrigendum dt. 13.08.2009, Entry No. 115A was introduced in the 6th Pay Commission vide Government Resolution, which is as follows: -

Sr. No. in Schedule	Designation	Existing pay scale	Revised pay structure	
			Pay band	Grade pay
115A School Education Department	Post Graduate Teacher in College of Education,	5500-9000	9300-34800	4600
		6500-10500	15600-39100 Higher grade	5400

16. This entry shows that, basic pay of postgraduate teacher is Rs. 9300-34800 with Grade Pay of Rs. 4600/. Since the petitioner's pay was fixed in the pay scale of Rs. 9300-34800 with Grade Pay of Rs. 4400 as on 01.01.2006, as per Section 41(5)(b) (iii), the petitioner was entitled for the earlier pay scale or the lowest pay scale in the new post whichever is higher. Accordingly, the respondents have fixed the pay of the petitioner in the pay scale of Rs. 9300-34800 with Grade Pay of Rs. 4600.

17. The petitioner cannot claim senior scale of Rs. 15600-39100 with Grade Pay of Rs. 5400, when his pay was fixed in the 6th pay commission at Rs. 9300-34800 with Grade Pay of Rs. 4400. Though he is not entitled for senior scale his basic pay as fixed on 01.01.2006 was to be protected. Thus, we hold that the petitioner cannot claim any separate benefit of first ACPS granted him in the

secondary school so as to carry forward the same to the College of Education. He had not worked on the lowest pay scale in the College of Education for a period of more than 12 years to claim benefit of 1st ACPS. The petitioner would be entitled for senior scale of Post Graduate teacher in College of Education only on grant of 2nd ACPS on completion of 12 years from 16.06.2001. We therefore find that the respondents have not committed any mistake with regard to fixation of his pay.

18. The only question that now remains is, whether the excess payment made to the petitioner can be recovered or not? The petitioner had given an undertaking that in case of wrong pay fixation, he is ready to reimburse the excess payment. The payment was made on 12.09.2011. On the same day the undertaking was taken and the direction for recovery was issued on 28.11.2013 and order was passed on 18.08.2016.

19. Normal rule in case of recovery of excess amount paid is laid down in judgments of the Hon'ble Apex Court. In Chandi Prasad Uniyal and others Versus State of Uttarakhand and others reported in (2012) 8 SCC 417, it is observed in para 14 which reads thus:

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.

20. In State of Punjab and Ors. etc. v. Rafiq Masih (WhiteWasher) etc reported in AIR 2015 SC 696, exception has been carved out in case of recovery from Class-III & Class-IV employees as follows:

12. *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 employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).*

- (ii) *Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.*
- (iii) *Recovery from 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.*

21. The petitioner is Class-III employee. He was not at fault for fixation of his pay at higher level. The recovery is for a period of excess of five years. The payments were made long back. It will not be equitable to make recovery from him. The ratio in State of Punjab and Ors. etc. v. Rafiq Masih's case (supra) is squarely applicable. In view of the above, we pass the following order.

- (i) The challenge to the pay fixation as on 01.01.2006 and 16.09.2006 is rejected.
- (ii) As far as recovery to the excess payment is concerned, considering the facts and circumstances, the respondents are directed not to make any

recovery and if recovery is made, it be refunded to the petitioner.

22. Rule is made absolute in the above terms with no order as to costs.

[A. M. DHAVALA]
JUDGE

[S. V. GANGAPURWALA]
JUDGE

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