

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

WRIT PETITION NO.5014 OF 2019

Ajay Shivajirao Pawar
Age: 49 yers, Occupation: Service,
R/o c/o Shri Saibaba Industrial Training Institute,
Shirdi, Taluka: Rahata, Dist. Ahmendnagar
..PETITIONER

VERSUS

1. Shri. Saibaba Sansthan Trust, Shirdi,
Taluka: Rahata, District: Ahmednagar,
Through its Executive Officer.
2. Shri. Saibab Industrial Training Institute,
Shirdi, Taluka: Rahata, District: Ahmednagar
Through it's Principal. ..RESPONDENTS

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Mr. Avinash K. Shejwal, Advocate for the
Petitioner.

Mr. Nitin R. Bhavar, Advocate for Respondents.

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**CORAM : S. V. GANGAPURWALA &
ANIL S. KIOR, JJ.**

DATED : 29th AUGUST, 2019.

ORAL JUDGMENT (Per: S. V. Gangapurwala, J.): -

1. Rule. Rule made returnable forthwith.
With the consent of parties, matter is taken up for
final hearing.

2. We have heard the learned counsel for the
petitioner. The petitioner is challenging the
order dated 10.01.2019, directing recovery of

excess amount of salary allowances paid to the petitioner.

3. We have heard the learned counsel for the petitioner. The learned counsel for the petitioner relies on the judgment of the Apex Court in the case of **State of Punjab and others Vs. Rafiq Masih (White Washer) and others** reported in **2015 (4) SCC 334**. The learned counsel further submits that the petitioner is working as Class-III employee. The recovery is claimed five years prior to the date of the order. The learned counsel submits that the ACPs benefit and the revision of pay scale is not on account of any misrepresentation on the part of the petitioner but it was a decision of the respondent itself.

4. Mr. Bhavar, the learned counsel submits that in 2009, petitioner had given an undertaking that he will refund the excess amount paid on account of wrong pay fixation. In view of the undertaking given by him, the petitioner is stopped now from challenging the recovery. The learned counsel relies on the judgment of the Apex Court in case of **Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others** reported in **(2012) 8 Supreme Court Cases 417**. According to the learned counsel that mistakenly the pay fixation in respect of petitioner was made as per provisions contained in Rule 11 (1) (a) of the Maharashtra Civil

Services (Pay) Rules, 1981. In fact, the pay fixation was to be made as per Rule 11(2) of the Maharashtra Civil Services (Pay) Rules, 1981.

5. We have considered the submissions canvassed by the learned counsel for the respective parties.

6. The present petition is restricted to the extent of recovery claimed by the respondent on account of erroneously granting ACPs benefits and wrong pay fixation.

7. It is not disputed that petitioner is Class-III employees. The benefit was granted to the petitioner on 26.02.2013. The said benefit is withdrawn under order dated 10.01.2019 i.e. after five years of the benefit granted. If the recovery is claimed, hardship would be caused to the petitioner. The Apex Court in the case of **State of Punjab Vs. Rafiq Masih** has laid down following parameters for not allowing recovery on account of wrong pay fixation:-

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from the retired employees, or 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.

8. It would appear that the ACPs benefit and the pay fixation and revision in pay fixation was made by the respondents as per their understanding. The petitioner never misrepresented or played fraud upon the respondents. The respondents accorded the benefit to the petitioner as per the Government Resolution dated 01.04.2010 and 26.02.2013. Inadvertently, the respondents fixed the pay as per Rule 11 (1) (a) of the Maharashtra Civil Services (Pay) Rules, 1981 instead of Rule 11 (2) of the Maharashtra Civil Services (Pay) Rules, 1981. After realizing the same, the respondents under order

dated 10.01.2019 have revised the pay scale so also have initiated recovery. Probably relying upon the undertaking given in the year 2009.

9. The undertaking was already taken in the year 2009, whereas, the revision of pay fixation and the benefit of ACPs was given in the year 2013. The said undertaking would not be of any avail to the respondents.

10. Even otherwise, the parameters as are detailed in the judgment of the Apex Court in case of **State of Punjab Vs Rafiq Masih** (supra) rendered are fulfilled.

11. In light of the above, the impugned order to the extent of recovery claimed from the petitioner is quashed and set aside.

12. Rule is accordingly made absolute in above terms. Writ petition is disposed of.

(ANIL S. KILOR)
JUDGE

(S. V. GANGAPURWALA)
JUDGE