

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

86 WRIT PETITION NO.5992 OF 2018

SHIVSHANKAR PANDURANG HERKAR ..PETITIONER

VERSUS

THE STATE OF MAHARASHTRA AND OTHERS ..RESPONDENTS

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Mr. Suryakant S. Pawar, Advocate for the
Petitioner.

Mrs. P. V. Diggikar, AGP for Respondents-State.

Mr. P. R. Tandale, Advocate for Respondent Nos.2 to
4.

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

DATED : 26th FEBRUARY, 2019.

PER COURT:-

1. Mr. Pawar, learned counsel for the
petitioner submits that the petitioner is
restricting his prayer to the extent of recovery
claimed by the respondents.

2. According to the learned counsel the
petitioner stood retired on 31.07.2007 and the
repay fixation is done and recovery is claimed
under the impugned order dated 29.05.2018. The
learned counsel relies on the judgment of the Apex
Court in a case of **State of Punjab and Others Vs.
Rafiq Masih** reported in (2015) 4 SCC 334.

3. Mr. Tandale, learned counsel submits that at the time when the claim for second ACPS benefit was given it was noticed that the petitioner was entitled for pay scale of Mistry Grade-I but was given pay scale of Junior Engineer. In view of that repay fixation is done under the impugned order and the recovery is claimed. The petitioner had consented for the recovery by giving an undertaking at the relevant time. In such case the respondents are entitled for recovery. The learned counsel relies on the judgment of the Apex Court in a case of **High Court of Punjab and Haryana and others Vs. Jagdev Singh** reported in (2016) 14 SCC 267.

4. As the petitioner is not challenging the repay fixation done under the impugned order, we are not required to go into the merits of the same. The claim is restricted to the recovery made.

5. It is not disputed that the petitioner retired on 31.07.2007 and impugned order is passed almost 11 years after his retirement on 29.05.2018.

6. The petitioner was working as Class-III employee even at the time of retirement. Now claiming recovery from the retiral benefits of the petitioner would cause hardship to the petitioner. The case of the petitioner is squarely covered under the parameters laid down by the Apex Court in a case of **Punjab and Others Vs. Rafiq Masih** (supra). The same can be reproduced as under:

" 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, summarize 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."

7. The reliance placed by Mr. Tandale, learned counsel for the respondents in the case of **High Court of Punjab and Haryana and others Vs. Jagdev Singh** (supra) would not inure to the benefit of the respondent, as in the said case the person

from whom the recovery was claimed has not only given an undertaking but was Class-I officer. In the present case the petitioner had retired 11 years back and now the recovery is claimed. As observed above all the parameters laid down in the case of **Punjab and Others Vs. Rafiq Masih** (supra) are applicable to the petitioner. The judgment in the case of **Punjab and Others Vs. Rafiq Masih** (supra) is near to the facts of the present case.

8. In view of the above, the respondents shall not claim recovery from the petitioner pursuant to the impugned order.

9. It is made clear that as the petition is restricted to the extent of recovery, as far as repay fixation is done the same is not disturbed.

10. Writ Petition is disposed of. No costs.

(A. M. DHAVALÉ)
JUDGE

(S. V. GANGAPURWALA)
JUDGE