Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3798 OF 2005

Nandkumar Shanarrao Mane
adult 51years, Occupation : Service
resident of Rahimatpur, Taluka &
District Satara ....**Petitioner**

Versus

1. State of Mahrashtra
Through the Secretary, Urban
Development Department Mantralaya,
Mumbai – 400 032
2. The Commissioner/ Director,
Municipal Administration, having
Officer on 3rd Floor, Sir Pochkhanwala
Road, Worli, Mumbai – 400 030
3. The Rahimatpur Municipal Council
through the Chief Officer, Rahimatpur,
District Satara ...**Respondents**

AND

WRIT PETITION NO. 3799 OF 2005

Ayub Mohammed Mulla
adult 51 years, Occupation : Service,
resident of Rahimatpur, Taluka & District
Satara ....**Petitioner**

Versus

1. State of Mahrashtra
Through the Secretary, Urban
Development Department Mantralaya,
Mumbai – 400 032
2. The Commissioner/ Director,
Municipal Administration, having
Officer on 3rd Floor, Sir Pochkhanwala
Road, Worli, Mumbai – 400 030
3. The Rahimatpur Municipal Council
through the Chief Officer, Rahimatpur,
District Satara **...Respondents**

Mr. R. M. Pethe, for the Petitioner in both Writ Petitions.
Mr. Yatin S. Khochare, AGP for Respondent no.1.
Mr. R. S. Khadapkar, for Respondent no.3.

CORAM: B. R. GAVAI &
N. J. JAMADAR, JJ
DATED: 3rd January, 2019

COMMON JUDGMENT:- (Per B. R. Gavai, J.)

1. The Petitioners have approached this Court being aggrieved by order dated 13th April, 2004 by which the recovery of excess amount paid to the Petitioners has been directed by Respondent no.2.

2. The facts in brief giving rise to the present petition are as under:

The Petitioners are employed as Accountant and Health Inspector respectively on the establishment of Respondent no.3 – Municipal Council.

It appears that Respondent no.3 – Municipal Council passed resolution on 30th June, 1990 thereby resolving to make the pay scale of the employees of the Municipal Council as per the recommendation of the Fourth Pay Commission. In so far as the Petitioners are concerned, it was recommended that they should be brought in pay scale of Rs.335-15-500-20-580-EB-20-680. The proposal of the Municipal Council was routed through the various authorities including the Collector Satara, the Deputy Director of Municipal Administration and finally it came before Respondent no.2 the Director of Municipal Administration. The Director of Municipal Administration vide its order dated 27th August, 1997 granted approval to the proposal as submitted by Respondent no.3 Municipal Council. However, it appears that Respondent no.2 issued show cause notice on 11th February, 2002 calling upon the Petitioner to show cause as to why the excess amount paid to the Petitioners should not be recovered from them. It appears that both the Petitioners duly replied to the said show cause notice.

3. By the impugned order, Respondent no.2 has held that the fixation of pay scale of the Petitioners was done erroneously and as such, an excess amount has been paid to the Petitioners for which they were not entitled. As such, he directed the pay scale of the Petitioners to be brought down to Rs.1200-2040 from Rs.1400-40-1800-EB-50-2300. He further directed recovery of the amount which was paid to the Petitioners which was in excess than to which they were entitled to. Being aggrieved thereby, the Petitioners have approached this Court.

4. The Division Bench of this Court vide order dated 5th July, 2005 has granted ad-interim relief in terms of prayer clause (b). As a result, the effect of the interim order was stayed by the

impugned order passed by Respondent no.2. Subsequently, while granting Rule on 2nd August, 2005, the interim relief granted earlier was confirmed.

5. By passage of time, the Petitioners have already retired from the service. In view of the interim order passed by this Court the Petitioners have received the salary as per the pay fixation, which was approved by Respondent no.2 in the year 1993. Not only the pension but also the arrears have been paid to the Petitioners from the year 1993.

6. Mr. Pethe, the learned Counsel for the Petitioners submits that the pay fixation which was done in the year 1993, was done on the basis of recommendation of Respondent no.3 – Municipal Council, which was duly approved by all the authorities including Respondent no.3. It is submitted that Petitioners have no role to play in the said pay fixation. However, by the impugned order, the recovery was imposed on the Petitioners though there was no fault on their part. He has relied on the judgment of the Hon'ble Apex court in the case of *Shyam Babu Verma & Ors vs. Union of India & Ors.*[1]

7. Mr. Yatin Khochare, the learned AGP vehemently opposes the petition. He submits that Respondent no.2 has rightly considered that the pay scale of the Petitioners could not have

1(1994) 2 SCC 521.

been higher than the pay scale of the similarly situated employees in the employment of the State Government. He, therefore, submits that the pay scale which was erroneously fixed, was rightly corrected by the impugned order and the recovery was rightly sought to be made of the amount for which the Petitioners were not entitled in accordance with law.

8. Mr. Khadapkar, the learned Counsel for Respondent no.3 – Municipal Council submits that the Municipal Council had passed the resolution for making the pay scale available to the Petitioners as per the recommendations of the Fourth Pay Commission, taking into consideration various factors including the additional work that was undertaken by the Petitioners. He submits that the pay scale was made applicable to them after the same was duly sanctioned by the State Government and as such there was no justification in passing the impugned order.

9. The facts in the present case are not in dispute. It is not in dispute that it was the Municipal Council – Respondent no.3, which had resolved to make the recommendations of the Fourth Pay Commission applicable to the employees of the Municipal Council. It also proposed pay scale for various State Government employees. The said proposal had undergone scrutiny at various levels and approved by Respondent no.3 in

the year 1993. It appears that only after a long period of more than five years, the issue was reopened by Respondent no.3 by giving a show cause notice to the Petitioners. The Petitioners had specifically opposed the notices on various grounds including the limitation. However, by the impugned order Respondent no.2 has rejected the contention of the Petitioners and held that Petitioners were not entitled to the salary more than that of the similarly placed employees of the State Government.

10. The factual scenario that emerges as under:

The Municipal Council had passed resolution to make the Fourth Pay Commission's recommendations applicable to its various employees including the Petitioners on the basis of the same proposal which was submitted to the State Government. The State Government had duly approved the same, only thereafter the said pay scale was made applicable to the Petitioners. Assuming for a moment that the Petitioners were paid salary more than the pay to which they were entitled to, it is clear that the Petitioners had no role to play in the pay fixation and it was done on the proposal of Respondent no.2 and approved by Respondent no.3. The Hon'ble Apex Court in the recent judgment in the case of *State of Punjab & Ors. vs. Rafiq Masih (Whitewasher)*[2] has observed thus:

> "16. This Court in *Syed Abdul Qadir v. State of Bihar* held as follows: (SCC pp. 491-92, para 59)
>
> > "59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. *The learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made.*"
> >
> > (emphasis supplied)
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> Premised on the legal preposition considered above, namely, whether on the touchstone of equity and arbitrariness, the extract of the judgment reproduced above, culls out yet another consideration, which would make the process of recovery iniquitous and arbitrary. It is apparent

2(2015) 4 SCC 334.

from the conclusions drawn in *Syed Abdul Qadir case*, that recovery of excess payments, made from the employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year from the date of his retirement on superannuation.

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:

(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.
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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.
>
> (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."

11. It can thus clearly be seen that the Hon'ble Apex Court held that no recovery can be made of the excess amount paid to the employees, if the excess amount was paid to them for no fault of their. We find that the law laid down in the said case would be entirely applicable to the facts of the present case. It is further pertinent to note that, the Petitioners have retired from the service long back and any recovery at this stage would not only be unjust but would cause great prejudice to them at the evening of their life.

12. In the result, Rule is made absolute in terms of prayer clause (a).

[N. J. JAMADAR, J.] **[B. R. GAVAI, J.]**