

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3128 OF 2018

1. Smt. Nilam Shripad Naik, Age 58 years,
Occu. Retired High Court employee,
Residing at B-1/401, Omkar CHS Ltd.,
Near Phoeix Hospital, Chikuwadi,
Boriwali West, Mumbai 400 092.

....Petitioner

Versus

1. The Registrar General,
High Court, Appellate Side, Mumbai.
2. State of Maharashtra,
Through the Director,
Directorate of Accounts and Treasury,
Maharashtra State, 3rd floor, Thakarsy
House, Mumbai Port Trust, J. N.
Haredia Marg, Bellard Estate, Fort,
Mumbai – 400 001.
3. The Member Secretary,
Maharashtra State Legal Services
Authority, 105, High Court (PWD) Bldg.,
First Floor, Fort, Mumbai 400 032.

...Respondents

Mr. Sanjay Kulkarni, for the Petitioner.

Mr. Rahul Nerlekar, for Respondent nos.1 and 3.

Mr. L. T. Satelkar, AGP for Respondent no.2/State.

CORAM: B. R. GAVAI &

N. J. JAMADAR, JJ

RESERVED ON: 25th February, 2019

PRONOUNCED ON: 8th March, 2019

JUDGMENT:- (Per N. J. Jamadar, J.)

1. Rule.

2. Rule made returnable forthwith. By consent of the
Counsels for the parties heard finally.

3. The Petitioner, a retired employee of the High Court, Bombay, has invoked the writ jurisdiction of this Court being aggrieved by re-fixation of her pay in the post of 'Assistant', though she had worked as the 'Section Officer' with effect from 1st April, 2005, and the recovery of an amount of Rs.1,44,834/- from the Death-cum-Retirement Gratuity benefit, on the count that the said amount was paid in excess of the Petitioner's entitlement due to incorrect determination of her pay.

4. The facts are few and lie in a narrow compass.

(a) On 1st April, 2005, while the Petitioner was working as an 'Assistant' on the establishment of Respondent no.1, the Petitioner came to be appointed as 'Section Officer' on the establishment of the Maharashtra State Legal Services Authority (MSLSA) – Respondent no.3, on deputation. In accordance with the conditions of said appointment, the Petitioner was repatriated to the parent cadre on 4th February, 2006 and was promoted as 'Section Officer' on the very day. After putting in four years service as 'Section Officer', with effect from 4th February, 2010, non-functional pay scale of Rs.9,300/- – Rs.34,800/- with grade pay of Rs.5,400/- came to be made applicable to the Petitioner. Eventually, the Petitioner came to

be promoted as an 'Assistant Registrar', and was due to retire on 31st January, 2018.

(b) In the meanwhile, the pay fixation in respect of the Petitioner came to be verified by Pay Verification Unit, under the control of Respondent no.2. Certain objections were raised. At the fag end of the service of the Petitioner, the Petitioner's pay was re-fixed in the cadre of the 'Assistant' and an amount of Rs.1,44,834/- was proposed to be recovered towards the excess payment. Faced with such prospect, the Petitioner was made to execute an undertaking and thereby give consent for recovery of the said amount from the Death-Cum-Retirement Gratuity, payable to her.

(c) After retirement, the Petitioner obtained certain information and documents from Respondent no.1. The Petitioner realised that the pay was incorrectly fixed in the cadre of the 'Assistant' though she was duly appointed as 'Section Officer' on the establishment of MSLSA. Even otherwise, when the pay was wrongly fixed by Respondent no.1 in the year 2010, there was no fraud or misrepresentation on the part of the Petitioner. Thus, the recovery of the said amount of Rs.1,44,834/- was arbitrary, unjust and iniquitous.

5. Respondent nos.1 and 3 contend that the Pay Verification Unit had found two discrepancies in the pay fixation. First, the pay of the Petitioner, when she was promoted to the post of Section Officer with effect from 4th February, 2006, ought to have been fixed at Rs.13,820/- instead of Rs.13,810/-. Second, when the non-functional pay was made applicable to the Petitioner with effect from 4th February, 2010, in terms of the Government Resolution dated 5th May, 2010, the Petitioner was not entitled to increment in the same year and the next increment was admissible on 1st July of the following year. However, the Petitioner was given an increment on 1st July, 2010. This resulted in subsequent incorrect fixation of her pay, on a higher side, and the consequent excess payment from July - 2010 onwards. In view of the discrepancy pointed out by the Pay Verification Unit, it was necessary to recover the amount, which was paid in excess, and to which the Petitioner was otherwise not entitled. Since the Petitioner has executed undertakings, whenever her pay was re-fixed/revised, to refund the excess amount, if later found to have been wrongly paid to her, the Petitioner cannot now question the recovery and seek refund of the amount in question.

6. We have heard Mr. Kulkarni, the learned Counsel for the Petitioner, Mr. Nerlekar, the learned Counsel for Respondent nos.1 and 3 and Mr. Satelkar, the learned AGP for Respondent no.2/State.

7. Mr. Kulkarni, submitted that the re-verification of pay, vide the Memorandum dated 26th December, 2017 in the post of the 'Assistant' from 1st April, 2005, when the Petitioner was, in fact, posted as the 'Section Officer', on deputation, on the establishment of Respondent no.3, was totally impermissible. This led to the incorrect fixation of pay and the consequent recovery. The second limb of the submission of Mr. Kulkarni was that even if, on account of an incorrect pay fixation, some excess payment came to be made to the Petitioner, in the year 2010 and onwards, the Respondents were not justified in recovering the said amount from the Death-Cum-Retirement Gratuity, on the verge of her retirement. The learned Counsel submitted that the case at hand is fully covered by the judgment of the Supreme Court in the case of ***State of Punjab and others vs. Rafiq Masih (White Washer) and others***¹ as all the situations enunciated therein, in which the recovery was ruled to be impermissible, are found in the instant case.

1 2015(4) SCC 334.

8. In the light of the material placed on record, the first submission based on the re-fixation of pay of the Petitioner in the post of 'Assistant' vide order dated 26th December, 2017, does not merit a deep scrutiny. From the perusal of the Memorandum dated 26th December, 2017 and the table annexed thereto, under the caption Excess Pay Recovery, it becomes abundantly clear that the excess payment came to be made to the Petitioner from July-2010 onwards. Thus, nothing turns on the fixation of pay in the post of 'Assistant' with effect from 1st April, 2005 to 4th February, 2006, the day the Petitioner came to be promoted as a 'Section Officer' on her parent establishment. Nor it is the case of the Petitioner that she was not paid the salary and emoluments of the post of the 'Section Officer' while she worked on the establishment of Respondent no.3.

9. As regards the second challenge, Mr. Nerlekar, the learned Counsel for Respondent nos.1 and 3 would urge that the release of an increment in the month of July-2010 was a patent error. In terms of Government Resolution dated 5th May, 2010, the increment could not have been released on 1st July as the Petitioner was given the non-functional pay scale from 4th February, 2010 and it was admissible in the following year.

Clause (4) of the said Government Resolution dated 5th May, 2010 regulates the date of release of increment in the non-functional pay scale. If the re-fixation is done in the non-functional pay scale from 2nd July to 1st January, the increment can be released on 1st July. However, if non-functional pay scale is made admissible from a date falling between 2nd January to 30th June, the increment becomes admissible on 1st July of the following year. In this backdrop the table annexed to the Memorandum dated 26th December, 2017 reveals that the non-functional pay scale was made admissible to the Petitioner on 4th February, 2010 and an increment was also released on 1st July, 2010, increasing her basic pay from Rs.16,720/- to Rs.17,390/-. This led to the excess payment. In this view of the matter, we do not find that there was any error in re-fixing the pay of the Petitioner vide the Memorandum dated 26th December, 2017.

10. This propels us to pivotal question as to whether the recovery of the excess amount of Rs.1,44,834/- was justified. As observed earlier, the learned Counsel for the Petitioner, banking upon the judgment in the case of **Rafiq Masih** (supra) vehemently urged that the recovery was wholly arbitray and unjust.

11. Mr. Nerlekar would, however, urge with equal vehemence that the Petitioner being a Class-II employee, cannot be permitted to raise the grievance about the recovery, especially after submitting undertakings to the effect that she would refund the amount if it is found to be paid in excess of her entitlement. Mr. Nerlekar, further submitted that pronouncement of the Supreme Court in the case of **Rafiq Masih** has been considered and explained in the case of **High Court of Punjab and Haryana and others vs. Jagdev Singh**² and it was ruled that the former ruling would not cover a situation wherein the officer had furnished an undertaking while opting for the revised pay scale. Reliance was also placed on a judgment of this Court in the case of **Dr. Ravindra Shamrao Darunte vs. State of Maharashtra and others**³ to bolster up the aforesaid submission.

12. In the case of **Rafiq Masih** (supra), the question that arose for adjudication before the Supreme Court was, whether the employees against whom an order of recovery (of the excess amount) has been made, should be exempted in law, from reimbursement of the same to the employer. After an elaborate

2 (2016) 14 SCC 267.

3 2017(3) ABR 563 (Aurangabad Bench).

discussion and a survey of all the previous pronouncements on the said issue, the Supreme Court, culled out certain situations, wherein recoveries by the employer would be impermissible in law, in paragraph 18 of the report, which reads 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, 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.

(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.”

13. Concededly, the Petitioner was a Class-II employee. Thus, the applicability of aforesaid Proposition (i) is ruled out. The learned Counsel for the Petitioner, however, urged that the case

is covered by Clauses (ii), (iii) and (v) of the guidelines delineated above.

14. At this juncture, the reference to the the judgemnt of the Supreme Court in the case of ***Jagdev Singh*** (supra) becomes apposite. In the said case, a Judicial Officer was given a higher pay scale under Haryana Civil Service (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules, 2001. In terms of the said Rules, the said officer had furnished an undertaking to the effect that any excess which may be found to have been paid will be refunded to the Government. It was found that excess payment was made and, thus, action for recovery was initiated. On a challenge by the said officer, on the ground that the recovery was being effected on the verge of his retirement, the High Court quashed the recovery.

15. In the backdrop of the aforesaid facts, the Supreme Court observed as under:

“9. The submission of the respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the State. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the respondent was clearly on notice of the fact that a future

re-fixation or revision may warrant an adjustment of the excess payment, if any, made.”

(emphasis supplied)

16. The Supreme Court, also considered the judgment in the case of **Rafiq Masih** (supra) and specifically held that the principle enunciated in Proposition (ii), extracted above, cannot apply to a situation where an undertaking is furnished. It was thus observed:

“**11.** The principle enunciated in Proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.”

17. Mr. Nerlekar, by placing strong reliance upon the aforesaid observations, strenuously urged that the aforesaid pronouncement is a complete answer to the grievance of the Petitioner as she had submitted the undertakings no 5th September, 2009, 2nd May, 2014 and 29th August, 2018, to refund the excess payment. At the first blush, the aforesaid submission on behalf of Respondent nos.1 and 3 appears attractive. However, there are few aspects which warrant a close scrutiny. Firstly, in the case of **Jagdev Singh** (supra), the Rules under which the senior scale was made applicable,

provided for submission of an undertaking to refund the amount, if found to be paid in excess of entitlement. Secondly, it was indubitable that such an undertaking was, in fact, furnished.

18. In the case at hand, it is pertinent to note that the mistake in determination of the pay, admittedly, occurred on 1st July, 2010. The said mistake occurred subsequent to the non-functional pay scale having been made applicable to the Petitioner with effect from 4th February, 2010. The Respondents have not placed on record any document to show that any undertaking was furnished by the Petitioner before or immediately after the said non-functional pay scale was made applicable to the Petitioner. The first undertaking dated 5th September, 2009 was in the nature of an accompaniment to the Government Circular dated 29th April, 2009. The second undertaking dated 2nd May, 2014 was on account of fixation of pay consequent to the promotion of the Petitioner to the post of 'Assistant Registrar'. The undertaking dated 29th August, 2018 was pursuant to the fixation of pay in the pay scale in terms of Government Resolution dated 31st March, 2018, post retirement. What is conspicuous by its absence is such undertaking in the context of the application of non-functional

pay scale with effect from 4th February, 2010. Thus, the aforesaid pronouncement in the case of **Jagdev Singh** (supra) may not govern the facts of the instant case with equal force.

19. The reliance placed by the learned Counsel for Respondent nos.1 and 3 on the judgment in the case of **Dr. Ravindra Darunte** (supra) also does not appear to be of much assistance to the Respondents. In the said case, the Petitioner was working as a Medical Officer, and had given an undertaking while opting for the revised pay scale. This Court after referring to the judgment of the Supreme Court in the case of **Rafiq Masih** (supra) as well as **Jagdev Singh** (supra), held that the case would not be covered by the propositions in the case of **Rafiq Masih** (supra) as the Petitioner had the potential to earn as a private medical practitioner and he would not thus suffer any hardship on account of the recovery. The Court further found that the petition was totally silent on the aspect of the hardship, which would result to the Petitioner in the event of the recovery.

20. Evidently, the judgment in the case of **Dr. Ravindra Darunte** (supra), came to be delivered in the light of its peculiar facts. In the case at hand, the Petitioner is not a professional,

and therefore, the element of hardship cannot be firmly ruled out. Moreover, the Petitioner has specifically averred that the recovery was highly iniquitous and harsh as the Petitioner required the said amount for the treatment of her husband, who had recently undergone angioplasty. The discharge summary issued by BhaktiVedanta Hospital and Research Institute indicating the Coronary Angiography (CAG) performed by Dr. Sandeep Patil, came to be placed on record, in support of the said claim. The final bill issued by BhaktiVedanta Hospital and Research Institute dated 11th November, 2017 reveals that the expenses of Rs.1,62,292/- were incurred for the said treatment.

21. Having regard to the attendant facts, especially the absence of the undertaking qua the particular fixation of pay, in the non-functional pay scale, with effect from 4th February, 2006, even the applicability of the Proposition (ii), in the case of **Rafiq Masih** (supra), cannot be eschewed from consideration. Proposition (iii) is also attracted as the excess payment was made from July-2010 onwards. Thus, the said excess payment continued for more than five years. In the peculiar facts of the case, as the recovery in question operated rather harshly upon the Petitioner in the backdrop of the

expenses which the Petitioner was required to incur for the treatment of her husband, Proposition (v) is also attracted.

22. We are, therefore, of the view that the recovery of the amount of Rs.1,44,834/- from the Death-Cum-Retirement Gratuity, payable to the Petitioner, a couple of days prior to her retirement was iniquitous and unjustifiable. In our view, the undertaking dated 22nd January, 2018 is of little assistance to the Respondents. Though styled as an undertaking, the said document was, in effect, in the nature of her consent for the recovery from admissible Death-Cum-Retirement Gratuity benefit. Faced with the prospect of either losing out, or inordinate delay in getting, the retiral benefit, such consent can hardly be said to be of the Petitioner's own volition and freewill, so as to bind her inexorably. An undertaking obtained by an employer from an employee at the verge of her retirement when the employee has no bargaining power, in our view, would be of no consequence. We are, therefore, inclined to direct that the said amount of Rs.1,44,834/- be refunded to the Petitioner.

23. For the forgoing reasons, the petition stands partly allowed.

24. The Respondents are directed to refund the amount of Rs.1,44,834/- to the Petitioner within a period of two months from today.

25. Rule made absolute in aforesaid terms. In the circumstances, there shall be no order as to costs.

[N. J. JAMADAR, J.]

[B. R. GAVAI, J.]