IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.772 OF 2019
WITH
CIVIL APPLICATION NO. 1091 OF 2019
WITH
CIVIL APPLICATION NO. 1090 OF 2019

Pune Zilla Parishad, Pune Yashwantrao Chavan Bhavan Somwar Peth, Pune-411 011. Through: Chief Executive Officer	} } }	Appellant (Original Defendant)
Versus		
Shri. Dattatraya Baburao Dhanlobhe Age: 66 years, Occupation-Retired R/at. S-10, Sagar Colony, Shastrinagar, Kothrud, Pune-411 029.	} } } }	Respondent (original Plaintiff)

Mr. Sanjeev J. Rairkar for the appellant/applicant.

Mr. Sugandh B. Deshmukh for the respondent.

CORAM : SMT. SADHANA S. JADHAV, J

RESERVED ON : 4th MARCH 2020.

PRONOUNCED ON : 3rd JULY 2020

PC:

. The appellant Zilla Parishad, Pune takes an exception to the judgment and order passed by the District Judge, Pune in Civil Appeal No. 579 of 2005 dated 7th December 2016, by which the Appellate Court had allowed the appeal filed by the respondent herein challenging the judgment and decree passed in Regular Civil Suit No. 1029 of 2000 dated 28th February 2005 passed by the learned Civil Judge Senior Division, Pune, by which the suit was partly allowed.

2. The substantial questions of law raised by the appellant are as follows:-

> *D. The learned judge of First Appellate Court whether committed gross error of law by placing heavy reliance on Apex Court judgment in Syed Abdul Qadir Vs. State of Bihar, reported in 2009 AIR SCW 1871-(2009) 3 SCC 475, without properly appreciating that the higher pay scale erroneously fixed could very well be revised by the appellant herein when the facts were clear and undisputed and, with respect, the said judgment could not be relied upon as a binding precedent?*
>
> *E. Whether the respondent herein, who accepted the promotion to the post of Development Officer, Education, Grade III without any demur, was bound by the terms and conditions of promotion order of February, 1994 and the pay scale of Rs.1400-40-1600-50-2300 E.B. 60-2600 attached thereto and as such, was not entitled to the higher pay scale of Rs.1640-2900 which he drew prior to his promotion on lower post of Head Master and on such undisputed facts, whether the appellant herein was duly competent to correct the error by placing the respondent in the pay scale of the promotional post and recover the overpayment of Rs. 14,305/- at the time of superannuation by way of deduction, which is very much in consonance with the 'Rules' and the 'undertaking' given by the respondent himself?*
>
> *F. The First Appellate Court whether committed gross error of law by failing to appreciate that error on the part of the authorities of the appellant in granting/continuing the respondent herein in the higher pay scale, though he was not entitled to receive the same on the promotional post, does not create any legal right so and / or equity as to enable him to challenge recovery of the overpayment of Rs. 14,305/-,*

at the time of superannuation?

3. For determination of the said issues, it would be necessary to consider the factual matrix of the case which are as follows:-

> *i) The respondent (the original plaintiff) had joined his service as a temporary school teacher with Zilla Parishad, Pune on 21st September 1959. He was promoted to the post of Head Master on 30th October 1980. In February 1994 he was promoted to the post of Development Officer (Grade-III). He superannuated from employment on 28th February 1999 on the post of Development Officer.*
>
> *ii) The respondent had complied with all the papers for claiming pension, gratuity and other retirement benefits. On 24th January 2000 a gratuity of Rs. 69,886/- was paid to the respondent. His monthly pension was fixed @ Rs. 37,090/- as on 21st January 2000. He had sold 1/3rd portion of his pension. The respondent was paid Rs. 48,667/- against 1/3 pension which was sold. The respondent had reliased that an amount of Rs.14,305/- was deducted as per letter dated 2nd February 1994. The respondent had no idea that an amount of Rs.14,305/- would be deducted as no notice was issued to him. He had brought to the notice of the pay and account department that the deduction of Rs.14,305/- was not in accordance with law. Since there was no response. The respondent was constrained to file a Civil Suit bearing No. 1029 of 2000. The suit was filed seeking an amount of Rs. 38,997/- and calculation was as follows:-*
>
> > *a) Interest @ 18% p.a. on unpaid pension for the period from 01.03.1993 to 24.02.2000.*
> >
> > *b) Interest on the sold portion of pension till 24.01.2000 as he had superannuated from employment on 28th February 1999 and was not paid any dues till 24.01.2000.*
> >
> > *c)* ***Rs. 14,305/- an amount which was deducted by***

the pay and accounts office without following due provisions of law.

4. The main contention in the suit was that on 31st of October 1992 he was promoted to the post of Development Officer, (Grade-III) and the pension ought to have been determined on the basis of the last drawn pay scale i.e. 1640-60-2600-75-2900 vide order dated 16th April 1998. It was contended that once the higher pay scale is given the same cannot be lowered to a pay scale of 1400-2300 and that there is no foundation for pay fixation @ 1400-2300.

5. The respondent had filed written statement, it was contended as follows:-

a) At the time when the plaintiff was promoted to the post of Development Officer the Panchayat Samiti, Shirur had committed an error in his pay fixation and said error had been noticed at the time of determining the pension, as there was pay verification at that stage and therefore, there was deduction of Rs. 14,303/- from his death-cum-gratuity.

b) It was contended that at the time of applying for pension, it is specifically mentioned in the application form that in case there is an excess amount which is paid the same is liable to be deducted in accordance with law.

c) That when he was serving as a Head Master his pay was fixed @ 1640-2900 but when he joined the post of Development Officer on 21st February 1994 the scale of the development officer was 1400-2300.

d) **It was specifically contended that he was given promotion after he was assured of pay protection.**

6. That the salary of a Development Officer is less than that of

a Head Master and knowing this fact fully well the plaintiff ought not to have joined the said post. It was also contended by the defendant that the plaintiff is not entitled to any interest on delayed payment because he had not affixed his photograph on the application, by which he had sold 1/3 pension and therefore a notice was issued to him on 14th January 2000. It was also contended that mandatory notice under section 80 was not issued to the defendant.

7. The plaintiff had deposed in consonance with his suit claim.

8. The learned counsel for the appellant has drawn the attention of this Court to the cross-examination of the plaintiff, wherein there is an admission that he could not recollect as to whether there was protection granted in favour of the plaintiff, at the time when he promoted to the post of a Development Officer. However, in the cross-examination the plaintiff had admitted that when he was promoted to the post of Development Officer <u>he was not given the pay fixed for that post.</u>

9. The Superintendent, Class-II, Education (Primary) School, Pune Zilla Parishad had stepped into the witness box on behalf of the defendant. It is specifically reiterated that Panchayat Samiti had committed an error in pay fixation which had transpired only at the stage of pay verification. **There was evidence on oath that the plaintiff was given pay protection at the time of promotion.**

10. It was the contention of the defendant that the pay and account department of Zilla Parishad had raised an objection at the time of fixation of pension. However, the said communication was not filed on record in the Court.

11. The learned counsel for the appellant has made efforts to draw the attention of this Court to various circulars. It is also contended that the defendant ought to have raised objection after noticing the entries in his service book.

12. It is pertinent to note that there is a specific entry in the service book on the basis of the Government Resolution dated 4th April 1990 issued by the State of Maharashtra and that his salary was fixed @ 1640-60-2300 and the same was sanctioned as per noting in his service book at the time he was relieved from duty as a Head Master.

13. It is vehemently contended by the appellant that there are no specific pleadings in the suit. That the Appellate Court has not assigned any justifiable reasons and that the evidence has not been appreciated in its proper perspective and this aspect according to the appellant is a substantial question of law. It is also contended that there was no specific prayer for fixing of pay and therefore, the Courts have committed a grave error in calculating the pay of the plaintiff @ 1640-2900 .

14. The learned counsel has placed reliance upon the judgment of the Apex Court in the case of ***Union of India and Others vs.***

Bhanwar Lal Mundan reported in (2013) 12 Supreme Court Cases 433, wherein the Appellate Court had observed as follows:-

> *"14....In the case at hand, as stated earlier, the respondent was getting higher scale of pay in the post while he was holding a particular post as a deputationist. After his repatriation to the parent cadre on selection to a higher post he was given higher scale of pay as it was fixed keeping in view the pay scale drawn by him while he was working in the ex-cadre post. Such fixation of pay, needless to say, was erroneous and, therefore, the authorities were within their domain to rectify the same. This analysed, the irresistible conclusion is that the Tribunal and the High Court have fallen into error by opining that the respondent would be entitled to get the pension on the basis of the pay drawn by him before his retirement".*

The said judgment has to be read in the facts of that particular case. More particularly, the fact that in the said case the claimant was sent <u>on deputation</u> and was not drawing salary on a regular promotional post, whereas in the present case, the respondent was granted regular promotion.

15. The learned counsel for the appellant, in order to substantiate the substantial questions of law as framed by the appellant has also placed reliance on the judgment of the Apex Court in the case of ***State of Rajasthan vs. Dayalal and Others*** reported in (2011) 2 Supreme Court Cases 429, wherein the Apex Court was considering the petitions which were initially filed under article 226 of the Constitution of India before the High Court at Rajasthan. In the said case there was a direction by the learned single Judge to the State

Government to frame a scheme on the same lines in which the State Government had earlier framed a scheme relating part time Cooks and Choukidars. The said scheme was framed by the State Government in pursuance to the directions of the Rajasthan High Court. The issues that were framed by the Hon'ble Apex Court were in respect of the absorption by way of regularisation in government service and to draw salary on par with Superintendents in government schemes under those hostels . The said cited case has no relevance in the present case.

16. The learned counsel for the appellant has also placed reliance upon the judgment of the Apex Court in the case of **Secretary, Finance Department and Others vs. West Bengal Registration Service Association and Others** reported in 1993 Supp (1) Supreme Court Cases 153. The Hon'ble Apex Court has held thus:-

> *"The mere fact that the Sub-Registrars were conferred gazetted status and the Registration Service was included in State Service did not entitle the Sub-Registrars to be placed in the higher scale when their duties and responsibilities did not justify the same. One of the basic principles for pay fixation is that the salary must reflect the nature of duties and responsibilities attached to the post, meaning thereby that the pay scale must be commensurate with the task to be performed and the responsibility to be undertaken by the holder of the post".*

There is no reference to the context as far as the present case is concerned and therefore, it would not be appropriate to rely upon the said judgment. In fact the present respondent was working as a Development Officer for a full zone and not restricted to the school as a Head Master and therefore he could not have been expected to work on a lower scale. His pay scale ought to be commensurate with the task performed and the responsibility to be undertaken

17. As against this, the learned counsel for the respondent has placed reliance upon the judgment of the Apex Court in the case of **State of Punjab and Others vs. Rafiq Masih** reported in AIR 2015 Supreme Court 696, wherein the Hon'ble Apex Court had held thus:-

> "....When the excess unauthorised payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery....".
>
> ".... As such if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee...."
>
> "....In such circumstances 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, should be accepted as the period during which the recovery should be treated as iniquitous...."
>
> " 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 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.

18. In the present case it cannot be said that the respondent was in any way responsible for misleading and drawing a salary to which he was not entitled when he was working on the post of a Development Officer.

19. The judgments passed by both the Courts are not arbitrary . In fact both the courts have rightly appreciated the evidence. The learned Appellate Court has also placed reliance upon the judgment in the case of **State of Punjab (cited supra)** wherein orders are passed on

the basis of the directions issued by the Hon'ble Apex Court. The Appellate Court had rightly awarded an interest @ 9 p.a. from the date of suit till its realisation. The appellant has deposited the suit amount in the Trial Court. In fact, the appellant herein ought to have abided by the observations in the service book wherein, the pay was fixed as per the Government Resolution dated 4th April 1996 and same has been considered by the Courts below.

20. The reasons assigned by both the Courts are justifiable, no other conclusion can be drawn to hold that the appellant herein had arbitrarily deducted an amount of Rs. 14305/- from the pension holding that he was given excessive payment while he was working as a Development Officer. It is rightly appreciated that the defendant had contended in the written statement as well as in the substantive evidence that at the stage of promotion the plaintiff was given pay protection.

21. The rights of an employee cannot be ignored more particularly, after superannuation because i.e. the time when an employee would require the amount to which he is entitled and for which he had worked through out his life. Hence, the appeal being sans merits deserves to be dismissed. The substantial questions of law raised by the appellant do not require any consideration.

21. In view of the above discussion and the guidelines issued by the Hon'ble Apex Court in the case of **State of Punjab (cited supra)** the appeal is dismissed. The decree be drawn accordingly and the same

be executed at the earliest, keeping in mind the fact that the respondent as on today is an Octogenarian. The appeal stands dismissed with no order as to costs.

(SMT. SADHANA S. JADHAV, J)