IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8854 OF 2018

Smt. Archana w/o. Rajabhau Deshpande,
Age 44 years, Occu. Service,
R/o. Dnyandeep Primary School,
Shikshaknagar, Sillod,
Tq. Sillod, Dist. Aurangabad. .. Petitioner

Versus

1. The State of Maharashtra
Through it's Secretary,
Rural Development and Soil
Conservation Department,
Mantralaya, Mumbai – 32

2. Education Officer (Primary),
Zilla Parishad, Aurangabad.

3. Account Officer (Education),
Aurangabad.

4. Superintendent,
Pay Squad (Primary),
Zilla Parishad, Aurangabad.

5. The President,
Yashodeep Shikshan Sanstha, Sillod,
Tq. Sillod, Dist. Aurangabad.

6. The Secretary,
Yashodeep Shikshan Sanstha, Sillod,
Tq. Sillod, Dist. Aurangabad.

7. Head Master,
Dnyandeep Primary School,
Shikshak Nagar, Sillod,
Tq. Sillod, Dist. Aurangabad. .. Respondents

...

Mr. B. V. Thombre, Advocate for petitioner
Mrs. M. A. Deshpande, AGP for respondent no. 1 – State
Mr. K. D. Mundhe, Advocate for respondent nos. 2 to 4
Mr. S. R. Kolhare, Advocate for respondent nos. 5, 6 and 7

...

CORAM : RAVINDRA V. GHUGE
AND
S. G. MEHARE, JJ.

DATE : 18TH NOVEMBER 2021

PC :

1. When this petition was filed on 30-07-2018, the petitioner had putforth prayer clauses "A", "B" and "C", as under:

> "A] Rule may be issued.
>
> B] By issuing Writ in the nature of Certiorari or any other appropriate Writ, like nature or any of the direction or order the impugned recovery of Rs.3,29,407/- (three lacks twenty nine thousand four hundred seven) made by the account officer (education), Aurangabad by revised pay fixation dt. 10/04/2018 may kindly be quashed and set aside.
>
> C] By issuing of an appropriate order or direction, it be held and declare that, the petitioner is entitled for amount of Rs.3,29,407/- (three lacks twenty nine thousand four hundred seven) paid during the period of 07/02/2006 to 31/03/2018 to the petitioner."

2. Subsequent to the above, the petitioner amended the petition on 18-10-2019 and putforth prayer clauses B-1 and C-1 as under:

> **"**B-1] By issuing writ in the nature of certiorari or any other appropriate writ, like nature or any of the direction or order the impugned notification dt. 22/04/2009 issued by the finance department, Mantralaya Mumbai at Exh. R-1 page 50 may kindly be quashed and set aside.

C-1] By issuing writ in the nature of Mandamus or an appropriate order or direction to the account officer (Education) Z.P., Aurangabad to make re-pay fixation of the petitioner as per G.R. dt. 01/03/2014, communication dt. 21/08/2019 and communication dt.03/10/2019 and other relevant Govt. Policy introduced by the Govt.**”**

3. The petitioner has, however, not arrayed the Finance Department, Mantralaya, Mumbai as respondent. It is informed that the notification dated 22-04-2009, now sought to be challenged, has already been converted into the Maharashtra Civil Services Pay Rules, 2009 (for short, “2009 Rules”).

4. We have considered the strenuous submissions of the learned counsel for the petitioner and the learned counsel appearing on behalf of the respondents. We are entertaining this petition only to the extent of the grievance set out in the prayer clauses, since the petitioner, has not challenged the 2009 Rules.

5. The petitioner was appointed as an untrained Teacher on 01-07-1997. Her appointment order dated 26-06-1997 indicates her status as “Assistant Teacher”. On 08-06-1999, she was permanently appointed as “Assistant Teacher”. Vide order dated 08-02-2005, the Education Officer (Primary), Zilla Parishad, Aurangabad granted approval to the petitioner as an “Assistant Teacher”. On 07-02-2006, the petitioner acquired the qualification of B.Ed. On 31-07-2006, she was

granted approval as an “Assistant Teacher” by the Education Officer (Primary), Zilla Parishad, Aurangabad.

6. Considering the 6th Pay Commission pay scale recommendations, the petitioner's pay scale was fixed and entry was made in her service-book by the Accounts Officer (Education), Zilla Parishad, Aurangabad, on 12-07-2010. Prior thereto, the petitioner executed an undertaking on 07-06-2009, by which she agreed for refund of any amount that may have been found to be paid in excess as a result of incorrect fixation of pay or if any excess payment is detected in the light of any discrepancies noticed subsequently. There is no doubt that the accounts of such Schools are audited once in ten years. In the audit caused in 2018, it was noticed that the petitioner’s pay fixation was erroneous and she was paid an amount of Rs.3,29,407/- (three lakhs twenty nine thousand four hundred seven), in excess. Based on such Audit Report, the management issued the impugned order directing the petitioner to refund the amount of Rs.3,29,407/- (three lakhs twenty nine thousand four hundred seven).

7. The grievance of the petitioner is, that the impugned recovery ought not to have been made after a passage of eight years. Reliance is placed on the judgment delivered by the Honourable Apex Court in the case of ***State of Punjab and others Versus Rafiq Masih (White Washer)***, ***(2015) 4 SCC 334***. It is further canvassed that as the petitioner is a Teacher, it would cause undue hardships if the said

amount is to be recovered. The undertaking issued by her should be treated as a nominal undertaking.

8. Insofar as the amended prayer clauses “B-1” and “C-1” are concerned, the same are inconsequential as the State Notification dated 22-04-2009 has been converted into the 2009 Rules and pay fixation has been revised by the competent authority pursuant to the Audit Report. If the petitioner is advised to challenge the 2009 Rules, she would be at liberty to do so subject to the objection of delay and laches.

9. The Accounts Officer (Education), Zilla Parishad, Aurangabad has filed affidavit-in-reply dated 21-11-2018. Alongwith the affidavit, an undertaking executed by the petitioner dated 07-06-2009 agreeing to refund the excess payment amount in view of pay fixation, has been placed before us. We find from the pleadings in the memo of the petition that the petitioner has suppressed from the Court that she had executed an undertaking on 07-06-2009, which was before her pay fixation and on the basis of such undertaking, the revised pay fixation was made applicable to her.

10. We find that the obvious reason for the petitioner suppressing this aspect from the Court, was to avoid applicability of the law laid down by the Honourable Apex Court in the case of ***High Court of Punjab and Haryana and Others Versus Jagdev Singh, 2016 AIR (SCW) 3523.***

11. Insofar as the conduct of the petitioner in suppressing material information from the Court as regards the undertaking executed by her, we are of the view that her case would be clearly covered by the law laid down by the Honourable Apex Court in ***Kishor Samrite Versus State of Uttar Pradesh, (2013) 2 SCC 398*** and ***Bhaskar Laxman Jadhav and others Versus Karmaveer Kakasaheb Wagh Education Society and others, (2013) 11 SCC 531***. The Honourable Apex Court has thus ruled, that if a litigant has suppressed material information from the Court, such litigant can be held to have abused the process of law and should be denied relief. It is also ruled that it is not for the litigant to filter information to be divulged to the Court. The litigant should divulge all the factors involved in his case and leave it to the Court to consider as to which of these factors would apply to the case. On this count, we are of the view that the petitioner cannot be granted any relief *insofar* as the recovery of excess payment is concerned.

12. The petitioner has approached this Court in 2018 when she had 14 years' of service left. As on date, she has 12 years' of service and cannot be said to be on the brink of retirement. Having executed an undertaking, the petitioner cannot canvass that the undertaking may be ignored as being as insignificant piece of evidence. Such arguments were canvassed before us, as well as before the Nagpur Bench, which we have considered in the matter of ***Ananda S/o. Vikram Baviskar Versus The State of Maharashtra and others*** (Writ petition No. 13262 of 2018 decided on 1st September, 2021) and observed in paragraph nos. 6 to 10, as under :

*"6. The learned advocate for the petitioner has strenuously contended that the petitioner was a graded headmaster when he retired from service. He has not played any fraud on the management. Though within 4 days, the excess amount has been recovered from him, it was only after he superannuated. He submits that the judgment delivered by the Hon'ble Apex Court in Jagdev Singh (Supra) would not be applicable to him and the judgment delivered in the matter of **State of Punjab and others Vs. Rafiq Masih (White Washer), (2015) 4 SCC 334**, would be applicable to him.*

7. Our Courts are dealing with hundreds of such cases. On each day, we have atleast one such case before us. Considering the law laid down in Rafiq Masih (Supra), our Courts have been quashing notices for recovery on the ground that such notices have been issued long after the retirement of an employee and especially in the cases of Class-IV employees, who would find it difficult to shell out large sums of money towards recovery/payment. Consequentially, we have pardoned several Class-IV employees and protected them as against recovery.

8. We are conscious of the fact that the Hon'ble Apex Court has delivered a judgment in Jagdev Singh (Supra) after noticing that an undertaking was issued by an officer vide which, he had agreed to refund/repay the excess amount.

9. This Court at the Nagpur Bench has dealt with Writ Petition No.4919 of 2018 filed by the State of Maharashtra and Others Vs. Sureshchandra S/o. Dharamchand Jain and Others for challenging the judgment of the learned Maharashtra Administrative Tribunal, Nagpur Bench dated 18.04.2017. In the said matter, the learned Tribunal had relied on Rafiq Masih (Supra) and had granted the relief to the appellant who was a Class-III employee. The learned Division Bench has observed in paragraph nos.4 to 7 as under:

4. The argument submitted in defence is fallacious. An undertaking has the effect of solemnity in law and if argument is to be accepted which has been submitted on behalf of the respondents, the majesty of law would be lowered and there would be a travesty of justice. Besides, the undertaking is about wrong pay fixation and consequent excess payment. The undertaking is not about grant of higher pay on the basis of right pay fixation. Had it been an undertaking as regards the later dimension of the case, one could have perhaps said that the undertaking was only a formality. When the undertaking takes into account the contingency of the wrongful pay fixation, the undertaking has to be said to have been given intentionally and with a view to be acted upon, in case the contingency did really arrive.

5. So, what we have before us is an undertaking given consciously and intentionally by the respondents and the respondents would have to be held bound by this undertaking. That means in the present case, no equity whatsoever has been created in favour of the respondents while making the excess payment and as such there is no question of any hardship visiting the respondents.

6. The reason weighing with the Hon'ble Apex Court imposing prohibition against recovery of excess payment in Rafiq Masih (supra) was of hardship resulting from creation of awkward situation because of the mistake committed by the employer and there being no fault whatsoever on the part of the employee. In order to balance the equities created in such a situation, the Hon'ble Apex Court in Rafiq Masih, gave the direction that so far as Class-III and IV employees were concerned, and who were found to be not having very sound economic footing, would have to be exempted from the consequence of recovery of the excess payment, if considerable period of time has passed by in between. But, as stated earlier, even in case of such an employee, there *would be no hardship for something which has been accepted by him consciously with an understanding that it could be taken away at any point of time, if mistake is detected. Clarifying the law on the subject, the Hon'ble Apex Court, in its recent judgment rendered in the case of **High Court of Punjab and Haryana and others vs. Jagdev Singh** reported in **2016 AIR (SCW) 3523**, in paragraph 11 it observed thus :*

> *"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."*

7. The fact situation of the present case is squarely covered by the above referred observations. These are the crucial aspects of the present case and the Maharashtra Administrative Tribunal, Nagpur Bench, Nagpur appears to have missed out on them and the result is of passing of an order which cannot be sustained in the eye of law."

10. We have a similar case in hand. The petitioner has specifically given an undertaking prior to his retirement that if he has received any amount in excess to what he was legitimately entitled to, the said amount would be repaid or can be recovered. Such undertaking, if ignored, would be reduced to the value of a waste paper. An undertaking has it's own meaning and effect. If an undertaking is not to bind a person issuing it, there would be no sanctity to an undertaking. We cannot accept such an argument canvassed by an employee that an undertaking is a mere formality and should be ignored, lest, we ourselves would be party to neutralising the value of an undertaking."

13. In view of the above, we find, this petition need not be entertained for being devoid of merits as well as for laches attributable to the conduct of the petitioner. The same is, therefore, dismissed.

14. Insofar as the grievance of the petitioner that her 2009 pay fixation in the light of the Notification dated 22-04-2009, now converted into the 2009 Rules, leads to a lesser payment to the petitioner. We are of the veiw that the petitioner has to decide whether she desires to challenge the same, subject to delay and laches. Needless to state that the recovery of the amount from the petitioner is based on the Audit objections and the revised pay scale and, therefore, in the event, in future, it is held by any authority that the pay fixation was on the lower side, such recovery would be subject to the result of such decision.

[S.G. MEHARE, J.] **[RAVINDRA V. GHUGE, J.]**

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