IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.129-2020

1. Shri Rupato M. Lopes,
Major in age, resident of H. No.7/1346, F 9, 1st floor, Raza Enclave, Sirvodem Margao, Goa. ..... Petitioner

2. Smt. Smita A. Vernekar
Major in age, resident of House No. 820, Accaona, Benaulim, Salcete Goa.

3. Shri. Rozendo Mariano Santos Fernandes,
Major in age, resident of H.No. 296, Cavelossim, Salcete-Goa.

4. Shri Shrikant S. Bhandari,
Major in age, resident of H.No.192, Dando, Sanguem Goa.

5. Smt. Ramabai D. Kudchadkar,
Major in age, resident of H.No.752B, Bagwada, Curchorem Goa.

6. Smt. Sunita D. Naique,
Major in age, resident of 84/1, Ashirvad Building, Betqui Borim, Ponda -Goa.

7. Smt. Shanta Kulkarni,
Major in age, resident of 2/3, Antoneta
Housing Co-operative Society, Borda,
Mragao Goa.

8. Smt. Scema S. S. Manerkar,
Z-F-5, Janata Housing Co-op. Society,
Aquem Margao Goa.

9. Shri. Shamba Y. Bhise,
Major in age, resident of C/o WD XIL,
WRD, Gogol, Margao Goa.

10. Smt. Asha R.N Dessai,
Major in age, resident of
H. No.2983, opp. Shilpa Apts,
Chandorwada, Fatorda, Margao -Goa.

11. Shri, Sham N. Poinguinkar,
Major in age, resident of
H. No.862, Welvada, Poinguini, Cancona
-Goa.

12. Shri. Deepak A. Totekar,
Major in age, resident of House No. 768,
Akarwado, Mardol Goa.

13. Shri. Romeo Fernandes,
Major in age, resident of H.No. 409,
Bagwada,
Sanvordem -Goa.

14. Smt. Gracinda Antao, Major in age, resident of H. No13, Chadwado, Davorlim, Navelim, Salcete Goa.

15. Smt. Alka C. Pai Fondekar, Major in age, resident of H. No742, Gogal, Fatorda, Margao Goa.

16. Smt. Antoneta Antao, Major in age, resident of H. No-599/604, Guirdolim, Chandor, Salcete Goa.

17. Shri. Shrikant K. S. Dessai, Major in age, resident of H. No1130, Ghotmored Kakoda,
Curchorem Goa.

18. Mr. Haroon Khan, Major in age, resident of H. No75/G (1), Zorrwada, Davorlim, Margao Goa.

19. Mrs. Lourencinha Fernandes, Major in age, resident of C/O Mr. Vicete J. A. Fernandes, H. NoA. 177, Amnilai, Panchwadi,
Ponda Goa.

21.Smt. Velina Gonsalves,
Major in age, resident of H. No.105, Condy,
Quepem-Goa.

22. Mrs. Jayanti A. Lotliker,
Major in age, resident of 403, Kurtarkar
Landmark, Gogal Margao Goa.

23. Shri. Tulsidas C. Khandeparkar,
Major in age, resident of C/o SLAO,
WRD Complex, Gogol Margao Goa.

24. Shri. Anand V. Naik,
Major in age, resident of C/o WD XII,
WRD, Gogol, Margao Goa.

25. Shri. Vasant B. Sawant,
Major in age, resident of C/o WDXI,
WRD, Rawonfond, Navelim Goa.

V/S.

1. State of Goa through the Chief
Secretary, Secretariat, Porvorim, Bardez,
Goa.

2. The Office of the Chief Engineer,
Water Resource Department,
Panaji Goa.

3. The Director of Accounts,
Directorate of Accounts,
Panaji, Goa. ..... Respondents

Mr. Vithal Naik, Advocate for the petitioner .

Mr. D.J. Pangam, Advocate General with Ms. Ankita Kamat, Additional Government Advocate for the respondents

Coram:- M. S. SONAK &
SMT. BHARATI H. DANGRE, JJ.
Reserved on :- 12th January,2021
Pronounced on :- 29th January 2021

JUDGMENT : (Per SMT. BHARATI H. DANGRE, J.)

1. The petitioners, the employees of the State Government, working with the Water Resources Department have approached this Court seeking quashment and setting aside of the circular dated 02/12/2010 issued by the Government of Goa, Department of Personnel Secretariat by which the petitioners are denied the effect of the MACPS and recoveries were proposed from the petitioners on account of wrongful fixation of their pay. The petitioners also seek a relief of fixation of their salary in the pay scale of Rs.9300-34000 + Rs.4200(G.P.) and the pensionary benefits based on the said pay scales along with future benefits based on revised pay scales. They also seek stay of the impugned circular by

which the petitioners alleged is affecting their prospects of appropriate fixation.

2. The petitioners bank on the judgment passed by this Court wherein the same circular dated 02/12/2010 came to be assailed along with the Corrigendum dated 15/04/2011 and it is the submission of the petitioners that the said Writ Petition was instituted by the employees of the Public Works Department (PWD) of State of Goa and in Writ Petition No.668/2014, the Division Bench of this Court quashed the said circular, qua the petitioners and the petitioners were held entitled for all the benefits in terms of the earlier communications in accordance with law. The petitioners question the denial of the same benefit to them and urge that the State has acted arbitrary in their action and their right to be equally treated as the employees of State Government is violated by the State and therefore they are entitled for a writ in the nature of Mandamus against the State Government.

3. The grievance of the petitioners can be briefly summarized as under :

The petitioners, 25 in number joined the services as Lower Division Clerks (LDCs) for the period ranging between 25 to 34 years and some of the petitioners have retired whereas the petitioner Nos.22 to 25 are in service. The petitioners allege that in terms of the Recruitment Rules the LDC's are entitled to the promotion to the post of UDC on rendering three years of regular service, they are further entitled to the promotion of the Head Clerk on rendering continuous service of three years and in the ladder, the Head Clerk is eligible for the promotion of the post of Superintendent on completion of 5 years of the regular service. The case of the petitioners is that though they were eligible to be promoted to the next higher post of UDC/Head Clerk, on account of non-availability of the vacancies they could not earn the promotion.

4. The "Assured Career Progression Scheme" (ACPS) promoted by the Government of India on recommendations of the Fifth Central Pay Commission applicable for 'B', 'C' and 'D' cadre employees and isolated posts in group 'A', 'B', 'C' and 'D' came to be

adopted by the State of Goa replacing the existing time bound promotion scheme. The emphasis of the ACP Scheme was to remove the issue of stagnation and hardship faced by the employees due to lack of adequate promotional avenues. The said scheme, being adopted by the Government of Goa was made applicable to the employees of the State Government w.e.f. 22/02/2001. Under the said scheme, two financial upgradations were permitted on completion of 12 years and 24 years of the regular service to the class 'B' 'C' and 'D' employees. These two upgradations were entitled to be counted against regular promotions availed from the grade and could be availed only if no regular promotions in the prescribed period i.e. between 12 to 24 years was granted to an employee. The financial upgradation under the scheme was purely personal to the incumbent and in no way to be realised into a functional/regular promotion. In order to avail the benefit of the said financial upgradation, a Departmental Screening Committee was constituted for screening the eligible employees and recommending them for being eligible for the benefits of ACPS.

On the basis of the said scheme the petitioners were conferred with second financial upgradation in the pay scale of Rs.4500-125-7000 being the next promotional pay scale in the hierarchy on completion of 24 years of regular service. The Orders by which the petitioners were granted the second financial upgradation form part of the petition.

5. On the Sixth Pay Commission recommendations from the Government, the State of Goa allowed its employees the benefit of the revised Sixth Pay Commission pay scale. A Modified Assured Career Progression Scheme(MACPS) was introduced w.e.f. 01/09/2008 in the State, by which the Government servant appointed on a regular basis, was entitled for financial upgradation at the intervals of 10, 20 and 30 years of continuous regular service. The case of the petitioners was considered by the committee constituted by the State to examine the cases of revision/upgradation of pay scales. On recommendation of the said committee the State of Goa in principle agreed with these recommendations qua the individual/group case(s) /categories/cadre of posts. Such

recommendation include granting of equivalent scale of pay to the Head Clerk as that of the Senior Assistant in the Secretariat i.e. Rs.9300-34800 +Rs.4200 (GP) in PB-2, equivalent to Rs.5500-9000(pre-revised) to be fixed notionally w.e.f. 01/01/2006 and the actual monetary benefits to be granted w.e.f. 01/10/2009 for the person's functioning in the Departments outside Secretariat.

6. The petitioner who had already completed 24 years of service were granted second financial upgradation by the order dated 11/11/2009 in the upgraded pay scale of the post of Head Clerk and they were placed in the PB-2 of Rs.9300-34800 + Rs.4200/- (GP). Even the third financial upgradation under MACPS was conferred on the petitioners who had completed 30 years of regular service. The similar benefit was conferred to the LDC, UDC and Head Clerk in the Public Works department. Consequent upon the upgradation under the ACP and MACP Scheme the petitioners' pay scale was fixed by their respective Head of the Offices and it is the case of the petitioners that they are regularly availing the upgraded pay scale in the post of Head Clerk.

7. The impugned circular issued by the Department of Personnel, Government of Goa which referred to the OM dated 19/05/2009 which clarified certain queries. This was followed by an order dated 11/11/2009 and several directions were issued in respect of the individual/ group **case(s)/** categories/ cadre of posts. This included clause no.6.1 which reads as under :

> "*6.1 In the case of Senior Assistants/Legal Assistants in Secretariat, the pay scale of Rs.5500-9000/- (pre-revised) is maintained. Based on the recommendations of the Committee, the Head Clerks who function in the Departments outside SEcretariat, shall be granted the pay scale equivalent to the Senior Assistants in the Secretariat i.e. Rs. 9300-34800 + Rs.4200 (GP) in PB-2 pay scale, equivalent to Rs.5500-9000/- (pre-revised), to be fixed notionally with effect from 01/01/2006. The actual monetary benefit shall however be granted with effect from 01/10/2009. In case of those Head Clerks, who have retired after 01/01/2006, their pension shall be fixed accordingly and pensionary benefits shall be granted with effect from 01/10/2009.*"

By the said circular, the benefit under para 6.1 of Government order dated 11/11/2005 is to be extended only to Head Clerks strictly on functional basis only i.e. Head Clerk who function as such and not to those who draw scale by virtue of non functional upgradation i.e. LDC/UDC in ACP-I or ACP-II will not be entitled for Rs.9300-34800+4200 (GP) in Pay Band II. Respondent no.2 issued corrigendum dated 15/4/2011 downgrading pay scale of petitioners who were already granted II financial upgradation under MACPS.

It is this clause which alleged to have adversely affected the prospects of the petitioners and they have approached this Court.

8. This Court in Writ Petition No.668 of 2014 was confronted with the same circular date 02/12/2010 and the Corrigendum issued subsequent thereto. The writ jurisdiction of this Court was invoked by the employees of the Public Works Division who were also conferred upgradation of the pay scale in the PB of Rs. 9300-34800 +4200(GP) in PB-2 pay scale equivalent to

Rs.5500-900 (pre revised). The petitioners before the Court were granted three financial upgradations under the MACPS on completion of 30 years of regular service but by the impugned circular, by stating in paragraph No.6.1 of the order dated 11/11/2009 contemplated extension of the said benefit only to the Head Clerks strictly on functional basis and not to those who draw pay scales by virtue of non functional upgradation was the bone of contention before the Division Bench. On consideration of the rival aspects of the matter and after examining the alleged discrimination qua the employees working outside the Secretariat, Office Memorandum in which categorically held that the right to ACP scheme has already accrued to the petitioners and in fact steps were already taken by the respondents to confer the benefits flowing from the scheme, in such circumstances by claiming that the MACPS which came into force in 2009 with retrospective effect, it was held that the purpose of framing ACP Scheme cannot be defeated to the detriment of the petitioners, as the right had crystallised in their fovour. Reliance is placed on the judgment passed by the Madras

High Court, which took a view that till the introduction of the MACP Scheme vide OM dated 19/05/2009, the benefit accrued to the employees under the erstwhile ACP scheme ought to have been made available. The stand of the respondents that the petitioners are entitled to the MACPS, as it came in force with retrospective effect was rejected and it was fortified that the petitioners were entitled for the benefit of ACP Scheme much earlier. The observation made by the Division Bench in paragraph nos.6 and 7 reads thus :-

> "6 We have considered the submissions of the learned counsel and we have also gone through the records. A short point for consideration is, whether the action of the respondents in refixing the pay scale based on the impugned Circular dated 02/12/2010 stands justified. As already pointed out herein above, the respondents seek to justify such action on the basis that the petitioners are not serving Head Clerks, but were only given such notional promotion on account of ACP Scheme. Clause (1) of the Office Memorandum reads thus :-

> "1. The ACP Scheme envisages merely placement in higher pay-scale/grant of financial benefits (through financial upgradation) only to the Government servant concerned on personal basis and shall, therefore, neither amount to functional/regular promotion nor would require creation of new posts for the purpose;"

> 7 On going through the said clause, it is seen that mere granting of such benefit under the ACP Scheme to an employee does not create any functional promotional post nor create any new post for such purpose. In such circumstances, the action of the respondents to differentiate the pay scale on the basis as to whether the post is functional or not, cannot be read into the said ACP Scheme. In the present case, as such, the stand of the respondents that they are entitled to revise the pay scales in view of the impugned Circular is not at all justified".

Based on the said finding, the operative portion of the order reads thus:

> "1*2. In view of the above, we find that the impugned Circular cannot be sustained and deserves to be quashed and set aside. The petitioners are thus held*

to be entitled for all the benefits as reflected in the earlier Communication dated 11th June, 2010, in accordance with law. Consequently, any recovery made by the respondents based on such impugned order cannot be sustained and deserves to be quashed and set aside.

13. In view of the above, we pass the following :

<u>O R D E R</u>

(I) The impugned Circular dated 2nd December, 2010, as far as the petitioners are concerned, is quashed and set aside.

(II) The respondents are, accordingly, directed to fix the retirement benefits of the petitioners in the light of the observations made herein above.

(III) *Rule is made absolute in the above terms.*"

9 On examination of the case of the petitioner and the challenge to the discriminatory action of the State, we concur with the view of the Division Bench dealing with a similar scenario. We

are also of the opinion that the action of the State is grossly arbitrary and violative of Article 14 of the Constitution and therefore, cannot be sustained.

10. The learned Advocate General object to extension of the same relief to the petitioners and though he do not dispute the preposition that the State cannot deny the relief to a particular set of employees, in case it is granted in place of identically situated employees, he would submit that this principle is however subjected to exception in case of delay and acquiescence. In support he placed reliance in the judgment of the Apex Court **State of Uttar Pradesh and others v/s Arvind Kumar Srivastava and others**[(2015) 1 SCC 347] wherein the Apex Court recognized the normal Rule, when a particular set of employees is given relief by the Court, all other identically situated need to be treated alike by extending that benefit and not doing so would amount to discrimination and would violate Article 14 of the Constitution. However, the Apex Court has also held that this principle is subject to well recognized exceptions in form of delay and laches as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after a long delay because

only because their counterparts had approached the Court, the benefit can be denied to such employees. In the words of the Hon'ble Apex Court held that they will be treated as fence sitters and their claim will be rejected. The exception however is held to be not applicable in cases where the judgment pronounced by the Court was judgment is rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not.

11. Examined the case of the petitioner in the light of the authoritative preposition. From the facts in hand, it can very well been seen that the judgment delivered by this Court in Writ Petition No.668 of 2014 has been accepted by the State Government, and it was not challenged before the higher Court. It is not only the petitioners in Writ Petition No.664 of 2014 who were granted the benefit but based on the said petition, Writ Petition No. 982 of 2017 was instituted and when the dues were not clear, direction came to be issued by this Court in Stamp (Application) No. 1412 of 2018 in Contempt Petition No.1 of 2018 on 2nd May 2018 and the State was directed to implement the judgment in Writ Petition No. 668 of 2014 as well as the order passed in Writ Petition No. 982 of 2017 within a period of four months. Relying upon the said judgment, another Division Bench of this Court (R.M. Borde and

Prithviraj K. Chavan,JJ) by judgment dated 05/12/2018, extended the benefits to the 20 petitioners before the Court relying upon the Division Bench decision in Writ Petition No.668 of 2014 and Writ Petition No.982 of 2017.

The submission that the case of the petitioners suffer from delay and therefore the benefit of the judgment in case of Writ Petition No. 668 of 2014 cannot be extended to them is not acceptable for more than one reason. The present petition has been filed in the year 2019 and the petitioners have placed on record the revision of the pay scales of one of the petitioners based on the impugned circular and which is dated 22/12/2016. The excess salary paid to the particular petitioner Tulsidas Khandeparkar is sought to be withdrawn by the statement annexed with the petition. Similar is the case of Smt. Alka Pai Fondekar wherein the recovery is sought for the period from 01/10/2009 to 31/10/2011. The petitioner has made a specific statement in paragraph 21 of the petition that the respondent no.3 has not approved the pension cases based on the upgraded pay scale granted by the State Government and in respect of same of the petitioners who have completed more than 36 years of continuous regular service and have retired, recoveries have been effected. Pertinent to note that the pre-revised pay scales of some other categories such as Stenographers, Accountants, Assistant Accounts Officer, Account Officers etc. are similarly upgraded by very same order dated 11/11/2019, but the condition imposed for granting the upgraded pre-revised pay scale to the LDCs/ UDCs under ACP Scheme has not been imposed on those categories. The State action has already held to be discriminatory. The petitioners are part of the same cadre/ class in respect of whom the Office Memorandum and the order dated 11/11/2019 has been held to be unsustainable and has been quashed and set aside. The petitioners fall within the purview of the same cadre i.e. Head Clerks and to whom the actual monetary benefits are conferred w.e.f. 01/01/2009 and those who have retired their pension has been directed to be fixed and granted w.e.f. 01/10/2009. The State Government is not entitled to discriminate between the employees of two of its wings i.e. the PWD and Water Resources Department. Though while delivering the judgment in Writ Petition No.668 of 2014, the circular dated 02/12/2010 has been held to be quashed qua the petitioners in that case, applying the parameters of Article 14, the petitioners cannot be denied the same benefit and particularly when on appreciation of the arguments advanced on behalf of the petitioners and the State Government, we find that the State

Government has failed to offer any justification for the discrimination amongst the Head Clerk's functioning outside the Secretariat; in respect of the Senior Assistant/legal Assistant in Secretariat the pay scale in the pre-revised band is maintained. On perusal of the Office Memorandum dated 09/09/2010 issued by the Government of India clarifying certain issues, clause No.6.1 of Annexure 1 of the MACPS which has come into existence from 01/09/2008 with the pay structure being changed with retrospective effect i.e. from 01/01/2006, it is clarified that the previous ACPS would be applicable in the new pay structure adopted w.e.f. 01/01/2006. The quashment of the relevant clause of the impugned Government circular is equally applicable and extended to the Head Clerks working in the Water Resources Department of the Government and we see no reason to deny them the benefit which has accrued to the Head Clerks in the PWD.

12. Another reason which prompt us to deprecate the recovery is the settled legal principle laid down and reiterated in **State Of Punjab & Ors vs Rafiq Masih (White Washer) and others** [(2015) 4 SCC 334] , where the Apex Court has summarised a few situations on hardship wherein recoveries by the employers

have been held impermissible in law and the contingencies stipulated at paragraph No.18 which reads thus:

> *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 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."

The case of the petitioners would fall within the said cases exhibiting hardship and the relief, restraining the recovery of excess payment is harsh on account of the fact that they have been deprived of their entitlement and also in equity since in exercise of judicial discretion the power can be exercised to relieve the employees from the said hardship if the recovery is implemented. The fixation of pay scale of the petitioners was an unilateral act on the part of the respondent Government and at a subsequent point of time there cannot be a U-turn by stating that its employees are not entitled for the benefit which they were already held entitled for. We, therefore, do not agree with the submissions advanced by the learned Advocate General as we feel that the petitioners who belonged to the

Water Resource Department can not be given of step motherly treatment as against their counterparts of the PWD against whom the embargo granted by the impugned circular has found to be detrimental to their interest and has been quashed and set aside.

11. In the about terms the writ petition is allowed by granted relief in terms of prayer clause A and B which reads thus.

> *"a) Issue a Writ of Certiorari or a writ in the nature of Certiorari, or any other appropriate writ, order or direction quashing and setting aside the impugned Circular dated 02/12/2010 issued by the Respondent No.3 and the recoveries effected from the petitioners in pursuance thereof vis a vis these petitioners;*
>
> *b) To direct fixation of the Salary and Pensionary benefits of the petitioners in the Pay scale of Rs.9300-34000+Rs.4200(G.P) along with future benefits based on the revised pay scales."*

SMT. BHARATI H. DANGRE, J. **M. S. SONAK, J.**

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