

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.579 OF 2017

1.Shri Rajan Madathil,
Major in age,
Ex-Instructor at Goa College of Engineering,
R/o Bharadwaj Building, Flat No: G-2
Ground floor, Nagzar, Curti,
Ponda Goa. ... Petitioner

Versus

1.State of Goa
Through Chief Secretary
With office at Secretariat,
Porvorim Goa.

2.The Principle,
Goa College of Engineering
Farmagudi Goa.

3.The Director,
Directorate of Technical Education,
Porvorim Goa.

4.The Director of Accounts (Pension Section)
Directorate of Accounts,
With office at Panaji,
Panaji Goa.

5.Under Secretary (Personnel-I)
Department of Personnel,
Secretariat,
Porvorim-Goa. ... Respondents

Ms. A. A. Agni, Senior Advocate with Ms. Jay Sawaikar, Advocate for the Petitioner.

Mr. Pravin Faldessai, Additional Government Advocate for the Respondents.

AND
WRIT PETITION NO.1009 OF 2015

Shri. Suvas Naik, major
Ex-instructor of workshop
Goa Engineering College Farmaguddi Ponda
R/o H.No.96/3, Mae De Deus
Sangolda Bardez Goa

..... Petitioner

Versus

1. The State of Goa
Through Chief Secretary
Secretariat, Porvorim - Goa.

2. The Under Secretary Finance Department
(R&C) Secretariat, Porvorim - Goa

3. The Principal
Goa College of Engineering
Farmagudi Ponda Goa.

4. The Director of Accounts,
Govt. of Goa
Panaji-Goa

..... Respondents

Ms. A. A. Agni, Senior Advocate with Ms. Jay Sawaikar, Advocate for the Petitioner.

Mr. Deep Shirodkar, Additional Government Advocate for the Respondents.

**Coram:- M. S. SONAK &
BHARATI H. DANGRE, JJ.**

Reserved on:- 1st February 2021

Pronounced on:- 3rd February 2021

JUDGMENT (Per M. S. Sonak, J)

Heard Ms. A. Agni, learned Senior Advocate with Ms. J. Sawaikar, learned counsel for the Petitioner in both these petitions, Mr. P. Faldessai, learned Additional Government Advocate for Respondents in WP No.579 of 2017 and Mr. D. Shirodkar, learned Additional Government Advocate for Respondents in WP No.1009 of 2015.

2. The learned counsel for the parties agree that the issues involved in both these petitions are substantially common and therefore, both these petitions may be disposed of by a common judgment and order.

3. In Writ Petition No.579 of 2017, Ms. Agni, learned Senior Advocate for the Petitioner has made the following three submissions:-

(a) That the retirement of the Petitioner on his attaining the age of 60 years with effect from 30th October 2015 was violative of Section 15A of the Goa University Act, 1984 (the said Act) and the Petitioner, being a member of the teaching staff of Goa College of Engineering, which is affiliated to the Goa University ought to have been

permitted to continue in service until he attained the age of 62 years i.e. up to 30th October 2017. She relies on *Madhuri S. Savaikar Vs State of Goa and others*¹ and *Mansavi Vadiakar Vs State of Goa and others*² in support of this submission;

(b) That there was no error whatsoever in the pay fixation of the Petitioner consequent upon the grant of third pay up-gradation vide order dated 25th June 2014 and 16th October 2014. She submits that such pay fixation was consistent with the rules then in force and therefore, the Respondents were not justified in reducing the pay and emoluments payable to the Petitioner in the name of correction of non-existent error. She, therefore, submits that the Petitioner is entitled to restoration of earlier paid emoluments which according to her were correctly fixed by the Respondents themselves;

(c) In any case and without prejudice to the submission at (b) above, Ms. Agni submits that there was no justification for recovering an amount of Rs.95,890/- from the Petitioner, by alleging the same as excess payment. She submits that the Petitioner was a Group C employee and such recovery was made after the Petitioner retired from service. She submits that such a recovery was barred in terms

1 Writ Petition No.375 of 2011 decided on 26th September, 2019

2 Writ Petition No.58 of 2020 decided on 22nd January, 2021

of law laid down by the Hon'ble Supreme Court in the *State of Punjab and others Vs Rafiq Masih (White Washer) and others*³.

4. Ms. Agni, learned Senior Advocate on behalf of the Petitioner in Writ Petition No.1009 of 2015 adopted the above submissions and urged that the rule in the said petition also be made absolute.

5. Mr. P. Faldessai and Mr. D. Shirodkar, learned Additional Government Advocates submitted that neither of the Petitioners were “*Teachers*” as defined by All India Council for Technical Education (AICTE) and therefore, were ineligible for the benefits of the provisions under Section 15A of the said Act. They pointed out that the AICTE Regulation of 2010 contemplates only three designations of teachers in University and College namely Assistant Professor, Associate Professor, and Professor. Admittedly, the Petitioners were neither of these and therefore, ineligible to continue in service until they attain the age of 62 years.

6. Mr. Shirodkar pointed out that there was undue delay and laches in the institution of Writ Petition No.579 of 2017 since the Petitioner therein retired on 30th October 2015 and the petition was instituted only on 25th April 2017. He submitted that this is an additional reason as to why the relief should be denied to the Petitioner

³ (2015) 4 SCC 334

in Writ Petition No.579 of 2017.

7. The learned Additional Government Advocates pointed out that there was a clear error in pay fixation and there was nothing wrong in Respondents correcting such error. They referred to the affidavits of the Respondents to point out the nature of the error and they relied on the decision of the Hon'ble Supreme Court in ***Chandi Prasad Uniyal and Ors vs State of Uttarakhand and Ors***⁴ to submit that there was nothing wrong in effecting recoveries. They also pointed out that the Petitioners had voluntarily agreed to the recovery of said amounts from out of gratuity amount payable to them and therefore, the Petitioners were estopped from challenging any such recoveries. For all these reasons, they urged the dismissal of both these petitions.

8. The rival contentions now fall for our determination.

9. The Petitioners in both these petitions were admittedly instructors at the Goa College of Engineering. There is no dispute that the Goa College of Engineering is affiliated to Goa University.

10. In the context of grant of benefit of enhanced age of superannuation from 58 to 60 years, the State vide order dated 11th October 2000 had considered “*instructor*” as a member of the teaching staff. There is other material on record to indicate that the Petitioners were actually discharging teaching duties and were always considered as

4 (2012) 8 SCC 417

members of the teaching staff.

11. Section 15A of the said Act provides that the retirement age on superannuation of the teaching staff of the Goa University and the affiliated colleges of the Goa University, whether aided by the Government or not, including the Principals of such colleges, shall be sixty-two years.

12. Since the Petitioners were the members of the teaching staff of Goa College of Engineering, which is admittedly a college affiliated to the Goa University, the Petitioners were entitled to the benefits of the provisions in Section 15A of the said Act and entitled to continue in service until they attain the age of 62 years.

13. The contention similar to the one based upon the AICTE regulation was considered and rejected by this Court in the case of *Madhuri S. Savaikar* (supra). The State has not challenged the decision in *Madhuri S. Savaikar* (supra) and thus, has accepted the same. Therefore, it was not open to the State to once again urge the same contention in the present matters. In any case, based on the reasoning in *Madhuri S. Savaikar* (supra), such contention is hereby rejected.

14. Even the facts in *Madhuri S. Savaikar* (supra) and *Mansavi Vadiekar* (supra) are quite similar to the facts in the present petitions. In *Madhuri S. Savaikar* (supra) the Petitioner was a Sister Tutor in the

institution of Nursing Education and was held entitled to the benefits of Section 15A of the said Act. In *Mansavi Vadiekar* (supra), the Petitioner was a Clinical Instructor in the Institute of Nursing Education and was also held entitled to the benefits of Section 15A of the said Act. Thus, applying the reasoning in *Madhuri S. Savaikar* (supra) and *Mansavi Vadiekar* (supra), both the Petitioners were entitled to continue in service until they attain the age of 62 years and could not have been retired upon their attaining the age of 60 years as was done in the present cases.

15. It is true, there is some delay in the institution of Writ Petition No.579 of 2017. However, the Petitioner has pointed out that he had made representations on the issue of the age of retirement. Ms. Agni, also referred to us to the averments in paragraph 28 of the petition, in which the Petitioner has explained on oath the circumstances in which the petition could not be filed earlier. The Petitioner has referred to the health issues with which he was afflicted and which prevented him from instituting the petition, earlier. Ms. Agni also relied on *Mansavi Vadiekar* (supra) in which the State did not raise the issue of delay to submit that this is a fit case where both the Petitioners should be granted the benefit of salary and other emoluments for two years during which they were not permitted to work, on account of their premature retirement at the age of 60 years.

16. According to us, in the facts of the present case, the relief as

claimed in the petition on the aspect of age superannuation cannot be denied to both the petitioners. Given the decision in *Madhuri S. Savaikar* (supra), it was expected that the State on its own extends the benefit of Section 15A to both the Petitioners. This is also not a case where some third party rights will be affected by the grant of additional retiral benefits to the Petitioner. The Petitioner has offered a detailed explanation for the delay and the delay cannot be said to be either inordinate or unexplained.

17. In so far as the second contention of the Petitioner is concerned, from the perusal of the affidavits filed on behalf of the Respondents, we are quite satisfied that there was indeed an error in pay fixation and such error noticed and thereafter corrected. Ms. Agni's contention that the pay fixation was correctly made cannot be accepted in the facts and circumstances of the present case. Rather, we reproduce the contents in paragraphs 19 to 23 of the affidavit filed by Prakash Pereira, Director of Accounts as from the same it is evident that there was an error in pay fixation leading to excess payment to the Petitioners. There was no infirmity or bar in the correction of such error as was held in *Rafiq Masih (supra)* and *Uniyal (supra)*. Paragraphs 19 to 23 of the affidavit read as follows:-

“19. I state that the Respondent no. 2 has on the recommendation of the VIth Pay Commission, has revised the pay fixation statement under Revised Pay (Rules) 2008 and therefore, the pay of the Petitioner has been revised w.e.f. 01.01.2006 by considering the existing basic

pay of Rs. 9025/- in the pre revised pay scale of Rs. 7450-11500 and the pay of the Petitioner had been fixed to Rs.16790+4600 Grade pay w.e.f. 01.01.2006. I repeat and reiterate as that stated hereinabove, the Respondent No. 2 has instead of considering the existing basic pay @ Rs.9025/-, w.e.f. 01.01.2006, has erroneously considered the basic pay @ Rs. 9475/- w.e.f. 01.02.2006 i.e. from the date the Petitioner opted to fix his pay which was subsequently rectified upon the observation made by this Respondent wherein a corrigendum was issued stating that the pay of the Petitioner had been revised w.e.f. 01.01.2006 instead of 01.02.2006 but the Respondent no.2 failed to correct the existing basic pay from Rs. 9475/- to Rs. 9025/- I state that upon the pay fixation, the Petitioner was granted the benefit of pay fixation on grant of 2nd ACPS w.e.f. 01.07.2006 i.e. upon the accrual of annual increment by raising his pay to Rs. 18110+4600 from 16790+4600 to which this Respondent raised a objection that the pay fixation done as on 01.07.2006 is erroneous.

20. I state that on account of merger of pre-revised pay scales of Rs.6500-200-11500 and 7450-225-11500 and in the light of the Office Memorandum dated 01.09.2008, the pay of the Petitioner was revised to 20710+4800 grade pay by the Respondent No.2 in terms of the OM dated 19.05.2009 by granting 3% increment and the grade pay of Rs.4600 of the Petitioner was revised to Rs.4800/-w.e.f. 01.09.2008 to which this Respondent raised an observation (at sr.no. 2 of the letter dated 24.11.2015) that the grant of increment by 3% w.e.f. 01.09.2008 was incorrect.

21. I state that in light of the said OM dated 13.11.2009 pertaining to merger of the pre revised pay scales, the posts which were in the pre revised pay scale of Rs. 6500-

10500 as on 01.01.2006, had been granted revised grade pay of Rs. 4600 and therefore, posts which were upgraded in the pay scale of Rs. 6500-10500 have been merged in the pay scale of Rs. 7450-11500.

22. I state that as stated herein above, the Petitioner was appointed to the post of Instructor in the pay scale of Rs. 440-750 (1400-2600 as per IVth Pay commission) w.e.f. 21.21.1981. I state that thereafter on completion of 12 years, the Petitioner was granted Time Bound Promotion Scale of Rs. 2000-3200 (6500-200-10500 as per Vth Pay Commission) w.e.f. 21.12 1993 and 2nd financial upgradation under ACPS in the pay scale of Rs. 7450-225-11500 w.e.f. 21.12.2005. I state that as per the revised pay structure under CCS Revised Pay (Rules) 2008 and subsequent implementation of MACP Scheme, the pay scales were merged and granted grade pay of Rs. 4800/- w.e.f. 01.09.2008 with an increment of 3%. I state that in terms of OM dated 13.11.2009 of the Modified Career Progressive Scheme, on account of merger of pay scales, only grade pay was to be granted and since an increment of 3% was granted to the Petitioner, an observation to that effect was raised.

23. I further states that on completion of 30 years of qualifying service, the Petitioner has been granted the 3rd financial upgradation under the MACP Scheme in the pay scale of Rs. 9300- 34800+5400 w.e.f. 01.12.2011, however, upon the scrutiny of the pay fixation of the Petitioner, it was observed that the pay of the Petitioner was not fixed in consonance with the condition laid down under Rule 13 of the CCS Revised Pay (Rules) 2008. I state that the Respondent No.2 granted two increments @ 3% which was incorrect when Rule 13 clearly provides that 3% increment was to be calculated on BP+GP. I state that as per the revised pay structure, the rate of increment

on account of upgradation/promotion is fixed at 3%, however, the Respondent No. 2 has calculated the 3% increment on grant of 3rd financial upgradation under MACP Scheme raising his pay from 21760+5400 to Rs.23930+5400 w.e.f. 11.12.2011 which is not in order.”

18. Similar reasoning applies in the case of the Petitioner in Writ Petition No.1009 of 2015 as well. Thus, we hold that there was no error on the part of the Respondents in correcting the pay scale and emoluments payable to the Petitioners.

19. However, when it comes to the issue of recovery, both the Petitioners are on a stronger wicket considering the law laid down by the Hon'ble Supreme Court in *Rafiq Masih* (supra). This decision was rendered by the Hon'ble Supreme Court after taking into consideration its earlier decision in *Chandi Prasad Uniyal* (supra).

20. In paragraph 18 of *Rafiq Masih* (supra), this is what the Hon'ble Supreme Court has laid down.

“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 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.”

21. Admittedly, the Petitioners were Group C employees and further recoveries were made post their retirement. This was not permissible in terms of the ruling of the Hon'ble Supreme Court in *Rafiq Masih* (supra).

22. The circumstance that the Petitioners may have agreed to the deduction of the aforesaid amounts cannot be held against the Petitioners in the facts and circumstances of the present case. In the first place, the Petitioners were made to retire on attaining the age of superannuation of 60 years when in fact, they were entitled to continue in service until they attain the age of 62 years. Secondly, any resistance to recoveries might have resulted in a delay in settlement of their retiral benefits like pension, gratuity, etc. Thirdly, the recoveries effected by the

Respondents were contrary to the directions issued by the Hon'ble Supreme Court in the case of *Rafiq Masih* (supra). For all these reasons, we do not think that the Petitioners ought to be denied this limited relief of refund on the grounds urged by the learned Additional Government Advocates.

23. Thus, for all the aforesaid reasons, we dispose of both these petitions by making the following order:-

(a) We declare that the retirements of both the Petitioners upon their attaining the age of superannuation of 60 years was not legal and proper and we direct the Respondents to pay to both the Petitioners all financial benefits like differential salary, increments, etc., based on the premise that both the Petitioners were continued in service until they attained the age of 62 years;

(b) We also direct that the retiral benefits payable to the Petitioners be also re-worked and paid to the Petitioners based on the aforesaid premise;

(c) We also direct the Respondents to refund an amount of ₹95,890/- to the Petitioner in Writ Petition No.579 of 2017 since this amount was unlawfully deducted from retiral dues payable to the Petitioner;

(d) We also direct the Respondents to refund an amount of ₹1,01,481/- to the Petitioner in Writ Petition No.1009 of 2015 since this amount was unlawfully deducted from

retiral dues payable to the Petitioner;

(e) We also direct the Respondents to complete the aforesaid exercise within three months from today failing which the Respondents will have to pay interest at the rate of 7% per annum to the Petitioners, on the amounts now due and payable under this order;

(f) There shall be no order as to costs.

24. All concerned to act based on the authenticated copy of this order.

BHARATI H. DANGRE, J

M. S. SONAK, J

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