

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.14526 OF 2019

Ajabrao Rambhau Patil

Age : 59 years, Occu : Junior Engineer (retired),

R/o. Plot No.15 A, Sharda Colony,

Near Mahabal Stop, Jalgaon, Dist. Jalgaon

.. Petitioner

Versus

1. The State of Maharashtra
Through the Secretary,
Water Resources Department,
Mantralaya, Mumbai.

2. The Superintending Engineer,
Jalgaon Irrigation Project Circle,
Grana Bhavan, Opp. Aakashwani Kendra,
Aakashwani Chowk, Jalgaon.

3. The Executive Engineer,
Waghur Dam Division, Jalgaon.

.. Respondents

...

Mr. A.D. Sugdare, Advocate for the Petitioner

Smt. R.P. Gour, AGP for Respondent No.1

Mr. Subhash S. Chillarge, Advocate for Respondent Nos.2 & 3

...

**CORAM : MANGESH S. PATIL &
SANDEEP V. MARNE, JJ.**

RESERVED ON : 12.09.2022

PRONOUNCED ON : 16.09.2022

JUDGMENT (*PER* SANDEEP V. MARNE, J.) :

. Heard. Rule. Rule is made returnable forthwith.

Learned AGP Smt. R.P. Gour waives service for respondent no.1 and

learned advocate Mr. Subhash Chillarge waives service for respondent nos.2 and 3. At the joint request of the parties, the matter is heard finally at the stage of admission.

2. The petitioner challenges the judgment and order dated 05.11.2019 passed by the Maharashtra Administrative Tribunal, Bench at Aurangabad in Original Application No.69 of 2018. In his Original Application, the petitioner had challenged the order dated 24.01.2018 directing recovery of amount of Rs.2,58,711/- from his retirement benefits. By the impugned judgment, the Tribunal has dismissed the Original Application.

3. The petitioner was appointed as Technical Assistant in the office of respondent no.3 on 16.02.1982, which post was abolished and the petitioner came to be absorbed on the post of Civil Engineering Assistant w.e.f. 01.01.1989. He had passed Sub Overseer examination on 18.05.1985 and by order dated 03.08.2004, he was promoted on the post of Sub Overseer by granting deemed date of promotion as on 18.05.1985. On account of completion of 12 years of service from the date of initial appointment of 16.02.1982, he was granted financial upgradation under the Time Bound Promotion scheme w.e.f. 01.10.1994. On completion of 24 years of service, he

was granted benefit of second Time Bound Promotion with effect from 01.10.2006. Later, he was promoted to the post of Junior Engineer, Class-II, Non Gazetted post by order dated 02.07.2007. On attaining the age of superannuation, he retired from service on 31.08.2017. Upon submitting his pension papers, the Accountant General, Mumbai formed an opinion that the petitioner's services from the date of initial appointment of 16.02.1982 could not be counted for Time Bound Promotion and the same were required to be counted from the date of his absorption as Civil Engineering Assistant w.e.f. 01.01.1989. Accordingly, re-fixation of petitioner's pay was done and an amount of Rs.2,58,711/- was directed to be recovered.

4. In his original application, the petitioner did not dispute the action of the respondents in re-fixing his pay. What was challenged was only the recovery effected as a consequence of re-fixation. The Tribunal proceeded to dismiss the original application on the ground that since the petitioner was functioning on Class-II post of Junior Engineer, he is not entitled to protection against recovery by applying ratio of the Judgment of the Apex Court in **State of Punjab & Ors. Vs. Rafiq Masih (white Washer) and Others, (2015) 4 SCC 334.**

5. Mr. Sugdare, learned advocate appearing for the petitioner would submit that even though the petitioner was promoted on the post of Junior Engineer on 02.07.2007, the recovery is in respect of the period when he was working on Class-III post. He would submit that the recovery in respect of such a long period could not have been effected after retirement of the petitioner. He relied upon judgment of the Apex Court in **The State of Maharashtra and another Vs. Madhukar Antu Patil and another, Civil Appeal No.1985 of 2022** decided on 21.03.2022.

6. Per contra, Mr. Chillarge, learned advocate appearing for respondent nos.2 and 3 opposes the petition and would submit that the petitioner was erroneously granted the benefit of Time Bound Promotion scheme. He would submit that in addition to Time Bound Promotions, the petitioner was also granted regular promotion on the post of Junior Engineer. He would therefore submit that the respondents have rightly withdrawn the erroneous benefit of Time Bound Promotion granted to the petitioner and have accordingly refixed his pay. He would further submit that recovery is a natural consequence of refixation of pay and the petitioner cannot be permitted to retain the amount erroneously granted to him. He would submit that being a Class-II Officer, the petitioner is not

entitled to the benefit of the judgment of the Apex Court in **Rafiq Masih** (supra).

7. The learned AGP appearing for respondent no.1 has supported the order passed by the Tribunal and has prayed for dismissal of the petition.

8. The law regarding recovery of excess payment is now well settled by the judgment of the Apex Court in **Rafiq Masih** (supra). After considering the entire jurisprudence regarding the subject of recovery of excess payment, the Apex Court has summarised the situations as under:

“12. 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 herein above, 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.”

9. Upon perusal of the principles laid down by the Apex Court in **Rafiq Masih** (supra), it is clear that the five situations summarized by the Court in para - 12 of the Judgment are not exhaustive. The Apex Court itself has made it clear that it is not possible to postulate all the situations of hardships, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer in excess of their entitlement. Thus, it cannot be stated that only in five situations summarized by the Apex Court, the recovery would be bad. It would always be open to the Courts to extend the benefit of protection from recovery in an appropriate case which is not covered by any of the five situations summarized in **Rafiq Masih** (supra).

10. Having considered the exposition of law laid down by

the Apex Court relating to recovery of excess payment in **Rafiq Masih** (supra), we now proceed to consider applicability of the situations to the present case.

11. We have gone through the affidavit-in-reply filed on behalf of respondent no.1 before the Tribunal. We find that the exact reason for re-fixation of pay of the petitioner was not disclosed in the affidavit-in-reply. However, following averments were made in para - 4 thereof.

“4. I say that as to contents of para No.6 (a), as submitted herein above, initial appointment of the applicant was on daily wages and on completion of five years, he was brought on CRTE. As submitted by the applicant, his services are to be reckoned from 1989.”

12. Thus, from the averments made in para - 4 of the affidavit-in-reply filed before the Tribunal, it appears that the petitioner's initial appointment w.e.f. 16.02.1982 was apparently on daily wages, that too on work charged establishment. This fact can be ascertained from para - 2 of the petition, wherein the petitioner has averred as under:

“02. The petitioner states that he belongs to Other Backward Class (O.B.C.). He was appointed as Technical Assistant in the Office of the Respondent No.3 on 16-02-1982. He continuously worked on the

work charged establishment till he came to be absorbed on the post Civil Engineering Assistant w.e.f. 01-01-1989. The petitioner passed Sub Overseer Examination on dated 18-05-1985, therefore, he was promoted on the post of Sub Overseer and he was granted 'deemed date' as on 18-05-1985. The petitioner rendered more than 12 years continuous service from the date of his appointment on 16-02-1982. He was found eligible for promotion but for the want of vacancy he was given benefit of Time Bound Promotion from 01-10-1994 on the post of Junior Engineer. Thereafter, he completed 24 years satisfactory service on the post of Technical Assistant, therefore, his case was considered for grant of 2nd benefit (Second Time Bound Promotion). Accordingly, benefit was extended to him w.e.f. 01-10-2006."

13. Thus, the petitioner came to be absorbed in regular service only on 01.01.1989 as Civil Engineering Assistant. It appears that for counting the service for grant of Time Bound Promotion, his initial service on work charged establishment with effect from 16.02.1982 was counted and he was granted the first Time Bound Promotion on 01.10.1994. This was clearly erroneous. The error was continued while granting second Time Bound Promotion on completion of 24 years of service w.e.f. 01.10.2006. It appears that the respondents have corrected the dates of effecting Time Bound Promotions by counting service of the petitioner from 01.01.1989. Since the corrective action taken by the respondents was valid, the petitioner chose not to challenge the same in his original application, in which he made the following prayers:

“B. By order or directions by this Tribunal the impugned order dated 24-01-2018 in Office Order No.13 of 2018 issued by the respondent no.3 regarding recovery of an amount of Rs.2,58,711 (Rupees Two Lacks fifty Eight Thousand Seven Hundred Eleven) be quashed and set aside.

C. By order or directions the respondent no.3 be directed to pay the amount which is sought to be recovered under office order no.13 of 2018 of Rs.2,58,711/- to the applicant.”

14. However, after the Tribunal criticized the petitioner for not having challenged refixation of pay, the petitioner has sought to challenge refixation of pay and has sought the relief of restoration of Time Bound Promotions as on 01.10.1994 and 01.10.2006 in the present petition. The prayers in the present petition are as under :

“A. Writ Petition may pleased be allowed.

B. By issuing writ of mandamus or any other writ in like nature, impugned order No.13/2018 dated 24/01/2018 issued by the Respondent No.3 in respect of recovery of Rs.2,58,711/- (revised amount of Rs.2,62,837/-) (in words Rs. Two Lakh Sixty Thousand Eight Hundred Thirty Seven only) be quashed and set aside.

C. By issuing writ of mandamus or any other writ in like nature the impugned letter dated 6th September, 2017 issued by the Accountant General, Mumbai please be quashed and set aside.

D. By issuing writ of Mandamus or any other writ in like nature or orders or directions, the order dated 05-11-2019 in O.A. No.69 of 2018 passed by the Maharashtra Administrative Tribunal Bench at Aurangabad be quashed and set aside.

E. By issuing writ of mandamus or any other

writ in like nature the Respondent No.3 may be directed to refix the pay of the petitioner by counting his service from his initial date of appointment i.e. 16-02-1982, by restoring Time Bound Promotion as on 01-10-1994 and 01-10-2006 respectively.

F. Pending hearing and final disposal of this W.P. the Respondent No.3 may be directed to refund the recovered amount of Rs.2,58,711/- (revised amount of Rs.2,62,837/-) (in words Rs. Two Lakh Sixty Thousand Eight Hundred Thirty Seven Only)."

15. We are afraid, in exercise of power of Superintendence over the order passed by the Tribunal, we cannot permit the petitioner to expand the scope of challenge in the present petition. We, therefore, proceed to ignore prayer clause 'E' made in the present petition.

16. In **Madhukar Antu Patil** (supra) relied upon by Mr. Sugdare, the fact situation was somewhat similar. In that case, the respondent therein was initially appointed on 11.05.1982 as Technical Assistant on work charged basis and came to be absorbed as Civil Engineering Assistant in the year 1989. He was erroneously granted Time Bound Promotions by considering the date of his initial appointment as 1982 and after his retirement, the error was sought to be corrected. The Apex Court has held in para nos.3.1, 4 and 5 as under:

"3.1 At the outset, it is required to be noted and it

is not in dispute that respondent no.1 was initially appointed on 11.05.1982 as a Technical Assistant on work charge basis. It is also not in dispute that thereafter he was absorbed in the year 1989 on the newly created post of Civil Engineering Assistant, which carried a different pay scale. Therefore, when the contesting respondent was absorbed in the year 1989 on the newly created post of Civil Engineering Assistant which carried a different pay scale, he shall be entitled to the first TBP on completion of twelve years of service from the date of his absorption in the post of Civil Engineering Assistant. The services rendered by the contesting respondent as Technical Assistant on work charge basis from 11.05.1982 could not have been considered for the grant of benefit of first TBP. If the contesting respondent would have been absorbed on the same post of Technical Assistant on which he was serving on work charge basis, the position may have been different. The benefit of TBP scheme shall be applicable when an employee has worked for twelve years in the same post and in the same pay scale.

4. In the present case, as observed hereinabove, his initial appointment in the year 1982 was in the post of Technical Assistant on work charge basis, which was altogether a different post than the newly created post of Civil Engineering Assistant in which he was absorbed in the year 1989, which carried a different pay scale. Therefore, the department was right in holding that the contesting respondent was entitled to the first TBP on completion of twelve years from the date of his absorption in the year 1989 in the post of Civil Engineering Assistant. Therefore both, the High Court as well as the Tribunal have erred in observing that as the first TBP was granted on the approval of the Government and the Finance Department, subsequently the same cannot be modified and/or withdrawn. Merely because the benefit of the first TBP was granted after the approval of the Department cannot be a ground to continue the same, if ultimately it is found that the contesting respondent was entitled to the first TBP on completion

of twelve years of service only from the year 1989. Therefore both, the High Court as well as the Tribunal have committed a grave error in quashing and setting aside the revision of pay scale and the revision in pension, which were on re-fixing the date of grant of first TBP from the date of his absorption in the year 1989 as Civil Engineering Assistant.

5. However, at the same time, as the grant of first TBP considering his initial period of appointment of 1982 was not due to any misrepresentation by the contesting respondent and on the contrary, the same was granted on the approval of the Government and the Finance Department and since the downward revision of the pay scale was after the retirement of the respondent, we are of the opinion that there shall not be any recovery on re-fixation of the pay scale. However, the respondent shall be entitled to the pension on the basis of the re-fixation of the pay scale on grant of first TBP from the year 1989, i.e., from the date of his absorption as Civil Engineering Assistant.”

17. Thus, under similar circumstances, the Apex Court has granted protection from recovery on re-fixation of pay scale in the case of **Madhukar Antu Patil** (supra). Mr. Chillarge has sought to distinguish the judgment in **Madhukar Antu Patil** (supra) by contending that the respondent therein retired on the post of Civil Engineering Assistant, which is a Class-III post, whereas the petitioner in the instant petition retired on the post of Junior Engineer, which is a Class-II Non-gazetted post. The question that therefore arises is, whether we can extend the protection granted in the case of **Madhukar Antu Patil** (supra) by following the judgment of the Apex Court or whether we restrain ourselves from doing so only because

the petitioner does not fall in situation at serial no.(i) of the Judgment in **Rafiq Masih** (supra) i.e. he is not Class-III or Class-IV employee. This is a reason why we have attempted to summarize situations expounded by the Apex Court in **Rafiq Masih** (supra) on law relating to recovery of excess payment and have arrived at a conclusion that in an appropriate and rare case, this Court would be justified in extending the benefit of recovery even to Class-I or Class-II Officers, if the situation so demands.

18. The recovery in the instant case has been effected after retirement of the petitioner. Nothing had prevented the respondents from correcting the mistake in grant of Time Bound Promotions to the petitioner during his service career. The re-fixation appears to have been done w.e.f. 01.10.1994 as the corrective action involved withdrawal of benefit of first Time Bound Promotion granted w.e.f. 01.10.1994. Thus, the corrective action is taken after a period of 23 long years and consequently, the recovery also appears to be in respect of 23 long years. Also, most of the period of recovery was when the petitioner was occupying Class-III post. Admittedly, there was no misrepresentation on the part of the petitioner in securing the excess payment. We have two very strong reasons in the present case for arriving at a conclusion that the recovery would be arbitrary, viz.

unduly long period of 23 years of recovery and retirement of the petitioner. After weighing these two positive factors against the negative factor of the petitioner retiring on Class-II Officer post, we find that the former would outweigh the latter. Undeniably, the case of the petitioner is similar to that of **Madhukar Antu Patil** (supra). The only distinguishing factor is the petitioner retired on Class-II post of Junior Engineer, whereas **Madhukar Antu Patil** (supra) retired on Class-III post of Civil Engineering Assistant. We find that the Apex Court in **Madhukar Antu Patil** (supra) without considering whether he belonged to Class-II or Class-III post extended the protection of recovery of excess payment. The protection is granted in the peculiar facts and circumstances of the case. Since the two cases are similar, we have no hesitation in following the judgment and applying the ratio of the judgment in **Madhukar Antu Patil** (supra) to the present case.

19. We are also not in agreement with the finding recorded by the Tribunal that the petitioner ought to have challenged the order of refixation of pay. It was always open to the petitioner to question only the recovery and not his refixation. In fact, we find that the petitioner has rightly not challenged refixation of his pay and he was still entitled to challenge recovery of excess payment after his

retirement.

20. Before parting, we would clarify that applicability of judgment of **Rafiq Masih** (supra) to the present case is on account of peculiar facts of this case and the same shall not be construed to mean that Class-I or Class-II Officer would be entitled to protection from recovery as per **Rafiq Masih** (supra).

21. Consequently, we allow the present petition by quashing and setting aside the impugned judgment and order of the Tribunal. The order dated 24.01.2018 effecting recovery of Rs.2,58,711/- from the pensionary benefits of the petitioner is also set aside. The respondents are directed to refund the recovered amount to the petitioner along with the interest thereon at the rate of 6% per annum within a period of four weeks from the date of receipt of this order.

22. Writ Petition is accordingly allowed. Rule is made absolute.

(SANDEEP V. MARNE, J.)

(MANGESH S. PATIL, J.)