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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.3753 OF 2021

Renu Jayant Nishane

... Petitioner

Versus

Municipal Corporation of
Greater Mumbai & Ors.

... Respondents

Mr. Rajesh Datar i/b Akshay J. Kandarkar for the Petitioner.

Mr. Anup Patil with Ms. Vandana Mahadik for the Respondent-MCGM.

**CORAM : S. V. GANGAPURWALA &
S. M. MODAK, JJ.**

DATED : 11TH JULY 2022

P.C. :

1. The learned counsel for the Petitioner on instructions had made a statement on last date that the present Petition will be restricted to the extent of recovery only.
2. In view of the above, we have considered this Petition to the extent of relief that the Respondent may not claim recovery from the Petitioner.
3. The Petitioner was appointed as a Physical Education Teacher on or about 18th July 1994. On or about 27th February 2003, Respondent No.1 issued a circular that the employees who are non-Marathi speaking employees and those who have not obtained education in Marathi shall

pass the examination of Marathi language within a period of three years from the date of the circular. The Petitioner did not pass the examination as contemplated in the circular dated 27th February 2003.

4. The Petitioner was given the pay scale probably on the ground that the Petitioner was exempted from passing the said examination, however, in July 2017, the effect of circular dated 27th February 2003 was given. The pay scale of the Petitioner and increment in salary of the Petitioner was withheld. Thereafter the recovery is also claimed on the ground that wrong pay fixation was done.

5. As the present Writ Petition is now restricted to the extent of recovery, we are not required to consider whether the Petitioner is exempted from passing the examination as contemplated under circular dated 27th February 2003 or otherwise. The Petitioner is working as Physical Education Teacher, Class III post. The recovery claim is for a period of more than five years. The Petitioner is at his advance stage of services. It would be inequitable now to claim recovery. The Petitioner cannot be said to be at fault nor it can be said that the Petitioner had played fraud or has misrepresented while the pay scale was fixed earlier.

6. In view of the above, the judgment of the Apex Court in case of *State of Punjab and Others vs. Rafiq Masih (While Washer) and Others (2015) 4 Supreme Court Cases 334* would squarely apply. The Apex Court had laid down the following parameters :

“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 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.”

7. In the present case, all aforesaid parameters laid down by the Apex Court would apply.

8. In the light of above, the present Petition is allowed to the extent of recovery claimed by the Respondents. The Respondents shall not claim recovery from the Petitioner in respect of the amount paid due to erroneous pay fixation, according to the Respondent.

9. It is made clear that we have not set aside the stand of the Respondents with regard to pay fixation.

10. The Writ Petition is disposed of accordingly. No costs.

(S. M. MODAK, J.)

(S. V. GANGAPURWALA, J.)