

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

907 WRIT PETITION NO.11330 OF 2022

Shaikh Shamim Ahmed Mohammad Ali,
Age 59 years, Occ. Pensioner,
R/o. B-2, Z.P. Quarter, opposite Government
Medical College, Panchakki Road,
Aurangabad, Dist. Aurangabad

...Petitioner

versus

1. The State of Maharashtra,
Through its Secretary
Water Conservation Department
Mantralaya, Fort, Mumbai
2. The Chief Executive Officer,
Zilla Parishad, Aurangabad
3. The District Water Conservation Officer
Minor Irrigation Department
Zilla Parishad Aurangabad
4. The Sub Divisional Water Conservation
Officer,
Minor Irrigation Department,
Sub Division, Sillod,
Zilla Parishad, Aurangabad
Dist. Aurangabad
5. Deputy Chief Accounts and
Finance Officer,
Finance Department,
Zilla Parishad, Aurangabad

...Respondents

...
Advocate for Petitioner : Mr. Avinash A Khande
AGP for Respondent No.1: Mr. P.S. Patil
Advocate for Respondent Nos. 2 to 5 : Ms. Manjusha Deshpande
.....

**CORAM : RAVINDRA V. GHUGE AND
SANJAY A. DESHMUKH, JJ.
DATED : 31st MARCH, 2023.**

ORAL JUDGMENT (PER RAVINDRA V. GHUGE, J.) :-

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The Petitioner has put forth prayer clauses B and C, as under:-

"B. By issuing writ of Mandamus or any other appropriate writ or order or directions in the like nature, impugned orders dated 18.05.2020 issued by respondent No.4, order dated 29.01.2021 issued by respondent No.3 and order dated 04.02.2021 issued by the respondent No.5 to the extent of recovery of Rs.8,44,176/- which is already deducted from amount of gratuity/pension benefits of the Petitioner may kindly be quashed and set aside and for that purpose issue necessary writ or orders.

C. By issuing writ of Mandamus or any other appropriate writ or order or directions in the like nature, the respondent authorities may kindly be directed to refund/pay the amount of Rs.8,44,176/- which is deducted from Petitioner's gratuity amount/pension benefits within a stipulated time period."

3. The Petitioner joined the service as Tracer vide order dated 5.5.1986. In 2006, his pay band was fixed in the pay scale of Rs.9300-34800 with grade pay of Rs.4300/-. In 2009, the pay fixation as per the 6th pay Commission Recommendations was made and he was placed in the pay band available to the post of Civil Engineering

Assistant in the pay band of Rs.9300-34800 with grade pay of Rs.4300/-. He superannuated on 31.5.2020. After verifying the pay band, since the employer noticed a mistake, re-fixation was carried out and an undertaking was taken from the Petitioner on 31.8.2020 that he would repay the excess amount. This is after his retirement. Nevertheless, prior to his retirement, when he received the first excess pay fixation in April, 2009, an undertaking was tendered by the Petitioner on 29.4.2009.

4. The Petitioner submits that though he has given an undertaking in April, 2009, the recovery has been ordered only after his retirement. He relies upon the law laid down by the Hon'ble Supreme Court in ***Syed Abdul Qadir vs. State of Bihar and others, 2009 (3) SCC 475*** and ***State of Punjab and other vs. Rafiq Masih (White Washer) etc. (2015) 4 SCC 334 = AIR 2015 SC 696***.

5. The learned advocate representing the Zilla Parishad has vehemently contented that as the Petitioner has executed an undertaking on 29.4.2009, the employer is within its right in recovering the excess amounts that were paid to him. The mistake committed by the department was noticed while calculating his retiral benefits and the mistake was rectified. The excess payment has to be recovered and if a person is permitted to retain excess payment, it would amount to unjustifiable enrichment. She relies upon the judgment delivered by the Hon'ble Supreme Court in ***High Court of***

Punjab and Haryana and others vs. Jagdev Singh, 2016 AIR (SCW) 3523.

6. It is undisputed that there is no contention or allegation against the Petitioner that he has played a fraud on the employer or he has orchestrated or manipulated the re-pay fixation of 2009 so also to gain undue advantage. There is no allegation of any involvement of the Petitioner in the pay fixation that took place in 2009.

7. As such, this case as to be viewed from angle that the Petitioner was not, in any way, instrumental or involved in the process of wrongful pay fixation. An oblique motive or fraud is not attributed to his conduct. The only issue is as regards an undertaking executed by him on 29.4.2009, by which he has assured the employer that any excess payment would be refunded by him or be adjusted against his future payments.

8. The Hon'ble Supreme Court has held in paragraph 12 in ***High Court of Punjab and Haryana and others vs. Jagdev Singh*** (supra), as under:-

“12. In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc. this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following

situations, a recovery by the employer 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.” (emphasis supplied).”

9. The Petitioner's case could be favourably considered under conditions (i), (ii), (iii) and (v). The Petitioner has been working in class III category. The recovery is initiated after his retirement. The recovery is made when the payment made to the Petitioner was in excess of five years prior to the order of recovery. After retirement, recovering an amount of almost Rs.8,44,176/- would be harsh and iniquitous. No doubt, the undertaking executed by the Petitioner in 2009 would normally bind him to repay the excess amount from future payments. However, he was paid such excess amount from April 2009 till 31.5.2000, which is a period of 11 years. This fact

situation would be covered by clause (iii) in paragraph 12 of the ***High Court of Punjab and Haryana and others vs. Jagdev Singh*** (supra).

10. In view of the above, this Petition is partly allowed. The deduction of Rs.8,44,176/- from the retiral benefits of the Petitioner is held to be illegal and unsustainable. Respondent No.2 shall repay the said amount to the Petitioner within 90 days. As the recovery was made in the light of the undertaking executed by the Petitioner, *bona fide* by the employer, we are not granting interest to the Petitioner. However, if the amount is not paid in 90 days, the same shall carry interest at the rate of 5% p.a. from June, 2020, onwards.

11. Rule is made partly absolute in the above terms.

(SANJAY A. DESHMUKH, J.)

(RAVINDRA V. GHUGE , J.)

rlj/