

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO.405 OF 2022

Petitioner : Gajanan Prabhakar Rao Pande,
 Aged about 63 years, Occ: Retired,
 R/o 369, Matru Pitru Chhaya, Hiwari Layout,
 Nagpur – 8.

– Versus –

Respondents : 1] Maharashtra Jeevan Pradhikaran,
 Through Member Secretary, CIDCO Building,
 South Wing, Belapur, New Mumbai.

2] Chief Engineer (Administration),
 Maharashtra Jeevan Pradhikaran,
 Regional Division, Nagpur.

3] Chief Accounts Officer,
 Pension Branch,
 Maharashtra Jeevan Pradhikaran,
 CIDCO Bhavan, Belapur, Navi Mumbai.

 Mr. S.D. Chopde, Advocate for the Petitioner.
 Ms. M.P. Munshi, Advocate for the Respondents.

CORAM : **ROHIT B. DEO AND Y.G. KHOBRAGADE, JJ.**

DATE : **7th FEBRUARY, 2023.**

J U D G M E N T : *(Per Rohit B. Deo, J.)*

Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel appearing for the parties.

02] The challenge in the petition is to the order 24/09/2021 issued by the Chief Engineer (Incharge) of the respondent 1 - Maharashtra Jeevan Pradhikaran, whereby recovery of Rs.3,20,100/- is ordered from the retiral benefits.

03] The petitioner was appointed by respondent 1 as Tracer vide order dated 22/07/1985 and was confirmed in service after completing the probation period.

04] The petitioner was promoted as Assistant Draftsman vide order dated 22/02/1990 and received the benefits of the time bound promotion scheme after completing continuous service of twelve years.

05] Thereafter, the petitioner was promoted as Draftsman vide order dated 28/05/2009 and he superannuated on 31/10/2020.

06] The petitioner submits that it was only on 26/01/2021 that the Chief Accounts Officer, Pension Branch of respondent 2 issued a communication to respondent 1 flag marking that the petitioner did not clear the professional examination required for promotion as Assistant Draftsman.

07] The petitioner contends that since he was holding the ITI Certificate in Civil Draftsman, he was exempted from clearing the departmental qualifying examination and was rightly promoted as Assistant Draftsman on 22/02/1990 and then as Draftsman vide order dated 28/05/2009.

08] The petitioner further emphasises that the service book records that in view of the qualification secured from Industrial Training Institute (ITI), the petitioner is exempted from clearing the qualifying examination for promotion, in view of the provisions of the Annexure 4 Rule 8 of the Maharashtra Public Works Manual.

09] The petitioner contends that he addressed a representation to respondent 3 highlighting that since he was possessing the requisite qualification from Government ITI, he was rightly exempted from passing the qualifying examination. The petitioner further requested the concerned authority to fix the pension in accordance with the last drawn pay as Draftsman.

10] The petitioner contends that notwithstanding the position obtaining on record, the order impugned is passed.

11] Learned Counsel Mr. Chopde for the petitioner has twin submissions to canvass. The first submission is that the question of recovery of the alleged excess payment made just does not arise inasmuch as the promotions as Assistant Draftsman and Draftsman granted to the petitioner in 1990 and 2009 respectively are not cancelled or revoked. Mr. Chopde would submit that the recovery is not on the basis of incorrect fixation of pay, as is projected by the respondents and rather the recovery is on the basis that the promotions which are granted to the petitioner are undeserved and wrongly granted. Mr. Chopde would submit that the competent authority not having cancelled or revoked the promotional orders, the question of ordering recovery on the basis of an audit objection, cannot and does not arise. The other submission of Mr. Chopde, which is made in the alternate, is that in any event in view of the law laid down in the case of State of Punjab and others vs. Rafiq Masih (White Washer) – (2014) 8 SCC 883, recovery from the retiral benefits cannot be ordered inasmuch as it is not even the case of the respondents that the petitioner secured the promotion by practicing fraud or misrepresentation.

12] The Maharashtra Jeevan Pradhikaran has filed an affidavit in response and the submissions which are canvassed by learned Counsel Ms. Munshi for the respondents are on the lines of the said affidavit. The

thrust of the submissions is that the promotions which were granted to the petitioner were incorrectly granted and that the exemption on the basis of ITI Certificate was available only to employees appointed prior to the coming into force of the Rules of 1977.

13] Ms. Munshi would emphasis that the since the petitioner submitted an undertaking that if the pay-scales prescribed by the 6th Pay Commission are made applicable, any excess payment due to the incorrect fixation of pay, in present or in future, may be recovered, the law laid down by the Hon'ble Supreme Court in High Court of Punjab and Haryana and other vs. Jagdev Singh would squarely apply.

14] We have given anxious consideration to the submissions canvassed by learned Counsel Ms. Munshi for the respondents. The undertaking is given by the petitioner when the pay-scales prescribed by the 6th Pay Commission were made applicable to the employees of the respondent 1. In our considered view, the undertaking on which heavy reliance is placed, takes the case of the respondents no further. Learned Counsel Mr. Chopde for the petitioner is right in submitting that the order of recovery and reduction of pay-scale is not on the premise of incorrect fixation as such. The order of recovery and the reduction of pay-scale, which would have a cascading effect

of pension, is as a fact on the assumption that the promotion of the petitioner as Assistant Draftsman in February 1990 and then as Draftsman in May, 2009 is illegal.

15] We further find substance in the submission that while the Audit Officer could have looked into the issue of incorrect fixation, in view of the promotional orders continuing to hold the field, the issue of recovery was beyond the domain of the Audit Officer and in the absence of the competent authority reviewing or recalling the promotional orders, the audit objection could not have been sole basis of the recovery and the re-fixation of pay-scale. To a certain extent, we draw support from the decisions rendered by the coordinate Bench in Vasanta Ramkrishna Ghogare vs. Administrative/Establishment Officer, Maharashtra Jeevan Pradhikaran & others in Writ Petition No.5839 of 2018, and Vitthal Shyamrao Kute vs. Maharashtra Jeevan Pradhikaran & others in Writ Petition No.1881 of 2018, which considered similar, if not, identical factual matrix. We are of the view that this petition deserves to be allowed on similar lines.

16] Writ petition is allowed. The impugned communications dated 03/09/2021, 24/09/2021 and 01/12/2021 are hereby quashed and set aside.

It is directed that the petitioner be granted pension as per rules, by considering his last drawn pay and all other benefits including gratuity and provident fund within four weeks from the date of receipt of the order of this Court. If any amount has been already recovered from the petitioner, it is directed to be refunded to the petitioner together with interest at the rate of 9% per annum from the date of recovery till its payment within eight weeks from the date of this order.

17] Rule is made absolute in the above terms with no order as to costs.

**sandesh*

(Y.G. KHOBRADE, J.)

(ROHIT B. DEO, J.)