2023:BHC-NAG:14636-DB

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

WRIT PETITION NO. 1984 OF 2022

Ashok Buchayya Pusalwar,
Aged 59 years,
Occupation – Retired Assistant Teacher,
R/o Prabhag No.4, Aheri, Tahsil – Aheri,
District – Gadchiroli. .... PETITIONER

VERSUS

1) The Zilla Parishad Gadchiroli,
through its Chief Executive Officer,
District – Gadchiroli.

2) The Chief Audit and Finance Officer,
Zilla Parishad, Gadchiroli,
District – Gadchiroli. .... RESPONDENTS

Mr. P.S. Kshirsagar, Counsel for the petitioner,
Mr. S.D. Zoting, Counsel for the respondents.

CORAM : PRITHVIRAJ K. CHAVAN &
URMILA JOSHI-PHALKE, JJ.

DATE OF RESERVING THE JUDGMENT : 3rd OCTOBER, 2023
DATE OF PRONOUNCEMENT OF THE JUDGMENT : 7th OCTOBER, 2023

JUDGMENT : (PER : PRITHVIRAJ K. CHAVAN, J.)

Rule.

2. Learned Counsel for the respondents waive service. Rule is taken up for hearing forthwith by consent of the learned Counsel for the parties.

3. The petitioner herein has invoked writ jurisdiction of this Court seeking a writ of certiorari challenging an order dated 27-10-2020 passed by the respondent No.2 whereby an amount of Rs.1,39,316/- has sought to be recovered from the retiral benefits of the petitioner as excess payment made in the salary for the period 12-8-2007 to 31-8-2019.

4. A few facts germane for disposal of this petition can be summarised as follows -

a) The petitioner was working as an Assistant Teacher with the Zilla Parishad, Gadchiroli. His date of appointment was 24-10-1996.

b) The petitioner sought voluntary retirement from the service on 30-6-2020 as an Assistant Teacher from the Zilla Parishad, Gadchiroli. With effect from 01-1-2006 pay scale as per the 6th Pay Commission was made applicable to the employees, and accordingly, as per the Maharashtra Civil Services (Revised Pay) Rules, 2009, the petitioner's pay scale was decided by the authority. After petitioner's voluntary retirement at the age of 59 years, his case was considered by the respondent No.2 for the purpose of quantifying the pension. It was observed that from August 2007 to August 2019 there was an excess payment to the petitioner.

c) It is contended that by an order dated 27-10-2020 respondent No.2 sanctioned an amount of Rs.6,68,575/- towards gratuity, however, an amount of Rs.1,39,316/- was shown as recovery being excess amount paid to the petitioner in the pay scale. It is *inter alia* contended that in the said order an amount of Rs.6,12,122/- has been shown as payable to the bank and Rs.56,453/- was an outstanding balance. As such an amount of Rs.1,39,316/- was shown to be an excess amount paid in the pay scale for the period commencing on 01-1-2006 to 30-11-2019. It is the contention of the petitioner that the respondents, as a matter of fact, could not have recovered the said amount.

d) The petitioner had tried to demonstrate financial hardship being faced due to such an action on the part of the respondents as, according to him, recovery cannot be made from the retiral benefits in view of the decision of the Supreme Court in the case of ***State of Punjab and others v. Rafiq Masih*** reported in ***2015(4) SCC 334.***

e) The petitioner contends that the impugned order dated 27-10-2020 has been passed in violation of principles of natural justice as the petitioner had not been granted an opportunity of being heard before passing the said order.

f) As such, the petitioner has prayed for quashing the impugned order.

5. In response to the said petition, in their affidavit-in-reply, the respondents have denied all the averments in the petition. The respondents have come with a case that the provisions of the Government Resolution (GR) dated 26-2-2019 are not applicable to the petitioner since the GR is not made applicable to the Zilla Parishad. As per the GR dated 06-8-2002, benefit of One Step

Promotion ceased to exist and the benefits of Chattopaddhay Committee Report are made applicable. Clause 7 of the said GR provides that the employees/officers enjoying the benefit of the Assured Progress Scheme are not entitled for One Step Promotion. The petitioner had already consented by an undertaking dated 03-6-2020 that an amount of Rs.1,39,316/- is recoverable from him by the respondents and he now cannot change his stand on that aspect. It is also stated in the reply that the petitioner had already exhibited his readiness and willingness to pay the outstanding amount of Rs.4,72,806/- payable to the Employees Society. As such, the respondents have prayed for dismissal of the petition.

6. Having heard the learned Counsel for the parties, we are of the considered opinion that the issue raised in this writ petition is no longer *res integra*. The law regarding the recovery of monetary benefits paid in excess of entitlement from the retiral benefits now stands crystalized with the decision in the case of ***Rafiq Masih*** (supra). We deem it appropriate to quote paragraph No.18 of the said decision herein below -

"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 the retired employees, or the employees who are due to retire within one year, of the order of recovery.
(iii) Recovery from the 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. Recovery of Rs.1,39,316/- from the retiral benefits by the respondent No.2 is indeed in the teeth of the decision of the Supreme Court in ***Rafiq Masih*** (supra). The Supreme Court has carved out exception where recovery would be impermissible.

8. Undisputedly, the petitioner retired from the post of an Assistant Teacher, which is a Class III post, on 30-6-2020. Clause 4 of the impugned order issued by the respondent No.2 indicates the details of retiral benefits to the petitioner, *inter alia,* the amount sought to be recovered as already stated hereinabove, which is to the tune of Rs.1,39,316/-. In view of Clause (i) of paragraph No.18 of the decision in ***Rafiq Masih*** (supra), recovery from the employees belonging to Class III and Class IV service (or Group-C and Group-D) would be impermissible. In the facts and circumstances of the case, Clause (i) of paragraph No.18 of the decision in ***Rafiq Masih*** (supra) is immediately attracted. Clause (v) of paragraph No. 18 of the decision in ***Rafiq Masih*** (supra) contemplates that 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 also seems to be appropriate in this context.

9. In this case, the Supreme Court has dealt with the issue of right of employer to recover the amount paid in excess to the

employee without any fault of an employee. There are plethora of decisions on this aspect wherein it has been consistently held that the excess amount, which is not paid on account of any misrepresentation or fraud of the employee, are not recoverable later on. It is nobody's case that the recovery sought to be made in the case of the petitioner herein was on account of any misrepresentation or fraud. It would also be advantageous to quote paragraph No.8 in the case of ***Rafiq Masih*** (supra).

> "*8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the concerned employee. If the effect of the recovery from the concerned employee would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.*"

10. The act of the respondent No.2 can be said to be egregious as it has been argued by its learned Counsel that the GR dated 26-2-2019 would not be made applicable to the petitioner since

the Zilla Parishad is not covered under the said GR. We are afraid, we cannot buy the argument of the learned Counsel for the respondent No.2 in the teeth of the decision of the Supreme Court in the case of ***Rafiq Masih*** (supra).

11. The petitioner has pleaded in the writ petition that except retiral benefits, there is no source of income to his family. He suffered financial hardship due to such recovery. We are, therefore, of the considered view that the recovery of the retiral benefits of the petitioner by the respondent No.2 is iniquitous and harsh, if the order impugned is not interdicted. We are, therefore, inclined to so interdict and direct the respondent No.2 to refund the amount of Rs.1,39,316/- with interest @ 6% per annum from the date recovery was made till the entire amount is refunded within a period of eight weeks.

12. The writ petition stands disposed of in the aforesaid terms, without costs. Rule is made absolute.

(URMILA JOSHI-PHALKE, J.) **(PRITHVIRAJ K. CHAVAN, J.)**

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