



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6054 OF 2021

Vd. Ganesh Sitaram Magar, ... Petitioner
Age 61 Years, Occu: Retired,
C/o Sampat Shelke, Badoda Bank Colony,
Sudke Mala, Balkashram Road,
Ahmednagar, Tq. & Dist. Ahmednagar

VERSUS

1. The State of Maharashtra,
Through the Principal Secretary,
Medical Education Department,
Mantralaya, Mumbai-32
2. The Director,
The Directorate of Ayush
St. George Compound, D'mello Road,
Mumbai 400 001
3. The Assistant Director of Ayurved,
4th Floor, New Administrative Building,
Pune, 411 001
4. Ayurved Shastra Seva Mandal,
Vishram Baug, Ahmednagar,
Through its President and /Or
Honorary Executive
5. Gangadhar Shastri Gune ayurved
Mahavidyalaya,
Ahmednagar, Through its Principal

6. The Accountant General ... Respondents
(Accounts & Entitlements)-1,
Pratistha Bhavan (Old CGO Building)
103, Maharshi Karve Marg,
Mumbai 400 020

Mr. S. S. Wagh h/for Mr. S. T. Shelke, Advocate for the petitioner
Mr. S. B. Narwade, AGP, for the Respondent-State
Mr. K. N. Lokhande, Advocate for Respondent Nos. 4 and 5.

**CORAM : RAVINDRA V. GHUGE, &
Y. G. KHOBRADE, JJ.**
RESERVED ON : 17.01.2024
PRONOUNCED ON : 25.01.2024

JUDGMENT (Per: Y. G. Khobragade, J.)

1. Rule. Rule Made returnable forthwith and heard finally with the consent of the parties.

2. By the present Petition under Article 226 of the Constitution of India, the Petitioner has put forth prayer clause (B) as under:

“(B) Issue a Writ of Certiorari or a Writ in the nature of Certiorari or a direction in the like nature for quashing the recovery of Rs.8,43,782/- from the amount of Gratuity and Pension as detailed in the Gratuity Payment Order dated 05.03.2021 at Exh. D and direct the respondents to make Gratuity Payment of Rs.7 lakhs to the Petitioner.”

3. In short, the grievance of the Petitioner is that, he completed BAMS, M. D. (Ayurveda - Rasshastra). On 21-07-1997, he had joined

Respondent No.5 College as a Lecturer. He was promoted to the post of Professor on 01.07.2000 and superannuated on 30.06.2019 as he attained 60 years of age. However, after retirement, he was served with a notice dated 18.12.2020 issued by Respondent No.5 thereby directed recovery of Rs.8,43,782/- (Rs. 6,60,810/- on account of wrong pay fixation, allowances + Rs.1,82,792/- towards other recovery).

4. Respondent Nos. 4 and 5 have contended that, as per GR dated 08.09.2011, the Petitioner was not entitled to receive benefit of three non compoundable increments. As per Clause 5 (i) of the said GR, an Assistant Professor/Lecturer is entitled for three increments. The Petitioner was appointed to the post of Reader at entry level. The Petitioner earlier had filed Writ Petition No. 1089 of 2020 thereby praying for finalisation of his pension and retiral benefits and to send his said proposal to the competent authority. On 11.01.2021, this court passed an order and directed respondent no. 3 to submit the said proposal within a period of two weeks and the Accountant General was directed to decide the same within a period of 4 weeks therefrom. Therefore, Respondent Nos. 4 and 5 submitted the proposal to Respondent No.3. Prior to the submitting of the proposal, the Petitioner executed an undertaking and agreed for recovery of amount from his pension benefits, if it is found that any excess amount is paid to him. Therefore, considering principle of estoppel, the petitioner is not

entitled to seek writ of mandamus prohibiting the Respondent from recovery of excess payment due to wrong pay fixation and other allowances, hence, prayed for dismissal of the petition.

5. Mr. Narwade, the learned AGP, canvassed that, the Petitioner was appointed directly to the post of Reader on 22.07.1997. He was granted three non compoundable increments, though he was not entitled. The communication dated 27.02.2018 clarifies that three non compounded increments are admissible only to the Assistant Professors appointed prior to 01.01.2006. Therefore, Respondent No. 3 re-fixed pay admissible to the Petitioner and corrected the mistake by reducing three non compounded increments. The Petitioner superannuated on 30.06.2019. However, no recovery was effected against the petitioner. Therefore, vide communication dated 18.12.2020, the Petitioner was directed to deposit excess amount received by him to the tune of Rs.7,60,790/-. In support of this submissions he relied on the case of ***Punjab and Haryana and others Vs. Jagdev Singh (2016) 14 SCC 267.***

6. It is an undisputed fact that, the Petitioner qualified BAMS, M.D. (Ayurveda- Rasshastra). On 21-07-1997, the Petitioner was appointed as a Reader/Assistant Professor with Respondent No.5 College and promoted to the post of Professor on 01.07.2000. It is also not in dispute that, the petitioner superannuated on 30.06.2019 on attaining the age of superannuation. But respondents were not deciding

his proposal of retiral benefits. Therefore, the Petitioner filed Writ Petition No. 1089 of 2020 before this Court. On 11.01.2021, the Co-ordinate bench of this Court (Coram: S.V. Gangapurwala And Shrikant D. Kulkarni, JJ.) passed the following order :-

1. We have heard Mr Shelke, the learned Counsel for the petitioner and Mr K.N. Lokhande, the learned Counsel for respondent Nos.

2. It appears that the dispute was with regard to the leave encashment. Mr Shelke, the learned Counsel for the petitioner submits that respondent Nos. 4 and 5 may forward the pension proposal barring the benefit of leave encashment.

3. Mr Lokhande, the learned Counsel submits that wrong increments were given to the petitioner. Mr Lokhande, the learned Counsel refers to the letter dated 23.10.2019 issued to the petitioner by the Assistant Director of Ayurved, Regional Office, Pune.

4. The learned Counsel undertakes that the proposal of the petitioner for pension and retiral benefits as is admissible would be forwarded within a period of two weeks to respondent No. 3. The respondent No. 3 on receipt of pension proposal from respondent Nos. 4 and 5, shall within a period of two weeks thereafter forward it to respondent No. 2 and further steps shall be taken in case the same is forwarded to the Accountant General within a period of four weeks. The decision shall be taken on the same expeditiously.

5. Writ petition is disposed of. No costs."

7. In compliance of the above order, Respondent Nos. 4 and 5 prepared proposal in respect of retiral benefits of the Petitioner, but prior to submission of proposal, the Petitioner executed undertaking and agreed for the recovery of amount from his pensionary benefits, if it is found that, excess amount was paid to him due to pay fixation. It is true that, the petitioner was served with notice dated 18.12.2020 directing recovery of excess payment of three non compoundable increments as per GR dated 08.09.2011 as the Petitioner was not entitled to receive benefit of three non compoundable increments to the tune of Rs.8,43,782/-.

8. In the case of **Punjab and Haryana and others vs Jagdev Singh cited supra**, the Hon'ble Supreme Court observed in Para Nos. 8 to 12 as under:

"8. The order of the High Court has been challenged in these proceedings. From the record of the proceedings, it is evident that when the Respondent opted for the revised pay scale, he furnished an undertaking to the effect that he would be liable to refund any excess payment made to him. In the counter affidavit which has been filed by the Respondent in these proceedings, this position has been specifically admitted. Subsequently, when the rules were revised and notified on 7 May 2003 it was found that a payment in excess had been made to the Respondent. On 18

February 2004, the excess payment was sought to be recovered in terms of the undertaking.

9. *The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.*

10. *In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc¹. 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).

11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.

12. For these reasons, the judgment of the High Court which set aside the action for recovery is unsustainable. However, we are of the view that the recovery should be made in reasonable installments. We direct that the recovery be made in equated monthly installments spread over a period of two years.

9. Similar question was involved in the recent case of **Balbir Singh Bhandari vs State of Uttarkhand , AIR ONLINE 2024 SC 18,**

wherein the the Hon'ble Supreme Court held in 10 to 15 as under:

"10. We have carefully perused the order dated 29th May 2014. It is noted in the said order that the Government order dated 8th March 2011 issued by the Finance Department, applicable to all service cadres of the State, directed that three financial upgradations be given to all personnel of the State under certain conditions on the post of direct recruitment after completion of continuous satisfactory service of 10, 18 and 26 years respectively from the first appointment. The order dated 29th May 2014 notes that, however, under the order dated 4th August 2011, the personal/promotional pay scale was made admissible after 8 and 14 years of service only to the Ayurvedic and Unani Medical Officers. Therefore, it was observed that a special class of Ayurvedic and Unani Medical Officers was created who have been given a different treatment. It is observed that though the Finance Department had objected to issuing the order dated 4th August 2011, the opinion of the Finance Department was overruled, and the same was issued without the approval of the Cabinet. That is how the Cabinet, on 22nd May 2018, decided to cancel the order dated 4th August 2011. We find no error in the view taken by the State Government as there was no valid reason to grant a higher pay scale only to the Ayurvedic and Unani Medical Officers after continuous satisfactory service of 8 years, whereas, for all other Government servants, satisfactory continuous service of 10 years was required.

11. What is relevant is the order dated 28th August 2014 passed by the Division Bench of the High Court. The said order reads thus:

"We are afraid, order passed by this Court dated 07.05.2013 as well as order passed on the Recall Application dated 04.03.2014, cannot be reviewed, merely, because subsequent to the passing of

the orders under review order dated 04.08.2011 has been recalled.

However, we find that it was specifically made clear by this Court in the order dated 04.03.2014 that till decision is taken by the Cabinet on the order dated 04.08.2011, it has to be implemented. Since, order dated 04.08.2011 has already been revoked/cancelled, therefore, Government is at liberty to act upon in accordance with Government Order dated 29.05.2014. Petitioner, if so aggrieved the order 29.05.2014, may approach the appropriate forum assailing the Government order dated 29.05.2014."(emphasis added)

12. *Notwithstanding the liberty granted under the order described above to the State Government to act upon the order dated 29th May 2014, by the order dated 9th October 2014, higher pay scales were granted to the appellants based on the order dated 4th August 2011. Thereafter, the Government passed the order dated 27th October 2014 ordering recovery of the amounts paid to the appellants according to the Order dated 4th August 2011. However, it was mentioned therein that earlier orders granting personal/promotional pay with effect from the date of regularisation, i.e. 27th January 2006, are revived. The order also accepts that the Medical Officers will be entitled to ACP benefits made available under the orders dated 8th March 2011 and 1st July 2013. The order of recovery reads thus:*

"The recoverable amount first be adjusted from the arrears payable on the basis of the ACP benefit made admissible to the concerned Medical Officers under the finance department's govt. order no. 872 dated 08/03/2011 and govt. order no. 589 dated 01/07/2013 and even after that some amount still remains to be recovered, a maximum of 1/3 of the total of pay and dearness allowance of the concerned Medical Officers be fixed as an installment per month and recovery of the remaining amount be ensured to be made."

13. As held earlier, under the order dated 4th August 2011, the benefit of personal/promotional pay scale was granted only on Ayurvedic Medical Officers upon completing 8 and 14 years of service. The said order was contrary to the order of the Finance Department and, therefore, was rightly withdrawn as we have held earlier. We may note here that by the order dated 8th November 2006, the personal time-bound pay scale was granted to the appellants, subject to the condition that if the Government takes any decision to the contrary, the amount will be recovered from the salary of the concerned medical officers.

14. While dealing with the refund issue, the High Court has held that the appellants, being Ayurvedic Medical Officers, do not belong to a weaker section of the society and, therefore, recovery will not be inequitable. Moreover, even after the grant of monetary benefits in terms of the Government Order dated 4th August 2011, the designation of the appellants, their duties and responsibilities remained the same. Therefore, the High Court was right in not setting aside the order of recovery.

15. Learned senior counsel appearing for the appellants relied upon the judgment and order dated 26th August 2022 passed by this Court in Civil Appeal No. 5527 of 2022 (M.P. Medical Officers Association vs. The State of Madhya Pradesh and Ors.), which granted relief to the employees against recovery. From paragraph 5 of the said decision, it is evident that the same has been rendered in peculiar facts and circumstances of the case. This Order was passed after holding that the law laid down by this Court in the case of State of Punjab v. Rafiq Masih may not be applicable. Therefore, the said decision rendered in the peculiar facts of the case will have no application. In the facts of the case in hand, what stares at the face is that the benefits granted only to the Ayurvedic and Unani Medical Officers under the Order dated 4th August 2011 were not extended to any other category of the State Government employees. No material was brought on record to show how and why favourable treatment was given to the appellants.

10. In the case of **State of Punjab and other vs. Rafiq Masih (White Washer) etc. (2015) 4 SCC 334 = AIR 2015 SC 696**, the Hon'ble Supreme Court summarized 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.

11. Admittedly, the Petitioner does not fall within the ambit of class III or class IV Employee. It is not the case of petitioner that, he did not furnish an undertaking for recovery of payment from his pensionary benefits due to excess payment made to him while granting three non compounded increments. On the other hand, the Petitioner executed an undertaking tendered to the Respondent Authorities agreeing for the deduction of any excess payment, if made to him on account of three non compounded increments wrongly paid to him as on 01.04.2011 as

per the GR dated 27.02.2018 regarding wrong pay fixation. Therefore, certainly the principle of estoppel applies and the petitioner is estopped from raising grievance about recovery of excess payment made to him. So also, considering the ratio laid down in cases of *Jagdev Singh and Balbir Singh Bhandari cited (supra)*, the petitioner is not entitled for the relief as prayed.

12. In view of the above discussion, **this Petition is dismissed.**
Rule is discharged.

(Y. G. KHOBRADE, J.)

(RAVINDRA V. GHUGE, J.)

JPChavan