IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6763 OF 2023

Khan Almas Zohara d/o
Gulam Ahmed Khan,
Age: 58 Years, Occ. Retired,
R/o. H.No.1-13-66, Kabadipura,
Opp. Teen Darga, Budhi Lane,
Aurangabad. **... PETITIONER**

V/s.

1. The State of Maharashtra
Through Secretary Municipal Corporation,
Mantralaya, Mumbai – 400 032.

2. The Commissioner,
Municipal Corporation Aurangabad.

3. The Education Officer,
Municipal Corporation Aurangabad. **... RESPONDENTS**

Mrs. A.N. Ansari, *Advocate for the Petitioner*
Mr. P.K. Lakhotiya, *AGP for Respondent-State*
Mr. A.R. Vaidya, *Advocate for Respondent Nos.2 & 3*
...

CORAM : RAVINDRA V. GHUGE &
Y. G. KHOBRAGADE, JJ.
DATE : 9th February, 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, C, C1 and D as under:

> *"B) To quash and set aside the order letter No. MCA/Education/2022/1016 dated 19.10.2022 issued by Education Officer Municipal Corporation Aurangabad, by issuing any appropriate writ order or direction as the case may be.*
>
> *C) To quash and set aside the office order No/MCA/Education/2023/224 dated 27.3.2023 issued by the Deputy Commissioner, Municipal Corporation Aurangabad, i.e. Respondent no. 2 by issuing any appropriate writ order or direction as the case may be.*
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> *C-1) To quash and set aside the order dated 23.10.2023 passed by the Municipal Commissioner, Aurangabad at Exhibit "R-2" page 50, by issuing any appropriate writ order or direction as the case may be.*
>
> *D) It may be held that Petitioner is not liable for any recovery from her retirement benefits on both the counts of not passing Hindi Marathi examination and MSCIT examination, by issuing any appropriate writ order or direction as the case may be."*

3. The learned advocate Mrs. Ansari appearing for the Petitioner submits that on 29.06.1998 the Petitioner was appointed as an Assistant Primary Teacher under the reserved category of O.B.C. with the Respondent Nos. 2 and 3. At the time of appointment, the Petitioner was having required educational qualification of S. S. C., D.Ed and after rendering approximately 25 years of service, the Petitioner was superannuated on 31.01.2023, however prior to her retirement on 19.10.2022, the Petitioner was served with impugned order dated 19.10.2022, whereby recovery of Rs.4,14,513/- was directed against her on account of excess amount being paid to her under

wrongful revised pay scale/erroneous revised pay scale on the basis of acquiring certificate of MS-CIT. Said pay scale was revised more than a decade ago. The Petitioner apprehended about not getting retiral and pensionary benefits. Therefore, the Petitioner submitted letter dated 09.11.2022 contending that she may be paid retiral benefits i.e. gratuity, after deducting the recovery of Rs.4,14,513/- from retiral benefits.

4. According to the Petitioner, she was served with letter dated 27.03.2023 issued by the Deputy Commissioner of Municipal Corporation showing deduction from salary from the year 1998 to 2010 for not passing Marathi – Hindi examination, but on 16.06.2023 the Petitioner submitted her reply contending that exemption was already granted to her for appearing in Marathi – Hindi examination vide letter dated 18.01.2022 and she already passed MS-CIT examination during her service period. Therefore, the recovery directed against her under impugned order dated 19.10.2022 and 27.03.2023 is illegal and bad in law. Further it was contended that on 23.03.2023 this Court passed the judgment in Writ Petition No.3320/2023 and other connected matters (Shaikh Amir Shaikh Kadar V/s. The State of Maharashtra through its Secretary and Ors.) wherein, the Division Bench of this Court (Coram: Ravindra V. Ghuge and Sanjay A. Deshmukh, JJ.) considered the law laid down in **High Court of Punjab and Haryana V/s. Jagdev Singh; 2016 AIR (SCW)**

3523, judgment dated 01.09.2021 passed by the Co-ordinate Bench of this Court in **Writ Petition No.13262/2018 (Ananda Vikram Baviskar V/s. State of Maharashtra and Ors.)** and **Syed Abdul Qadir V/s. State of Bihar and Ors.; 2009 (3) SCC 475**, wherein it has been held that if the employee did not play a fraud or was personally not involved in wrongful revision of her pay scale or orchestrating wrongful pay revision by manipulating the record, the recovery of excess amount of payment made to the employee shall not be recovered from the Class III and IV employees.

5. Per contra, the learned advocate for Respondent Nos. 2 and 3 vehemently canvassed that while fixation of pay scale, the Petitioner submitted her undertaking on 24.01.2000 thereby she has undertaken that if in case any excess payment found to have been made due to incorrect fixation of pay scale or any excess amount detected in light of any discrepancy, then the such amount shall be refunded. However, it was found that the Petitioner did pass the MS-CIT and Hindi-Marathi language.

6. According to Respondent Nos. 2 and 3, on 17.08.2023, the Respondent No.1-State Government issued GR for securing undertaking from the employees for returning of excess amount of payment, if made to them due to wrongful fixation. In pursuance of said GR, the Petitioner submitted her undertaking for recovery of excess payment. The Petitioner was not entitled for

higher pay scale and she was never exempted from appearing in Marathi – Hindi language because vide order dated 23.10.2023 the exemption which was granted to her on 18.01.2022 from appearing in Marathi-Hindi language, was recalled. Therefore, she is not entitled for any benefits as prayed. Hence prayed for dismissal of the petition.

7. The grievance of the Petitioner is that recovery has been directed under communication dated 19.10.2022 to the tune of Rs. 4,14,513/- toward excess payment of increments made to her under 5th and 6th Pay Commission due to not getting exemption from passing Marathi examination as well as not acquiring qualification of MS-CIT. The Petitioner contended that, she superannuated on 31.01.2023 and on verge of retirement, recovery has been directed, which is illegal and bad in law.

8. Needless to say that, the Petitioner was granted incremental benefit and later on it was revealed that the Petitioner did not have qualification of MS-CIT. However, subsequently the Petitioner acquired MS-CIT qualification in the month of September-2021. But no undertaking was acquired from the Petitioner, for more than a decade, when her pay scale was fixed.

9. We have referred to the law laid down by the Hon'ble Supreme Court in **High Court of Punjab and Haryana and others vs. Jagdev Singh (supra)**. However, in the case in hand on perusal of record it reveals that no undertaking was taken from the Petitioner when the pay scale was revised. As held by this Court in **Writ Petition No.13262/2018 (Ananda Vikram Baviskar V/s. State of Maharashtra and Ors.),** an undertaking has to be taken from the candidate on the day when the revised pay scale is made applicable to her and the payment commences. At the stroke of superannuation of the said employee, asking her to tender an undertaking, practically amounts to an afterthought on the part of the employer and a mode of compelling the candidate to execute an undertaking since, she is apprehensive that her retiral benefits would not be released until such undertaking is executed. Such an undertaking will not have the same sanctity of an undertaking executed when the payment of revised pay scale had commenced. We, therefore, respectfully conclude that the view taken in **High Court of Punjab and Haryana and others vs. Jagdev Singh (supra)**, would not be applicable to the case of the Petitioner.

10. Taking into account that the Petitioner was not involved in any mischief, fraud or deceit in orchestrating her wrongful pay revision, the law laid down by the Hon'ble Supreme Court in **Syed Abdul Qadir (supra)** and

State of Punjab and other vs. Rafiq Masih (White Washer) etc. (2015) 4 SCC 334 : AIR 2015 SC 696, would apply to this case.

11. In the present case, the Respondent No. 3 has already deducted amount under communication dated 27.03.2023. As per communication dated 19.10.2022, the Petitioner was to retire w.e.f. 31.01.2023, however the Petitioner did MS-CIT in the month of September-2021. Therefore the recovery of amount of Rs.4,14,513/- was directed on account of wrongful/erroneous fixation of revised pay scale.

12. Further, on 27.03.2023 the Respondent No. 2 issued a communication and directed deduction from salary of the Petitioner from the year 1998 to 2010 on account of Marathi-Hindi examination. It is apparent on face of record that the Petitioner was exempted from appearing in Marathi – Hindi examination vide communication dated 18.11.2022, however, said exemption was revoked by the Respondent No. 2 on 23.10.2023 without any show cause notice to the Petitioner. Admittedly, the Petitioner is Class III employee. Though excess payment of salary due to wrong fixation is not permissible, the Petitioner had not played any fraud and she was not personally involved in wrongful revision of her pay scale or manipulation of record. The undertaking which has been furnished by the Petitioner on 24.01.2000 does not appear by free will of the Petitioner. Therefore,

considering the law laid down by the Hon'ble Supreme Court in the case of **High Court of Punjab and Haryana V/s. Jagdev Singh, Syed Abdul Qadir** and **Ananda Vikram Baviskar cited (supra),** directing the recovery against the Petitioner due to wrongful / erroneous fixation is not permissible. Nonetheless, the Petitioner passed MS-CIT in the month of September – 2021 and said fact is not denied by the Respondents, so also, the Petitioner was already exempted from appearing in Marathi – Hindi examination vide communication dated 18.01.2022, which has been subsequently revoked by the Respondent No.2 without according opportunity of being heard. Therefore, said revocation of exemption from appearing in Marathi-Hindi examination is not justifiable.

13. In view of above discussion and considering the law laid down in above cited cases, **the Writ Petition is allowed** and the impugned order dated 19.10.2022 and 23.10.2023 are hereby quashed and set aside. The amount due and payable to the Petitioner after her superannuation, shall be paid to the Petitioner within a period of 90 days with interest @ 6% per annum.

14. Rule is made absolute in the above terms. No order as to costs.

[Y. G. KHOBRAGADE, J.] **[RAVINDRA V. GHUGE, J.]**

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