

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

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WRIT PETITION NO.564 OF 2023

Smt.Varsha Kapil Doshi)
Age 59 yrs., Occu : Assistant Public Prosecutor,)
R/at.75/77/79, Cave Lane No.2,)
Bhatia Niwas, Ground Floor,)
Mumbai 400 002.) .. Petitioner

Versus

1. The State of Maharashtra)
Through the Additional Chief Secretary,)
Home Department, Mantralaya,)
Mumbai – 32.)
2. The Director,)
Directorate of Prosecutor,)
Maharashtra State, Mumbai)
Ketan Bhavan, Sadhika No.8, 5th Floor,)
J. Tata Road, Churchgate - 400 020.) .. Respondents

Mr.Sandeep Dere a/w Ms.Arati Patil & Ms.Sonali Pawar for the
petitioner.
Ms.Reena Salunkhe, AGP for respondents-State.

**CORAM : A.S. CHANDURKAR &
JITENDRA JAIN, JJ.
DATE : 20th FEBRUARY 2024**

Judgment (Per Jitendra Jain, J.) :-

. Rule. Ms.Salunkhe, learned Assistant Government Pleader
waives service of notice for respondents-State. By consent of the parties,
the writ petition is heard finally.

2. By this petition under Article 226 of the Constitution of India, the petitioner seeks to challenge the order dated 25th September 2019 passed by the Maharashtra Administrative Tribunal ('Tribunal') whereby the Original Application No.1093 of 2018 (OA) filed by the petitioner came to be dismissed.

3. **Brief facts are as under :-**

(i) On 12th August 1993, the petitioner was appointed as a Police Prosecutor and promoted to the post of Assistant Public Prosecutor on 2nd May 1996.

(ii) As per Maharashtra Government Servant (other than the Judicial Department Service) Marathi Language Examination Rules, 1987 ('1987 Rules'), the petitioner was required to pass the Lower and Higher Marathi Language Examination within 2 years from the date of appointment which in the instant case, expired on 12th August 1995.

(iii) However, the petitioner passed the said exam on 10th April 2015. In spite of the same, she continued to receive increments from 13th August 1995 to 18th January 2015. Therefore, on 17th November 2018, the respondents initiated an action for recovery of increments released during the said period between 1995 and 2015. The petitioner retired on 30th January 2019.

4. Being aggrieved by the order of recovery dated 17th November 2018, the petitioner filed OA No.1093 of 2018 before the Tribunal. The Tribunal vide its order dated 25th September 2019 dismissed the said OA on the ground that the petitioner did not disclose that she had not cleared Marathi Language Examination within a period of 2 years but continued to receive the increments and therefore, the order of recovery was justified. It is in this backdrop that the petitioner is before us challenging the order of the Tribunal.

5. The petitioner submits that the respondents themselves in the reply filed before the Tribunal has admitted that it was due to their own inadvertence that the increments came to be released and therefore, the reasoning of the Tribunal that the petitioner had suppressed this fact is erroneous. The petitioner also submits that the respondents have admitted in the reply that the work for which the petitioner was appointed did not get hampered merely because she did not clear the Marathi Language Examination although the documents which she was supposed to work while on duty were in Marathi language. The petitioner relied on the decision of the Supreme Court in case of ***State of Punjab & Ors. Vs. Rafiq Masih (White Washer)***¹ and submitted that the Tribunal has not appreciated the said judgment correctly and has

1 (2015) 4 SCC 334

erroneously dismissed the application.

6. Per contra, the respondents submit that the decision in case of *Rafiq Masih (supra)* is not applicable since the petitioner has suppressed that she had not cleared her Marathi Language examination and continued to receive the increments. The respondents further submitted that the aforesaid decision of the Supreme Court is not applicable because the said decision is applicable only to Class-III and Class-IV services whereas the petitioner was Class-I service. The respondents, therefore, supported the order of the Tribunal and prayed for dismissal of the petition.

7. We have heard the learned counsel for the petitioner and the respondents and with their assistance perused the documents annexed to the petition.

8. Admittedly, there is no dispute that the petitioner did not clear Marathi Language Exam within the time specified in the 1987 Rules i.e. within two years from the date of appointment which expired on 12th August 1995, but the petitioner cleared the exam in 2015. The respondents in their reply before the Tribunal in para 10 have admitted that it was their own mistake that the increment came to be released. It is not the case in the reply of the respondents that there was any

suppression on the part of the petitioner nor was it the reason given in the communication dated 17th November 2018 by which the recovery was sought. Therefore, the reasoning given by the Tribunal that the petitioner had suppressed this fact is not based on any material on record nor is it a reason mentioned in the order dated 17th November 2018. The same is also not the case of the respondents in the reply. It is a settled position that validity of the order has to be tested on the touchstone of the original order and nothing can be added or subtracted thereto. Therefore, the Tribunal was not justified in rejecting the Original Application on the ground of suppression by the petitioner.

9. The respondents have admitted in the reply before Tribunal that it was their mistake in releasing the increment. The respondents have also not stated that on account of the petitioner not clearing her Marathi Language Exam the works suffered. However, merely because the work did not suffer it cannot be the sole basis of giving relief to the petitioner.

10. At this juncture, it is relevant to reproduce the illustrative situations laid down by the Supreme Court in the case of *Rafiq Masih (supra)* where recoveries 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. The petitioner was to retire on 30th January 2019 and the order seeking recovery has been passed on 17th November 2018. The Supreme Court in the case of ***Rafiq Masih (supra)*** has stated that recovery from employee is impermissible in law when excess payment has been made for a period in excess of five years before the order of the recovery is issued. In the instant case, the payment has been made from 1995 which is sought to be recovered in the year 2018 and therefore the same being in excess of five years, the respondents are not justified in seeking recovery.

12. The Supreme Court in the case of ***Rafiq Masih (supra)*** further also observed that no recovery is permissible from employees who are due to retire within one year of the order of the recovery. In the

instant case, the order of recovery is on 17th November 2018 and the retirement is on 30th January 2019. Therefore, the case of the petitioner squarely falls within the parameters laid down by the Supreme Court for non-recovery of the dues.

13. The contention of the respondents that decision of the Supreme Court would be applicable only to class III and IV service employee is not correct. The situations summarized in para 12 of the said decision, insofar as the clause 1 is concerned is for class III and IV service employee, whereas with respect to the other situations it is applicable to all class of employees. Therefore the contentions of the respondents on this count is also to be rejected.

14. It is not the case of the respondents in the order dated 17th November 2018 that the petitioner having not cleared Marathi Language Examination represented to the respondents as if she cleared the exam. Therefore the contention of mis-representation at the behest of the petitioner is also not correct.

15. The other parameters laid down by the Supreme Court is that recovery if made would be harsh or arbitrary as would outweigh the equitable balance of the employer's rights to recover. In the instant case, the respondents themselves have admitted that it was their mistake in

releasing the increment. Furthermore, work of the petitioner has not suffered on account of Marathi Language Examination cleared belatedly and thirdly it would be harsh to recover the increment released during period between 1995 and 2015 when the employee is on the verge of the retirement. In our view, considering all these factors the equitable balance lies in favour of the petitioner and not the respondents to quash the recovery order dated 17th November 2018. In this connection, it is also important to note para 8 of the ***Rafiq Masih's*** case which reads as under :-

“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 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”.

16. In view of above, we pass the following order :-

ORDER

- (i) Communication dated 17th November 2018 is quashed and set aside.
- (ii) Order passed by the Maharashtra Administrative Tribunal in Original Application No.1093 of 2018 on 26th September 2019 is set aside.

- (iii) Excess increments paid to the Petitioner for a period from 13th August 1995 to 18th January 2015 are not liable to be recovered.
- (iv) The petitioner is entitled to receive pension by calculating her entitlement from the date she cleared the requisite examinations.
- (v) Rule is made absolute in the aforesaid terms with no order as to costs.

JITENDRA JAIN, J.

A.S. CHANDURKAR, J.