

**MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI
BENCH AT AURANGABAD**

ORIGINAL APPLICATION NO. 982 OF 2019

DISTRICT:- AURANGABAD

Govind S/o Yadavrao Bharsakhale,
Age: 62 years, Occu: Retired as
Civil Engineering Assistant,
R/o MHADA Colony, Ramkrushna
Colony, Shahanoormiya Dargaha
Road, Osmanpura, Aurangabad.

.. **APPLICANT**

V E R S U S

1. The State of Maharashtra
Through the Secretary,
Public Works Department,
M.S. Mantralaya, Mumbai-32.
2. The Superintending Engineer,
Public Works Department,
Aurangabad Division,
Aurangabad.
3. The Executive Engineer,
Public Works Department,
Padampura, Aurangabad.
4. The Accountant General (A&E) II,
P.B. No. 114, GPO, Civil Area,
Nagpur.
5. The Account Officer,
Account & Treasury,
Pay Verification Unit,
Near Collector Office,
Aurangabad.

.. **RESPONDENTS**

APPEARANCE : Shri Kiran G. Salunke, learned counsel
for the applicant.
: Shri I.S. Thorat, learned Presenting
Officer for the respondent authorities.

CORAM : **JUSTICE SHRI P.R.BORA, VICE CHAIRMAN**

DATE : **28.08.2023**

ORAL ORDER

Heard Shri Kiran G. Salunke, learned counsel for the applicant and Shri I.S. Thorat, learned Presenting Officer for the respondent authorities.

2. By filing the present Original Application applicant has prayed for quashment of the order dated 11.10.2019 passed by respondent No. 4, whereby the recovery of Rs. 33,460/- towards overpayment of gratuity and recovery of Rs. 48,016/- towards overpayment of commutation is sought to be directed against the applicant.

3. The applicant retired from the Government service on 30.6.2010 on attaining the age of superannuation. It is the grievance of the applicant that the recovery so directed against the applicant is illegal and unsustainable for the reason that the same has been directed unilaterally without giving any notice or opportunity of hearing to the applicant. Another reason which has been put-forth in exception to the aforesaid order is that in view of the law laid down by the Hon'ble Apex Court in the case of **State of Punjab and others Vs. Rafiq Masih (White Washer) etc., AIR**

2015 SC 596 such recovery is impermissible. In the circumstances, the applicant has prayed for quashment of the aforesaid order of recovery.

4. The contentions raised in the O.A. and prayers made therein are opposed by respondent Nos. 1 to 3 by filing their affidavit in reply. Respondent No. 4 has filed separate affidavit in reply. In paragraph No. 15 of the affidavit in reply filed on behalf of respondent Nos. 1 to 3, the respondents have tried to justify the impugned order by stating that the applicant was not eligible for absorption in the cadre of Civil Engineering Assistant w.e.f. 22.4.1994 and had become eligible for such absorption on 6.12.2001. It is further contended that the aforesaid mistake was subsequently noticed and accordingly the corrected absorption order was issued on 5.7.2018. It is further contended that the pay and pension of the applicant have been accordingly revised and direction has also been given for recovery of the excess payment made to the applicant wrongly paid to the applicant in excess of his entitlement.

4. Respondent No. 4 in his affidavit in reply has referred to Rule 132 of the Maharashtra Civil Services (Pension) Rules, 1982 and in view of the said provisions under the said rule has prayed for dismissal of the Original Application.

5. Shri Kiran G. Salunke, learned counsel appearing for the applicant relying on the judgment of the Hon'ble Apex Court in the case of **State of Punjab and others Vs. Rafiq Masih (White Washer) etc.**, (cited supra) submitted that the impugned order cannot be sustained being directly in conflict with and contrary to the law laid down by the Hon'ble Apex Court in the aforesaid judgment. Learned counsel submitted that it is not the case of the respondents either in the impugned order or even in the affidavit in reply filed on behalf of the respondents that absorption of the applicant in the cadre of Civil Engineering Assistant w.e.f. 22.4.1994 done due to any misrepresentation or concealment of any fact by the present applicant. Learned counsel submitted that in such circumstances the impugned order directing recovery of the allegedly excess amount of gratuity and commutation cannot be recovered by the respondents.

7. Shri I.S. Thorat, learned Presenting Officer opposed the submissions made on behalf of the applicant. He submitted that the applicant has by filing another O.A. bearing No. 376/2019 has challenged the correctness of the order dated 5.7.2018. Learned P.O. submitted that unless the said O.A. is decided and the legality of the order dated 5.7.2018 is finally determined by

the Tribunal, it would be premature to pass any order in the present O.A. since the recovery is based on the said order dated 5.7.2018. Learned P.O. further submitted that even otherwise the applicant, who was not entitled for such payment legally is liable to refund the said amount to the Government. Learned P.O. in the circumstances prayed for rejecting the O.A.

8. I have duly considered the submissions made on behalf of the applicant, as well as, respondents. It is not in dispute that the applicant retired from the Government service on 30.6.2010 on attaining the age of superannuation. It is further not in dispute that the impugned order came to be passed on 11.10.2019 i.e. almost after 10 years of his retirement. There further appears no dispute that before directing such recovery the applicant was not served with any notice or was not given any opportunity of hearing. From the record it appears that the respondents had issued corrected absorption order on 5.7.2018. The record further reveals that the applicant has challenged the aforesaid order also by filing O.A. No. 376/2019 and the same is pending before this Tribunal. In this context it has been argued by learned P.O. that unless O.A. No. 376/2019 is decided by this Tribunal the present O.A. cannot be decided.

9. The contention of the learned P.O. however, cannot be accepted. There are two separate issues, first that the respondents have revised the order of absorption of the applicant vide order issued on 5.7.2018 and secondly on the basis of the said order the pay has been revised and the recovery has been directed against the applicant vide the impugned order. It has to be stated that the order dated 5.7.2018, challenged in the aforesaid O.A. No. 376/2019, even if is not set aside and kept undisturbed even then the recovery as has been directed against the present applicant on the basis of alleged pay revision may not be sustained in view of the law laid down by Hon'ble Supreme Court in the case of **State of Punjab and others Vs. Rafiq Masih (White Washer) etc.**, (cited supra).

10. According to the respondents, because of the alleged mistake in directing the absorption of the applicant in the cadre of Civil Engineering Assistants w.e.f. 22.4.1994 instead of 6.12.2001 the applicant was wrongly given the benefits of the post of Junior Engineer during the said period. Because of mistake committed as above there was wrong fixation of pay of the applicant which resulted in awarding more gratuity amount to the applicant after his retirement to the tune of Rs. 33,460/- and accordingly, commutation amount was also paid in excess to the applicant to the tune of Rs. 48016/- and the amounts so

paid to the applicant after his retirement sometime in the year 2010 or 2011 are sought to be recovered by the respondents.

11. As I noted hereinabove it is not the case of the respondents that the alleged excess payment was made to the applicant as a result of any misrepresentation made by the applicant or because of any foul role played by the applicant in receiving the said amount knowing well that he was not entitled for the said amount. It has been argued by learned P.O. that the Government has every right to recover the excess amount paid to the Government servant because of wrong fixation of his pay for which he was not entitled. Learned P.O. has relied upon the judgment of the Hon'ble Supreme Court in the case of **Chandi Prasad Uniyal & Ors. Vs. State of Uttarakhand & Ors., [2012] 7 S.C.R. 307.** Learned P.O. read out paragraph Nos. 2, 9 and 16 to 18 of the said judgment. Learned P.O. submitted that facts of the present case are more akin to the facts involved in the case of **Chandi Prasad Uniyal & Ors . Vs. State of Uttarakhand & Ors.** (cited supra) and, as such, the law laid down by the Hon'ble Supreme Court in the said case would apply to the case of the present applicant.

12. Learned counsel appearing for the applicant resisted the arguments so made on behalf of the State authorities. Learned

counsel pointed out that the judgment in the case of **Chandi Prasad Uniyal & Ors. Vs. State of Uttarakhand & Ors.** (cited supra), as well as, in **Sahib Ram Vs. State of Haryana, 1995 Supp. (1) SCC 18** and in **Col. B.J. Akkara (retired) Vs. Government of India, (2006) 11 SCC 709** are considered by the Hon'ble Supreme Court in the matter of **State of Punjab and others Vs. Rafiq Masih (White Washer) etc.** (cited supra). Learned counsel pointed out that circumstances which are discussed in the case of **State of Punjab and others Vs. Rafiq Masih (White Washer) etc.** (cited supra) have not been discussed in the earlier judgments. In paragraph 12 of the said judgment their Lordships have noted down said circumstances for making recovery of any amount paid to the Government employee allegedly excess to his entitlement because of wrong pay fixation or alike reasons impermissible. I deem it appropriate to reproduce para 12 of the said judgment, which reads thus: -

“12. 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 herein above, we may, as a ready reference, summarize 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 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 employees, 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."

13. After having considered the circumstances which are stated above, there remains no doubt that the case of the present applicant would fall within the ambit of said circumstances. In the said case the Hon'ble Supreme Court has ruled that any recovery directed from the Government employees in Class-III and Class-IV after their retirement has to be held iniquitous and has, therefore, made it impermissible. In the present matter it is not disputed that the applicant is a Class-IV employee. It is further not disputed that the recovery is directed after his retirement. I reiterate that whatever excess payment is allegedly made to the applicant as per the contentions of the respondents was not because of any misrepresentation by the applicant. In the circumstances, it appears to me that the order of recovery made on 11.10.2019 which has been

impugned in the present matter cannot be sustained and deserves to be quashed and set aside. It is clarified that insofar as revision made in the pay of the applicant which may have impact in determining the amount of pension to be paid to the applicant is concerned, unless order dated 5.7.2018 is set aside would be applicable to the applicant. However, if the said order is set aside the applicant will continue to receive the pension as before as if there was no order passed either on 5.7.2018 or on 11.10.2019.

14. For the reasons stated above, the following order is passed: -

ORDER

- (i) The Original Application stands allowed. Impugned order dated 11.10.2019 is quashed and set aside.
- (ii) There shall be no order as to costs.

VICE CHAIRMAN

O.A.NO.982-2019 (SB)-2023-HDD-ARJ-Recovery