

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI**

**ORIGINAL APPLICATION NO.1093 OF 2018  
(Subject : Recovery)**

**DISTRICT : MUMBAI**

Smt. Varsha Kapil Doshi, )  
Age : 57 years, Occ. Assistant Public Prosecutor, )  
R/at. 75/77/79, Cavel Cross Lane No.2, )  
Bhatia Niwas, Ground Floor, )  
Mumbai 400 002. ) **..... Applicant**

**Versus**

1. The State of Maharashtra, )  
Through the Addl. Chief Secretary, )  
Home Department, Mantralaya, )  
Mumbai 400 032. )

2. The Director, Directorate of Prosecutor, )  
Maharashtra State, Mumbai. )  
Khetan Bhavan, Sadhika No.8, 5<sup>th</sup> floor, )  
J. Tata Road, Churchgate 400 020. ) **..... Respondents**

Shri S.S. Dere, learned Advocate for the Applicant.

Smt. Archana B.K., learned Presenting Officer for the Respondents.

**CORAM** : SHRI A.P. KURHEKAR, MEMBER (J).

**RESERVED ON** : 25.09.2019.

**PRONOUNCED ON** : 26.09.2019.

**J U D G M E N T**

1. Heard Shri S.S. Dere, learned Advocate for the Applicant and Smt. Archana B.K., learned Presenting Officer for the Respondents.

2. Applicant has challenged the impugned order dated 17.11.2018, whereby the recovery of excess payment i.e. increments released in favour of the Applicant mistakenly for the period from 13.08.1995 to 18.01.2015 are sought to be recovered.

Shortly stated facts giving rise to the Original Application are as follows:-

3. Applicant was appointed as Police Prosecutor on 12.08.1993 and promoted to the post of Assistant Public Prosecutor on 02.05.1996. She was required to pass the Lower and Higher Marathi Language Examination within two years from the date of appointment, as contemplated under Maharashtra Government Servants (other than Judicial Department Servants), Marathi Language Examination Rules, 1987, [hereinafter referred as *Marathi Language Examination Rules, 1987*, for brevity]. However, she did not clear the said examination within two years from the date of appointment, but her increments were released regularly despite specific provisions in Marathi Language Examination Rules, 1987 which *inter alia* provides for withholding of the increments if the examinations are not cleared within two years from the date of appointment. She passed the Lower Standard examination in 2002 and has passed the Higher Standard examination on 10.04.2015. As she was due to retirement on 30.01.2019, Respondent No.2 (Director, Directorate of Prosecutor) by impugned order dated 17.11.2018 informed the Assistant Director of Prosecutor, Mumbai to take necessary action of the recovery of the increments released in favour of the Applicant from 13.08.1995 to 18.01.2015 and report the compliance in terms of directions of the Government by letter dated 12.03.2018. The Applicant has challenged this communication dated 17.11.2018 by filing the present O.A. contending that the recovery sought to be made is illegal, particularly, in view of the decision of the Hon'ble Supreme

Court in **Civil Appeal No.11527 of 2014 arising out of SLP No.11684 of 2012, State of Punjab & Others Vs. Rafiq Masih (white Washer).**

4. Respondents resisted the application by filing the affidavit-in-reply *inter alia* denying that the impugned order suffers from in legal infirmity. Respondents contend that as the Applicant has failed to pass Lower and Higher Marathi Language Examination within two years from the date of appointment she was not entitled to increments in terms of Marathi Language Examination Rules, 1987. Respondents contends that it is in 2015 only the Applicant cleared the Marathi Language Examination and therefore the recovery of the increments released in favour of the Applicant is legal and the decision of the Hon'ble Supreme Court in **Rafiq Masih's case** cited supra is not attracted to the facts of the present case.

5. Shri S.S. Dere, learned Advocate for the Applicant sought to made two fold submissions. Firstly, the Applicant being well versed in marathi since appointment is successfully working as Prosecutor in Magistrate Court where most of the judicial business is transacted in Marathi language and knowledge of Marathi was not barrier while discharging duties. Therefore, mere non passing of Marathi Language Examination cannot be a ground to recover the increments paid to her. Secondly, the Marathi Language Examination Rules 1987, which provides for passing of Lower and Higher Marathi Language Examination within two years from the date of appointment, Rules nowhere provides for the recovery of the increments already paid and in any case the recovery is not permissible in view of the decision of the Hon'ble Supreme Court in **Rafiq Masih's case.**

6. Par contra, Smt. Archana B.K. learned Presenting Officer for the Respondents submits that the Applicant was well aware of the requirement to pass Lower and Higher Marathi Language Examination within two years from

the date of appointment and despite non compliance she continued to receive yearly increments without disclosing the fact of not passing the examination and this amounts to suppression of material fact and therefore the Applicant is not entitled to the benefit of decision of Hon'ble Supreme Court in **Rafiq Masih's case**. She has, further, pointed out that in similar situation this Tribunal in O.A.No.664/2017, (Shri Kiran Kirit Solanki Versus State of Maharashtra & 2 Ors.) decided on 04.07.2019, rejected the O.A. wherein action of recovery of amount towards increments was challenged for not passing Marathi Language Examination.

7. Undisputedly, the Applicant was appointed on 02.08.1993 and was required to pass the Lower and Higher Marathi Language Examination within two years, but passed the Higher Marathi Language Examination only in 2015. It is not disputed that despite of non clearing of examination increments were released in her favour. She has filed the present O.A. on 11.12.2018 and stands retired during the pendency of O.A. i.e. on 30.01.2019.

8. Thus, the crux of the matter is whether the recovery of the amount towards increments released in favour of the Applicant for the period from 13.08.1995 to 18.01.2015 by impugned order dated 17.11.2018 is legal and valid.

9. At this juncture, it would be apposite to see the provisions of Maharashtra Government Servants (other than Judicial Department Servants), Marathi Language Examination Rules, 1987. Rules 3, 4 and 5 are material, which are as follows :-

- "3. Subject to the provisions of rule 4, every Gazeted or non-Gazeted Government Servant shall be required to pass the –*
- (i) Lower Standard Examination before the expiry of two years from the date of coming into operation of these rules or from the date of his appointment, whichever is later; and*

(ii) Higher Standard Examination before the expiry of two years after his passing the Lower Standard Examination.

**Note** : - An Officer belonging to the All India Services who is exempted from passing the Lower Standard Examination under sub-rule (6) of the rule 4 of these rules, shall be required to pass the Higher Standard Examination within four years from the date of his joining the State service.

4. (1) Notwithstanding anything contained in rule 3, a Government Servant shall be exempted from passing of the examinations if, -

(i) he has passed the examinations according to the existing rules ;

(ii) he was eligible for exemption or was exempted under the existing rules ;

(iii) his mother tongue is Marathi;

(iv) he has passed the Secondary School Certificate Examination or equivalent examination with Marathi as a higher standard subject of 100 marks' paper, prior to joining the Government service; or

(v) he is a class III government servant holding a post for which requisite recruitment qualification is less than passing of the Secondary School Certificate Examination level :

Provided that, Government Servants whose duties are of technical or arduous nature and who are not required to correspond in Marathi Language, may be exempted from passing the Examinations by the concerned Administrative Department in consultation with the General Administration Department.

(2) A Government Servant who claims that his mother tongue is Marathi shall fulfill the following conditions, -

(i) he should be able to write Marathi language in Devnagari script, with facile ;

(ii) he should produce a certificate from his Head of the Department / office that he can effectively correspond in Marathi.

(3) A Government Servant who does not claim that his mother tongue is Marathi but that he has studied in Marathi medium and who has not passed Secondary School Certificate or Higher Standard Examination with Marathi shall fulfil the following conditions for getting exempting from these rules :-

- (a) *he should be able to write with facile in Devnagari script ;*
- (b) *he should produce a certificate from the concerned Institute indicating that he has taken education in Marathi medium at least upto 7<sup>th</sup> standard ; and*
- (c) *he should produce a certificate from the Head of Department/ Office that he can correspond in Marathi.*
- (4) *The Appointing Authority or the Head of the Department as the case may be, of a Government servant shall, issue orders in respect of the Government Servant falling under this rule.*
5. *A Government Servant who fails to pass the examinations within the prescribed period shall, after the expiry of the said period, be liable to have his increments withheld until he passes the examination or examinations, as the case may be, or is exempted from passing the same under the provisions of rule 4.*
- Note 1 :- The date of passing the examination shall be deemed to be the date following the date on which the examination ends;*
- Note 2 :- Increments so withheld shall become payable to the Government Servant with effect from the date on which he passes the examination or is exempted from passing it and increments shall accrue to him as if no increments had been withheld. He shall not be entitled for the arrears due to withholding of increments.”*

10. Only because Applicant is well versed in Marathi Language and had successfully conducted the court business without any barrier of language, that itself cannot be the ground for exemption unless she complies Rule 4(2), (3), 3 (a), (b) and (c) of Marathi Language Examination Rules, 1987. As per these Rules, the Competent Authority is empowered to issue orders whether the Government Servant is able to write with facile in Devnagari script and produce the certificate from the concerned Institute indicating that he has taken education in Marathi medium at least upto 7<sup>th</sup> standard and further produce certificate that he can correspond in Marathi. In absence of compliance of these Rules, only because the Applicant had conducted court business in Marathi Language for years together, cannot be the ground for not passing Marathi Language Examination. Suffice to say, the Applicant's case

does not fall within the Rule of 4(3) of the Marathi Language Examination Rules, 1987.

11. As such what emerges from the Marathi Language Examination Rules, 1987, that in view of the failure of the Applicant to pass Marathi Language Examination within two years from the date of appointment her increments were required to be withheld till she pass the examination or exempted from passing the same under Rule 4 of Marathi Language Examination Rules, 1987. However, she availed the increments which is now sought to be recovered.

12. The whole emphasis of the learned Advocate for the Applicant was upon the judgment of Hon'ble Supreme Court in **Rafiq Masih's case**, wherein the Hon'ble Supreme Court laid down certain parameters / situation wherein the recovery of pay and allowance, wrongly paid to the employees for no fault on their part, is not permissible. Learned Advocate for the Applicant submits that in view of the retirement of the Applicant on 30.01.2019, now the recovery, even if the Applicant is Class-I officer, is not permissible and Clause (ii), paragraph 12 of the judgment is attracted.

13. In so far as judgment of Hon'ble Supreme Court in **Rafiq Masih's case** is concerned therein the issue for consideration was pertaining to recovery of excess payment made to the employees on account of wrong fixation of pay without any fault or mistake on the part of the employees. The Hon'ble Supreme Court held that it would be iniquitous and arbitrary for an employer to recover the wages wrongly paid to the employees after the period of 5 years or more, where no fault, fraud or mistake can be attributed to the employees. Paragraph 12 from the judgment of the Hon'ble Supreme Court is as follows :-

*"12. It is not possible to postulate all situation 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, summarise 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 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."*

14. Turning to the facts of the present case, it is nowhere in case of the Applicant that she was not aware of the mandatory requirement of passing Marathi Language Examination within two years from the date of appointment. The Applicant was appointed not in Clerical cadre but on the post of Police Prosecutor and then promoted as Assistant Police Prosecutor, who is suppose know the law and relevant rules. As stated above, though the Applicant did not pass Marathi Language Examination she continued to avail increments year to year. Thus, it is explicit that though she was aware of not passing Marathi Language Examination she did disclose the same though she was bound to disclose it to the Drawing and Disbursing Officer. But she kept silence and continued to avail increments regularly for years together. The Applicant being appointed as Police Prosecutor she was expected to be honest and disclose the facts to her Department about non clearing / passing of Marathi Language Examination. This is nothing but suppression of material facts with an intention to gain wrongfully. The benefit of judgment of Hon'ble Supreme Court in **Rafiq Masih's case** was extended to the employees to whom



no fault or mistake can be attributed and where excess payment is made due to sheer fault of the Department in fixation of pay. Whereas in present case, the situation is otherwise, where the Applicant knowingly continued to avail benefit of increments in contravention of Marathi Language Examination Rules, 1987. This is nothing but wrongful gain on the part of the Applicant and the benefit of judgment in **Rafiq Masih's case** cannot be availed by such employee who has suppressed the material fact. Therefore, in my considered opinion, with due respect the judgment of Hon'ble Supreme Court in **Rafiq Masih's case** is of little assistance to the Applicant. The suppression of the material facts suggestive of dishonesty is quite visible which render her disentitled to the benefit of decision in **Rafiq Masih's case**. Suffice to say, she has not come with clean hands and not entitled to the benefit of judgment in **Rafiq Masih's case**.

15. The next submission advanced by learned Advocate for the Applicant that in Marathi Language Examination Rules, 1987 there is no provision for recovery of increments paid and therefore in absence of any such provision recovery is not permissible, is misplaced as well as misconceived. Whenever excess payment is made mistakenly it can be recovered by the Government even after retirement from the retiral benefit of the Government servant. In this behalf Rule 132 of Maharashtra Civil Services (Pension) Rules, 1982, empowers the Government to recover any such allowance wrongly paid to the Government servants and to recover or adjust the same from gratuity. Suffice to say submission advanced by learned Advocate for the Applicant holds no water.

16. Shri S.S. Dere, learned Advocate for the Applicant sought to place reliance on the judgments rendered by the Tribunal in support of his contention that the recovery is not permissible. He referred to the decision in O.A.No.493 of 2015 (Mrs. Saeeda Yaseen Shaikh Versus the State of

Maharashtra & Anr.) decided by this Tribunal on 30.10.2015. I have gone through the judgment wherein also issue of recovery on account of failure to pass Marathi Language Examination coupled with the exemption from passing Marathi Language Examination was involved. It is in that context Tribunal issued the directions only to consider the request of the Applicant for grant of exemption from passing Marathi Language Examination. As such this judgment is of no help to the Applicant as there is no such conclusive finding of the Tribunal. He further, referred to the decision in O.A.No.711 of 2016 (Omprakash Dhondiram Mane Versus State of Maharashtra & 2 Ors, decided by this Tribunal on 20.12.2019 and O.A.No.162 of 2016 (Dr. Virendraprasad Rajendraprasad Shrivastav Versus State of Maharashtra & 5 Ors.) decided by this Tribunal on 15.06.2017. In both the matters the action of recovery of the excess payment made due to wrong fixation was in issue and in the light of the judgment of Hon'ble Supreme Court in **Rafiq Masih's case** order of recovery was quashed. As such these matters pertain to wrong fixation of pay, where no fraud was attributable to the Applicants. Whereas in present case as stated above, Applicant has suppressed the material fact and availed regular increments. Therefore, these judgments are quite distinguishable and have no assistance to the Applicant.

17. The totality of aforesaid discussion lead me to sum up that the Applicant is not entitled to the benefit of the judgment of Hon'ble Supreme Court in **Rafiq Masih's case** as she is guilty of suppression of material facts and obtained wrongful gain of increments unlawfully. Needless to mention that decision in **Rafiq Masih's case** is based upon the principle of equity. Therefore, the person who seeks equity must come with clean hands and if there is suppression of material fact on his part, it rendered him disentitled to the equity relief. This being the position, the Applicant cannot be allowed to retain the Government money which is a loss to public exchequer.

18. In this view of the matter, impugned order of recovery cannot be faulted with and the Original Application deserves to be dismissed.

**ORDER**

Original Application is dismissed. No order as to costs.

Sd/-

**(A.P. Kurhekar)**  
**Member(J)**

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