

IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

**ORIGINAL APPLICATION NO.155 OF 2020
WITH
ORIGINAL APPLICATION NO.157 OF 2020
WITH
ORIGINAL APPLICATION NO.161 OF 2020**

DISTRICT: MUMBAI

ORIGINAL APPLICATION NO.155 OF 2020

- 1) Shri Dipak Laxman Fulpagar,)
Retired as Watchman Kurla Dairy,)
R/o. 1/1, Trideep Society, Santosh Nagar, Pune)
Link Road, Kalyan (E), Thane 421306.)... **Applicant**

Versus

- 1) The Incharge General Manager,)
Mother Dairy, Kurla (E), Mumbai-24.)
- 2) The State of Maharashtra,)
Through Principal Secretary, (Dairy Development))
Agriculture, Animal Husbandry, Dairy)
Development & Fisheries Department, Having)
Office at Mantralaya, Mumbai- 400 032.)... **Respondents**

WITH

ORIGINAL APPLICATION NO.157 OF 2020

- 1) Shri D. Y. Kamble,)
Aged 63 years, Retired as Watchman Kurla Dairy,)
R/o.Sajjanganrh C.H.S. Building Bo.52, Room No.309,))
A-Wing, Lallubhai Compound, Mankhurd,)
Mumbai – 43.)

- 2) Shri Tukaram B. Kotwadekar,)
 Aged 64 years, Occ. Retired from Mother Dairy,)
 Kurla, Mumbai.)
 R/o. A/p. Khawadi, Tal. Lanja, Dist. Ratnagiri.)... **Applicants**

Versus

- 1) The General Manager,)
 Worli Milk Scheme, Worli, Mumbai 18.)
- 2) The State of Maharashtra,)
 Through Principal Secretary, (Dairy Development))
 Agriculture, Animal Husbandry, Dairy)
 Development & Fisheries Department, Having)
 Office at Mantralaya, Mumbai- 400 032.)... **Respondents**

WITH

ORIGINAL APPLICATION NO.161 OF 2020

- 1) Shri Anant Appa Zajam,)
 Aged 60 Yrs, Occ. Retired from Worli Milk Dairy,)
 R/o. Room No.5, Shri Sai Krupa C.H.S., Samarth)
 Nagar, Bhandup (W), Mumbai-78.)
- 2) Shri Bhagchandra Vithoba Bhagwat,)
 Aged 61 Yrs, Occ. Retired from Central Dairy,)
 Aarey, Mumbai-65, R/o. Room No.304, 3rd Floor,)
 Vaishnav Park, Sector 10, New Panvel.)
- 3) Shri Suresh Waghu Chavan,)
 Aged 63 Yrs, Occ. Retired from Mother Dairy,)
 Kurla, Mumbai, R/o. A/P. Sultapur, Tal. Wai,)
 Dist. Satara.)

- 4) Shri Mahaling Ganapati Patil,)
 Aged 62 Yrs, Occ. Retired from Worli Dairy,)
 R/o. A/P. Sawarde Bk, Tal. Kagal, Dist. Kolhapur.)
- 5) Shri Eknath Rambhau Patil,)
 Aged 62 Yrs, Occ. Retired from Worli Dairy,)
 R/o. Aarey Colony Unit-6, Goregaon (E),)
 Mumbai-65.)
- 6) Shri Vishwas Vitthal Chavan,)
 Aged 62 Yrs, Occ. Retired from Central Dairy,)
 Aarey, Mumbai-65, R/o. Subhedar Ramji Ambedkar)
 Nagar, A.J. Khan Road, Worli, Mumbai-19.)
- 7) Shri Komal Bachu Yadav,)
 Aged 62 Yrs, Occ. Retired from P.D.M., Mantralaya)
 R/o. Room No.312, Adarsha Nagar, Goregaon)
 Aarey Colony, Goregaon (E), Mumbai-65.)
- 8) Shri Prasanath Badri Pal,)
 Aged 61 Yrs, Occ. Retired from Government Printing)
 Press, R/o. Gram Rohani, Khujagipul, Post Derema,)
 Dist. Sultanpur, Uttar Pradash.)
- 9) Shri Kalidas Ramchandra Kamble,)
 Aged 60 Yrs, Occ. Retired from Mother Dairy, Kurla)
 Mumbai, R/o. Aarey Colony Unit Room No.5,)
 Goregaon (E), Mumbai-65.)
- ... Applicant**

Versus

- 1) The General Manager,)
 Worli Milk Scheme, Worli, Mumbai-19.)
- 2) The Incharge General Manager,)
 Mother Dairy, Kurla (E), Mumbai-24.)

- 3) The Incharge General Manager,)
Central Dairy, Aarey, Goregaon, Mumbai-65.)
- 4) The State of Maharashtra,)
Through Principal Secretary, (Dairy Development))
Agriculture, Animal Husbandry, Dairy)
Development & Fisheries Department, Having)
Office at Mantralaya, Mumbai- 400 032.)
- 5) The Member Secretary,)
Development Board for the rest of)
Maharashtra, New Administrative Building,)
18th Floor, Opp. Mantralaya, Mumbai-32.)
- 6) The Directorate of Govt. Printing &)
Stationery, Mumbai, having office at Charni)
Road Railway Station, Mumbai.)
- 7) The Chief Executive Officer,)
Central Dairy, Aarey, Goregaon,)
Mumbai 400 605.)..... **Respondents**

Shri A. V. Bandiwadekar, learned Advocate for the Applicants.

Smt. Kranti Gaikwad, learned Presenting Officer for the Respondents.

CORAM : Shri A. P. Kurhekar, Member (J)

DATE : 18.03.2021

ORDER

The Applicants have challenged the action taken by the Respondents for recovery of excess payment from the retirement benefits and for direction to grant pension on the basis of last drawn pay which they were

availing at the time of retirement. These Original Applications being arising from common issue are decided by common order.

2. Shortly stated facts giving rise to Original Applications are as under:-

The Applicants have joined the Government service as Watchman (Group-D post) on the establishment of Respondent No.1- General Manager, Worli Milk Scheme, Mumbai in between 1984 to 1993 with initial pay scale of Rs.200-280. Later, they were granted benefit of first Time Bound Promotion on completion of 12 years continuous service and their pay came to be revised from 750-940 to 950-1500 for the post of Gate Keeper / Chief Investigator. Thereafter, again the benefit of Second Time Bound Promotion given on completion of 24 years of continuous service (except Applicant Nos.6 and 9 in O.A.No.161/2020). Accordingly, they were placed in pay-scale of Rs.5,200-20200 with G.P.1,900 in terms of G.R. dated 05.07.2010 in the context of isolated post. Accordingly, the Applicants availed all the service benefits and stand retired in between 2015-2020 as shown in chart below :

O.A.No.155/2020						
Sr. No.	Name	Date of Appointment	Post Held	Date of grant of first Time Bound Promotion	Date of grant of second Time Bound Promotion	Retd. Date
1	Deepak L. Phulpagar	15.01.1981 01.01.1985	Watchman	01.01.1997	01.01.2009	31.05.2018
O.A. No.157/2020						
1	Tukaram B. Kotawadekar	10.08.1985	Watchman	17.05.1996	30.03.2012	31.05.2015
2	Damu Y. Kambale	02.02.1981 01.03.1986	Watchman	01.03.1998	01.03.2010	31.07.2017

O.A.No.161/2020						
1	Bhagchandra V. Bhagwat	05.11.1985	Watchman	08.11.1997	08.11.2009	30.04.2018
2	Suresh W. Chavan	08.07.1986	Watchman	08.11.1998	08.07.2010	31.05.2017
3	Mahalingam G. Patil	07.05.1980	Watchman	07.10.1997	07.10.2009	30.06.2018
4	Komal B. Yadav	19.08.1985	Watchman	19.08.1997	29.08.2009	31.07.2018
5	Eknath R. Patil		Watchman	12.09.1996	15.09.2018	31.12.2018
6	Vishwas V. Chavan	24.04.1981 10.02.1982	Watchman	20.12.2002		30.06.2018
7	Parasnath Pal	16.05.1986	Watchman	17.03.2011	13.10.2013	30.01.2019
8	A.A. Zajam	23.04.1981 10.02.1982	Watchman	10.06.1997	15.10.2013	30.09.2019
9	K. K. Kamble	22.03.1993	Watchman	29.08.1998		30.09.2019

However, the problem arose while releasing retirement benefits when the service books were sent for pay verification. The objection was raised about grant of 1st and 2nd Time Bound Benefit in absence of approved Recruitment Rules. In pursuance of it, in O.A.No.157/2000, the Respondent No.1 by order dated 15.01.2020, issued directions for recovery of excess amount of Rs.4,87,490/- from gratuity. Whereas, no such orders were passed in O.A.No.161/2000. However, in so far as O.A.No.155/2020 is concerned, by order dated 12.02.2019 sum of Rs.5,38,479/- has been recovered from gratuity.

3. It is on above background, the Applicants have filed these Original Applications challenging the action of recovery from gratuity after retirement and also sought directions to the Respondents to refund the excess amount recovered from them and to grant pension on the basis of last drawn pay which they were availing at the time of retirement.

4. It is really disturbing to note that though the Applicants stand retired in between 2015-2020, even no provisional pension was granted to them and on the contrary they were subjected to belated recovery from retirement benefits. Therefore, after filing of Original Applications, it is only in pursuance of interim order passed by this Tribunal, the provisional pension is granted.

5. The Respondents resisted the Original Applications mainly on the ground that the Applicants were not entitled to the benefit of 1st Time Bound Promotion scheme as well as benefit of 2nd Time Bound Promotion Scheme since they were not having educational qualification required for grant of these benefits of promotional post in terms of Draft Recruitment Rules of 2004. The Respondents further contend that it is in view of the objection raised by Pay Verification Unit, the Respondent No.1 issued the orders of recovery in this behalf. The Respondents further sought to contend that in view of difficulties faced by the department because of grant of benefits to the petitioners as well as other similarly situated persons, the matter was referred to the Government for appropriate guidance but nothing is materialized and the issue is still hanging in fire at the level of Government. It has been further specifically pointed to the Government that the Draft Recruitment Rules, 2004 being neither approved nor notified, the benefits of Time Bound Promotion Scheme was rightly granted to the Watchman considering their seniority and experience.

6. Shri A. V. Bandiwadekar, learned Counsel for the Applicants has pointed out that as per admission of Respondent No.1 in his letter dated 24.09.2018 (Page No.80 of PB), it is explicit that while benefits were granted to the Applicants, no Recruitment Rules were in existence, and therefore, the benefits of 1st and 2nd Time Bound Promotion was rightly granted to the Applicants considering their seniority and experience for the next promotional post of Gate Keeper / Chief Investigator. He has further pointed out that even till date no Recruitment Rules are finalized much less notified in the official Gazette though the same were forwarded by the department to the Government in 2004 itself. He, therefore, submits that now on the basis of the Draft Recruitment Rules of 2004 which are not even finalized and notified till date the benefits already granted to the Applicants cannot be withdrawn with retrospective effect. He, therefore, submits that the impugned action of recovery is totally impermissible in law and the Applicants are entitled to retirement benefits on the basis of last drawn pay. As regard impermissibility of recovery from the Applicants (who are Class-III and Class-IV employees), he referred to the decision of the Hon'ble Supreme Court in ***Civil Appeal No.11527/2014 (State of Punjab and others Vs. Rafiq Masih (White Washer), decided on 18th December, 2014.***

7. Per contra, Smt. Kranti Gaikwad, learned Presenting Officer for the Respondents made feeble attempt to justify the impugned action of recovery contending that since the Applicants did not possess requisite qualification for the next promotional post of Gate Keeper / Chief Investigator in terms of Draft Recruitment Rules, they were not entitled for the pay-scale of promotional post but the same was given wrongly and the same was objected by Pay Verification Unit when the service books were

referred for verification. She, therefore, sought to contend that it is on the basis of objection raised by the Pay Verification Unit, the recovery was sought. She has further pointed out that the department has already referred the matter to the Government but no final decision is taken in this behalf.

8. The factual position about the date of appointment, date of grant of 1st and 2nd Time Bound Benefits is in dispute. Apart, admittedly till date the Recruitment Rules of 2004 are neither finalized nor notified in the official Gazette so as to confer statutory flavor and it is still at nascent stage.

9. The issues involved in the present Original Applications are twofold:
(A) Whether the impugned action of recovery of monetary benefits paid to the Applicants during service period is permissible from their retirement benefits in view of the decision of the Hon'ble Supreme Court in **Rafiq Masih's** case (cited supra).
(B) Are the Applicants entitled to retirement benefits on the basis of last drawn pay.

10. In so far as the recovery issue is concerned, it is no more *res-integra* in view of the decision of the Hon'ble Supreme Court in **Rafiq Masih's** case. The Applicants are Class-IV employees and all stand retired. It is only after retirement, the recovery is sought. The monetary benefits were paid to them more than two decades ago. This being the position, there is no escape from the conclusion that in such situation, the recovery should be too harsh and iniquitous and it squarely falls within the Claus Nos.(i), (ii),

(iii) and (v) of Para No.12 of the decision of the Hon'ble Supreme Court in **Rafiq Masih's** case, which is as under :-

"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 belong to Class-III and Class-IV services (or Group 'C' and Group 'D' services).*
- (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. Suffice to say, Clause Nos.i, ii, iii & v of Para No.12 of the decision of the Hon'ble Supreme Court in **Rafiq Masih's** case are clearly attracted and recovery from the Applicants is not at all permissible in law. The amount recovered is liable to be refunded.

12. Now, next the question comes about entitlement of the Applicant to the benefit of 1st and 2nd Time Bound Promotion as well as grant of pension on the basis of last drawn pay. As stated above, the facts and circumstances of these Original Applications are very peculiar in nature

since the benefit of 1st and 2nd Time Bound Promotions were given to them by the department at their own, considering the seniority and experience. Admittedly, the Applicants had no role to play in grant of these benefits and no fraud or misrepresentation or suppression of facts of any kind or fault can be attributed to the Applicants. Indeed, it is explicit from the reply of the Respondents that the benefits were extended as per prevailing practice in the department, considering seniority and experience.

13. It may be noted that the department has granted benefit of 1st and 2nd Time Bound Promotion as per practice since there was no finalization and approval to the Draft Recruitment Rules of 2004 so as to attribute statutory flavor to the rules. The department, therefore, thought it appropriate to extend the benefits of 1st and 2nd Time Bound Promotion to the Applicants considering their seniority and experience. However, now Pay Verification Unit belatedly after retirement of the Applicants raised objections. Here material to note that the department (Respondent No.1) by letter dated 24.09.2018 (Page 80 of PB) brought these aspects to the notice of Government and sought directions. Significant to note that in letter, it is stated that in respect of some employees, no objection was raised by Pay Verification Unit and all benefits were extended to them. In letter, it is further clarified that in absence of Recruitment Rules which were hanging in fire since 2004, the DPC had given benefit of 1st and 2nd Time Bound Promotion to the Applicants considering their seniority and experience. Respondent No.1 further brought to the notice of Government that because of objection raised by Pay Verification Unit, there is unrest amongst employees and requested for guidance from the Government. However, appalling to note that the Government is simply sitting over the

matter and the file is being moved from one department to another department. What is more surprising and disgusting to note that the Draft Recruitment Rules of 2004 have also not seen the day of light since they are kept in cold storage without any approval much less notified in official Gazette so as to confer the statutory flavor to it.

14. At this juncture, it would be apposite to note some of the paragraphs of letter dated 24.09.2018 referred to above which are as following :

“बृहन्मुंबई दूध योजनेअंतर्गत आरे, वरळी व कुर्ला या तिन्ही दुग्धशाळेमध्ये पूर्वी मोठया प्रमाणात रोजंदार कामगारांची भरती केली जात असे. तदनंतर सदर कामगारांनी त्यांना नियमित आस्थापनेवर सामावून घेण्याकरीता मा. औदयोगिक न्यायालयात वेगवेगळया याचिका दाखल केल्या होत्या. मा. न्यायालयाने आदेशा अनुपालन करण्याच्या दृष्टीने त्या त्या वेळी चतुर्थश्रेणीत उपलब्ध असलेल्या वेगवेगळया संवर्गातील उपलब्ध रिक्त पदावर नियमित आस्थापनेवर सामावून घेण्यात आले आहे. पैकी काही कर्मचा-यांची पहारेकरी पदावर नियुक्ती करण्यात आलेली आहे. पहारेकरी पदाचे सेवाप्रवेश नियम नसल्यामुळे तसेच भविष्यात कर्मचा-यांच्या पदोन्नती अभावी आलेली कुंटीतता घालविण्यासाठी शासनाकडून कालबध्द पदोन्नती योजनेअंतर्गत लाभ देण्यात येतील असे ज्ञात नसल्याने पहारेकरी पदांकरीता शारिरीक दष्टया सक्षम असलेल्या कामगारांना पहारेकरी पदावरील रिक्त पदावरी नियुक्ती देण्यात आलेली आहे. या पदाकरीता सेवाप्रवेश नियमही अस्तित्वात नव्हते त्यामुळे शैक्षणिक अर्हता विचारात घेण्यात आलेली नव्हती.

बृहन्मुंबई दूध योजनेतील पहारेकरी वेतनश्रेणी (रु.४४४०-७४४० ग्रेड वेतन रु.१३००/-) पदावरील कर्मचा-यांना वेळावेळी विभागीय पदोन्नती समितीने पदोन्नती / कालबध्द पदोन्नती / सेवांतर्गत आश्वासित प्रगती योजनेअंतर्गत रु.९५०-१५०० (चौथा वेतन आयोग) रु.३०५०-४५९० (पाचवा आयोग) रु ५२००-२०२०० ग्रेड वेतन रु.१९००/- (सहावा आयोग) ही वेतनश्रेणी मंजूर केली असून त्यापैकी काही पहारेकरी कर्मचा-यांची सेवापुस्तके वेतन पडताळणी पथकाने मंजूर केली आहेत. बृहन्मुंबई दूध योजनेतील पहारेकरी पदावरील कर्मचा-यांना पदोन्नतीचे जे फायदे दिले आहेत, ते आम्हालाही मिळावेत असा दावा केली असता औदयोगिक न्यायालयाने या कर्मचा-यांचे बाजूने निकाल दिला होता. त्यानुसार त्यांना कालबध्द पदोन्नतीचे सर्व फायदे देण्यात आले आहेत.

या संदर्भात शासन मान्यता प्राप्त झालेल्या प; दि.२२.०८.२०१२ नुसार प्रस्तुत प्रकरणातील कर्मचा-यांना सेवानिवृत्तीचे लाभ विहित कालावधीत मंजूर करणे क्रमप्राप्त असल्याने हे प्रकरण पुर्वीदाहरण राहणार नाही या अटीच्या अधिन राहून मान्यता देण्यात आली आहे. तसेच यापुढे सेवांतर्गत आश्वासित प्रगती योजनेचा लाभ देताना लगतच्या वरिष्ठ पदाच्या सेवाशर्तीची पूर्तता होत आहे किंवा कसे हे तपासणे आवश्यक आहे. शासन मान्यता घेताना आयुक्त कार्यालयाकडून प्रस्तावित सेवाप्रवेश नियमाची प्रत सादर करण्यात आलेली होती. सदर सेवाप्रवेश नियमाच्या प्रतीवर अधिसूचना क्रमांक नमूद केलेला नाही अथवा अधिसूचना कोणत्या अधिका-याच्या स्वाक्षरीने

काढण्यात आली आहे. त्या अधिका-याचे नाव वा स्वाक्षरी नाही, अशी प्रत विधीग्राह्य समजता येणार नाही, असे शासन प; दि.३.५.२०११ मध्ये नमूद करण्यात आली आहे.

तथापि पूर्वीपासून आजतागायत पहारेकरी पदावरील कर्मचा-यांचे सेवाप्रवेश नियम अंतिम: मंजूर नसताना तसेच १३.४.२००४ रोजी शासनाकडे पाठविलेल्या प्रारूप सेवाप्रवेश नियमांना अंतिम मंजूरी मिळालेली नसताना महाव्यवस्थापक, बृहमुंदूयो यांनी व त्यांचे अखत्यारीतील पदोन्नती समितीने वेळावेळी पहारेकरी पदावरील कर्मचा-यांना सेवाज्येष्ठता / अनुभव पाहून दिलेली नियमित वा कालबध्द पदोन्नती दिली आहे.

उपरोक्त वस्तुस्थिती लक्षात घेता वेतन पडताळणी पथकाच्या आक्षेपाचे निराकरण करण्यांस बृहल्लुंबई दूध योजनेतील पहारेकरी संवर्गातील कर्मचा-यांना कालबध्द पदोन्नती अंतर्गत अन्वेषक पदावर व त्यानंतर प्रमुख अन्वेषक पदावरच्या पदोन्नती साखळीनुसारच्या वेतनश्रेणीचा लाभ दयावा किंवा लेखा अधिकाकरी वेतन पडताळणी पथक यांचे दि.०४/०४/२०१८ पत्रानुसार कर्मचा-यांना एकाकी पदाचा लाभ दयावा. याबाबत कृपया शासन स्तरावरून उचित आदेश व्हावेत, ही विनंती.

15. Thus, the Applicants are subjected to discrimination since in the matter of their counterpart, no objection was raised by Pay Verification Unit but in their matter only, Pay Verification Unit has raised objection.

16. True, as per the proposed Draft Rules of 2004, the Applicants seems not fulfilling requisite qualification for the promotional post. This is the only objection on the ground of which retiral benefits of the Applicants are held up. As stated above, the department was aware of Draft Recruitment Rules of 2004 and despite this position, granted benefits of 1st and 2nd Time Bound Promotion since they found it inappropriate to apply the rules, since it was finalized and notified in the official Gazette so to enforce the same as a statutory provision. One can understand if the department has taken some remedial measures that time itself but it is not so. On the contrary, benefit of 2nd Time Bound Promotion was given in between 2009 to 2018. This being the position, now the Respondents cannot be allowed to turn around and to use Draft Recruitment Rules of 2004 to the disadvantage of the Applicants that too with retrospective effect. Service

conditions of employees cannot be changed in such haphazard manner that too with retrospective operation to the disadvantage of employees.

17. Indeed, the question of enforceability of Draft Recruitment Rules of 2004 does not arise since till date those are not approved as required to be approved under Article 309 of the Constitution so as to enforce the same as a statutory provisions. It is still in nascent stage. Suffice to say such Draft Recruitment Rules cannot be used to take away the monetary benefits granted to the Applicants more than decades ago. Otherwise it would be against the doctrine of legitimate expectation.

18. The doctrine of legitimate expectation is based upon the principles that good administration demands observance and reasonableness and where it adopted prevailing practice for a long time then even in absence of provisions of law, administration should adhere to such practice and should not take any such action to the detriment of pensioner after their retirement, any such action would be totally arbitrary, irrational and autocratic.

19. In this behalf, it would be apposite to refer the decision of the Hon'ble High Court in ***W.P.No.2260/2018 (State of Maharashtra V/s. Vasant Balel)*** which was decided with other connected W.P.s on 26.06.2018 arising from the decision rendered by the Tribunal. In that case, benefit of promotion was granted to the Applicants since the Recruitment Rules of 1983 were not made effective for want of finalization and publication in the official Gazette. The Applicants were promoted to the post of Instructor/ Draft Instructor and enjoyed all the benefits of

promotion. The Tribunal allowed the O.A.s and quashed the order of reversion and granted all consequential benefits. Being aggrieved by it, the Government had filed Writ Petitions which came to be dismissed.

20. It would be apposite to reproduce Para Nos.8 and 9 of the judgment of the Hon'ble High Court in W.P.No.2260/2018 which are as follows :-

8) *This is not a case where the respondents had secured any promotions by practising fraud or misrepresentations. In such circumstances, the petitioners cannot simply wake-up after 18 years and state that the promotions granted to the D.S.Sherla page 5 of 9 27-j-cwp-2260-18-gropu respondents were a mistake and therefore, the respondents should not only suffer reversion, but also refund the amount earned by them in the promotional posts, notwithstanding the fact that the respondents may have worked in the promotional posts for all these years. There is absolutely no explanation as to why the respondents were promoted in the first place and thereafter, permitted to continue for over 18 years in the promotional posts, if indeed the 1983 Rules were in force.*

9) *It is in this context that the MAT has observed that so called Recruitment Rules of 1983 were never made effective, possibly, for want of publication in the Official Gazette. The petitioners concede that the Recruitment Rules of 1983 were never published in the Official Gazette. Further, the circumstance that despite the so called existence of the unpublished Recruitment Rules of 1983, actually promoted the respondents as Instructors/Craft Instructors and further, continued them in the said position for a period of over 18 years, clearly implies that even the petitioner did not treat the so called 1983 as operative for all this while.*

21. As regard Draft Recruitment Rules and its implication, learned Counsel for the Applicants referred to the decision of the Hon'ble Supreme Court **1998 SCC (L & S) 1018 (Vimal Kumari V/s State of Haryana & Ors.)**, in para nos.6, 7 and 8, the Hon'ble Supreme Court held as under:-

"6. It is open to the Government to regulate the service conditions of the employees for whom the Rules are made, by those Rules even in their "draft stage" provided there is clear intention on the part of the Government to enforce those Rules in the near future. Recourse to such Draft Rules is permissible only for the interregnum to meet any emergent situation. But if the intention was not to enforce or notify the Rules at all, as is evident in the instant case, recourse to "Draft Rules" cannot be taken. Such Draft Rules cannot be treated to be Rules

made under [Article 309](#) of the Constitution and cannot legally exclude the operation of any existing executive or administrative instruction on the subjects covered by the Draft Rules nor can such Draft Rules exclude the jurisdiction of the Government, or for that matter, any other authority, including the appointing authority, from issuing the executive instructions for regulating the conditions of service of the employees working under them.

7. *In the instant case, as pointed out above, the Draft Rules were prepared in 1983. They have been lying in the nascent state since t hen. In the meantime, many promotions, including that of the appellant were made on the basis of 'seniority' which, in the absence of any Rule made under [Article 309](#), could be legally adopted as the criteria for making promotion on the post of Superintendent could not have been displaced by the Draft Rules and the High Court could not have invoked any provision of those Draft Rules which had been lying frozen at their embryonic stage for more than ten years.*

8. *In the absence of any decision of the State Government that so long as the Draft Rules were not notified, the service conditions of the appellant or the respondent and their other colleagues would be regulated by the "Draft Rules" prepared in 1983, it was not open either to the Government or to any other authority, nor was it open to the High Court, while disposing of the writ petition, to invoke any of the provisions of those Rules particularly as the Government has not come out with any explanation why the Rules, thought prepared in 1983, have not been notified for the long period of more than a decade. The delay, or, rather inaction, is startling."*

22. The ratio laid down by the Hon'ble Apex Court in the aforesaid judgment is squarely attracted to the fact and circumstances of the present case. In the present case, admittedly the Draft Recruitment Rule of 2004 are in nascent stage but it is on the basis of these rules now the Respondents sought to recover monetary benefits paid to the Applicants while granting benefit of 1st and 2nd Time Bound Promotion which was indeed granted as per prevailing practice followed in the department. In such situation, it would be travesty of justice to take away the monetary benefits enjoyed by the Applicants till their retirement and to deprive of pensionary benefits. It is against the doctrine of legitimate expectation and totally unfair as well as arbitrary.

23. The Applicants are, therefore, entitled for grant of pension considering their last drawn pay which are held up for a long period. Consequently, the orders of recovery deserve to be quashed.

24. The totality of the aforesaid discussion leads me to conclude that the impugned action of recovery is totally unsustainable in law and Applicants are entitled to pensionary benefits in accordance to their last drawn pay. Original Applications, therefore, deserves to be allowed. Hence the following order:-

ORDER

- (A) Impugned order dated 15.01.2020 in O.A.No.157/2020 is quashed and set aside.
- (B) Impugned order dated 12.12.2019 in O.A.No.155/2020 is also quashed and set aside. Respondents are directed to refund sum of Rs.5,38,479/- recovered from gratuity to the Applicants within two months from today.
- (C) Retirement benefits be granted to the Applicants considering their last drawn pay and monetary benefits be accordingly released within two months from today.
- (D) No order as to costs.

Sd/-
(A. P. Kurhekar)
Member (J)

Place: Mumbai
Date: 18.03.2021
Dictation taken by: VSM