**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI**

**ORIGINAL APPLICATION NO.199 OF 2021**

**DISTRICT : PUNE**

Dr. Satish Balwantrao Baralay. )
Age : 64 Yrs., Occu.: Retired Assistant )
Professor, Dentistry and residing at E-601,)
Suvarna Rekha Society, Lene Behind )
Navshya Maruti Mandir, Opp. P.L. )
Deshpande Garden, Sinhgad Road, )
Pune – 411 030. )**...Applicant**

**Versus**

1. The State of Maharashtra. )
Through Chief Secretary, )
Mantralaya, Mumbai – 400 032. )

2. The Director. )
Office of Directorate, Medical )
Education and Research Department)
Govt. Dental College & Hospital )
Building, St. George's Hospital )
Compound, Near C.S.T. Station, )
Mumbai – 400 001. )

3. The Dean. )
B.J. Govt. Medical College & )
Sassoon General Hospitals, )
Pune – 411 001. )**...Respondents**

**Mr. S.K. Nair with Smt. Reshma Kurle, Advocates for Applicant.**

**Mr. S.P. Manchekar, Chief Presenting Officer for Respondents.**

**CORAM : A.P. KURHEKAR, MEMBER-J**

**DATE : 14.03.2022**

**JUDGMENT**

1. The Applicant has challenged letter dated 30.12.2020 issued by Respondent No.3 thereby seeking recovery of Rs.7,46,464/- from gratuity and prayed for direction to Respondents to release retiral benefits without revising his pay scale, invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

2. The Applicant was serving as Assistant Professor, Dentistry on the establishment of Respondent No.3 – B.J. Government Medical College, Pune. He retired on 31.07.2020. After retirement, when pension papers were processed, the Pay Verification Unit raised objection that since on 01.09.1998, he was already given higher start of Rs.2500/- how he was entitled to 3 additional increments which was given to him resulting into wrong fixation of pay and excess payment from 01.09.2008. It is on the basis of objection, the Respondent No.3 examined the issue and by letter dated 31.12.2020 directed for recovery of excess payment of Rs.7,46,464/- from his gratuity. The Respondent No.2 – Director, Medical Education and Research, therefore, issued letter dated 07.01.2021 stating that No Dues Certificate is issued subject to recovery of Rs.7,46,464/- from the Applicant. It is on this background, the Applicant has filed the present O.A. challenging recovery from gratuity.

3. The Respondents resisted the O.A. by filing Affidavit-in-reply *inter-alia* contending that in 2009 while pay of the Applicant was revised in terms of G.R. dated 10.11.2009 issued by Medical Education and Drugs Department, the Applicant's pay was fixed at Rs.2500/- by giving 4 additional increments, but again 3 non-compounded advanced increments were paid wrongly to which Applicant was not entitled. The benefit of non-compounded advanced increments was to be given only once, which has been clarified by Government in terms of clarification issued on 29.03.2010. As such, mistakenly, double benefit was given to the Applicant and it was noticed by Pay Verification Unit when the

pension papers were submitted. The Respondents, therefore, sought to justify the recovery of Rs.7,46,464/-. The Respondents further contend that at the time of fixation of pay, the Applicant has executed agreement in favour of Department in terms of G.R. dated 10.11.2009 and also given Undertaking that if excess amount is found paid, it should be recovered from his retiral benefits. The Respondents, therefore, plead that Applicant being retired as Group 'B' Government servant, in view of Undertaking given by him, the impugned action of recovery is legal and valid.

4. Shri S.K. Nair, learned Advocate for the Applicant sought to assail impugned action on following grounds :-

(i) The payment of gratuity is governed by the provisions of "Payment of Gratuity Act 1972" (hereinafter referred to as 'Gratuity Act of 1972" for brevity) and the gratuity cannot be withheld unless it comes within the ambit of Section 4(6) of "Gratuity Act of 1972".

(ii) The recovery from gratuity of retirement without giving opportunity of hearing or notice is in breach of principles of natural justice and unsustainable in law.

(iii) The recovery is not permissible in view of decision of Hon'ble Supreme Court in ***(2015) 4 SCC 334 (State of Punjab and others Vs. Rafiq Masih (White Washer)***.

5. Per contra, Ms. S.P. Manchekar, learned Chief Presenting Officer sought to justify the impugned action *inter-alia* contending that the Applicant was given the benefit twice wrongly though in fact he was entitled for the benefit of additional increments only for once in tenure, and therefore, having noticed the mistake in view of objection raised by Pay Verification Unit, the recovery of Rs.7,46,464/- is legal and valid. In this behalf, she placed reliance on the decision of Hon'ble Supreme Court in ***Civil Appeal No.3500/2006 [High Court of Punjab and Haryana &***

***Ors. Vs. Jagdev Singh] decided on 29.07.2016*** in view of Undertaking given by the Applicant that if excess payment is found, it should be recovered from retiral benefits.

6. In view of submission advanced at the Bar, the issue posed for consideration is as to whether in peculiar facts and circumstances of the case, the impugned action of recovery is legal and valid.

7. Adverting to the provisions of 'Gratuity Act of 1972', particularly Section 4(6) of 'Gratuity Act of 1972', the submission was advanced by learned Advocate for the Applicant that gratuity cannot be withheld except for the situations falling in Section 4(6) of 'Gratuity Act of 1972'. Indeed, the Applicant being Government servant, the provisions of 'Gratuity Act of 1972' are not at all applicable to the present case, as rightly pointed out by learned C.P.O. The employee to whom provisions of 'Gratuity Act of 1972' are applicable are defined in Section 2(e) of 'Gratuity Act of 1972', which is as follows :-

> "**2(e)** "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity."
>
> [underline supplied]

As such, the provisions of 'Gratuity Act of 1972' excludes State Government servants they being governed by different set of Rules for payment of gratuity. Suffice to say, the submission advanced on this score is totally devoid of merit.

8. The Applicant was initially appointed in 1988 purely on temporary basis and thereafter he was selected through MPSC in 1993. By G.R. dated 10.11.2009, the pay scale of Teachers of Medical Education and Drugs Department and in Government Medical and Dental Ayurvedic

Colleges was revised. As per Para 8(iii) of G.R. dated 10.11.2009, the Teachers who are in service possessing Master Degree or Ph.D. recognized by Medical Council of India shall be entitled to 3 non-compounded increments. The revised pay scale was made effective from 01.09.2008. That time, admittedly, the Applicant was to be given revised pay scale in pay scale of Rs.2200-75-2800-100-4000. The then existing pay scale of Applicant was 700-400-1100-50-1600, as seen from Page No.231 of Paper Book. The existing pay scale and revised pay scale is shown as under :-

| Designation of the post | Existing scale | Revised scale of pay |
|---|---|---|
| (i) Lecturer (Normal Scale) | 700-40-1100-50-1600 | 2200-75-2800-100-4000 |
| (ii) Lecturer (having a MD/MS qualification | | Higher start at Rs.2500 in the pay scale Rs.2200-4000 |

9. Admittedly, the Applicant was given higher start at Rs.2500 in pay scale of Rs.2200-4000. But thereafter again, he was given 3 additional non-compounded increments. In fact, as per clarification issued by Government (Page No.99), the benefit of non-compounded advanced increments should not be given twice. The clarification to that effect is as under :-

> "भारतीय आयुर्विज्ञान परिषद मान्यताप्राप्त शैक्षणिक अहर्ता नसलेल्या तथापि महाराष्ट्र शासनाने शासन अधिसूचना क्र. एमईडी-१००६/प्र.क्र. ८७/०६/शिक्षण-२, दि. १६.११.२००७ व दि. १८.१२.२००८ अन्वये अधिसूचित केलेली शैक्षणिक अहर्ता संपादन केलेल्या अध्यापकांना विद्यापीठ अनुदान आयोग शिफारशीत सुधारित वेतनश्रेणी तसेच वरील वेतनवाढीचा लाभ अनुज्ञेय राहील. ज्या अध्यापकांना आगाऊ वेतनवाढी (Non-compounded advance increments) तरतुदीचा लाभ यापूर्वी देण्यात आला असेल अशा अध्यापकांना दि. १०.११.२००९ च्या शासन निर्णयातील परिच्छेद २(८)(xix) मधील तरतुदीनुसार सदर लाभ पुन्हा अनुज्ञेय असणार नाही."

10. In pursuant to G.R. dated 10.11.2009, the Applicant has notarized Agreement on Stamp of Rs.100/- in fovour of Department with following contents.

> "AND WHEREAS the Government of Maharashtra has by Government Resolution Medical Education & Drugs Department No.Pay-2009/C.R.181/09/Vaiseve. Dated 10th November 2009 (hereinafter referred as "the said Resolution" a copy whereof is Annexed hereto)

sanctioned a scheme for revision of pay scale of the college teachers and other measures for improving standards in Higher Education.

AND WHEREAS accordingly the said College has agreed to revise the pay scale of the Employee on the Employee agreeing to accept and duly comply with terms and conditions laid by the Government of Maharashtra by said resolution which the Employee has agree to do.

Now this Agreement witnesses and it is hereby agreed and decided by and parties hereto as follows :

1. Agree and accept and duly comply with the terms and conditions specified in the said Government Resolution;

2. Agree to have these conditions, inserted in the contract of this appointment which he has already executed or which may have executed hereinafter;

3. Agree that in the event of his failure to abide by these conditions he shall cease to derive benefits of revised pay scales."

11. Furthermore, he had submitted Undertaking, which is as under :-

"**निवृत्तीवेतन अगर उपदानातून शासकीय देणे वसूल करण्याबाबत संमतीपत्र**

मी या निवेदनाद्वारे जाहीर करतो की वेतन, भत्ते, अग्रिम अगर इतर शासकीय देणी वसूल करावयाची राहिली असल्यास या किंवा अन्य कारणांमुळे शासकीय देणे निघत असल्यास ते मी मला मिळणारे निवृत्तीवेतन अगर उपदानातून वसूल करण्यास संमती देतो.

दिनांक :- .... सही :- ....

स्थळ :- पुणे पत्ता :- ....

**निवृत्तिवेतन अगर उपदान जास्त मिळाले असल्यास परत करण्याबाबतचे हमीपत्र**

मी या निवेदनाद्वारे हमी आम्ही देतो की महालेखापाल यांनी प्राधिकृत केलेले निवृत्तीवेतन अगर उपदानाची रक्कम मला नियमानुसार मिळणा-या रकमेपेक्षा जास्त निघाली तर सदर जादा मिळालेली रक्कम परत करीन."

The factum of Undertaking is not denied by the Applicant.

12. The backbone of contention raised by learned Advocate for the Applicant is that now after retirement, the recovery of excess payment made to the Applicant without there being any fraud or misrepresentation on his part is totally impermissible in law in view of the decisions rendered by Hon'ble Supreme Court in ***(2009) 3 SCC 475 [Syed Abdul Qadir & Ors. Vs. State of Bihar & Ors.]*** and ***(2015) 4 SCC 334 [State of Punjab & Ors. Vs. Rafiq Masih (White Washer) &***

***Ors.]***. The learned Advocate for the Applicant further raised the issue of non-opportunity of hearing or show cause notice before passing recovery order and breach of principles of natural justice. In this behalf, he sought to place reliance on Rule 134(A) of Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as 'Pension Rules of 1982' for brevity).

13. Pertinently, it is not the case of Applicant that he was legally entitled to three non-compounded increments, and therefore, recovery is illegal. There is absolutely no such pleading. The entire emphasis is on impermissibility of recovery in view of decision in ***Rafiq Masih's*** case.

14. Hon'ble Supreme Court in ***Syed A. Qadir's*** case in Para Nos.57 to 59 held as under :-

> "**57.** *This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee, and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.*
>
> ***58.*** *The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See Sahib Ram v. State of Haryana, Shyam Babu Verma v. Union of India, Union of India v. M. Bhaskar, V. Gangaram v. Director, Col. B.J. Akkara [Retd.] v. Govt. of India Purshottam Lal Das v. State of Bihar, Punjab National Bank v. Manjeet Singh and Bihar SEB v. Bijay Bahadur.*
>
> ***59.*** *Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part.*

*The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."*

15. Whereas, Hon'ble Supreme Court in ***Rafiq Masih's*** case, after considering various decisions including Judgment in ***Syed A. Qadir's*** case culled out certain situations wherein recovery would be impermissible in law. In this behalf, Para No.18 is material, which is as under :-

"***18.*** *It is not possible to postulate all situation s 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."*

16. Indeed, the very foundation of the decision of the Hon'ble Supreme Court in ***Rafiq Masih's*** case is based on the principle that the recovery of excess payment from employees after a long period from their

retirement, dues would be inequitable and accordingly, the Hon'ble Supreme Court has summarized few situations where recovery would be impermissible in law. Clause (i) of Para No.12 relates to recovery from employees belongs to Class-III and Class-IV services. Clause (ii) pertains to recovery from retired employees, or employees who are due to retire within one year, of the order of recovery. Clause (iii) relates to 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. Clause (iv) pertains to recovery of wrong allowances of higher post. Whereas, Clause (v) is residuary clause which states that recovery is impermissible where the court arrives at the conclusion, that recovery would be iniquitous or harsh or arbitrary to such an extent, as would for outweigh the equitable balance of the employer's right to recovery.

17. Now turning to the facts of the present case, admittedly, Applicant stands retired as Group 'B' Government servant. The mistake in grant of 3 additional non-compounded increments occurred in 2009 when they were revised in terms of G.R. dated 10.11.2009. As stated above, at the time of revision of pay scale, the Applicant had executed notarized bond as well as also executed Undertaking as reproduced in Para Nos.9 and 10 of this Judgment. The Applicant has given Undertaking in unequivocal and clear terms that if excess amount is found paid to him, it can be recovered from his gratuity and he specifically authorizes Accountant General for recovery/adjustment of the same from his gratuity. Thus, once Applicant furnishes Undertaking, he is certainly bound by the Undertaking and now estopped from challenging the same. The Applicant has given Undertaking on his own volition and he was clearly put on notice that if excess amount is found paid, it would be recovered from his gratuity. As such, in view of conscious Undertaking given by the Applicant, now he cannot be heard to say that the recovery is impermissible. He is Group-B Officer drawing salary of Rs.1,91,000/- at the time of retirement, and therefore, it cannot be said that any hardship would cause to him if recovery is made.

18. The decisions rendered by Hon'ble Supreme Court in ***Syed A. Qadir's*** case as well as ***Rafiq Masih's*** case are basically revolved upon the probable hardship likely to be suffered by a Government servant, if recovery is made after lapse of long period. I am not in agreement with the submission advanced by the learned Advocate for the Applicant that present case falls within Clause (ii), (iii) or (v), since in the present case, the Applicant has given clear understanding and he was drawing salary of Rs.1,91,000/- p.m. at the time of retirement. Such a person cannot be said to suffer any such hardship, so as to take the benefit of Judgment in ***Rafiq Masih's*** case.

19. The issue of permissibility of recovery of excess payment in case a Government servant who has given Undertaking is no more *res-integra* in view of subsequent decision of Hon'ble Supreme Court in ***Jagdev Singh's*** case decided on 29.07.2016. In that case, there was recovery of Rs.1,22,003/- from Judicial Officer, who was compulsorily retired from service on 12.02.2003. Whereas, order of recovery of Rs.1,22,003/- was served upon him by letter dated 18.02.2004. He challenged the recovery by filing Writ Petition before Hon'ble High Court, which came to be allowed. Being aggrieved by it, Civil Appeal was filed before Hon'ble Supreme Court. Hon'ble Supreme Court distinguished the decision in ***Rafiq Masih's*** case and in view of Undertaking given by him in Para Nos.11 and 12 held as under :-

> "***11.*** *The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.*
>
> ***12.*** *For these reasons, the judgment of the High Court which set aside the action for recovery is unsustainable. However, we are of the view that the recovery should be made in reasonable instalments. We direct that the recovery be made in equated monthly instalments spread over a period of two years.*"

20. In the present case also, the Applicant has given clear and unequivocal Undertaking as well as also executed notarized bond in favour of Department, as adverted to above. He retired as Group 'B' Government servant and drawing amount of Rs.1,91,000/- p.m. at the time of retirement. Therefore, even if recovery is of excess payment made for a period in excess of 5 years, it cannot be said that he would suffer any such hardship and importantly, in view of Undertaking given by him, the situation is squarely covered by the decision in ***Jagdev Singh's*** case (cited supra). In such situation, if recovery is not made, it would amount to wrongful enrichment which cannot be countenanced in law.

21. Insofar as question of non-issuance of notice prior to recovery is concerned, the learned Advocate for the Applicant sought to place reliance on Rule 134-A of 'Pension Rules of 1982', which is as under :-

> "**134-A**. **Recovery and adjustment of excess amount paid.-**
>
> If in the case of a Government servant, who has retired or has been allowed to retired, it is found that due to any reason whatsoever an excess amount has been paid to him during the period of his service including service rendered upon re-employment after retirement or any amount is found to be payable by the pensioner during such period and which has not been paid by, or recovered from him, then the excess amount so paid or the amount so found payable shall be recovered from the amount pension sanctioned to him :
>
> Provided that, the Government shall give a reasonable opportunity to the pensioner to show cause as to why the amount due should not be recovered from him :
>
> Provided further that, the amount found due may be recovered from the pensioner in instalments so that the amount of pension is not reduced below the minimum fixed by Government."

22. Thus, it is explicit from the perusal of Rule 134-A that where recovery is to be made from pension, in that event only before issuance of recovery order, notice is required to be given to a pensioner. Whereas in the present case, we are dealing with a case where recovery is being made from gratuity and not from monthly pension. Here, the situation is

squarely covered by Rule 132 of 'Pension Rules of 1982', which his as under :-

> "***132.*** *Recovery and adjustment of Government dues-(1) It shall be the duty of the Head of Office to ascertain and assess Government dues, payable by a Government servant due for retirement.*
>
> *(2) The Government dues as ascertained and assessed by the Head of Office which remain outstanding till the date of retirement of the Government servant, shall be adjusted against the amount of the (retirement gratuity) becoming payable.*
>
> *(3) The expression "Government dues" includes-*
>
> *(a) dues pertaining to Government accommodation including arrears of licence fee, if any;*
>
> *(b) dues other than those pertaining to Government accommodations, namely balance of house building or conveyance or any other advance, overpayment of pay and allowances or leave salary and arrears of income- tax deduction at source under the Income Tax Act, 1961 (43 of 1961)."*

23. As such, it is explicit that Rule 132 of 'Pension Rules of 1982' empowers Government to recover such excess payment from gratuity. Rule 132 of 'Pension Rules of 1982' does not provide for issuance of any such notice prior to adjustment from gratuity. This being the position, on the anvil of Rule 132 of 'Pension Rules of 1982' as discussed above, in my considered opinion, the recovery cannot be said bad in law. Even assuming for a while that prior notice was necessary to follow the principle of natural justice, in that event also, in view of Undertaking given by the Applicant, absence of notice does not matter and not fatal.

24. Shri Nair, learned Advocate for the Applicant made reference to decision of this Tribunal rendered in O.A.No.805-807 of 2016 decided by

this Tribunal by order dated 05.12.2018 quashing recovery which has been upheld by Hon'ble High Court in ***Writ Petition No.7154/2019 [The State of Maharashtra & Ors. Vs. Mrs. Rekha V. Dubey] decided on 24.09.2021***. The learned Advocate for the Applicant tendered the copy of order of Hon'ble High Court dated 24.12.2021. It was a case pertaining to recovery from Group 'C' Government servant and Tribunal placing reliance on the decision in ***Rafiq Masih's*** case, held that the recovery would be impermissible from retirement benefits. Whereas, in the present case, we are dealing with a matter of Group 'B' Government servant who has given clear and unequivocal Undertaking. Therefore, the decision in ***Rekha Dubey's*** case (cited supra), in my opinion, is of little assistance to the Applicant.

25. Similarly, reliance placed by learned Advocate for the Applicant on the decision ***2020(3) Mh.L.J. 487 [Sanjay Solanki Vs. State of Maharashtra]*** is also of no help to the Applicant. In that case, petition was filed challenging recovery of difference of HRA. Initially, HRA was paid as applicable to Nagpur City, and thereafter, institution was shifted to Wana Dongari (Rural Area). However, HRA was paid as higher rate applicable to Nagpur City. There was no Undertaking obtained from Petitioners. The Petitioners challenged recovery from retiral benefits. It is in fact situation, Hon'ble High Court quashed the order of recovery placing reliance on the decision in ***Rafiq Masih's*** case. Apparently, the facts are quite distinguishable and the decision is hardly of any assistance to the Applicant. Needless to mention that decision in authority at what it actually decides and not what logically follows from it.

26. The totality of aforesaid discussion leads me to conclude that challenge to the recovery orders is devoid of merit and O.A. deserves to be dismissed. Hence, the order.

**O R D E R**

The Original Application stands dismissed with no order as to costs.

Sd/-

**(A.P. KURHEKAR)**
**Member-J**

Mumbai
Date : 14.03.2022
Dictation taken by :
S.K. Wamanse.
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