IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NO.275 OF 2019

DISTRICT : THANE

Dr. Pratibha Ajay Gawhale)
Occ. Service as Medical Officer, in the)
Office of Regional Mental Hospital,)
Thane. R/o. Azzario Rustumji Arbaniya)
Majiwada, Thane (W), Dist.- Thane.)**...Applicant**

Versus

1. The Additional Chief Secretary,)
Public Health Department,)
Mantralaya, Mumbai-32.)
Through Chief Presenting Officer)
M.A.T., Mumbai.)

2. Director of Public Health Department)
St. Georges Hospital Compound,)
Near, V.T. Mumbai.)

3. Deputy Director Health Service,)
Mumbai Circle, Thane.)

4. Medical Superintendent,)
Government Maternity Hospital,)
Ulhasnagar-4.)

5. District Civil Surgeon)
General Hospital, Raigad /Alibaug,)
Dist.-Alibaug.)

6. Medical Superintendent,)
Regional Mental Hospital, Thane) **...Respondents**

Mr. V.P. Potbhare, Advocate for Applicant.

Mrs. A.B. Kololgi, Presenting Officer for Respondents.

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

DATE : 04.03.2020

JUDGMENT

1. The Applicant has challenged the impugned order dated 22.02.2019 whereby sum of Rs.4,35,634/- has been sought to be recovered in monthly installment of Rs.25,000/- from the salary of the Applicant.

2. Shortly stated facts giving rise to this application are as under:-

The Applicant is serving as Medical Officer (Group 'A'), Regional Mental Hospital, Thane. While she was serving at Civil Hospital, Alibaug, she proceeded on Medical Leave from 05.07.2003 to 10.08.2004 (402 days). The Applicant submits that she proceeded on Medical Leave but Respondent No.1 by order dated 04.03.2010 communicated that his absence from 05.07.2003 to 26.11.2003 and 28.11.2003 to 10.08.2004 has been treated as 'Extra-Ordinary Leave' (without pay) as per Rule 63(3) of Maharashtra Civil Services (Leave) Rules, 1981 (hereinafter referred to as 'Leave Rules of 1981'. However, in the period of said leave, the increments were released. When the Service Book was sent to Pay Verification Unit for verification, it objected for grant of increments during the period of Extra-Ordinary Leave. In view of objection of Pay Verification Unit, the pay of the Applicant was revised thereby postponing the annual increment and excess amount of Rs.4,35,634/- was found paid because of increment granted during Extra-Ordinary Leave period. The Respondents, therefore, by impugned order dated 22.02.2019 directed for recovery of said amount in monthly installment of Rs.25,000/- from the salary of the Applicant. This order of recovery is challenged by the Applicant in the present O.A.

3. The Respondents resisted the claim by filing Affidavit-in-reply *inter-alia* contending that the Applicant being absent on duty and particularly, in view of treating the period of absence from 05.07.2003 to 26.11.2003 and 28.11.2003 to 10.08.2004 as Extra-Ordinary Leave (without pay), the Applicant was not entitled for yearly increment in the said period. However, inadvertently, the increments were released and the said illegality was noticed by Pay Verification Unit when Service Book was sent for verification. Therefore, by impugned order dated 22.02.2019, the recovery of Rs.4,35,634/- is sought to be made by monthly installment of Rs.25,000/- from the salary of the Applicant. The Respondents further contend that the Applicant being Medical Officer (Group 'A'), his retirement age has been extended initially upto 60 and thereafter upto 62 in view of Government Resolutions dated 29.08.2018 and 01.07.2019 respectively. As such, in view of extension of age, the Applicant would be retiring on 30.09.2023. The Respondents thus contend that in view of Rule 39(2)(b)(i) of Maharashtra Civil Services (Pay) Rules, 1981 (hereinafter referred to as 'Pay Rules of 1981' for brevity) read with G.R. of Finance Department dated 26.12.2011, the Applicant was not entitled for increments because of treating the absence period of 402 days Extra-Ordinary Leave (without pay), and therefore, recovery orders are rightly issued and prayed to dismiss the O.A.

4. Shri V.P. Potbhare, learned Advocate for the Applicant heavily relied on the decision of Hon'ble Supreme Court in reported in ***(2015) 4 SCC 334 (State of Punjab and others Vs. Rafiq Masih (White Washer)*** and submits that the present matter squarely falls within the parameters laid down by Hon'ble Apex Court in the said decision. He further canvassed that the increments were released by the Department in 2005, and therefore, now the excess amount cannot be recovered from the Applicant who is on the verge of retirement. He further raised the ground of non-issuance of notice prior to issuance of impugned order.

5. Per contra, the learned Presenting Officer submits that the Applicant was unauthorizedly absent from 05.07.2003 to 10.08.2004 and the said absence was treated as unauthorized absence and it was treated as Extra-Ordinary Leave (without pay). She, therefore, submits that the Applicant was not entitled for release of increment in 2003 because of unauthorized absence, but it was released inadvertently, and therefore, recovery is sought.

6. In view of pleadings and submissions, now the question posed for consideration whether the order of recovery of Rs.4,35,634/- can be faulted with.

7. In order to appreciate the applicability of the parameters laid down by Hon'ble Supreme Court in ***Rafiq Masih's*** case (cited supra), it is essential to know factual background. Indisputably, in 2003, while Applicant was serving on the post of Medical Officer at Ulhasnagar, he was transferred to Alibaug and consequently relieved on 03.07.2003, but she joined at Alibaug only on 27.11.2003 and again remained absent from 28.11.2003. Thereafter, she was transferred back to Ulhasnagar vide order dated 10.08.2004, and thereafter, only she joined as per choice posting at Ulhasnagar on 11.08.2004. Thus, this aspect invariably shows that the Applicant was not willing to serve at Raigad, and therefore, she remained absent and ultimately, in view of subsequent order of re-transfer only, she joined at Ulhasnagar. There is no denying that the period from 05.07.2003 to 26.11.2003 and 28.11.2003 to 10.08.2004 was treated as Extra-Ordinary Leave (without pay) in terms of Rule 63(3) of 'Pay Rules of 1981' and it has attained finality.

8. The submission advanced by the learned Advocate for the Applicant that the Applicant was on Medical Leave is misconceived and fallacious, as ultimately, the absence was treated as Extra-Ordinary Leave (without pay). It would be apposite to see the applications made

by the Applicant while proceeding on leave. The Respondents placed on record the copies of applications made by the Applicant for grant of leave which are at Page Nos.160 to 168 of Paper Book. Material to note that the application first in time was made on 15.02.2003 (Page No.160 of P.B.) whereby she sought Medical Leave from 05.07.2003 to 15.09.2003 stating that she had lunger pain (मला कंबर दुखीचा आजार आहे त्यामुळे बाहेर येणे जाणे जमत नाही). It was not supported by Medical Certificate. Then, second application was made vide Page No.162 of P.B. for extension of Medical Leave which was also without Medical Certificate. Then, third application was made on 27.02.2003 again for extension of Medical Leave without any Medical Certificate. Thereafter again, the applications were made for extension of Medical Leaves vide Page Nos.166 to 168 of P.B. without producing Medical Certificate. It is thus evident that the Applicant was not interested to work at Raigad, and therefore, did not join though she was relieved from Ulhasnagar from 04.07.2003. It is for the first time, she joined on 27.11.2003 and again proceeded on leave from 28.11.2003. The Respondents have also produced Show Cause Notices issued to the Applicant, which are at Page Nos.170 to 172 of P.B, whereby the Applicant was directed to remain present before the Medical Board and to produce Medical Certificate, failing to which disciplinary action will be taken. It appears that, ultimately, the Applicant has produced Medical Certificate dated 28.05.2004 (Page No.174 of P.B.) but Medical Board did not made any recommendation for previous leave period (absence period). It is on this background, the matter was referred to the Government and ultimately, the absence period from 05.07.2003 to 26.11.2003 and 28.11.2003 to 10.08.2004 has been treated as Extra-Ordinary Leave (without pay).

9. Thus, in view of unauthorized absence and treating the said period as Extra-Ordinary Leave, the Applicant was not entitled for release of increments which was due in her leave period on 11.12.2003 and was required to be postponed till she join the post in view of bar of Rule 39(2)(b)(i) of ‘Pay Rules of 1981’, which is as follows :-

"**39. Service which counts for increment**.-
(2) .....

(b) Subject to the restriction mentioned herein, the following periods shall count for increment in the time-scale applicable to a post in which a Government servant was officiating :-

(i) all leave, except extraordinary leave."

10. Thus, it is explicit from the aforesaid Rule that, if the employee is on Extra-Ordinary Leave, then such leave cannot be counted as a service period to earn increment. Needless to mention, for grant of increment, the employee is required to put in regular service and in case of Extra-Ordinary Leave, the increment is required to be postponed. However, in the present matter, the increment was inadvertently released, though it was required to be postponed. This aspect was noticed by Pay Verification Unit and having noticed the illegality, the directions were issued for recovery in installment of Rs.25,000/- p.m. The Applicant being Group 'A' Medical Officer, it cannot be said that he was not aware of this basic rule. Despite this position, he availed the increment and continued to avail accrued benefits till it was noticed by Pay Verification Unit. As such, it cannot be said that the Applicant had no knowledge of his disentitlement to the increment.

11. Even assuming for a moment that the Applicant was not aware that he was not entitled to the release of increment, in that event also, there is no escape from the conclusion that the grant of increment was contrary to Service Rules, particularly Rule 39(2)(b)(i) of 'Pay Rules 1981'. In other words, the Applicant wants to retain wrongful gain to which he was not entitled in Service Rules.

12. Now turning to the decision of Hon'ble Supreme Court in ***Rafiq Masih's*** case, the Hon'ble Supreme Court in Para No.12 laid down the following parameters, which reads as follows :-

"**12.** *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."

13. Here, it would be apposite to see the nature of dispute before the Hon'ble Supreme Court in ***Rafiq Masih's*** case. It was pertaining to mistake committed by the Government in determining the emoluments payable to the employees for various reasons. In Para Nos.2 and 11 of the Judgment, the Hon'ble Supreme Court held as follows :-

*"**2.** All the private respondents in the present bunch of cases, were given monetary benefits, which were in excess of their entitlement. These benefits flowed to them, consequent upon a mistake committed by the concerned competent authority, in determining the emoluments payable to them. The mistake could have occurred on account of a variety of reasons; including the grant of a status, which the concerned employee was not entitled to; or payment of salary in a higher scale, than in consonance of the right of the concerned employee; or because of a wrongful fixation of salary of the employee, consequent upon the upward revision of pay-scales; or for having been granted allowances, for which the concerned employee was not authorized. The long and short of the matter is, that all the private respondents were beneficiaries of a mistake committed by the employer, and on account of the said unintentional mistake, employees were in receipt of monetary benefits, beyond their due.*

11. *For the above determination, we shall refer to some precedents of this Court wherein the question of recovery of the excess amount paid to employees, came up for consideration, and this Court disallowed the same. These are situations, in which High Courts all over the country, repeatedly and regularly set aside orders of recovery made on the expressed parameters.*

(i) Reference may first of all be made to the decision in Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475, wherein this Court recorded the following observation in paragraph 58:

> *"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, 1995 Supp. (1) SCC 18, Shyam Babu Verma v. Union of India, (1994) 2 SCC 521, Union of India v. M. Bhaskar, (1996) 4 SCC 416, V. Ganga Ram v. Director, (1997) 6 SCC 139, Col. B.J. Akkara (Retd.) v. Govt. of India, (2006) 11 SCC 709, Purshottam Lal Das v. State of Bihar, (2006) 11 SCC 492, Punjab National Bank v. Manjeet Singh, (2006) 8 SCC 647 and Bihar SEB v. Bijay Bahadur, (2000) 10 SCC 99."*
>
> *(emphasis is ours)*

First and foremost, it is pertinent to note, that this Court in its judgment in Syed Abdul Qadir's case (supra) recognized, that the issue of recovery revolved on the action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorised payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference because an action is iniquitous, must really be perceived as, interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements, and a variety of sundry expenses."

14. It is on the above background, the Hon'ble Supreme Court laid down parameters in Para No.12 of the Judgment, which are reproduced above.

15. It is thus obvious that the relief against the recovery granted in certain situation not because of any vested right in the employee but on equitable consideration exercising judicial discretion to relieve the employee from hardship which he may suffer if recovery is ordered after a long period. In other words, very foundation of decision of Hon'ble Supreme Court is on equitable consideration, so as to minimize the financial hardship likely to be caused to the employee. In my considered opinion, where it is found that some excess payment is made in contravention of specific Rules and employee himself is not entitled to such excess payment, then judicial discretion cannot be exercised in favour of such employee. Otherwise, it would amount to giving disadvantage to such employee of his own wrong and it would be nothing but unjust enrichment.

16. Now turning to the facts of the present case, as narrated above, the record clearly spells that the Applicant was not willing to join at Raigad and willfully remained absent and join thereafter only when his transfer order was cancelled. He could not produce Medical Certificate to justify such a long absence, as evident from the record. It is on this background, his absence for 402 days was treated as Extra-Ordinary Leave (without pay), and therefore, embargo of Rule 39(2)(b)(i) of 'Pay Rules of 1981' is clearly attracted, which bar the employee from claiming increment during the period of Extra-Ordinary Leave. As such, with great respect, in my considered opinion, considering the facts and circumstances of the present case, the decision of Applicant's case does not fall within the parameters in ***Rafiq Masih's*** case.

17. Pertinent to note that the Applicant is Medical Officer (Group 'A'). In view of Government Resolutions dated 29.08.2018 and 01.07.2019, the retirement age of the Applicant is extended upto 62 years. As such, he would be retiring on 30.09.2023. Therefore, Clause Nos.(i) and (ii) of Para No.12 of the Judgment in ***Rafiq Masih's*** case is not attracted. True, as per Clause No.(ii), the recovery cannot be ordered when excess

payment has been made for a period in excess of five years before the order of recovery is issued and as per Clause (v), the recovery may not be ordered 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. In so far as Clause Nos. (iii) and (v) are concerned, as stated above, the Applicant is Group 'A' Officer and due to retire in 2023. He availed the benefit of increment though not entitled to it and at no point of time brought it to the notice of the Department. As stated above, he was unauthorizedly absent only with an intent to avoid working at Raigad. As such, this conduct of the Applicant, in my considered opinion would disentitle him to claim such discretionary relief which is founded on equitable consideration. Equity will not assist a person who is guilty of breach of Rules misconducted himself and availed the benefit. This is not a case where excess payment was made by the Department while applying wrong pay scale. Therefore, in my considered opinion, such order of recovery cannot be said harsh or arbitrary or iniquitous, so as to quash the same.

18. In so far as non-issuance of notice before issuance of impugned order is concerned, the learned Advocate for the Applicant could not point out any provision which mandates issuance of prior notice. Indeed, as per Rules 132 and 134 of Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as 'Pension Rules of 1982' for brevity), it is the duty of head of Office to take steps to assess the dues two years before the date of retirement of the Government servant and to proceed further for recovery. It does not contemplate issuance of notice as canvassed by the learned Advocate for the Applicant. It is only in case of recovery from the pensioner, a show cause notice is required to be issued, as contemplated under proviso to Rule 134(A) of 'Pension Rules of 1982'. Here, the Applicant is in service, and therefore, the question of issuance of notice does not arise.

19. Apart, the learned Advocate for the Applicant could not point out prejudice caused to the Applicant because of non-issuance of prior notice. Unless prejudice is shown the ground of non-issuance of notice which is only technical in the present situation does not render the impugned order illegal. Indeed, by impugned order, the recovery is sought by installment of Rs.25,000/- p.m. considering the salary of the Applicant. Suffice to say, the ground of absence of show cause notice holds no water.

20. The learned Advocate for the Applicant sought to place reliance on the decision rendered in ***O.A.1102/2015 (Syed M. Hashmi Vs. Government of Maharashtra) decided on 14.06.2016*** and ***O.A.820/2016 (Dilip M. Diwane Vs. The Accounts Officer) decided on 13.06.2017*** wherein recovery orders were quashed based upon the decision in ***Rafiq Masih's*** case. The fact of the present O.A. is totally distinguishable, and therefore, these decisions is of no assistance to the learned Advocate for the Applicant.

21. The cumulative effect of aforesaid discussion leads me to conclude that the challenge to the impugned order is devoid of merit and O.A. deserves to be dismissed. Hence, the following 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 : 04.03.2020
Dictation taken by :
S.K. Wamanse.
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