IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI

ORIGINAL APPLICATION NOS.301 & 1044 OF 2017
WITH
ORIGIINAL APPLICATION NOS.33 & 282 OF 2018

DISTRICT : PUNE

****

ORIGINAL APPLICATION NO.301 OF 2017

Shri Jeevan Krishna Bhosale.)
Age : 59, Occu.: Retired Police Sub-Inspector,)
Armed Police, Worli, Mumbai and having)
Residential address as 29/02, Worli Police Camp,)
Sir Pochkhanwala Road Road, Worli,)
Mumbai – 400 030.)**...Applicant**

Versus

1. The Addl. Chief Secretary.)
   Home Department, Mantralaya,)
   Mumbai - 400 032.)

2. The Director General of Police.)
   M.S, Old Vidhan Bhavan, Colaba,)
   Mumbai.)

3. The Commissioner of Police.)
   Having Office at Crawford Market,)
   Fort, Mumbai.)

4. Additional Commissioner of Police.)
   Armed Police, Naigaon, Mumbai.)

5. Deputy Commissioner of Police.)
   Armed Police, Worli, Mumbai.)**…Respondents**

WITH

ORIGINAL APPLICATION NO.1044 OF 2017

Shri Hemant G. Chopade.)
Age : 58, Occu.: Retired,)
R/at Flat No.307, Yugal Kaushal Bldg,)
Chintamani Nagar, Hadapsar, Pune - 411 028.)**...Applicant**

Versus

1. The Addl. Chief Secretary.)
Home Department, Mantralaya,)
Mumbai - 400 032.)

2. The Director General of Police.)
M.S, Old Vidhan Bhavan, Colaba,)
Mumbai.)

3. The Commissioner of Police.)
Pune City, Pune – 411 001.)

4. The Accountant General (I))
Maharashtra, 101, Maharshi Karve)
Road, Mumbai – 400 021.)**…Respondents**

WITH

ORIGIINAL APPLICATION NO.33 OF 2018

Shri Subhash R. Shahane.)
Age : 63, Occu.: Retired as PSI,)
R/at Snehankit, S.No.15/6K,)
Karvenagar, Pune - 411 052.)**...Applicant**

Versus

1. The Addl. Chief Secretary & 3 Ors.)**…Respondents**

WITH

ORIGIINAL APPLICATION NO.282 OF 2018

Shri Arun A. Lokhande.)
Age : 58, Occu.: Retired as P.S.I,)
R/at Flat No.304, Iris Apartment,)
Lane No.13, Tingre Nagar, Pune - 411 032.)**...Applicant**

Versus

1. The Addl. Chief Secretary & 3 Ors.)**…Respondents**

Mr. V.V. Joshi, Advocate for Applicants in O.As.1044 OF 2017 & O.A.Nos.33 & 282/2018.

Mr. M.D. Lonkar, Advocate for Applicant in O.A.No.301/2017

Mrs. K.S. Gaikwad with Mrs. A.B. Kololgi, Presenting Officers for Respondents.

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

DATE : 04.02.2019

JUDGMENT

1. All these Original Applications are arising from common issue and, therefore, decided by this common Judgment.

Shortly stated facts giving rise to these applications are as follows :

2. The Applicant in O.A.301 of 2017 was appointed as Police Naik on 01.11.1992 and in due course, he was promoted to the rank of Head Constable and thereafter as A.S.I. Thereafter, by Circular dated 29th December, 2015, the Applicant was promoted on temporary basis to the rank of PSI and accordingly, he joined the promotional post. He stands retired on 30.11.2016 from the post of PSI. At the time of retirement, he was in the pay scale of Rs.9300-34800 + G.P. 4300. The Applicant made representation on 01.11.2016 to fix the pension on the basis of last drawn pay. However, the Respondents sanctioned provisional pension only, that too, on the basis of pay scale in the rank of ASI. The Applicant, therefore, contends that he is entitled to pension on the basis of last drawn pay in view of Resolution issued by Finance Department, Government of Maharashtra read with Corrigendum issued by Finance Department to the said Resolution on 9th June, 2016 which provides the fixation of pension on the basis of "basic pay fixed for the post from which an employee has been retired".

3. The Applicant in O.A.1044 of 2017 joined as Police Constable on 02.09.1978 and in due course of time, he was promoted to the post of Police Naik, Hawaldar and A.S.I. By letter dated 03.03.2017, he was promoted to the post of P.S.I. for 60 days. He stands retired on 30.04.2017. At the time of retirement, he was in the pay scale of Rs.9300-34800 + G.P. 4300. At the time of retirement, when pension papers were processed, it was noticed that the excess payment of Rs.1,36,364/- was made to the Applicant due to wrong fixation of pay. Therefore, the recovery of Rs.1,36,364/- pertaining to the period from 2006 was ordered. Furthermore, though at the time of retirement, he was in the pay scale of Rs.9300-34800 + G.P. 4300. His pension was fixed on the post of A.S.I. i.e. 9300-34800 + G.P. 2800.

4. The Applicant in O.A.33 of 2018 joined as Police Constable on 11.06.1979 and in due course of time, he was promoted to the post of Police Naik, Hawaldar

and Assistant Sub Inspector (A.S.I.). On 20.05.2010, he was promoted to the post of P.S.I. temporary for a period of 89 days. Later, the period of promotion was extended from time to time. He was in pay scale of Rs.9300-34800 + G.P.4300 on the post of PSI at the time of retirement. The Applicant stands retired on 31.05.2012.

5. Whereas, the Applicant in O.A.282 of 2018 joined as Police Constable on 03.09.1978 and in due course of time, he was promoted to the post of Police Naik, Hawaldar and A.S.I. On 29.04.2016, he was promoted to the post of P.S.I. temporary. Later, from time to time, his period of promotion was extended. The last extension was by order dated 04.05.2017 till 31.05.2017. He stands retired on 31.05.2017 from the post of P.S.I. At the time of retirement, his last drawn pay on the post of P.S.I. was in the pay scale of Rs.9300-34800 + G.P. 4300.

6. In all these O.As, the common defence raised by the Respondents is that the Applicants were promoted purely on temporary basis as per the requirement of the Department under Rule 90(3) of Police Manual, and therefore, such promotion does not confer right to receive pension on the basis of promotional pay. The Applicants were serving in the cadre of ASI, but they were temporarily promoted to the rank of PSI, and therefore, the pension needs to be fixed on the basis of their pay in the cadre of ASI. The Respondents further contend that, in the promotion order itself, it was made clear that they will not be entitled to retiral benefits on account of the temporary promotion. This is the only defence raised by the Respondents in all these O.As.

7. Heard Shri V.V. Joshi and Shri M.D. Lonkar, learned Advocates for the Applicants and Mrs. K.S. Gaikwad and Mrs. A.B. Kololgi, learned Presenting Officers for the Respondents.

8. Before adverting to the other aspects, it is pertinent to note at this stage itself that, there is no defence or contention that the Applicants were not eligible

for the promotional post as per Recruitment Rules. Besides, there is no such defence that no substantive posts for their promotions were available. In fact, in O.A.301/2017, the order of temporary promotion dated 29th December, 2015 (Page No.14) reveals that the Applicant was promoted on vacant post. As such, the material point is that, except the defence of temporary promotion, no other defence of want of vacancy of promotional post or non-eligibility for promotion is raised and this needs to be kept in mind while appreciating the issue involved in these applications.

9. Indeed, in this behalf, Circular issued by Special D.I.G. dated 21st October, 2010 as well as Circular dated 04.11.2016 issued by same authority is inconsistent to the defence now raised by the Respondents. By these Circulars, the Special Inspector General of Police directed the Department to consider last drawn pay of retiring PSI to whom temporary promotion on the post of PSI has been granted. Here, it would be useful to reproduce the text of Circular which is as follows :

> "उपरोक्त संदर्भाधीन विषयास अनुसरुन कळविण्यात येते की, या कार्यालयाच्या क्र. पोमसं/५/१०/अर्हता-से.नि. वे./४७/२०१०, दि.२१/१०/२०१० चे परिपत्रकान्वये तात्पुरती अभावित पदोन्नती देण्यात आलेले पोलीस उप निरीक्षक हे त्या पदावरुन सेवानिवृत्त झाल्याास त्यांचे सेवानिवृत्तवेतन पोलीस हवालदार / सहायक पोलीस उप निरीक्षक या मूळ पदावरच निशचित केले जाते. त्यामुळे त्या कर्मचा-याचे निवृत्तीवेतनाव्दारे झाल्यास त्यांना पोलीस उपनिरीक्षकाचे शेवटच्या महिन्याच्या मूळ वेतनानुसार निवृत्तीवेतन देय ठरते.
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> तसेच शासन निर्णय, विता विभाग क्र सेनिवे १०९/ प्र.क्र.३३/ सेवा-४, दि.३०/१०/२००९ नुसार महाराष्ट्र नागरी सेवा (निवृत्तीवेतन) नियम्,१९८२ मधील नियम ११० (२) (ए) नुसार पुर्ण निवृत्तीवेतनासाठी दि. २७/०२/२००९ पासून (हकीम समितीच्या शिफारशी स्विकारल्या दिनांकापासून) ३३ वर्षाच्या किमान अर्हताकारी सेवेची आवश्यकता नसून शासकीय कर्मचा-याने २० वर्षाची किमान अर्हताकारी सेवा पुर्ण केल्यानंतर सेवानिवृत्तीच्या शेवटच्या १० महिन्यात अर्जित केलेल्या सरासरी मूळ वेतनाच्या ५० टक्के यापैकी जी रक्कम त्याला लाभदायक ठरेल, ती रक्कम निवृत्तीवेतन म्हणून अनुज्ञेय होईल.
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> वर नमूद शासन निर्णय व या कार्यालयाच्या दि. २१/१०/२०१० च्या परिपत्रकानुसार सेवानिवृत्त पोलीस उप निरीक्षक धोंडीराम शकर बनगर यांना पोलीस उप निरीक्षक पदावर देण्यात आलेली तात्पुरती पदोन्नती ही निवृत्ती वेतनासाठी देय ठरते. याबाबतचा अनुपालन अहवाल या कार्यालयास सादर करावा, ही विनंती.''

10. Thus, it appears that, despite the acknowledgment of right of the Applicants to get pensionary benefits on the basis of last drawn pay in the rank of PSI and direction to that effect by Special Inspector General of Police, the

Applicants have been deprived of from getting the pension on last drawn pay of promotional post.

11. Undisputedly, in O.A.33/2018, the Applicant was promoted to the rank of PSI by order dated 20.05.2010 and he retired on 31.05.2012. Thus, he worked on the promotional post for more than two years. Whereas, the Applicant in O.A.282/2018 was admittedly promoted by order dated 29.04.2016 and his promotion was extended from time to time by issuing various orders. He ultimately retired on 31.05.2017. The Applicant in O.A.1044/2017 was promoted to the rank of PSI for 60 days by order dated 03.03.2017 but before completion of that period, he stands retired on 30.04.2017. Whereas, the Applicant in O.A.301/2017 was promoted to the rank of PSI on 12.02.2016 and stands retired as PSI on 30.11.2016.

12. According to Respondents, all these Applicants were promoted purely on temporary basis as per Rule 90(3) of Bombay Police Manual. Rule 90 reads as follows :

> "**90**. Officiating appointments of Sub-Inspectors of Police:- (1) In order to enable him to make appointments by promotion, Deputy Inspector General will maintain in their offices a list of Head Constables qualified for such appointments on the following principles:-
>
> (a) The list of qualified Head Constables should be maintained range wise.
>
> (b) (i) Seniority should be fixed according to the date of passing the qualifying examination.
>
> (ii) Inter se seniority of qualified Head Constables passing the examination at the same time should be fixed according to the date of their substantive promotion to the rank of Head Constables in the lowest grade.
>
> (c) The lists should be prepared every year and the new comers on the list should be placed below the Head Constables already on the list.

(2) The above principles are also applicable in the case of qualified Armed Head Constables.

(3) In case of emergency, i.e. when Sub-Inspectors in charge of Police Stations are sent out on deputation for quelling disturbances, riots, etc, the Deputy Inspector General may appoint the Senior Head Constables of such Police Stations as Sub-Inspectors subject to the following conditions:-

(a) The power should be exercised in cases of emergencies only.
(b) Appointments should be made on the initial pay of the Sub-Inspector's grade.
(c) The appointments should be made for a maximum period of two months.
(d) Such appointments should not be made, if the vacancies are for less than one month.
(e) The I.G.P and the Government should be informed of the appointments, as soon as they are made."

13. Thus, what transpires from the aforesaid Rule that, such temporary appointment should be for maximum period of two months and in case of emergency, it is so permissible. Whereas, interestingly, in the present case, except Applicant in O.A.1044/2017, the Applicants in remaining O.As have worked for more than one year on the said promotional post. Thus, there are reasons to say that these temporary promotions were in fact not strictly as per Rule 90 for a temporary period, but under the garb of said Rule, the work of PSI has been extracted from the Applicants for a longer period than permissible in Rule 90. Therefore, now denial of pensionary benefits in the rank of PSI is nothing but arbitrary and in the infringement of rights of Applicants. There is nothing to show that, these Rules have any statutory force or those have been issued under Article 309 of the Constitution of India. Therefore, such Rule cannot override express provisions made in Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as "MCS Pension Rules").

14. Now, let us have a look at relevant provisions of MCS Pension Rules. In Pension Rules, Rule 9 Clause 36 defines 'pay' as follows :

"**36**. "Pay means the amount drawn monthly by a Government servant as --

(i) .....

(ii) .....

(iii) .....

(iv) .....

(v) In the 6th Pay Commission, the pay drawn in the prescribed pay band plus applicable grade pay but does not include any other type of pay like special pay, which the Government Servant was receiving immediately before his retirement or on the date of his death."

15. Rule 9 Clause 38 defines 'Pensionable pay' as follows :

"**38**. **Pensionable pay** means the average pay earned by a Government servant during the last ten months service [or last month's pay, whichever is more beneficial to the Government Servant]"

16. Rule 9 Clause 39 defines 'Pensionable Service' as follows :

"**39**. **Pensionable Service** means service which qualifies the Government servant performing it to receive a pension from the Consolidated Fund."

17. At this juncture, it would be also apposite to refer G.R. No.PEN1009/CR33/SER-4, dated 30th October, 2009 issued by Finance Department, Government of Maharashtra in view of recommendation of 6th Pay Commission whereby modification has been made in Pension Rules for the purpose of grant of pension and family pension, gratuity, commutation, etc. Here, Clause 5.2 of Resolution is material, which is as follows :

"**5.2** Linkage of full pension with 33 years qualifying service as per Rule 110(2) of Maharashtra Civil Services (Pension) Rules, 1982 is dispensed with from 27th February, 2009 (the date from which recommendations of Hakim Committee has been accepted). Once a Government Servant has rendered the minimum qualifying service of twenty years, pension shall be paid at 50% <u>of the last basic pay</u> or 50% of average basic pay received during the last 10 months, whichever is more beneficial to him. Therefore, Rule 110(2) (a) of the Maharashtra Civil Services (Pension) rules, 1982 is deleted from 27th February, 2009. Retiring benefits to the Government servant in such cases are explained in Annexure III. Accordingly, Rule 110(2) (a) of the Maharashtra Civil Services (Pension) Rules, 1982 shall stand modified to this extent."

18. Subsequently, the Government of Maharashtra has issued Corrigendum dated 9th June, 2016, which is as follows :

> "Following changes are made in para 5.1 & 5.2 of the Government Resolution dated 30th October, 2009 referred to above regarding revision of pension / family pension of post 1st January, 2006 pensioners.
>
> For the sentence "of the last basic pay", the sentence "the basic pay fixed for the post from which an employee has been retired' shall be substituted."

19. Thus, the conjoint reading of G.R. dated 13th October, 2009 and Corrigendum dated 9th June, 2016 makes it abundantly clear that, for the purpose of pension, the basic pay fixed for the post from which an employee has been retired is the criteria.

20. Now, coming to the facts of the present case, there is no dispute about the qualifying service of the Applicants for grant of pension. Besides, as stated above, there is no such specific defence that the Applicants were not eligible or fulfilling the criteria for promotion in the rank of PSI, nor there is any defence of non-availability of substantive post. This being the position, in view of G.R. dated 13th June, 2009 and the Corrigendum dated 9th June, 2016, there is no escape from the conclusion that the pension of the Applicants was required to be fixed for the post from which they have been retired. Therefore, the aspect of temporary promotion pale into insignificance and it has absolutely no relevance for the denial of the reliefs claimed by the Applicants. When statutory provisions creates rights in favour of employee to get pension on the basic pay fixed for the post from which the employee has been retired, then it would not lie in the month of Respondents to turn around and to fix the pay on the post of ASI which they held prior to promotion. Suffice to say, harmonious construction of the Pension Rules, more particularly in view of Corrigendum dated 09.06.2016 supports and establishes the Applicants' entitlement to get pension fixed on the basis of last drawn pay.

21. Shri M.D. Lonkar, learned Advocate for the Applicant in support of his contention placed reliance on the Judgment of Hon'ble Supreme Court in ***AIR 1967 SC 1889 (Roshan Lal Tandon Vs. Union of India)*** wherein Para No.6 reads as follows :

> "**6.** It is 'true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public 'law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Art. 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Art. 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are 'fixed by the law and in the enforcement of these duties society has an interest. In the language of juris- prudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned."

This authority is a clear answer to the defence of temporary promotion raised by the Respondents.

22. Suffice to say, the entitlement of the Applicants when found based on their status, they cannot be denied pensionary benefits under the garb of issuing temporary promotions. It is nothing but ruse to avoid the statutory liability.

23. Shri Lonkar, learned Advocate for the Applicant referred the Judgment in 1985 SCC (L & S) 53 (Salabuddin Mohamad Yunus Vs. State of Andhra Pradesh) wherein the Hon'ble Supreme Court held that, the employee has fundamental right to receive pension according to the Rules in force at the time of retirement

and this right can only be taken away or curtailed in the manner provided in the Constitution. Para No.5 of the said Judgment is as follows :

> "**5**. That, however, is not the end of the matter, because in spite of this position, the Appellant is entitled to succeed in view of the Judgment of this Court in Deokinandan Prasad's case which is a decision of a five judge Bench of this Court. We find that the Division Bench has misunderstood the ratio of that decision.
>
> In that case, this Court held that the payment of pension does not depend upon the discretion of the State but is governed by rules made in that behalf and a Government servant coming within such rules is entitled to claim pension. It was further held that the grant of pension does not depend upon an officer being passed by the authorities to that effect though for the purpose of quantifying the amount having regard to the period of service and other allied matters, it may be necessary for the authorities to pass an order to that effect, but the right to receive pension flows to an officer not because of the said order but by virtue of the rules. It was also held in that case that pension is not a bounty payable at the sweet will and pleasure of the Government but is a right vesting in a Government servant and was property under clause (1) of Article 31 of the Constitution of India and the State had no power to withhold the same by a mere executive order and that similarly this right was also property under sub-clause (f) of clause (1) of Article 19 of the Constitution of India and was not saved by clause (5) of that Article. It was further held that this right of the Government servant to receive pension could not be curtailed or taken away by the State by an executive order."

24. Shri Lonkar, learned Advocate for the Applicant referred the Judgment in ***1995 SCC (L & S) 1365 (A.P. Srivastava Vs. Union of India & Ors.)*** wherein the question of grant of pension to a temporary Government servant who has rendered 28 years of service was in question. Para Nos. 5 and 6 are material, which are as follows :

> "**5.** In view of the rival submissions at the bar, the question for consideration is whether there is any rationale behind the rule disentitling pension to a government servant when an order of compulsory retirement is passed in exercise of power under Rule 56 (J) of the Fundamental Rules? As has been noticed earlier after completion of a particular period of service the employer has a right to compulsorily retire the employee in public interest and similarly the employee has a right to voluntarily retire on giving three months notice. It has been held by this Court time and again that the pension is not a charity or bounty nor it is conditional payment solely dependant on the sweet will of the

> employer. It is earned for rendering a long service and is often described as deferred portion of payment for past services. It is in fact in the nature of social security plan provided for a superannuated government servant. If a temporary government servant who has rendered 20 years of service, is entitled to pension, if he voluntarily retires, there, is no justification for denying the right to him when he is required to retire by the employer in the public interest. In other words, the condition precedent for being entitled to pension in case of a temporary government servant is rendering of 20 years of service.
>
> **6.** In view of the legal position that an order of compulsory retirement is not a punishment and pension is a right of the employee for services rendered, we see no justification for denying such right to a temporary government servant merely on the ground that he was required to retire by the employer in exercise of power under Rule 56 (J) of the Fundamental Rules. In our considered opinion a temporary government servant would be entitled to pension after he has completed more than 20 years of service even if he is required to retire by the employer in exercise of power under Rule 56 (J) of the Fundamental Rules."

25. Lastly, Shri Lonkar, learned Advocate for the Applicant also referred the Judgment in ***1971 (2) SCC 330 (Deokinandan Prasad Vs. State of Bihar & Ors.)*** which has been referred by Hon'ble Supreme Court in ***Salabuddin's*** case (cited supra) in ***Devkinandan's*** case (cited supra) what has been held is as follows :

> "The right of the petitioner to receive pension is property under Art. 31(1) and by a mere executive order the State had no powers to withhold the same. Similarly, the said claim is also property under Art. 19(1)(f) and it is not saved by sub-article (5) of Article 19. Therefore, it follows that the order denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1) of the Constitution and as such the writ petition under Article 32 maintainable."

26. Shri V.V. Joshi, learned Advocate for the Applicants in this behalf also placed reliance on the Judgment of Hon'ble Supreme Court in ***K. Anbazhagan & Anr. Vs. The Registrar General (Civil Appeal No.8216-8217 of 2018 arising out of SLP (C) No(S).24328-24329/2015)***. In this matter, while deciding three appeals on the question where ad-hoc / fast tract Court Judges are entitled to count the service rendered on ad-hoc basis for pension purposes held that the Appellants therein are entitle to superannuation pension for gratuity and encashment of Earned Leave. The Ho'ble Supreme Court in this matter referred to its earlier

Judgment in ***2018 (7) Scale 343 (Mahesh Chandra Verma Vs. The State of Jharkhand & Ors.)*** wherein in Para Nos.15, 17 & 18 has been held as follows :

"**15.** The appellants were not appointed to the Fast Track courts just at the whim and fancy of any person, but were the next in line on the merit list of a judicial recruitment process. They were either part of the select list, who could not find a place given the cadre strength, or those next in line in the select list. Had there been adequate cadre strength, the recruitment process would have resulted in their appointment. We do believe that these Judges have rendered services over a period of nine years and have performed their role as Judges to the satisfaction, otherwise there would have been no occasion for their appointment to the regular cadre strength. Not only that, they also went through a second process for such recruitment. We believe that it is a matter of great regret that these appellants who have performed the functions of a Judge to the satisfaction of the competent authorities should be deprived of their pension and retiral benefits for this period of service. The appellants were not pressing before us any case of seniority over any person who may have been recruited subsequently, nor for any other benefit. In fact, we had made it clear to the appellants that we are only examining the issue of giving the benefits of their service in the capacity of Fast Track court Judges to be counted towards their length of service for pensionary and retiral benefits. To deny the same would be unjust and unfair to the appellants. In any case, keeping in mind the spirit of the directions made Under Article 142 of the Constitution of India in Brij Mohan Lal[II] and in Mahesh Chandra Verma, the necessary corollary must also follow, of giving benefit of the period of service in Fast Track courts for their pension and retiral benefits. The methodology of noncreation of adequate regular cadre posts and the consequent establishment of Fast Track courts manned by the appellants cannot be used as a ruse to deny the dues of the appellants.

17. The position in respect of the appellants is really no different on the principle enunciated, as there was need for a regular cadre strength keeping in mind the inflow and pendency of cases. The Fast Track Court Scheme was brought in to deal with the exigency and the appellants were appointed to the Fast Track courts and continued to work for almost a decade. They were part of the initial select list/merit list for recruitment to the regular cadre strength but were not high enough to be recruited in the existing strength. Even at the stage of absorption in the regular cadre strength, they had to go through a defined process in pursuance of the judgment of this Court and have continued to work thereafter.

18. We are, thus, unhesitatingly and unequivocally of the view that all the appellants and Judicial Officers identically situated are entitled to the benefit of the period of service rendered as Fast Track court Judges to be counted for their length of service in determination of their pension and retiral benefits."

27. Ultimately, in Para No.50, the Hon'ble Supreme Court in ***K. Anbazhagan's*** case held as follows :

> "**50**. Although in the above case of Mahesh Chandra, Fast Track Court Judges were ultimately absorbed in the regular cadre strength but the fact that period of services as Fast Track Court Judges had been directed to be added for theirpensionary benefits, does support the claim of the appellants in the present case."

28. Now, turning to the facts of the present case, admittedly, the Respondents have extracted the work of PSI from the Applicants. On the cost of repetition, I would again like to mention that, there is no defence of non-eligibility or absence of substantive post. Therefore, harmonious construction of the Pension Rules in the light of aforesaid Judgment of Hon'ble Supreme Court clearly spells that, even if the promotion was under the garb of temporary promotion, the Respondents cannot deny retiral benefits to the Applicants on the basis of last drawn pay from which they stand retired. Needless to mention that the pension is not charity or bounty. It is the right of Government employee. The principle enunciated by Hon'ble Supreme Court in various decisions referred to above, are clearly attracted to the present set of facts. Therefore, it would be highly unjust and iniquitous to deny the pensionary benefits to the Applicants. Such pensionary benefits conferred upon them by statute cannot be taken away under the guise of temporary promotion for no fault on the part of Applicants, particularly after extracting the work of promotional post from them. This conclusion is again fortified in view of the corrigendum issued by State of Maharashtra on 09.06.2016, which specifically provides to consider basic pay fixed for the post from which an employee has been retired for the purposes of grant of pension.

29. Suffice to say, the denial of such right by the Respondents is contrary to the Rules and fundamental rights of the Applicants to receive the pension. Such

statutory right cannot be taken away under the garb of executive order of temporary promotion.

30. In view of aforesaid discussion, I have absolutely no hesitation to sum up that the Applicants are entitled to the pension on the basis of last drawn pay, which is on the rank of PSI and the applications deserve to be allowed.

31. In O.A.1044 of 2017, the Applicant has also prayed for declaration that the order of recovery of Rs.1,36,364/- be declared illegal and the amount be refunded with interest. In so far as this aspect is concerned, this recovery is sought to be made because of earlier wrong fixation of pay of the Applicant for the period from 2006. According to Respondents, the said mistake was noticed by Pay Verification Unit and thereupon, the recovery has been directed. In this behalf, the legal position is well settled that such recovery from the Applicant after retirement from retiral benefits is not permissible in view of the law laid down by Hon'ble Supreme Court in ***Rafiq Masih's*** case. The Hon'ble Supreme Court in Para No. 12 summarized the legal position 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.*

> *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."*

32. Thus, the case of the Applicant in O.A.1044 of 2017 squarely falls within the ratio laid down by Hon'ble Apex Court, and therefore, the recovery deserves to be quashed.

33. The alleged understanding given by the Applicant to refund excess amount as sought to contend by the Respondents cannot be the ground to deny him the relief of refund of the said amount in view of the Judgment of Hon'ble Supreme Court in ***Rafiq Masih's*** case (cited supra). There is nothing to attribute any fraud or misrepresentation to the Applicant. The excess payment was made due to mistake on the part of Department. Therefore, in view of law laid down by Hon'ble Supreme Court in ***Rafiq Masih's*** case, such course of action of recovery is not at all sustainable.

34. Now, turning to the aspect of alleged Undertaking. The Respondents have also produced on record a copy of Undertaking given by the Applicants at the time of fixation of pay. True, the Applicants seem to have given Undertaking at the time of fixation of pay. It is normal practice to obtain the Undertakings from the employees. *Necessitas non habet legem* is an age-old maxim which means necessity knows no law. The Applicants being Group 'C' employees, they were not in a position to bargain with the Government who is in stronger/dominant position. This aspect cannot be forgotten.

35. The totality of aforesaid discussion, therefore, leads me to conclude that the Applicants are entitled to the relief claimed and the applications deserve to be allowed. Hence, the following order.

O R D E R

(A) The Original Application Nos. 301/2017, 1044/2017, 33/2018 and 282/2018 are allowed.

(B) The Respondents are directed to grant retirement benefits to the Applicants on the basis of last drawn pay of the post from which they stand retired and shall release all other consequential benefits to them within three months from today.

(C) The order of recovery of Rs.1,36,364/- in O.A.1044 of 2017 is declared illegal and Respondents are directed to refund the said amount to the Applicant within three months, failing which it shall carry interest at the rate of 9% p.a. till the date of actual payment.

(D) No order as to costs.

Sd/-

(A.P. KURHEKAR)
Member-J

Mumbai
Date : 04.02.2019
Dictation taken by :
S.K. Wamanse.
D:\SANJAY WAMANSE\JUDGMENTS\2019\2 February, 2019\O.A.301 & 1044.17 with O.As.33 & 282.18.w.2.2019.Pension & Recovery.doc