IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NO.402 OF 2017

DISTRICT : MUMBAI

Shri Tanaji Hari Dhekale.)
Retired Assistant Police Inspector,)
Protection IV, Office of Additional)
Commissioner of Police, Protection &)
Security, Vaju Kotak Marg,)
Mumbai – 400 001 and residing at D/56,)
Worli Police Camp, Sir Pochkhanwala)
Road, Worli, Mumbai – 400 030.)**...Applicant**

Versus

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

2. Director General of Police.)
M.S, Having his office at Colaba,)
Mumbai.)

3. Commissioner of Police.)
Having his office at Crawford Market,)
Mumbai.)

4. Commissioner,)
State Intelligence Department,)
Maharashtra State, Mumbai.)

5. Additional Commissioner of Police.)
Protection & Security, Vaju Kotak)
Marg, Fort, Mumbai – 400 001.)

6. Superintendent of Police (Admn.))
Special Security Department, Dadar,)
Mumbai.)

7. Office of Accountant Genera.)
Having his office at Maharshi)
Karve Road, Mumbai – 400 020.)

8. Directorate of Accounts & Treasuries)
Through its Director, Maharashtra)
Thackarcy House, 3rd Floor,)
Ballard Estate Mumbai – 400 038.)**...Respondents**

Mr. M.D. Lonkar, Advocate for Applicant.

Mrs. K.S. Gaikwad, Presenting Officer for Respondents.

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

DATE : 09.03.2020

JUDGMENT

1. The Applicant has challenged the orders dated 08.11.2016 and 21.11.2016 whereby the recovery of Rs.4,17,457/- was sought to be recovered from retiral benefits of the Applicant, invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

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

The Applicant was appointed as Police Constable by order dated 27.12.1977. During the course of service, he was promoted upto the rank of Police Head Constable (Writer) in 1994. Thereafter, by order dated 06.03.2003, he was promoted to the post of PSI w.e.f. 10.01.2003 on ad-hoc basis. Later, he was regularly promoted to the post of PSI by order dated 11.08.2011 w.e.f.01.01.2007. The Applicant was due to retire on 31.12.2016. As per order dated 06.03.2003, the promotion being purely temporary, the Applicant was not entitled for yearly increment. However, the increments were

released in favour of the Applicant. Before retirement, his Service Book was sent to Pay Verification Unit for verification. That time, Pay Verification Unit raised objection that though the Applicant was appointed on ad-hoc basis with specific stipulation, he will not be entitled to regular increment of the promotional post, the same was released by the Department, and therefore, returned the Service Book for necessary correction. In view of objection raised by Pay Verification Unit and stipulation in promotion order dated 06.03.2003, the Respondents revised pay of the Applicant and recovery of Rs.4,17,457/- was directed towards excess payment of increments. The Applicant has challenged the impugned order of recovery in the present O.A. contending that he is entitled to yearly increment in terms of Rules 36 and 39 of Maharashtra Civil Services (Pay) Rules, 1981 (hereinafter referred to as 'Rules of 1981' for brevity). The Applicant further contends that he is subjected to discrimination. According to him, Shri Chimaji Jadhav was also promoted on ad-hoc basis, but in his case, increments were released and no objection was raised by Pay Verification Unit. His pension was accordingly fixed considering increments granted to him. He, therefore, prayed to quash the impugned order of recovery and grant other consequential service benefits.

3. The Respondents resisted the claim by filing Affidavit-in-reply inter-alia denying the entitlement of the Applicant to the relief claimed. The Respondents contend that by order dated 06.03.2003, purely temporary promotion was granted to the post of PSI subject to specific stipulation that he will not be entitled to yearly increment. However, inadvertently, increments were released. The mistake was noticed when Service Book was sent for verification to Pay Verification Unit. Accordingly, the sum of Rs.4,17,457/- was found paid excess to the Applicant towards the increment. The Respondents, therefore, sought to justify the impugned action. The Respondents denied that the Applicant is subjected to

discrimination. As regard the matter of Chimaji Jadhav, the Respondents contend that ad-hoc promotion given to him was regularized by order dated 11.08.2011, and therefore, increments were rightly released to him. Whereas, in Applicant's matter, he was given ad-hoc promotion by order dated 06.03.2003 which was discontinued and after giving break, fresh orders of ad-hoc promotions were issued. As such, the Applicant was not in continuous service on ad-hoc promotional post, and therefore, his case cannot be compared with Chimaji Jadhav. With this pleading, the Respondents prayed to dismiss the O.A.

4. Shri M.D. Lonkar, learned Advocate for the Applicant made two-fold submission. He contends that even if promotional post of PSI by order dated 06.03.2003 was on ad-hoc basis, the Applicant having rendered service on promotional post, he is entitled to yearly increment of promotional post and increments are required to be drawn as a matter of course unless it is withheld as penalty. In this behalf, he referred to Rules 36 and 39 of 'Rules of 1981'. He further submits that the impugned action of recovery of Rs.4,17,457/- from retiral benefits is impermissible in view of the decision of Hon'ble Supreme Court in ***(2015) 4 SCC 334 (State of Punjab and others Vs. Rafiq Masih (White Washer)***. As regard discrimination, he submits that in the matter of Chimaji Jadhav, though he is similarly situated, no recovery is made towards increment granted to him and the Applicant is subjected to discrimination. He, therefore, submits that the impugned action is unsustainable in law.

5. Per contra, Smt. K.S. Gaikwad, learned Presenting Officer sought to justify the impugned action in view of the contentions raised in the reply. As regard recovery, she fairly states that in view of decision of Hon'ble Supreme Court in ***Rafiq Masih's*** case, the recovery may not be permissible but pay fixation as revised by

withdrawing the benefit of increment of promotional post is legal and it need not be interfered with.

6. Indisputably, the Applicant was promoted to the post of PSI purely on ad-hoc basis in terms of order dated 06.03.2003 (Page No.17 of P.B.). Here, it would be useful to see the stipulations and conditions subject to which promotion was granted to the Applicant.

> "खालील नमुद अर्हता प्राप्त पोलीस हवालदार यांना त्यांच्या नावासमोर दर्शविलेल्या ठिकाणी स्थानापन्न पोलीस उपनिरीक्षक म्हणून खालील नमुद अटीच्या अधिन राहून दि.१०/०१/२००३ (म.नं.) पासून १ वर्षांकरीता पुन्हा तात्पुरती (अभावित) पदोन्नती देण्यात येत आहे.
>
> १. सदरची पदोन्नती तात्पुरती (अभावित) असल्याने त्यांना स्थानापन्न पोलीस उप निरीक्षक या पदावरील सेवाज्येष्ठता किंवा या पदाच्या वेतनश्रेणीतील वार्षिक वेतनवाढ देय होणार नाही.
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> २. स्थानापन्न पोलीस उप निरीक्षक या संवर्गातील यापुढे पोलीस उप निरीक्षक यांची पदे उपलब्ध होतील त्याप्रमाणे त्यांच्या ज्येष्ठतेप्रमाणे त्यांना नियमित स्थानापन्न पोलीस उप निरीक्षक या पदावर पदोन्नती देण्याबाबतचे आदेश यथावकाश निर्गमित करण्यात येतील."

7. It is thus explicit from the stipulation mentioned in promotion order that it was purely temporary promotion with specific rider that the Applicant will not be entitled for seniority as well as increment of promotional post. It further exhibits that the Applicant's promotion will be regularized subject to availability of the post of PSI in future. As such, apparently, the promotion was not on substantive vacant post and it was purely temporary promotion. The Applicant has accepted terms and conditions and later in 2011, he was promoted regularly w.e.f.01.01.2007.

8. Material to note that even after getting temporary promotion for one year by order dated 06.03.2003 by subsequent orders with break, he was again given temporary promotion from time to time. In this behalf, it would be useful to refer subsequent orders produced by the Respondents, which are at Page Nos.122, 133, 144 and 156 which shows that the temporary promotion earlier granted to the various Police Personnel including the Applicant was cancelled and with short break, fresh orders of temporary promotion

were again issued from time to time. In these orders also, there is specific mention that the employees will not be entitled for yearly increment of the promotional post. As such, it is not a case where the Applicant had continuously worked on the promotional post without any interruption. True, there seems to be technical break of 2/3 days in between orders issued from time to time. However, the fact remains that there was break in service on promotional post and this aspect is of much importance while considering the entitlement of the Applicant to the increment.

9. True, as per Section 36 of 'Rules of 1981', an increment shall ordinarily be drawn as a matter of course unless it is withheld as penalty. In the present case, there is no question of withholding of penalty as a punishment but the question involved is of release of increment during the period of temporary promotion. Therefore, Section 36 of 'Rules of 1981' on which reliance is placed by the learned Advocate for the Applicant is misplaced. Needless to mention that increment is earned by the Government servant after completion of one year complete service on the post held by him. Whereas, in the present case, the Applicant was given temporary promotion for one year initially, but later before completion of one year, technical break was given and with technical break, fresh appointment was issued from time to time. This being the position, this is not a case where the Applicant has completed one year service on promotional post, so as to earn the increment of promotional post.

10. Apart, the promotion itself was temporary with specific stipulation that the Applicant will not be entitled to increment. It is also quite clear from the promotion order that it was not on substantive, vacant post. He was to be regularized in future as and when vacancies would become available. As such, having examined

the issue from both the angles, the Applicant's contention that he was entitled to the increment holds no water.

11. The Applicant's case also does not fall within Rule 39 of 'Rules of 1981' which *inter-alia* prescribes the conditions on which service counts for increment. It inter-alia provides that subject to provisions of Rules 11, 14, 20 and 44, all duties in a post on a time scale counts for increments in that time scale. It pertains to grant of increment on regular post and substantive post on completion of one year service. Whereas in the present case, the Applicant was promoted purely on temporary basis and not on substantive vacant post. Therefore, Rule 39 is of no assistance to the Applicant in the present situation.

12. As regard discrimination, the learned P.O. has rightly pointed out that in the matter of Chimaji Jadhav, his temporary promotion was regularized, and therefore, the increments were rightly released. Even assuming for a moment that Chimaji Jadhav got increment that itself would not be claimed as a ground of discrimination. The parity or discrimination cannot be claimed on the basis of wrong orders passed in favour of one employee, otherwise it would amount to perpetuate the illegality. Suffice to say, the ground of discrimination raised by the learned Advocate for the Applicant is without any substance.

13. As such, the action of withdrawal of increment, re-fixation of the pay for the purpose of grant of pension cannot be faulted with.

14. Now turning to the aspect of recovery, the Respondents sought to recover the sum of Rs.4,17,457/- from the retiral benefits of the Applicant. Admittedly, the Applicant retired as Group 'B' employee on 31.12.2016. This being the position, as rightly pointed out by the learned Advocate for the Applicant that the recovery is not

permissible in view of decision of Hon'ble Supreme Court in ***Rafiq Masih's*** case.

15. The issue of recovery of excess payment made to the employees is no more *res-integra* in view of decision of Hon'ble Supreme Court in ***Rafiq Masih's*** case. The Hon'ble Supreme Court in Para No.12 held 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."*

16. Thus, the Applicant's case squarely falls within Clauses (ii), (iii) & (v) of Para No.12 of ***Rafiq Masih's*** case. The excess payment is sought to be recovered in respect of payment made from 2003. It is nowhere the case of the Respondents that any fraud or misrepresentation is attributable to the Applicant. The increment was released by the Department at their own inadvertently. Therefore, after retirement, it would not be iniquitous and harsh to

recover such amount from the retiral benefits of the Applicant. Suffice to say, the case of the Applicant squarely falls within Clause Nos.(ii), (iii) & (v) of Para 12 of ***Rafiq Masih's*** case. The order of recovery is, therefore, not sustainable.

17. The totality of aforesaid discussion of law and facts leads me to conclude that the impugned order dated 08.11.2016 seeking recovery of Rs.4,17,457/- is not sustainable in law and O.A. deserves to be allowed partly. Hence, the following order.

O R D E R

(A) The Original Application is allowed partly.

(B) The impugned orders dated 08.11.2016 and 21.11.2016 seeking recovery from retiral benefits is quashed and set aside.

(C) There shall no recovery from the retiral benefits of the Applicant and to this extent, the O.A. is allowed.

(D) The Applicant's retiral benefits if withheld be released as per his entitlement within two months from today.

(E) No order as to costs.

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

Mumbai
Date : 09.03.2020
Dictation taken by :
S.K. Wamanse.
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