IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NOS.574 & 575 OF 2018

DISTRICT : PALGHAR

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ORIGINAL APPLICATION NO.574 OF 2018

Shri Santosh P. Baviskar.)

Age : 41 Yrs., Occu.: Service.)**...Applicant**

Versus

1. The State of Maharashtra.)
Through its Principal Secretary,)
Public Health Department, G.T. Hospital)
Complex Building, 10th Floor, B Wing,)
New Mantralaya, Mumbai 400 001.)

2. Deputy Director of Health Services,)
Mumbai Region, Thane.)

3. Medical Superintendent, Rural Hospital,)
Mokhada, District : Palghar.)**…Respondents**

WITH

ORIGINAL APPLICATION NO.575 OF 2018

Shri Pawansingh G. Pardeshi,)

R/o. B-205, Tirupati CHS, near Vitthal Mandir)

Pakhadi Kharigaon, Kalwa (West),)

DistRICT : Thane – 400605.)...**Applicant**

Versus

1. The State of Maharashtra, through its)
Principal Secretary, Public Health Department,)
G. T. Hospital Complex Building, 10th floor,)
B- Wing, Mantralaya, Mumbai 400 032.)

2. Deputy Director of Health Services,)
Mumbai Region, Thane.)

3. Medical Superintendent, Regional Mental)
Hospital, near Dnyansadan School,)
Wagale Estate, Thane (W) – 400604.)**…Respondents**

Mr. N.D. Thombre, Advocate for Applicants.

Mrs. A.B. Kololgi, Presenting Officer for Respondents in O.A.No.574/2018.

Ms. N.G. Gohad, Presenting Officer for Respondents in O.A.No.575/2018.

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

DATE : 22.01.2019

JUDGMENT

1. Heard Shri N. D. Thombare, learned Advocate for the Applicants and Smt. A.B. Kololgi and Ms. N.G. Gohad, learned Presenting Officers for the Respondents.

2. The issue in both the Original Applications is common, and therefore, both the matters are decided by this common Judgment.

3. Shortly stated the facts of O.A. No.574/2018 are as follows :-

The Applicant was appointed as Pharmacist (Group 'C') on 03.03.2006. Thereafter, the designation of the post has been changed from Pharmacist to Pharmacy Officer (Group 'C'). The Applicant is working at Rural Hospital, Mokhada, District Palghar. Abruptly, by order dated 23.08.2017, the Respondent No.3 informed him that since 2006, the Grade Pay has been paid to him Rs.3100 instead of Rs.4300 and the said mistake was noticed by the Pay Verification Unit. Therefore, the pay has been revised w.e.f. 03.03.2006 to October, 2016. The excess payment of Rs.3,27,137/- was found made to him during this tenure.

The Applicant is challenged the said recovery in the present application. He contends that the order of recovery of Rs.3,27,137/- from his salary in installment has been issued without issuing show cause notice and, therefore, the same is arbitrary. Secondly, the recovery is not permissible in view of the judgment to the Hon'ble Supreme Court as the same would be harsh and iniquitous to him. The Applicant, therefore, prayed to set aside the impugned order dated 23.08.2017.

4. The Respondent Nos.1 to 3 resisted the application by filing Affidavit-in-Reply *inter-alia* denying that the order of recovery is iniquitous or arbitrary. The Respondents contend that at the time of Pay Fixation, the concerned department could not understand the provision of Rules and Regulations, which resulted into wrong Pay Fixation of the pay scale of the Applicant. The said mistake was revealed by Pay Verification Unit. As such, the recovery of excess payment of Rs.3,27,137/- is legal and valid. The Respondents further contend that in 2009, at the time of fixation of pay, the Applicant had furnished the Undertaking that in case, if excess payment found made, he would refund the same. The Respondents, therefore, contend that the recovery is legal and valid and prayed to dismiss the application.

5. Shortly stated the facts of O.A. No.575/2018 are as follows :-

The Applicant is Group 'C' employee. He was appointed as Pharmacist in 2002. Thereafter, his designation was changed as Pharmacy Officer, Group 'C'. He is working at Regional Mental Hospital, Thane. His pay was revised from time to time in view of the recommendations of Pay Commission. Abruptly, the Respondent No.3 by impugned order dated 09.01.2018 informed the Applicant that there was mistake while fixing his pay, and therefore, the excess payment has been made to him. There was excess payment from the year 2006 upto 31.10.2016 amounting to Rs.6,60,370/-. The Respondent No.3, therefore, directed the recovery from his salary in installments. The Applicant has challenged the said recovery order contending that the same is arbitrary and illegal being issued without show cause notice to him as well as it is in contravention of the Judgment of the Hon'ble Supreme Court. He also contends that the same is impermissible. With these pleadings, he contends that now, the recovery of the said amount would be iniquitous and harsh for him. He, therefore, prayed to quash and set aside the order dated 09.01.2018.

6. The Respondent Nos.1 to 3 resisted the application by filing Affidavit-in-Reply *inter-alia* denying that the recovery is arbitrary or illegal. In this behalf, the Respondents contend that the pay scale of the applicant was wrongly fixed as 9300-34800, G.P.4300 instead of pay scale of Rs.5200-20200 + G.P.2800+300 = 3100. As the concerned department erred in understanding the rules of Pay Fixation, the pay scale of the applicant was wrongly fixed. The said mistake was revealed while service books were sent to Pay Verification Unit. The Respondents, therefore, contend that the recovery order valid and legal. The Respondents further contend that while fixation of pay, the applicant had furnished the Undertaking that in case, excess payment found made, he will

refund the same. The Respondents, therefore, sought to justify the action of recovery and prayed to dismiss the application.

7. Shri Thombre, learned Advocate for the Applicants submitted that the impugned order of recovery in both the applications has been issued without giving an opportunity of hearing, and therefore, the same is arbitrary and unsustainable in law and facts. He has further pointed out that the excess payment pertains to the period from 2006 to 2016 for no fault on the part of Applicants, and therefore, it would be iniquitous and harsh to recover the said amount after the span of more than decade. In this behalf, he further urged that the present situation is squarely covered by the decision of Hon'ble Supreme Court in ***Civil Appeal No.11527/2014 (State of Punjab and others Vs. Rafiq Masih (White Washer)), decided on 18th December, 2014***.

8. Per contra, the learned P.O. countered that the excess payment was made due to wrong fixation of pay scale and having noticed it, in verification of Service Book, the same is being corrected. It is further pointed out that at the time of fixation of pay scale, the Applicants have given Undertaking that in case, if excess payment is found to have been made, then he will refund the same to the Government. On this line of submission, the leaned P.O. sought to justify the impugned orders of recovery.

9. At the very outset, it needs to be stated that, indisputably, the Applicants belong to Group 'C' category. Admittedly, during fixation of pay scale, the Department committed mistake resulting into wrong fixation of pay scale and consequently, the excess payment has been made right from 2006 to 2016. In this respect, there is specific admission in the reply filed by the Respondents that, at the time of fixation of pay, the concerned official had erred in understanding the provisions of Rules and Regulations to be borne in mind while fixing the pay. Instead of Grade Pay of Rs.3100/-, they paid Grade Pay Rs.4300/-. Thus,

admittedly, the Applicants have no role to play in the fixation of pay and no *malafide* or fault is attributed to the Applicants. It was solely due to mistake of Department.

10. In view of above, the question comes whether such recovery where excess payment is made for more than a decade is permissible. This issued is no more *res-integra* in view of Judgment in ***Rafiq Masih's*** case (cited supra) which has been followed consistently by this Tribunal and was also upheld by the Hon'ble High Court. In ***Rafiq Masih's*** case, the Hon'ble Supreme Court held as follows :

> "**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.
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> (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:
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> > "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).
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> 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. Based on the above consideration, we are of the view, that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee."

11. The Hon'ble Supreme Court having considered its earlier decisions in Para No.12 held as follows :

"**12.** It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(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."

12. Thus, the conspectus of the aforesaid decision is that, if the payment had been made for long duration of time, it would be iniquitous to make recovery particularly from employees of Group 'C' and Group 'D' on the principle that, the Government employee is primarily dependent on his wages and if any deduction is to be made from wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family, and therefore, they should not be subjected to ordeal of recovery even if they were the beneficiaries of receiving higher emoluments, then were due to them and such recovery would be iniquitous and arbitrary and also breach of the mandate contained in Article 14 of the Constitution of India.

13. Now, turning to the aspect of alleged Undertaking. The learned P.O. in this behalf sought to place reliance on the Judgment of Hon'ble Supreme Court in ***Civil Appeal No.3500 of 2006 (High Court of Punjab and Haryana & Ors. Vs. Jagdev Singh) decided on 29.07.2016.*** 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.

14. In case of ***Jagdev Singh*** (cited supra), the matter relates to the Judicial Officer (Group 'A' Officer). In view of Undertaking given by him, the order of recovery was upheld. Whereas in the present case, the Applicants are Group 'C' employees. The excess payment is made for more than a period of decade, and therefore, at this stage, it would be iniquitous and arbitrary to recover this

amount from them. As such, the facts in the present case are quite distinguishable. Therefore, the situation is squarely covered in ***Rafiq Masih's*** case which holds the field.

15. Suffice to say, the situation in the present case is squarely covered particularly by Clause (i) and (iii) of Para 12 of ***Rafiq Masih's*** case. This being the settled legal position, it would be iniquitous and harsh to upheld the recovery to such an extent, which would far out-waive the equitable balance of the employer's right to recover the excess payment on the basis of Undertaking given by the Applicants, who were not in a position to bargain.

16. The necessary corollary of the aforesaid discussion leads me to sum-up that the O.As deserve to be allowed. The action of recovery on the part of Respondents is unsustainable in law. Hence, the following order.

O R D E R

In O.A.574/2018 :

(A) The Original Application is allowed.

(B) The impugned order of recovery dated 23.08.2017 is hereby quashed and set aside.

(C) The Respondents are directed to refund the amount recovered from the salary of the Applicant from August, 2017 onwards within two months from today.

(D) No order as to costs.

In O.A.575/2018 :

(A) The Original Application is allowed.

(B) The impugned order of recovery dated 09.01.2018 is hereby quashed and set aside.

(C) The Respondents are directed to refund the amount recovered from the salary of the Applicant from January, 2018 onwards within two months from today.

(D) No order as to costs.

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

Mumbai
Date : 22.01.2019
Dictation taken by :
S.K. Wamanse.
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