

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.664 OF 2017

DISTRICT : MUMBAI

Shri Kiran Kirit Solanki.)
Age : 29 Yrs., Occu.: Service,)
Working at M.A. Potdar Hospital,)
Dr. Annie Besant Road, Worli,)
Mumbai – 400 018.)...Applicant

Versus

1. The State of Maharashtra.)
Through the Secretary,)
Medical Education Department,)
Mantralaya, Mumbai – 400 032.)
2. The Director of Ayurveda.)
Government Dental College & Hospital,)
4th Floor, St. Georges Hospital Compound,))
P.D’Mello Road, Fort, Mumbai – 01.)
3. The Dean.)
M.A. Potdar Hospital, Dr. Annie)
Besant Road, Worli, Mumbai – 18.)...Respondents

Mr. L.S. Deshmukh, Advocate for Applicant.

Mr. A.J. Chougule, Presenting Officer for Respondents.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 04.07.2019

JUDGMENT

1. The Applicant has challenged the order dated 7th April, 2017 whereby the recovery is sought on account of release of increment because of failure of the Applicant to clear Marathi Language Examination within stipulated period.

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

The Applicant is serving as Staff Nurse with the Respondent No.3 viz. M.A. Potdar Hospital, Worli, Mumbai. She was appointed by order dated 17th September, 2008 on the post of Staff Nurse and was required to pass Marathi Language Examination within two years as contemplated under Maharashtra Government Servants (other than judicial department servants) Marathi Language Examination Rules, 1987 (hereinafter referred to as 'Marathi Language Examination Rules, 1987' for brevity). He sought to contend that she was not made aware that she was to clear Marathi Language Examination. For the first time, by letter dated 21st August, 2012, the Respondent No.2 informed her that she too pass Marathi Language Examination. Thus, she sought to contend that because of ignorance, she did not appear in Marathi Language Examination. Besides, in the period from October, 2012 to October, 2014, she was on study leave for completing B.Sc. (Nursing). She, therefore, sought to contend that the impugned action of Respondent No.3 to recover increments paid to her from 01.07.2011 is illegal. With this pleading, she prayed to set aside the impugned order dated 07.04.2017.

3. The Respondents resisted the application denying the entitlement of the Applicant to the relief claimed. The Respondents denied that the Applicant was not aware of the condition to pass Marathi Language Examination within two years from the date of appointment. In this behalf, the Respondents contend that in appointment order itself, there is stipulation that she was to pass Marathi

Language Examination within two years from the date of appointment. As such, the Applicant was well aware of requirement to pass Marathi Language Examination within two years from the date of appointment and having not done so, she is not entitled to increments, which were required to be withheld after expiration of period of two years as contemplated in Rule 5 of Marathi Language Examination Rules, 1987. However, the increments were mistakenly released from 1st July, 2011 to which she was not entitled and having noticed the same, the Respondent No.3 issued order dated 07.04.2017 for recovery of the same from Pay and Allowances of the Applicant. The Respondents thus sought to justify the impugned action and prayed to dismiss the O.A.

4. Heard Shri L.S. Deshmukh, learned Advocate for the Applicant and Shri A.J. Chougule, learned Presenting Officer for the Respondents.

5. Admittedly, the Applicant was appointed on the post of Staff Nurse by order dated 17th September, 2008. The appointment order is at Page No.12 of the Paper Book wherein as per stipulation No.6, she was required to pass Marathi Language Examination within stipulated period. It is also not in dispute that she had not passed the said examination within stipulated period, but inadvertently, the increments were released w.e.f.01.07.2011. Having noticed so, by impugned order dated 07.04.2017, the recovery is sought. True, the Applicant has passed the said examination during the pendency of this O.A. in July, 2017. However, subsequent passing of examination have no consequence, as admittedly she did not clear the said examination within stipulated period.

6. The ground taken by the Applicant in O.A. that she was not aware of the requirement of passing Marathi Language Examination within stipulated period is totally untenable in view of specific condition in appointment order dated 17th September, 2008 stating that she was to clear Marathi Language Examination within stipulated period as per the Rules. Therefore, it does not lie in her mouth

to contend contrary to the terms and conditions of service, which she has accepted while entering into service. Such stand of public servant, therefore, has to be rejected in *toto*.

7. True, she was on study leave from October, 2012 to October, 2014 for pursuing B.Sc. (Nursing). However, that would not exempt her from fulfilling the conditions subject to which she was appointed. She seems to have applied for study leave which was granted by the Department. But at any rate, that will not exempt her from passing Marathi Language Examination within two years nor it will extend the period of two years prescribed in Marathi Language Examination Rules, 1987.

8. At this juncture, it would be apposite to see Marathi Language Examination Rules, 1987. Rule No.5 is material, which is as follows :-

“5. Failure to pass examination.

A Government Servant who fails to pass the examinations within the prescribed period shall, after the expiry of the said period, be liable to have his increments withheld until he passes the examination or examinations, as the case may be, or is exempted from passing the same under the provisions of rule 4.”

9. Thus, there is no denying that as per Rule 5, the Applicant was not entitled to further increment after expiration of two years from the date of appointment and increments were required to be withheld until she passes the examination or exempted from passing the same under Rule 4 of Marathi Language Examination Rules, 1987.

10. The whole emphasize of the learned Advocate for the Applicant was upon the Judgment of Hon’ble Supreme Court in **(2015) 4 SCC 334 (State of Punjab and Ors. Vs. Rafiq Masih and Ors.)** wherein the Hon’ble Supreme Court laid down certain situations wherein the recovery of Pay and Allowances wrongly paid to

the employees is not permissible. The learned Advocate for the Applicant vehemently urged that, in view of the Judgment of Hon'ble Supreme Court, the recovery from the Applicant being Class-III employee is covered by the said Judgment, and therefore, the impugned action of recovery is unsustainable in law.

11. Per contra, Shri A.J. Chougule, learned Presenting Officer sought to contend that the Judgment of Hon'ble Supreme Court in **Rafiq Masih's** case (cited supra) is clearly distinguishable. He has pointed out that in **Rafiq Masih's** case, the issue was pertaining to recovery of Pay and Allowances wrongly paid to the employees because of miscalculation or wrong fixation of Pay, etc. He submits that in the present case, the Applicant was required to pass Marathi Language Examination within two years from the date of appointment. Though the increments were released inadvertently, it was incumbent on the part of Applicant to bring it to the notice of Department, and therefore, in such peculiar facts of the present case, the principles laid down in **Rafiq Masih's** case would not apply.

12. In so far as the Judgment of Hon'ble Supreme Court in **Rafiq Masih's** case is concerned, therein the issue for consideration was pertaining to recovery of excess payment made to the employees on account of wrong fixation of pay. The Hon'ble Supreme Court held that it would be iniquitous and arbitrary for an employer to recover the wages wrongfully paid to the employees or where no fault or fraud or mistake can be attributed to the employee. The Hon'ble Supreme Court, therefore, laid down the situations where recovery would be impermissible in law, which are as follows :-

- (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. Now turning to the facts of the present case, here is the situation where the Applicant was well aware that she was to clear Marathi Language Examination within two years from the date of appointment in view of specific stipulation in the appointment order. Rule 5 of Marathi Language Examination Rules, 1987 provides for the consequences for not passing the said Examination within stipulated period. It empowers the Competent Authority to withhold increment of such employee who failed to pass the Examination until he or she possess the examination or exempted from passing the same under Rule 4. In the present matter, Rule 4 has no application which speaks about the exemptions. As such, there is no denying that the Applicant was not entitled to increment in view of her failure to clear the Marathi Language Examination within two years. However, she continued to avail the increment which was inadvertently granted in ignorance of Rules. The Applicant being aware of her not entitlement to the increment, she ought to have brought it to the notice of Respondent No.3 as a faithful Government servant, but she remained silent. This being the position, it cannot be said that there was no mistake or lapse attributable to the Applicant. The benefit of decision of Hon'ble Supreme Court in **Rafiq Masih's** case is extended to the employees to whom fraud or mistake cannot be attributed and where the payment is made wrongly by the Department in the matter of fixation of pay. Here is the situation where Rule

itself provides for withholding of increments for failure of the Applicant to clear the Examination and this being the position, which was well within the knowledge of the Applicant, in my considered opinion, the decision of Hon'ble Supreme Court will not help the Applicant.

14. Needless to mention that one need to examine the context in which the recovery is sought. In the present matter, the Applicant herself is at fault as well as blameworthy for not passing the examination within stipulated period and secondly, for not disclosing the said aspect to the Respondent No.3. Suppression of material fact suggestive of dishonesty are quite visible which render her disentitle to the benefit of **Rafiq Masih's** case. On the contrary, she continued to enjoy the increments till the passing of impugned order. As such, the Applicant has not come with clean hands, and therefore, with due respect, the Judgment of Hon'ble Supreme Court in **Rafiq Masih's** case will not help her.

15. The totality of aforesaid discussion leads me to sum-up that the challenge to the impugned order is devoid of merit and O.A. deserves to be dismissed. Hence, the following order.

ORDER

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

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

Mumbai
Date : 04.07.2019
Dictation taken by :
S.K. Wamanse.