IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

ORIGINAL APPLICATION NO.1172 of 2019

District : Mumbai

Dr. Subhasah Kamlakar Walinjkar)
R/at 904, Shree Tower, New Link Road,)
Borivali (W), Mumbai 400 091.)
Working as Associate Professor at Grant)
Government Medical College,)
Mumbai 400 008.)**...Applicant**

Versus

1. The State of Maharashtra, through)
Its Department of Medical Education)
& Durgs, Mantralaya, Mumbai.)

2. Director Medical Education &)
Research, St. Georges' Hospital)
Compound, Mumbai.)

3. Grant Government Medical College,)
Through its Dean, having office at)
Nagpada-Mumbai Central, Noor Baug)
Mazgaon, Mumbai 400 008.)

4. Swami Ramanand Teerth Rural)
Medical College, through its Dean,)
O/at SRT Medical College, Dr. B. R.)
Ambedkar Road, Ambajogai,)
Maharashtra – 431517.)**...Respondents**

Shri M. V. Thorat, learned Advocate for the Applicant.
Ms S. P. Manchekar, learned Chief Presenting Officer for the Respondents.

CORAM : Shri A.P. Kurhekar, Member-J

DATE : 22.03.2021

J U D G M E N T

The Applicant has challenged the order dated 27.09.2019 issued by the Respondent No.3 thereby directing him to deposit (Rs.16,12,552/- + 12,50,024/-) total Rs.28,62,576/- which was paid to him in excess on account of excess payment towards non compoundable increments and Non Practicing Allowance (NPA) invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunal Act, 1985.

2. Shortly stated facts giving rise to the O.A. are as under:-

The Applicant is M.D. (Pediatrics). He was appointed as a Lecturer through M.P.S.C. in 1985 and was posted on the establishment of Respondent No.3 – Grant Medical Government Collage, Mazgaon, Mumbai. In 2004, he was promoted as Associate Professor and transferred on the establishment of Respondent No.4 –Swami Ramanand Teerth Rural Medical Collage, Ambajogai. In 2010, he was again transferred back on the establishment of Respondent No.3. He retired on 31.12.2019 as Associate Professor. Before about three months of retirement at the time of processing pension papers, Respondent No.3 noticed that excess payment of Rs.16,12,552/- was paid towards non compoundable increment twice inadvertently and further noticed that sum of Rs.12,50,024/- was also paid to him towards NPA. The Respondent No.3, therefore, by order dated 27.09.2019, directed the Applicant to deposit total amount of Rs.28,62,576/- in treasury and produce the receipt. The Applicant made representation on 18.11.2019 addressed to Respondent No.3 stating that in view of the decision of the Hon'ble High Court Bench Aurangabad in ***W.P. No.6261/2017 (Vaishali Bhagawat & Ors V/s State of Maharashtra and Ors)*** decided on 26.04.2019**,** recovery of Rs.12,50,024/- towards NPA is illegal. As regard recovery of Rs.16,12,552/-, he submitted that no such double payment of non compoundable increment was paid to him. However, the Respondents did not respond on his representation.

3. It is on the above background, the Applicant has filed present Original Application challenging recovery of Rs.28,62,576/- *inter-alia* contending that in view of his retirement on 31.12.2019, now, no such recovery is permissible and prayed to quash and set aside the impugned order of recovery.

4. The Respondents resisted the O.A.by filing Affidavit-in-Reply *inter-alia* denying entitlement of the Applicant to relief claimed. The defence raised in this behalf will be dealt with during the course of discussion.

5. Shir M. V. Thorat, learned Counsel for the Applicant sought to assail the impugned order of recovery by making following submissions:

(A) The Recovery of Rs.12,50,024/- towards NPA is totally illegal in view of the decision of the Hon'ble High Court in ***W.P. No.6261/2017*** (cited supra).

(B) In so far as recovery of Rs.16,12,552/- towards excess payment of non compoundable increment is concerned, the recovery of same is also impermissible in view of the decision of the 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***, wherein the Hon'ble Supreme Court has culled out certain situations where the recovery from Government servant is held impermissible after retirement.

6. Per contra, Ms S. P. Manchekar, learned Chief Presenting Officer for the Respondents fairly concedes that recovery of Rs.12,50,024/- towards NPA is not permissible in view of the judgment rendered by the Hon'ble High Court Bench Aurangabad in ***W.P. No.6261/2017*** which was filed by the colleagues of the Applicant and recovery of NPA is held not legal. However, as regard recovery of Rs.16,12,552/-, learned C.P.O. vehemently urged that the Applicant was granted benefit of non compoundable increment twice and the mistake was noticed in 2018. She has further pointed out that the Applicant had given undertaking on 15.03.2019 to refund the excess payment by adjustment against future

payments due to him, and therefore, in view of the undertaking, the action of recovery of Rs.16,12,552/- is legal and valid. In this behalf, she sought to place reliance on the decision of the Hon'ble Supreme Court in ***Civil Appeal No.3500/2016 (High Court of Punjab and Haryana & Ors. V/s Jagdev Singh), decided on 29.07.2016.***

7. In so far as recovery of Rs.12,50,025/- towards NPA is concerned, the issue is no more *res-integra* in view of the decision of the Hon'ble High Court Bench Aurganabad in ***W.P. No.6261/2017***. Learned C.P.O. also fairly concedes the legal position. The Hon'ble High Court in Para No.15 and 16 held as under:-

> *"15. Some of the petitioners have been paid non-practicing allowance at the revised rate with effect from 01.09.2008 and some from 01.01.2006. It appears that Government Resolution dated 10.11.2009 was interpreted by the authorities to the effect that the non-practicing allowance would be paid from 01.09.2008. It appears that the authorities interpreted Clause 10(i) of Government Resolution dated 10.11.2009 in a manner that non-practicing allowance also would be included in the special allowance and shall take effect from 01.09.2008. The said interpretation was erroneous. However, some of them have been given the benefit of non-practicing allowance from the earlier date than prescribed under the Government Resolution dated 24.07.2012.*
>
> *16. We do not find that petitioners in any way had misrepresented the authorities. It is probably on interpretation (though erroneous) of the Government Resolution dated 10.11.2009 the benefit was accorded to some of the petitioners of payment of non-practicing allowance as per the revised pay scale. In view of that, we direct that if the recovery has not been made by the respondents from petitioners regarding the excess amount of non-practicing allowance paid, the same shall not be made as the same would be inequitable.*

8. Suffice to say, the issue of recovery of NPA is set at rest and consequently the impugned action of recovery of Rs.12,50,024/- is illegal. It is squarely covered by the said decision.

9. Now, material question comes whether the impugned action of recovery of Rs.16,12,552/- is permissible from the gratuity or other retiral benefits of the Applicant.

10. As regard non compoundable increment, the Respondents in their reply stated as follows:-

A) Non compoundable Increment –

It is submitted that, Government of India vide letter dated 31.12.2008 has revised pay scale of Teachers and equivalent cadre covered under U.G.C. as per 6th Pay Commission. The state Government has decided to implement the revised pay scale of all teachers and equivalent cadre as per direction laid down in Government of India, Ministry of Human Resources Development Department of Higher Education letter dated 31.12.2008 and appropriate policy had issued vide Government Resolution dated 10.11.2009.

It is submitted that in clause 3 of said Government Resolution revised pay scales, service conditions and career advancement scheme for teachers and equivalent positions are prescribed. In respect of prayers of Applicant, provisions of clause 8 (i) to (iii) of G.R. dated 10.11.2009 is as follows -

" (i) Three non-compounded advance increments shall be admissible at the entry level of recruitments as Assistant Professor to persons possessing the degree of MD /MS /DNB / Ph.D awarded in the relevant discipline by the University following the process of admission registration, course work and external evaluation as prescribed by the U.G.C. in its regulation.

(ii) Those possessing D.M./M.Ch. degree recognize by the Medical Council of India/ Dental Council of India/Central Council of India Medicine System shall be entitled 5 non Compounded advance increments at the entry level.

(iii) Teachers who are in service possessing MD /MS /DNB / Ph.D degree recognized by the Medical Council of India/Dental Council of India/Central Council of India Medicine System shall be entitled 3 non Compounded increments. Those who are in service possessing D.M. /M.Ch. degree recognized by the Medical Council of India/Dental Council of India/Central Council of India Medicine System shall be entitled to 5 non Compounded increments. Provided such degree is in the relevant discipline and has been awarded by a University complying with the process prescribed by U.G.C. for enrolment, course work and evaluation etc. in its regulation."

4.1 It is further submitted that, in point No. 10 (i) it is clearly stated that -

"The revise scale of pay and revised rates of Dearness Allowance under this scheme shall be effective from 01.01.2006 and the non compounded advance increments / special allowances as applicable shall take effect from 01.09.2008."

4.2 Considering the above provision regarding non compounded advance increments, it's clear that such a advance increments shall be admissible at the entry level of recruitment as a Assistant Professor and Teachers who are in service possessing requisite educational qualification shall be entitled for 3 or 5 non compounded advance increments. These non compounded advance increments shall be given from 01.09.2008. Such non-compounded advance increments shall be given only in one cadre."

11. There is no denying that the Applicant was given benefit of non compoundable increment twice though it was to be paid only once throughout the career. In this behalf, material to note a letter dated 20.02.2018 issued by the Respondent No.4 wherein it is stated that six non compoundable increments were granted to the Applicant in 2008 and thereafter again three non compoundable increments were w.e.f. 01.09.2008 at the time of fixation of his pay on promotion (letter is at Exb.111 of PB). It is thus explicit that the benefit of non compoundable increment was given twice which resulted into excess payment and on recalculation /refixation sum of Rs.16,12,552/- found paid in excess.

12. Material to note that it is nowhere the case of the Applicant that he was entitled to the benefit of non compoundable increment twice. Only contention in this behalf is that the recovery of said amount after retirement of the Applicant is not permissible in view of the decision of the Hon'ble Supreme Court in ***Rafiq Masih's*** case (cited supra). Thus, entire emphasis of the learned Counsel for the Applicant was on the decision in ***Rafiq Masih's*** case. He has pointed out that the said excess payment was made from 2008 and now the recovery is being sought only after retirement. According to him, such situation squarely falls with the Clause Nos.(ii), (iii) and (v) of Para No.12 of the judgment of ***Rafiq Masih's*** case.

13. As regard the decision in ***Jagdev Singh's*** case, learned Counsel for the Applicant submits that in that matter undertaking was given by Group-A Government servants initially at the time of fixation of pay itself, and therefore, in view of the said undertaking, recovery was held permissible. He has pointed out that in present case, undertaking was admittedly not given in 2008 when the pay was fixed but undertaking is given at the verge of retirement, and therefore, the said undertaking cannot be relied upon.

14. There is no denying that the Applicant had furnished undertaking on 15.03.2019 (Page 124 of PB) and its contents are as follows:-

"UNDERTAKING

[As per Ministry of Finance (Department of Expenditure) order O.M.No.F.23-7/2008-IFD dated 23.10.2008]

I hereby undertake that any excess payment that may be found to have been made as a result of incorrect fixation of pay or any excess payment detected in the light of discrepancies noticed subsequently will be refunded by me to the Government either by adjustment against future payments due to me or otherwise.

Date :-15.03.2019
Station : Mumbai

Singature : Sd/-
Name : Dr. Walinjkar S. K.
Designation: Asso. Professor
College/Institution : G.G.M.C.Mumbai.

Sd/-
Administrative Officer
Grant Government Medical College
Mumbai 400 008."

15. Here, important to note that the issue of excess payment on account of non compoundable increment in 2008 was noticed in 2018. In this behalf reference of letter dated 20.02.2018 (Page No.111 of PB) is significant as the copy of which was also furnished to the Applicant. By this letter, necessary directions were given by Respondent No.4 to recover excess payment and the copies were marked to the Respondent No.2 – Director Medical Education and Research, Mumbai as well as the Respondent No.3 – Grant Medical Government College, Mumbai and the Applicant as well. This being the position, it is explicit that the Applicant had knowledge of the steps initiated by the Respondents to recover excess payment. Whereas, undertaking was furnished by the Applicant on 15.03.2019. Thus, manifestly the Applicant was aware about the steps taken by the Respondents for recovery and knowing it well with full understanding, he had submitted undertaking on 15.03.2019. In other words, he was put on notice of the payment of excess allowances and the contemplated action of recovery and knowing of its consequences the Applicant voluntarily submitted undertaking.

16. Normally undertakings are taken from the Government servant in advance at the time of refixation of pay may be in term of successive pay commissions / recommendations or at the time of revision of pay. Thus, normally such undertakings are obtained that if in future, excess payment is found then it can be recovered from the Government servant. Whereas in present case, undertaking dated 15.03.2019 was given by the Applicant knowing fully well that the department had already initiated action for recovery of the excess payment. This being the position, undertaking dated 15.03.2019 is on higher pedestal then the normal usual undertaking obtained from a Government servant at the time of re-fixation of pay in advance. Therefore, even if, the Applicant has not given undertaking in 2008, when pay was fixed that does not matter in view of his undertaking given on 15.03.2019 knowing fully well the proposed action of department for recovery. Thus, this undertaking

dated 15.03.2019, even if, given before some months of retirement relate back to the excess payment paid to him from 2008 and the Applicant cannot be allowed to resile from it.

17. In ***Jagdev Singh's*** case, the Hon'ble Supreme Court considered the decision in ***Rafiq Masih's*** case and held that in view of the undertaking given by Group-A officer, the action of recovery cannot be faulted with and he is bound by the undertaking. In Para No.10 and 11 of the Hon'ble Supreme Court held as under:-

> *"10. In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc1. this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer 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." (emphasis supplied).*
>
> *11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking."*

18. Admittedly, the Applicant retired as Group-A officer. He has given undertaking consciously knowing well that he is in receipt of excess payment towards non compoundable increment and department has initiated the action to recover the same. Thus, he has given undertaking knowing fully aware that the same will be acted upon by the Government. There is absolutely nothing to indicate that it was given in duress or by coercion. He submitted it voluntarily knowing fully well its implications. Suffice to say, he cannot be allowed to resile from the undertaking and the principle of estoppel is clearly attracted.

19. True, in ***Jagdev Singh's*** case undertaking was given when the petitioner therein opted for revised pay-scale stating that he would be liable to refund any excess payment made to him. Whereas, in the present case, undertaking has been given on 15.03.2019. The Hon'ble Supreme Court held that in view of undertaking furnished by the Applicant, the recovery is permissible. As such, there is slight difference in the facts but what is important is ratio laid down by the Hon'ble Supreme Court in ***Jagdev Singh's*** case. There could be no two cases of exactly identical facts and little difference in facts is but natural. One need to see whether the ratio or principle of law is applicable in fact situation. In other words, whether undertaking was given at the time of fixation of pay or later is not of that much importance. What is important is the legal principle expounded in the judgment as binding precedent.

20. Indeed, the very foundation of the decision of the Hon'ble Supreme Court in ***Rafiq Masih's*** case is based on the principle that the recovery of excess payment from employees after a long period from their retirement, dues would be inequitable and accordingly, the Hon'ble Supreme Court has summarized few situations where recovery would be impermissible in law. Clause (i) of Para No.12 relates to recovery from employees belongs to Class-III and Class-IV services. Clause (ii) pertains to recovery from retired employees, or employees who are due to retire within one year, of the order of recovery. Clause (iii) is

about 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. Whereas, Clause (v) is residuary clause which states that recovery is impermissible where the court arrives at the conclusion, that recovery would be iniquitous or harsh or arbitrary to such an extent, as would for outweigh the equitable balance of the employer's right to recovery.

21. In so far as the facts of present case are concerned, the Applicant retired as Group –A officer. At the time of retirement, he was drawing salary around Rs.2,04,000/-. In such situation, it cannot be said that recovery would be harsh or iniquitous considering his status and huge amount payable to him after retirement. He has already given undertaking on his own volition knowing fully well its implication. In such situation, retaining excess payment of Rs,16,12,552/- to which he was not admittedly entitled, would amount to unlawful enrichment.

22. At this juncture, it would be apposite to refer Rule No.132 of Maharashtra Civil Services (Pension) Rules, 1982 which *inter-alia* empowers Government to recover excess payment from gratuity, which is as under:-

> *"132. Recovery and adjustment of Government dues-(1) It shall be the duty of the Head of Office to ascertain and assess Government dues, payable by a Government servant due for retirement.*
>
> *(2) The Government dues as ascertained and assessed by the Head of Office which remain outstanding till the date of retirement of the Government servant, shall be adjusted against the amount of the (retirement gratuity) becoming payable.*
>
> *(3) The expression "Government dues" includes-*
>
> *(a) dues pertaining to Government accommodation including arrears of licence fee, if any;*
>
> *(b) dues other than those pertaining to Government accommodations, namely balance of house building or conveyance or any other advance, overpayment of pay and allowances or leave salary and arrears of income-*

tax deduction at source under the Income Tax Act, 1961 (43 of 1961)

23. Thus, Rule 132 of Maharashtra Civil Services (Pension) Rules, 1982 empowers Government to recover such excess payment from gratuity. The notice of recovery dated 27.09.2019 was issued three months before retirement of the Applicant. This being the position, on the anvil of Rule 132 of Pension Rules, recovery cannot be questioned.

24. Shri M. V. Thorat, learned Counsel for the Applicant sought to refer the decision rendered by this Tribunal in ***O.A.No.863/2018 (Anita Jethwani V/s State of Maharashtra & Anr.),*** decided on19.11.2019. In that case, the Applicant therein retired as Group – C employee and there was no undertaking given by her, therefore, recovery after retirement in view of the decision of the Hon'ble Supreme Court in ***Rafiq Masih's*** case held impermissible. It is of no help to the Applicant in the facts and circumstances of the case.

25. The totality of the aforesaid discussion leads me to conclude that the impugned action of recovery of Rs.16,12,552/- towards non compoundable increment cannot be questioned in view of the decision of the Hon'ble Supreme Court in ***Jagdev Singh's*** case and challenge to that extent holds no water. However, in so far as the recovery of Rs.12,50,024/-towards NPA is concerned, as learned C.P.O. fairly concedes, it is not permissible in view of the decision of the Hon'ble High Court Bench Aurangabad in ***W.P. No.6261/2017*** (cited supra). Original Application, therefore, deserves to be allowed partly. Hence the following order:-

ORDER

(A) Original Application is allowed partly.

(B) Impugned action of recovery of Rs.12,50,024/- towards NPA is held impermissible in view the judgment of the Hon'ble Supreme Court in ***W.P. No.6261/2017.***

(C) Impugned action of recovery of Rs.16,12,552/- towards excess payment of non compoundable increment is legal.

(D) No order as to costs.

Sd/-

(A.P. KURHEKAR)
MEMBER (J)

Date : 22.03.2021
Place : Mumbai
Dictation taken by :
Vaishali Santosh Mane
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