IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI

ORIGINAL APPLICATION NO.280 OF 2017
WITH
ORIGINAL APPLICATION NO.241 OF 2019

DISTRICT : SATARA

****

ORIGINAL APPLICATION NO.280 OF 2017

Shri Valsan Valiya Punathil.)
Age : 57 Yrs., Working as Sectional)
Engineer, Medium Project Sub-Division)
No.9, Vaduj, Tal.: Khatav, District : Satara.)**...Applicant**

Versus

1. The Executive Engineer.)
   Dhom Irrigation Division, Satara)
   and having Office at Sinchan Bhavan,)
   Krushna Nagar, Satara – 3.)

2. The State of Maharashtra.)
   Through Principal Secretary,)
   Water Resources Department,)
   Mantralaya, Mumbai – 400 032.)

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Engineer, Medium Project Sub-Division)
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Versus

The Executive Engineer.)
Dhom Irrigation Division, Satara)
and having Office at Sinchan Bhavan,)
Krushna Nagar, Satara – 3.)**...Respondents**

Mr. A.V. Bandiwadekar, Advocate for Applicant.
Mrs. A.B. Kololgi, Presenting Officer for Respondents.

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

DATE : 25.06.2021

JUDGMENT

1. Since in both the O.As, the Applicant is same and both the O.As pertained to retiral benefits, they are being decided by common Judgment.

2. In O.A.280/2017, the Applicant who stands retired on 31.05.2017 has challenged the impugned action of recovery of Rs.16,98,269/- paid to him towards increments, which Respondents sought to recover for not passing the Marathi Language Examination as prescribed by the Government. Whereas, in O.A.241/2019, the Applicant is seeking direction to the Respondents to release regular pension, gratuity and leave encashment which seems to have been withheld on account of initiation of D.E. initiated after retirement as well as registration of crime against him after retirement on the allegation of fraud allegedly committed by him during his tenure in between 2011 to 2015. Thus, the Applicant has invoked Section 19 of Administrative Tribunals Act, 1985 by filing these O.As.

3. Uncontroverted facts of O.A.280/2017 are as under :-

(i) The Applicant was appointed as Junior Engineer by order dated 11.03.1980 and posted in the office of Executive Engineer, Irrigation Project, Investigation Division, Ratnagiri.

(ii) As per Condition No.7 of appointment order, he was required to pass the departmental Marathi and Hindi Examination as per Government orders.

(iii) Indeed, at the time of appointment of the Applicant, he was governed by the Rules called "Non-Gazetted Government Servants (Other than Judicial Department Servants) Marathi Language Examination Rules, 1969 (hereinafter referred to as 'Rules of 1969' for brevity) and in terms of those Rules, the Applicant was required to pass Lower Standard Marathi Language Examination within two years from the date of his appointment and to pass Higher Standard Marathi Language Examination within next two years from the date of passing Lower Standard Marathi Language Examination. Apart, the Government servant who failed to pass Language Examination within prescribed period was liable to have his increments withheld until he passes the examination or until necessity of his passing the same is terminated by order of the Head of Department.

(iv) 'Rules of 1969' were replaced by "Maharashtra Government Servants (Other than Judicial Department Servants) Marathi Language Examination Rules, 1987 (hereafter referred to as 'Rules of 1987' for brevity) reiterating the same requirement for passing Marathi Language Examination and withholding of increments, if Government servant failed to pass the examination within stipulated period with one additional provision that, where Government servant, whose duties are of technical or arduous nature and who are not required to correspond in Marathi Language may be exempted from passing the examinations by the

concerned administrative department in consultation with General Administration Department.

(v) Another distinguishing feature of 'Rules of 1987' is that, as per Rule 9, the Government is empowered to relax the provision of these Rules under special circumstances in such manner as appeared it to be just and reasonable.

(vi) The Applicant has not passed Marathi Language Examination within stipulated period in terms of 'Rules of 1969' or 'Rules of 1987' but admittedly, he has passed Lower Standard Marathi Language Examination on 03.06.1985 and also passed Higher Standard Marathi Language Examination on 17.01.2016.

(vii) Thus, though the Applicant did not pass Marathi Language Examination within stipulated period, the yearly increments were released to him right from 01.04.1992.

(viii) During entire tenure of the Applicant, at no point of time, any objection was raised by the Department for not passing Marathi Language Examination within stipulated period not he was served with any Show Cause Notice or Memo pointing out any deficiency in his service for want of non-passing Marathi Language Examination.

(ix) It is for the first time in 2016, when Service Book of the Applicant was sent to Pay Verification Unit in view of his retirement on 31.05.2017, the objection was raised for not passing Marathi Language Examination, and therefore, Respondent No.1 – Executive Engineer, Dhom Irrigation Division, Satara by order dated 25.11.2016 issued direction for recovery of Rs.16,98,269/- towards increments paid to him with further direction to recover it in installments from his salary (Page No.23 of Paper Book).

(x) By order dated 25.11.2016, the Respondent No.1 further directed the Applicant to explain as to how he will refund the excess payment made to him in view of his ensuing retirement on 31.05.2017.

(xi) The Applicant submitted his explanation on 07.12.2016 stating that he had tendered 37 years' service to the satisfaction of Department without any objection by the Department for not passing Marathi Language Examination within stipulated period, and therefore, the action of recovery is iniquitous and arbitrary.

(xii) In pursuance of aforesaid direction, sum of Rs.1,50,000/- were recovered by the Respondents till his retirement.

(xiii) The Applicant accordingly stands retired from the post of Sectional Engineer (Class-II Non-Gazetted) from the establishment of Respondent NO.1 on 31.05.2017.

4. It is on the above background, the Applicant has filed the present O.A. challenging the impugned order dated 25.11.2016 for recovery of Rs.16,98,269/- paid to him towards increments right from 01.04.1992 and further seeks direction to Respondents to release his retiral benefits.

5. Whereas, in O.A.241/2019, the Applicant has challenged the communication dated 02.02.2019 whereby provisional pension granted to him stands cancelled invoking Rules 26 and 27 of Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as 'Pension Rules of 1982' for brevity) on the ground that offence under Sections 465, 409, 420 read with 201 of Indian Penal Code has been registered against the Applicant on 28.01.2019 on the allegation that during his tenure in between 2011-2015, he had misappropriated Rs.2,41,000/- as well as illegally obtained Rs.9,09,500/- from the farmers by issuing false water permits. In this O.A, the Applicant contends that no D.E. or criminal prosecution was initiated or pending against him on the date of his

retirement, and therefore, impugned action of canceling provisional pension is illegal and unsustainable in law.

6. In so far as O.A.No.241/2019 is concerned, the following are the uncontroverted facts.

(i) There was no departmental enquiry or judicial proceedings were initiated or pending against the Applicant on the date of his retirement on 31.05.2017.

(ii) It is only on 28.01.2019 on the report of Shri Vilas K. Patil, Sub-Divisional Engineer, an offences under Section 409, 420, 465 read with 201 of I.P.C. were registered against the Applicant in Police Station Vaduj, District Satara.

(iii) Though the offences were registered against the Applicant on 28.01.2019, till date, no charge-sheet is filed in the Court of law and the matter is still under investigation with Vaduj Police Station.

(iv) In so far as D.E. is concerned, the charge-sheet in D.E. has been served on 08.07.2020 and it is still incomplete.

7. In both the O.As, the Respondents resisted the claim by filing Affidavit-in-reply supporting the impugned action *inter-alia* contending that in view of failure of the Applicant to pass Marathi Language Examination within the stipulated period, he was not entitled for increments, but the same were wrongly released and having noticed so, on re-fixation, sum of Rs.16,38,269/- was found paid excess to him and it is rightly sought to be recovered. As regard impugned action of withholding provisional pension, the Respondents sought to support their action in view of registration of crime against the Applicant on 28.01.2019 as well as initiation of D.E. by issuance of charge-sheet on 08.07.2020.

8. **As regard O.A.280/2017** :

In this O.A, the challenge is to the recovery of Rs.16,98,269/- as sought from impugned order dated 25.11.2016. Shri Bandiwadekar, learned Advocate for the Applicant sought to assail legality, fairness and rationality of the impugned action of recovery on following grounds :-

(a) The impugned action of recovery by communication dated 25.11.2016 is without giving notice to the Applicant, and therefore, it being in breach of principles of natural justice, particularly from the retiral benefits of the Applicant, the same is unsustainable in law.

(b) By impugned action, the Respondents sought to recover increments paid to him from 01.04.1992 and by revising pay scale to recover the amount after retirement from retiral benefits which is not permissible in view of decision of Hon'ble Supreme Court in ***(2015) 2 SCC (L & S) 33 [State of Punjab and Ors. Vs. Rafiq Masih (White Washer) & Ors.]***.

(c) During the entire service of 37 years rendered by the Applicant, the Respondents had no point of time raised any objection for non-passing Marathi Language Examination nor any deficiency in his performance was noticed for not passing the said examinations. Therefore, after retirement, it would be highly unjust, iniquitous and unfair to recover the amount from retiral benefits, which is the only source for livelihood for pensioner.

9. Per contra, Mrs. A.B. Kololgi, learned Presenting Officer canvassed that in terms of specific stipulation in appointment order of the Applicant as well as 'Rules of 1969', the Applicant was required to pass Language Examinations within stipulated period, which he admittedly failed to do so, and therefore, he was not entitled to yearly increments, but the same was paid mistakenly and having noticed the same, it is now sought to be

recovered from the Applicant. As regard absence of notice, she submits that the Applicant was aware for not passing the examination as well as he was also aware about the action of recovery, and therefore, the question of want of notice for hearing before passing impugned order does not survive. She has further pointed out that Applicant has given Undertaking in 2009 and 2013 (Page Nos.66 and 67 of P.B.) to refund the excess amount, if found made to him, and therefore, he is estopped from challenging the recovery.

10. At the very outset, it needs to be stated that though the Applicant has not passed Marathi Language Examination within stipulated period in terms of Rule 69 of 'Rules of 1987', admittedly, he passed Lower Standard Marathi Language Examination on 03.06.1985 and also Higher Standard Marathi Language Examination on 17.01.2016. He retired on 31.05.2017. True, in appointment order dated 11.103.1980, there was specific stipulation that he was required to pass departmental Marathi Language Examination as per Government orders. Indeed, at the time of appointment, 'Rules of 1969' were in force and in terms of these Rules, he was required to pass Lower Standard Marathi Language Examination within two years and to pass Higher Standard Marathi Language Examination within two years from the date of passing Lower Standard Marathi Language Examination. In terms of these Rules, if a Government servant fails to pass the examination, his increments were liable to be withheld until he passes the examination or he is exempted by the competent authority.

11. The perusal of record reveals that at the fag end of service of the Applicant, his Service Book was sent to Pay Verification Unit. It raised objection by its communication dated 23.06.2016 on the point of non-passing Marathi Language Examination. On that basis, the Respondent No.1 passed order revising pay scale and to recover the excess payment made to him by order dated 22.08.2016 (Page Nos. 25 to 28 of P.B.). True, the copy of said order seems to have been sent to the Applicant for

information as per endorsement thereon. However, admittedly, before passing such order of re-fixation of pay and recovery, no such Show Cause Notice was given to the Applicant. Initially, the Respondent No.1 issued direct order of recovery on 02.09.2016 (Page No.76 of P.B.) for Rs.17,18,627/-. Before passing such order, no such Show Cause Notice was given to the Applicant and only copy of the order was marked to the Applicant as per the endorsement thereon. Thereafter, the Respondent No.1 revised his order by passing fresh order on 25.11.2016 by reducing the amount from 17,18,627/- to 16,98,269/-. In the said order, he directed to recover the same from installments from the salary of the Applicant payable from September, 2016. What is stated in the order that installment of Rs.30,000/- and Rs.20,000/- are being deducted from the salary of September and October, 2016 and there would be further recovery of Rs.25,000/- p.m. from the salary of November, 2016. It is for the first time, by the said Notice, the Applicant was directed to explain how he would refund remaining amount. This is the only Notice given to the Applicant, that too, after passing the orders of recovery. The Applicant submitted his reply on 07.12.2016 (Page No. 34 of P.B.) explaining that he had rendered 37 years' service to the satisfaction of Department and had already passed the examinations though not within stipulated period in terms of Rules. He, therefore, submits that the recovery of such huge amount paid to him from 1992 would be harsh and iniquitous and accordingly prayed to recall the order of recovery in view of his ensuing retirement.

12. Material to note that the Department has not passed any further orders after receipt of explanation tendered by the Applicant. Thus, the situation emerges that Department had first passed the orders of recovery and then simply asked him how he would make excess payment paid to him. Suffice to say, before passing the orders of recovery dated 02.09.2016, 25.11.2015 and 22.08.2016, no Notice was given to the Applicant giving an opportunity of hearing, which was required to be given as a principle of natural justice.

13. In this behalf, Shri Bandiwadekar, learned Advocate for the Applicant rightly referred to AIR 1972 SC 2472 (B.D. Gupta Vs. State of Haryana) and ***2020 (1) SLR 248 (P & H) [Prem Sagar and Ors. Vs. State of Punjab & Ors.]*** which reiterates the principle that where order affects employee financially, it must be passed after objective consideration and assessment of all relevant facts as well as after giving full opportunity to the employee to make out his case. It has been further observed that the order which causes prejudice to the employee cannot be passed without following Rules of natural justice. Therefore, in fact situation, the orders of recovery were quashed and directions were given to refund the amount already recovered from the employee. The principles set out in the said Judgment are squarely attracted in the present case, since no opportunity of hearing before passing the impugned order was given to the Applicant.

14. Apart, even assuming for a moment that in view of issuance of order of recovery to the Applicant that he had knowledge of excess payment paid to him, still admittedly, the Applicant being retired as Class-II (Non-Gazetted) Official, the recovery is impermissible in view of decision of Hon'ble Supreme Court in ***Rafiq Masih's*** case (cited supra). In this case, the Hon'ble Supreme Court has taken review of its various earlier decisions on the point of recovery of excess payment made to the employee during the course of their employment and laid down parameters in which recovery would be impermissible in law. In Para Nos.7 and 8, the Hon'ble Supreme Court held as under :-

> "***7.*** *Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the*

recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.

8. *As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the concerned employee. If the effect of the recovery from the concerned employee would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover."*

15. The Hon'ble Supreme Court then laid down the parameters in which recovery would be impermissible in law in Para No.18 of the Judgment, which is as under :-

"***18.*** *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. As stated above, the Applicant stands retired on 31.05.2017 as a Class-II (Non-Gazetted) Government servant. Admittedly, the excess amount now sought to be recovered pertains to increments paid to the Applicant from 01.04.1992 and consequent revision of pay. Thus, by the said impugned recovery, the Department sought to recover the amount paid to the Applicant in the period starting from 1992. This being the position, Clause No.(i), (ii), (iii) and (iv) are squarely attracted. The recovery of such huge amount from the Applicant after retirement would be certainly iniquitous, harsh and arbitrary to such an extent that it would far outweigh of the equitable balance of the employer's right to recover.

17. It needs to be reiterated that at no point of time during the span of 37 years of the Applicant, the Department has not raised any objection or deficiency in his service for want of passing Marathi Language Examination. Indeed, he was appointed as Sectional Engineer and doing technical job. This being the position, it would be apposite to see relevant provisions of 'Rules of 1987'. In this behalf, proviso of Rule 4(1) of 'Rules of 1987' is that where Government servant whose duties are of technical or arduous nature and who are not required to explain in Marathi language may be exempted from passing the Examinations by the concerned Administrative Department in consultation with GAD. True, there are no such orders passed by the concerned Department granting exemption to the Applicant. However, the fact remains that Applicant's duties were technical in nature and at no point any deficiency was noticed by the Department. It is not the case of Respondents that Applicant was required to correspond in Marathi language and for not passing Marathi Language Examination, there was any deficiency in 37 years' service rendered by him.

18. Indeed, in terms of Rule 9 of 'Rules of 1987', the Government has empowered to release the provisions of any of these Rules under special

circumstances in such manner as shall appear it to be just and reasonable.

19. As stated above, the Department at his own released the increments way back in 1992 and continued thereafter till the retirement of the Applicant. It is not the case of Respondents that Applicant made any misrepresentation or played any fraud in getting the increments released. As such, no misrepresentation of fraud is attributable to the Applicant. It is the Department who mistakenly released yearly increments of the Applicant. Therefore, ***Rafiq Masih's*** Judgment is squarely attracted.

20. The learned Advocate for the Applicant has further referred to the decision of Hon'ble High Court in Writ Petition No.1010 of 2015 (Grace ***George Pampoorickai Vs. Municipal Corporation of Gr. Mumbai & Ors.) decided on 20th April, 2018, 2020 (3) Mh.L.J. (Sanjay Solanki Vs. State of Maharashtra)*** and also referred to the decision rendered by this Tribunal in **O.A.No.1102/2015 (Syed M. Hashmi Vs. Govt. of Maharashtra) decided on 14.06.2016**. **O.A.No.805/2016 (Rekha Dubey Vs. State of Maharashtra) decided on 05.12.2018** wherein in view of decision of Hon'ble Supreme Court in ***Rafiq Masih's*** case, the order of recovery were quashed.

21. In this behalf, it would be apposite to refer one more decision of Hon'ble Supreme Court ***2000 SCC (L & S) 394 [Bihar State Electricity Board and Anr. Vs. Bijay Bahadur and Anr.]*** wherein the excess amount paid to the Petitioner towards increments released during 14 to 15 years of service sought to be recovered for not passing Language Examination within stipulated period. The Petitioner joined service in 1979, but passed Language Examination in 1993. The Hon'ble Supreme Court held that since increments were given during 14-15 years of service not on account of misrepresentation and the fact that the Petitioner therein had passed the examinations later, the action of

recovery for not passing Language Examinations held not in consonance with equity, good conscious, justice and fairness. The only distinguishing factor is that, in that matter, the requirement of passing the Examination was not incorporated in terms and conditions of service and there was no intimation to that effect to the staff. Whereas, in the present case, 'Rules of 1969' were already in force and secondly, there was also specific condition mentioned in the appointment order. However, the fact remains that in the present case also, the amount sought to be recovered was paid to the Applicant from 1992. Admittedly, he has passed both the examinations during the tenure of service though not strictly within the stipulated period in terms of 'Rules of 1969' or 'Rules of 1987'. This aspect coupled with the aspect that the Applicant was rendering technical duties and Department has not noticed any such deficiency in service rendered by the Applicant for not passing the Marathi Language Examination render the impugned action of recovery unjust, unfair and iniquitous. Suffice to say, peculiar facts and circumstances of the matter outweigh the right of employer to recover the amount.

22. True, as canvassed by the learned P.O, the Applicant has given Undertaking on 18.05.2009 (Page No.66 of P.B.) and on 01.08.2013 (Page No.67 of P.B.). However, these Undertakings do not pertain to the increments paid to him and it pertains to the revised pay fixation in 2009 and in 2013. Therefore, these Undertakings which are normally obtained from the employee are of no assistance to the Respondents, particularly in view of decision of Hon'ble Supreme Court in ***Rafiq Masih's*** case.

23. The learned P.O. sought to place reliance on the decision rendered by this Tribunal in **O.A.No.1097/2018 (Smt. Varsha Doshi Vs. The State of Maharashtra) decided on 26.09.2019** and **O.A.No.664/2017 (Kiran Solanki Vs. State of Maharashtra) decided on 04.07.2019** wherein recovery for not passing Language Examinations was upheld by this Tribunal. Those Petitioners therein challenged the recovery during

the tenure of their service. Therefore, in fact situation, O.As were dismissed. Whereas, in the present case, the Applicant is already retired from Government service in 2017 and recovery is sought from his retiral benefits. Apart, additional circumstance in favour of Applicant is that he has passed Marathi Language Examinations though belatedly. This being the position, it certainly falls within the parameters laid down by Hon'ble Apex Court in ***Rafiq Masih's*** case.

24. The learned P.O. further referred to the decision of Hon'ble Supreme Court in ***Civil Appeal No.3500/2006 (High Court of Punjab & Haryana Vs. Jagdev Singh)*** wherein recovery from Judicial Officer (Group 'A') in view of his specific Undertaking given by him was upheld. Whereas, in the present case, the Applicant retired as Group-B [Non-Gazetted] employee. Therefore, the decision in ***Jagdev Singh's*** case (cited supra) with due respect is of no assistance to the Respondents.

25. In this view of the matter, I have no hesitation to sum-up that impugned action of recovery from the retiral benefits of the Applicant is totally impermissible and unsustainable in law.

26. **<u>As regard O.A.No.241/2020</u>** :-

In this O.A, the Applicant has challenged the communication dated 02.02.2019 whereby provisional pension already granted to him was cancelled quoting Rules 26 and 27 of 'Pension Rules of 1982'. By the said order, the Respondent No.1 cancelled the provisional pension because of registration of crime against the Applicant under Section 409, 420, 465 read with 201 of I.P.C. for alleged misappropriation committed by him during the course of his service, particularly in between 2011-2015. In view of complaint filed by Shri Vilas K. Patil, Sub-Divisional Engineer on 28.01.2019, the FIR came to be registered, as seen from copy of FIR at Page No.46 of P.B. As such, admittedly, on the date of retirement of the Applicant, no criminal prosecution was instituted

against him. Similarly, no D.E. was initiated or pending against him on the date of retirement.

26. Thus, it is only after his retirement, on the basis of FIR registered on 28.01.2019, the provisional pension has been cancelled quoting Rules 26 and 27 of 'Pension Rules of 1982'. Furthermore, significant to note that till date, admittedly, no charge-sheet is filed in the Court of law and the matter is still under investigation. In so far as D.E. is concerned, the charge-sheet in D.E. has been served on the Applicant on 08.07.2020. Now, it is at the stage of recording evidence of witnesses.

27. Now question comes whether impugned action of cancelling provisional pension is legal and correct and the answer is in negative.

28. In this behalf, we need to consider the provisions of Sections 26 & 27 of 'Pension Rules of 1982'. As per Section 26(k) of 'Pension Rules of 1982', the future good conduct shall be implied conditions for grant of pension and Government may by order in writing withheld or withdraw pension or family pension where pensioner or family pensioner is convicted of a serious crime or found guilty of grave misconduct. As such, conviction of a competent Court or finding of holding pensioner guilty for grave misconduct is condition precedent to withdraw or withheld the pension.

29. Whereas, in the present case, as seen from impugned order, the pension has been cancelled only on the basis of registration of crime subsequent to the retirement of the Applicant. This being the position, the impugned order of cancelling provisional pension is *ex-facia* in contravention of Rule 26(1) and (2) of 'Pension Rules of 1982'.

30. In so far as Section 27 is concerned, it speaks about right of Government to withhold or withdraw pension, if in departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or

negligence during the period of his service. Whereas, as per Rule 27(2)(a) of 'Pension Rules of 1982', where departmental proceeding as referred in Rule 27(1) if instituted while Government servant was in service, deemed to have been proceedings instituted under the said Rules. In other words, if departmental proceedings are instituted before retirement of Government servant and continued thereafter, in that event, the Government has right to withhold or withdraw pension. Whereas, as per Rule 27(b), where departmental proceedings are not instituted while Government servant was in service, it shall not be instituted without sanction of appointing authority. Secondly, it shall not be in respect of any event which took place more than four years before such institution. Whereas, as per Rule 27(6), the departmental proceeding shall be deemed to be instituted on the date on which statement of charges is issued to the Government servant or pensioner. The judicial proceeding shall be deemed to be instituted in case of criminal proceeding on the date on which complaint or report of Police Officer of which Magistrate takes cognizance is made.

31. Whereas, admittedly, in the present case, there was no departmental proceedings nor judicial proceedings instituted against the Applicant on the date of retirement.

32. Thus, even if DE is not initiated during the tenure of service of a Government servant, later it can be initiated subject to compliance of rigor of Rule 27(2)(b)(i)(ii) of 'Pension Rules of 1982'. In the event, the pensioner is found guilty of misconduct or negligence, the Government is empowered to withdraw or withhold pension or any part of it permanently or for a special period, as it deems fit. In other words, in case of DE is initiated after retirement, then the scope of DE and its outcome is very limited and it cannot go beyond withholding pension for a specific period or permanently as Government deems fit.

33. At this juncture, it would be apposite to refer the Judgment of Hon'ble High Court in ***2013(6) Mh.L.J. 311 (Manohar B. Patil Vs. State of Maharashtra)***. In that case, the Petitioner was relieved from the employment on 30.04.2010 in view of voluntary retirement, but the charge-sheet in D.E. was issued on 07.09.2011. The Petitioner had challenged the institution of D.E. after retirement. This authority highlights the scope of Rule 27 in the situation where the charge-sheet has been filed after retirement and to that extent important in the present matter. The Hon'ble High Court dismissed the petition in view of provisions of Rule 27 of 'Rules of 1982'. The following passage from the Judgment highlights the scope and ambit of Rule 27, which is as follows:-

> "*On a conjoint reading of sub-rule (1) with sub-rule (2) of Rule 27 of the said Pension Rules, we are of the view that the Pension Rules provide for initiation of departmental proceedings after retirement of a Government servant subject to constraints of sub-clauses (i) and (ii) of Clause (b) of sub-rule (2) of Rule 27 of the Pension Rules. The departmental proceedings can be instituted after retirement only for the purposes of sub-rule (1) of Rule 27 to enable the Government to recover from pension, the whole or part of any pecuniary loss caused to the Government if in the departmental proceedings, the Pensioner is found guilty of grave misconduct or negligence during the period of his service. On conjoint reading of sub-rules (1) and (2) of Rule 27 of the Pension Rules, it is obvious that in the departmental proceedings initiated after retirement, no penalty can be imposed on a Government servant in accordance with the Discipline and Appeal Rules. The departmental inquiry can be initiated after superannuation only for the purposes of withholding the whole or part of the pension.*"

34. It would be also useful to refer the decision of Hon'ble High Court in The ***Chairman/Secretary of Institute of Shri Acharya Ratna Deshbhushan Shikshan Prasarak Mandal Versus Bhujgonda B. Patil : 2003 (3) Mah.L.J. 602***. In that case, the D.E. was initiated during the service but was continued after retirement of the Respondent. In this authority also, the Hon'ble High Court highlighted the scope, ambit as well as limitation of Rule 27 of 'Rules of 1982'. Para No.13 of the Judgment is important, which is as follows :-

"***13.*** *All these provisions, read together, would apparently disclose that the departmental proceedings spoken of in Rule 27 of the Pension Rules are wholly and solely in relation to the issues pertaining to the payment of pension. Those proceedings do not relate to disciplinary inquiry which can otherwise be initiated against the employee for any misconduct on his part and continued till the employee attains the age of superannuation. Undoubtedly Sub-rule (1) refers to an event wherein the pensioner is found guilty of grave misconduct or negligence during the period of his service or during his re - employment in any departmental proceedings. However, it does not specify to be the departmental proceedings for disciplinary action with the intention to impose punishment if the employee is found guilty, but it speaks of misconduct or negligence having been established and nothing beyond that. Being so, the proceedings spoken of in Rule 27 of the Pension Rules are those proceedings conducted specifically with the intention of deciding the issue pertaining to payment of pension on the employee attaining the age of superannuation, even though those proceedings might have been commenced as disciplinary proceedings while the employee was yet to attain the age of superannuation. The fact that the proceedings are continued after retirement only with the intention to take appropriate decision in relation to 10 O.A.768/2018 the payment of pension must be made known to the employee immediately after he attains the age of superannuation and, in the absence thereof the disciplinary proceedings continued for imposing punishment without reference to the intention to deal with the issue of payment of pension alone cannot be considered as the proceedings within the meaning of said expression under Rule 27 of the Pension Rules."*

35. Thus, the conspectus of these decision is that the D.E. is permissible even if instituted after retirement of the Government servant but it should satisfy the rigor of Rule 27(2)(b) of 'Rules of 1982' and where on conclusion, the Government servant (pensioner) found guilty, then the Government is empowered to withdraw or withhold the pension. In other words, it is only in the event of positive finding in D.E, the pension can be withdrawn or withheld.

36. As regard gratuity, the Rule 130(c) says "no gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon." Here, the legislature has not used the word "pensioner" and has specifically used the word "Government Servant", which is significant in the present context. This leads to suggest that Rule 130(c) is applicable where the enquiry is initiated before retirement and continued after the retirement. The learned P.O. could not point out any other provision which provides

for withholding gratuity where charge-sheet is issued after retirement. Whereas, we have specific provision in the form of Rule 27, which provides for withholding pension where any D.E. either instituted before retirement or even after retirement, subject to limitations mentioned in Rule 27(2)(b) of 'Rules of 1982', in case pensioner is found guilty of conclusion of D.E. However, pertinently, there is no such provision in Rules for withholding the gratuity where charge-sheet is issued after retirement. Once the Government servant stands retired honorably, right to receive pension and gratuity accrues to him and such right cannot be kept in abeyance on the speculation or possibility of initiation of D.E. in future. All that permissible is to withhold pension, if found guilty in D.E, if initiated fulfilling embargo mentioned in Rule 27(2)(b) of 'Pension Rules 1982'. In case, the D.E. is instituted after retirement, then the scope of such D.E. and its outcome cannot go beyond the scope of Rule 27 as adverted to above and highlighted in the Judgment of Hon'ble High Court referred to above. This being so, the initiation of D.E. after retirement will not empower the Government to withhold pension or gratuity in absence of Rule to that effect. Whereas, the Rules discussed above, only provides that withholding of pension, if found guilty in D.E.

37. The learned P.O. except Rule 130(c) could not point out any provision to substantiate that the gratuity can be withheld where charge-sheet in D.E. has been issued after retirement. Needless to mention, the pension as well as gratuity are the statutory rights of the Government servants, which cannot be taken away in absence of express provision to that effect.

38. In view of aforesaid discussion, I have no hesitation to conclude that the impugned action of cancelling provisional pension only on the basis of registration of FIR is contrary to law. It is only in case of conviction from competent Court, the Government may withdraw or withhold the pension. In other words, the impugned action of cancellation of provisional pension is totally premature and

unsustainable in law. Consequently, the impugned order dated 02.02.2019 is liable to be quashed.

39. The totality of aforesaid discussion leads me to sum-up that the impugned action of recovery of Rs.16,98,269/- by order dated 31.05.2017 (in O.A.No.280/2017) and impugned order dated 02.02.2019 cancelling provisional pension in O.A.No.241/2019 is totally impermissible and unsustainable in law. The Applicant is entitled to receive regular pension until he is held guilty in criminal case or held guilty in departmental enquiry. The O.A, therefore, deserves to be allowed. Hence, the following order.

<u>Order in O.A.280 of 2017</u>

(A) The Original Application is allowed.

(B) The impugned action of recovery by order dated 25.11.2016 is quashed and set aside.

(C) The amount recovered from the Applicant be refunded to him within two months from today.

(D) The retiral benefits withheld by the Respondents be released within two months from today.

(E) No order as to costs.

<u>Order in O.A.241 of 2019</u>

(A) The Original Application is allowed.

(B) The order dated 02.02.2019 cancelling provisional pension is quashed and set aside.

(C) The Respondents to release regular pension without prejudice to their right to withhold or withdraw pension in

case Applicant is held guilty in criminal case or departmental enquiry initiated against him in accordance to law.

(D) The Respondents are further directed to ensure the completion of DE initiated against the Applicant within four months from today and the decision, as the case may be, shall be communicated to the Applicant within two weeks thereafter.

(E) No order as to costs.

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

Mumbai
Date : 25.06.2021
Dictation taken by :
S.K. Wamanse.
D:\SANJAY WAMANSE\JUDGMENTS\2021\June, 2021\O.As.280.17 with 241.19.w.6.2021.Recovery.doc

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