FIN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI

ORIGINAL APPLICATION NO. 953 OF 2022

DISTRICT : Mumbai
SUB : Recovery

Mr. Arif Ahmed Khaliluddin Shaikh)
Age 44 years,)
Occupation Head Constable B. No. 3016)
Residing at Mohmmadi Urdu High School)
No. 1, New Mohammedi Manzil,)
Azad Nagar, Sonapur, Bhandup West,)
Mumbai 78. **).....Applicant**

Versus

1. The State of Maharashtra)
Through its secretary (Home))
Home Department, Madam)
Cama Road, Hutatma Rajguru)
Chowk, Mantralaya,)
Mumbai 4000032)

2. Commissioner of Police, Railways,)
Mumbai, Having office at Area)
Manager Building, P'demello Road,)
Wadi Bunder Mumbai 400003.)

3. Deputy Commissioner of Police,)
(DCP), Western Zone, Railways,)
Ghass Bazar, near DRM Western)
Railways Office, Mumbai Central,)
Mumbai.

4) Assistant Commissioner of Police,)
Railways, Mumbai (Administration),)
Having office at Area manager)
Building, P'demello Road, Wadi)
Bunder Mumbai 400003.)

5) Maharashtra Administrative Tribunal)
CPO. **).....Respondents**

Shri N. M. Pokharankar, learned Advocate for the Applicant.
Smt. Archana B. K., learned Presenting Officer for the Respondents.

CORAM : Hon'ble Shri M. A. Lovekar, Vice-Chairman

Reserved on : 12.03.2025

Pronounced on : 19.03.2025

JUDGEMENT

Heard Shri N. M. Pokharankar, learned Advocate for the Applicant and Smt. Archana B. K., learned Presenting Officer for the Respondents.

2. Undisputed facts are as follows :-

The Applicant joined the Respondent Department as Police Constable on 19.03.2000. As per G.R.s dated 30.12.1987 and 01.01.1993 he had to clear Marathi Lower Grade Examination within two years from the date of joining and had to further clear Marathi Higher Grade Examination within two years from the date of passing the former Examination. Unless these examinations were cleared his increments could not have been released. The Applicant cleared the examinations on 08.01.2018. Yet, all his increments were released inadvertently for the intervening period leading to excess payment of Rs.9,29,789/-. By the impugned order dated 26.08.2022 this amount of excess payment is sought to be recovered. Hence, this Original Application.

2. Stand of the Respondent Nos.2 to 4 is that since the Applicant did not clear Marathi Examinations within the stipulated time, the impugned order of recovery will have to be sustained.

3. Since the facts are not in dispute, the fate of the matter shall be determined by law applicable to the same.

4. The Applicant has relied on the judgment of this Tribunal dated 03.10.2018 in ***O.A.No.1073/2017 (Shri Ramdaras S. Prasad V/s State of Maharashtra & 3 Ors.).*** In Para 3 of this judgment, the Tribunal observed :-

> *"Submissions of both sides would show that present applicant was granted increment during his service period, though he did not pass examination of Marathi language as per the rules within prescribed period. After prescribed period the applicant has passed the Marathi language examination."*

In Para 7, the Tribunal further observed :-

> *" We have the decision in O.A.No.840 & 841 of 2016, filed by Shri Subhash R. Kanojiya & Shri Shirjuddin B. Bagsiraj (resp.) Versus State of Maharashtra & Ors. dated 31.01.2017 (copy whereof is from page 26) and in 0.A.No.431 of 2017, filed by Shri Yamanppa R. Konnur Versus The State of Maharashtra & Ors. dated 21.07.2017 (copy whereof is from page 37). The decision would show that the orders of recovery were quashed wherein reliance was placed on the judgment in the matter of* ***State of Punjab and others Vs. Rafiq Masih: (2015) 4 SCC 334 (White Washer),*** *seen at page 46.*

By applying the law to the facts as above, the Tribunal directed the Respondents not to recover the amount from the Applicant. The Tribunal further directed refund of the amount recovered, if any.

5. The Applicant has further relied on the judgment of this Tribunal dated14.12.2023 in ***O.A.No.1001/2022 (Manohar S/o Bhimrao Kapse V/s State of Maharashtra & 2 Ors.).*** In this case benefits of 1st and 2nd Time Bound Promotions were wrongly extended and subsequently, after retirement of the Applicant, the amount of excess payment was sought to be recovered. This Tribunal, by relying on ***{State of Punjab & Others Vs. Rafiq Masih (White Washer)}, (2015) 4 SCC 334, Thomas Deniel V/s State of Kerala & Ors. in Civil Appeal No.7117/2010, decided on 02.05.2022 & Prasad Vinayak Sohoni V/s Treasury Officer, Thane & Anr. in W.P. No.1192/2021, decided on 12.01.2022*** held that the impugned recovery was not permissible.

6. The Applicant has also relied on the judgment of the Hon'ble Supreme Court on reference in the case of ***State of Punjab Vs. Rafiq Masih (White Washer)***. While disposing of this reference the Hon'ble Supreme Court held :-

> *"In that view of the above, we are of the considered opinion that reference was unnecessary. Therefore, without answering the reference, we send back the matters to the Division Bench for its appropriate disposal."*

7. The Applicant has also relied on the judgement of the Hon'ble Bombay High Court dated 20.02.2024 in ***W.P.No.564/2023 (Smt. Varsha Doshi V/s the State of Maharashtra and 1 Anr.).*** In this case, it is held :-

> "8. Admittedly, there is no dispute that the petitioner did not clear Marathi Language Exam within the time specified in the 1987 Rules i.e. within two years from the date of appointment which expired on 12th August 1995, but the petitioner cleared the exam in 2015. The respondents in their reply before the Tribunal in para 10 have admitted that it was their own mistake that the increment came to be released. It is not the case in the reply of the respondents that there was any suppression on the part of the petitioner nor was it the reason given in the communication dated 17th November 2018 by which the recovery was sought. Therefore, the reasoning given by the Tribunal that the petitioner had suppressed this fact is not based on any material on record nor is it a reason mentioned in the order dated 17th November 2018. The same is also not the case of the respondents in the reply. It is a settled position that validity of the order has to be tested on the touchstone of the original order and nothing can be added or subtracted thereto. Therefore, the Tribunal was not justified in rejecting the Original Application on the ground of suppression by the petitioner.
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> 9. The respondents have admitted in the reply before Tribunal that it was their mistake in releasing the increment. The respondents have also not stated that on account of the petitioner not clearing her Marathi Language Exam the works suffered. However, merely because the work did not suffer it cannot be the sole basis of giving relief to the petitioner.
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> 10. At this juncture, it is relevant to reproduce the illustrative situations laid down by the Supreme Court in the case of ***Rafiq Masih (supra)*** where recoveries 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.

11. The petitioner was to retire on 30th January 2019 and the order seeking recovery has been passed on 17th November 2018. The Supreme Court in the case of ***Rafiq Masih (supra)*** has stated that recovery from employee is impermissible in law when excess payment has been made for a period in excess of five years before the order of the recovery is issued. In the instant case, the payment has been made from 1995 which is sought to be recovered in the year 2018 and therefore the same being in excess of five years, the respondents are not justified in seeking recovery.

12. The Supreme Court in the case of Rafiq Masih (supra) further also observed that no recovery is permissible from employees who are due to retire within one year of the order of the recovery. In the instant case, the order of recovery is on 17th November 2018 and the retirement is on 30th January 2019. Therefore, the case of the petitioner squarely falls within the parameters laid down by the Supreme Court for non-recovery of the dues."

8. The Respondents, on the other hand, have relied on the judgment of the Hon'ble Bombay High Court dated 19.07.2019 in ***W.P. No.7929/2019 (Kiran Kirit Solanki V/s State of Maharashtra & Ors.)***. The relevant part of this judgment reads as under :-

"It would be appropriate to make a reference to Rules 3 and 5 of the said Rules of 1987 which read thus :-

3. Passing of examination - Subject to the provisions of Rule 4 every Gazetted or Non-Gazetted Government servant shall be required to pass the

(i) Lower Standard Examination before the expiry of two years from the date of coming into operation of these rules, or from the date of his appointment, whichever is later, and

(ii) Higher Standard Examination before the expiry of two years after his passing the Lower Standard Examination.

Note - An Officer belonging to the All India Services who is exempted from passing the Lower Standard Examination under sub-rule (6) of Rule 4 of these rules, shall be required to pass the Higher Standard Examination within four years from the date of his joining the State service.

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.

Note 1- The date of passing the examination shall be deemed to be the date following the date on which the examination ends.

Note 2 Increments so withheld shall become payable to the Government servant with effect from the date on which he passes the examination or is exempted from passing it and increments shall accrue to him as if no increments had been withheld. He shall not be entitled for the arrears due to withholding of increments."

5 The Rules are very clear and specific and the consequences of non passing of the examination enables the employer to withhold the increment till the candidate passes the examination or is exempted for passing the same. The petitioner did not fall in exemption category and therefore, the consequences prescribed in Rule 5 must necessarily fall upon her due to non-passing of the examination. The learned counsel for the petitioner has placed heavy reliance on the Judgment of the Apex Court in the case of State of Punjab and others Vs. Rafiq Masih (White Washer) and others [(2015) 4 SCC 334]. The Maharashtra Administrative Tribunal has rightly refused to rely upon the said Judgment. We agree with the view of the Tribunal. In the said Judgment the Apex Court was dealing with the recovery of the amount paid in excess without fault of the recipient and it took into consideration hardship caused to the employee in case of recovery, in case such recovery cannot be attributed to the employee.

The Tribunal has rightly observed that the Applicant herself was at fault and to be blamed for non-passing examination within the stipulated period provided by the said Rules. Therefore, the ratio laid down by the Apex Court in the case of Rafiq Masih (supra) cannot be of any support to the petitioner. As far as the contention of the learned counsel for the petitioner that she was never intimated about the examination being conducted and that she had to apply, we are of the view that the burden was cast on the petitioner to clear the departmental examination in terms of the Rules framed in exercise of power conferred under Article 309 of the Constitution of India and the employer was not duty bound to intimate the petitioner. Since the petitioner is at fault, the respondent was duty bound to act in terms of the Rule 5 of the Rules of 2007 but has released the increments which ought to have been withheld as a consequence of non-passing of the examination.

6 In such circumstances, the subsequent recovery of the increments which have been paid to the petitioner and which has been upheld by the Tribunal by the impugned Judgment, in our view do not call for any interference. Resultantly, the order passed by the Tribunal is upheld and the petition filed by the petitioner is dismissed."

9. The Respondents have also relied on the judgment of this Tribunal dated 1st April, 2022 in ***O.A.No.1023/2019 (J. Manoharan S/o K. Jegatheesan V/s State of Maharashtra & 3 Ors.).*** In this judgment the facts were set out in Paras 10 and 11 which read as under :-

> "10. There is no dispute that applicant was a Government employee. Therefore, he is bound by the service conditions of the Maharashtra Government. As per the rules, the applicant was required to pass Marathi and Hindi language examination. The applicant has not passed Marathi and Hindi language examination, but he was granted exemption from passing Hindi language examination as per the Govt. G.R. dated 10/6/1976. As per the Rule 4 (3) of the Rules of 1987, the applicant has to fulfil the conditions as mentioned above.
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> 11. The applicant's mother tongue is not Marathi. He is a Tamil person. He is not able to read and write Marathi language, therefore, he has not fulfilled the conditions of Rule 4 (3) of the Rules of 1987 and therefore the increments which were wrongly granted to him, were calculated and recovered from him. While preparing the pension case, the applicant has given a specific undertaking as under-
>
> > *"I hereby undertake that any excess payment that may be found to have been made as a result of incorrect fixation of pay as per Government Resolution No. RPS 1220/1/TE-5, dated 27th February, 2003, or any excess payment in the light of discrepancies noticed subsequently will be refunded by me to the Government either by adjustment against future payment due to me or lump sum."*

In Para 15, this Tribunal observed :-

> "15. The applicant is not entitled for the relief, because, the applicant has given specific undertaking before the respondents at the time of preparing pension case. In his undertaking, he has stated that any excess payment that may be found to have been made as a result of incorrect fixation of pay as per the Government Resolution No.RPS 1220/1/TE-5, dated 27th February, 2003 or any excess payment deducted in the light of discrepancies noticed subsequently will be refunded by me to the Government either by adjustment against future payment due to me or lump sum. In another undertaking, he has given specific undertaking stating that any over/excess payment can be recovered from his pensionary benefits."

In Para 17 of the judgment, the Tribunal referred to the judgment of the Hon'ble Supreme Court in the case of ***High Court of Punjab & Haryana and Ors. v/s Jagdev Singh, 2016 AIR (SCW) 3523***. It was observed :-

> "The Hon'ble Supreme Court has held that "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."
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> In this O.A., the applicant had given undertaking at the time of preparation of pension case stating that any excess payment made by the respondents, shall be recovered from his pensionary benefits. Admittedly, the applicant was given wrong increments, because, he had not passed Marathi language examination which is a condition precedent as per the Rule 4 (3) of the Rules of 1987. Therefore, deduction by the respondents of wrongly paid increments, cannot be said to be illegal in view of the Judgment of Hon'ble Supreme Court in the case of High Court of Punjab and Haryana and others vs. Jagdev Singh (cited supra)."

10. There are two judgments of the parent High Court viz. ***Kiran Solanki & Smt. Varsha Doshi (supra)*** taking contrary views. The facts in both these cases were identical to the facts of instant case. In the former ruling, it was held that since the Applicant herself was at fault the relief against recovery could not be extended to her by relying on ***Rafiq Masih (supra).*** In the latter ruling i.e. ***Smt. Varsha Doshi*** it was held that the Applicant had made out a case for grant of relief against recovery. While coming to this conclusion following facts of the case were adverted to –

(1) The Applicant had not suppressed anything.

(2) On account of not clearing Marathi Examinations, her performance while discharging her duties was not hampered in any way.

(3) The Respondents had admitted that increments were wrongly released in favour of the Applicant due to their inadvertence.

(4) The excess payment was made for a period in excess of five years.

(5) The Applicant was due to retire within one year from the date of order of recovery.

(6) The impugned recovery would have been harsh for the Applicant.

By holding thus, it was concluded that case of the Applicant was covered by various clauses in the case of ***Rafiq Masih (supra)*** and, therefore, she was entitled to get relief against recovery.

11. As mentioned above, in the case of ***Kiran Solanki (supra),*** on identical facts the Bombay High Court concluded that benefits of ratio laid down in the case of ***Rafiq Masih*** could not be extended to the Applicant.

12. In view of divergent views taken by two Benches of coordinate strength of parent High Court, the question would arise as to which of these two views may be relied upon. So far as this aspect of the matter is concerned, the learned P.O. has relied on ***State of Utter Pradesh & Others V/s Ajay Kumar Sharma & Anr. with Ram Charan Singh Prajapati V/s State of Utter Pradesh & Others, (2016) 15 SCC 289.*** In this case, it is held :-

> "The principles of precedent and stare decisis are a cardinal feature of the hierarchical character of all common law judicial systems. The doctrine of precedent mandates that an exposition of law must be followed and applied even by coordinate or co-equal Benches and certainly by all smaller Benches and subordinate courts. That is to say that a smaller and a later Bench has no freedom other than to apply the law laid down by the earlier and larger Bench; that is the law which is said to hold the field. Apart from Article 141 of the Constitution, it is a policy of the courts to stand by precedent and not to disturb a settled point. The purpose of precedents is to bestow predictability on judicial

> decisions and it is beyond cavil that certainty in law is an essential ingredient of rule of law. If binding precedents even of coordinate strength are not followed, the roots of continuity and certainty of law which should be nurtured, strengthened, perpetuated and proliferated will instead be deracinated. A departure may only be made when a coordinate or co-equal Bench finds the previous decision to be of doubtful logic or efficacy and consequentially, its judicial conscience is so perturbed and aroused that it finds it impossible to follow the existing ratio. The Bench must then comply with the discipline of requesting the Hon'ble Chief Justice to constitute a larger Bench."

Further reliance may be placed on ***Mary Pushpam V/s Telvi Curusumary & Ors., (2024) 1 S.C.R.11 : 2024 INSC 8.*** In this case, while dealing with the doctrine of precedent, the Hon'ble Supreme Court has held

> "It promotes certainty and consistency in judicial decisions providing assurance to individuals as to the consequences of their actions – When a decision of a coordinate Bench of same High Court is brought to the notice of the bench, it is to be respected and is binding subject to right of the bench of such co-equal quorum to take a different view and refer the question to a larger bench – It is the only course of action open to a bench of co-equal strength."

By relying on the ratio laid down in the cases of ***State of Utter Pradesh & Ors. V/s Ajay Kumar Sharma & Anr. and Mery Pushpam (supra),*** I respectfully rely on the judgment in the case of ***Kiran Solanki (supra)*** which was delivered earlier in point of time i.e. 19.07.2019. In view of this conclusion the Original Application will have to be dismissed. It is accordingly dismissed with no order as to costs.

Sd/-
(M. A. Lovekar)
Vice-Chairman

Place: Mumbai
Date: 19.03.2025
Dictation taken by: V. S. Mane
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