

**DISTRICT : PUNE**

## Versus

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|----|---|--|
| 1. | The Medical Superintendent,<br>E.S.I.S Hospital, Mohan Nagar,<br>Chinchwad, Pune – 19.  | )<br>)<br>)                            |
| 2. | The Commissioner / Director,<br>[Administration],<br>E.S.I.S, having office at<br>Panchdeep Bhavan, 6 <sup>th</sup> floor,<br>N.M Joshi Marg, Lower Parel,<br>Mumbai 400 013. | )<br>)<br>)<br>)<br>)<br>)             |
| 3. | The State of Maharashtra,<br>Through Principal Secretary,<br>Public Health Department,<br>Mantralaya, Mumbai 400 032.   | )<br>)<br>)<br>)... <b>Respondents</b> |

Shri A.V Bandiwadekar, learned advocate for the Applicant.

Ms Savita Suryavanshi, learned Presenting Officer for the Respondents.

**CORAM** : **Shri Justice A.H Joshi (Chairman)**  
**RESERVED ON** : **03.10.2017**  
**PRONOUNCED ON** : **26.10.2017**

**ORDER**

1. Heard Shri A.V Bandiwadekar, learned advocate for the Applicant and Ms Savita Suryavanshi, learned Presenting Officer for the Respondents. Perused the record.

2. The facts which are relevant to adjudication are listed below as follows:-

(a) Government of Maharashtra has issued Recruitment Rules for the post of Staff Nurse by notification dated 10.1.1964.

(b) Rule 2 of 1964 Rules contains following clause:-

“The selected candidates shall be on probation for one year and shall have to pass the languages examination according to the prescribed rules.”

(quoted from page 80 of Exhibit R-2).

(c) Government of Maharashtra has issued rules relating to exemption in Hindi language by Notification dated 10.6.1976.

(Copy thereof is annexed as Exh. R-3, which is at page 81).

All five rules contained therein are relevant, which are quoted below for ready reference:-

“१. पूर्वीच्या नियमानुसार विहीत केलेल्या निम्नस्तर, उच्चस्तर बोलभाषा हिंदी परीक्षा प्रत्येक शासकीय कर्मचा-यास उत्तीर्ण होणे आवश्यक राहिल. या परीक्षा शासकीय सेवेत रुजू झालेल्या दिनांकापासून तीन वर्षांच्या मुदतीत किंवा शासनाने काही कारणास्तव मुदत वाढविल्यास त्या मुदतीत उत्तीर्ण होणे आवश्यक राहिल. पूर्वीच्या नियमानुसार जे कर्मचारी ह्या परीक्षा यापूर्वी उत्तीर्ण झालेले असतील त्यांनी परीक्षा उत्तीर्ण होणे आवश्यक राहणार नाही. मात्र जे कर्मचारी ह्या परीक्षा अद्यापि उत्तीर्ण झालेले नसतील त्यांना परीक्षा उत्तीर्ण होणे अनिवार्य आहे.

२. दिनांक १ ऑक्टोबर १९७६ रोजी ज्या कर्मचा-यांच्या वयाची ४५ वर्षे पूर्ण होतील किंवा ज्या वेळी त्यांच्या वयाची ४५ वर्षे पूर्ण होतील अशा कर्मचा-याला विहीत हिंदी परीक्षा उत्तीर्ण होण्यापासून सुट राहिल.

३. एतदर्थ मंडळाच्या उच्चस्तर व निम्नस्तर परीक्षेचा दर्जा अनुक्रमे माध्यमिक शालांत परीक्षा मंडळाच्या उच्चस्तर व निम्नस्त हिंदी परीक्षेच्या समकक्ष राहिल.

४. हिंदी भाषेच्या प्रचाराचे काम करणा-या मान्यवर खाजगी संस्थातर्फे घेतल्या जाणा-या ज्या परीक्षांचा दर्जा एतदर्थ मंडळाच्या निम्नस्तर व उच्चस्तर परीक्षांच्या समकक्ष मानला जाईल त्या परीक्षा उत्तीर्ण झालेल्या व होणा-या कर्मचा-यांना एतदर्थ मंडळाच्या परीक्षा उत्तीर्ण होण्यापासून सुट राहिल. अशा संस्थांची नावे व समकक्ष परीक्षांची यादी यथावकाश जाहीर करण्यात येतील.

५. जे शासकीय कर्मचारी विहीत मुदतीत किंवा त्यांच्या वयाची ४५ वर्षे पुर्ण होईपर्यंत या परीक्षा उत्तीर्ण होणार नाहीत त्यांची वार्षिक वेतनवाढ उक्त मुदत संपल्यानंतर ही परीक्षा उत्तीर्ण होईपर्यंत रोखण्यात येईल.

या नियमानुसार रोखून धरण्यात आलेली वार्षिक वेतनवाढ शासकीय कर्मचारी ज्या दिनांकास परीक्षा उत्तीर्ण होतील किंवा त्यांच्या वयाला ४५ वर्षे पुर्ण होतील त्या दिनांकापासून त्यांना देय होईल व पुढील सर्व वेतनवाढी कोणतीही वेतनवाढ रोखून धरण्यात आली नव्हती असे मानून त्यांना मिळतील. मात्र वेतनवाढ रोखून ठेवल्यामुळे कर्मचा-यांना ज्या प्रत्यक्ष वेतनास मुकावे लागेल त्याची थकबाकी मिळण्याचा हक्क राहणार नाही.”

(d) Applicant was appointed as Staff Nurse by order dated 10.2.2000. The order contains a condition:-

“शासनाने आवश्यक केल्यानुसार नेमणुक झाल्यापासून लगेच त्यांनी हिंदी/मराठी भाषा परिक्षा उत्तीर्ण होणे आवश्यक आहे.”

(copy whereof is at Exh. B, page 24 and page 25).

(e) Applicant did not pass the examination. Yet applicant was granted annual increments, benefits of ACP Scheme by order dated 18.2.2014, (Exh. C, page 26) and fixed applicant's pay of each amongst those. Applicant's pay was accordingly fixed at Rs. 15,280/- + Grade Pay of Rs. 4300/- w.e.f 1.7.2013. (Exh. C at page 27).

- (f) By circular dated 23.9.2015, the Commissioner, ESIS directed stopping of annual increments and recovery of amount payed to the employees payed in excess of their eligibility. (Exh. R-6, page 86).
- (g) The applicant's pay has been revised and refixed. This order of revision and of deduction of excess payment which is dated 11.1.2016 (copy of whereof is at page 20).
- (h) Commissioner, ESIS, by order dated 20.1.2016, directed that benefits of ACP scheme granted to the employees who did not qualify according to the conditions of service be withdrawn.
- (i) The Medical Superintendent, E.S.I Corporation Hospital, Mohannagar, Chinchwad, Pune, issued an order which is dated 03.03.2016 (copy whereof is at Exh. D, page 28) and revoked the order dated 18.2.2014 (Exh.C, page 26) whereby the first A.C.P was granted to the applicant on the ground that applicant had failed to pass Hindi language Ad hoc Board examination.
- (j) Applicant has prayed for quashing of order dated 11.1.2016 at Exh. A, pages 20 & 21.

3. The grounds of challenge are scattered, and are contained in paras 6.12 to 6.28. All these grounds are opposed by the State.

4. In course of oral submission, learned advocate for the applicant has isolated on following grounds. Summary of grounds and the reply thereto are condensed for convenient reference as follows:-

Sr. No.	Ground number and Summary.	Para number of Reply of the State
(i)	Ground nos 6.12 & 6.13 :	14 & 15

Respondent no. 1 has no authority to pass order, rather it should have been passed by Respondents no 2 or 3.

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| (ii)  | Ground no 6.14 :<br>Prior show cause notice before issuing impugned order is and hence principles of natural justice are violated   | 16                 |
| (iii) | Ground nos 6.15 & 6.16 :<br>Appointment order, particularly clause 5 thereof did not specify any outer time limit for passing the examination, nor it provided for consequences of failure to pass the examination                                      | 17 & 18            |
| (iv)  | Ground nos 6.17, 6.18, 6.19 & 6.20 :<br>There is no nexus between passing of Hindi language examination with applicant's job. The Respondents ought to have granted exemption. It is not granted. The applicant is meted with discriminatory treatment. | 19, 20, 21<br>& 22 |

5. Learned Advocate for the Applicant has placed reliance on following judgments:-

- (a) Judgment of this Tribunal in O.A nos 144/2017 & others (Shri Mahadeo N. Jagdale Vs. Government of Maharashtra & Others dated 7.9.2017).
- (b) Judgment of Hon'ble Supreme Court in State of Punjab & Ors etc Vs. Rafiq Masih (White Washer's case), Civil Appeal No. 11527/2014) dated 18.12.2014.

6. Learned Chief Presenting Officer has placed reliance on the judgment of Hon'ble Supreme Court in the case of High Court of Punjab & Haryana & Others Vs. Jagdev Singh, Civil Appeal No. 3500 of 2006, dated 29<sup>th</sup> July, 2016.

7. Applicant's submission on which special thrust is given are summarized as below:-

- (i) The consequence of failure of a candidate to pass the Hindi examination conducted by the Ad hoc Board that the increment shall not be granted, was never told to the applicant.
- (ii) Respondent no. 1, Superintendent, E.S.I.S Hospital, Mohannagar, Chinchwad, Pune has ordered recovery, who is not competent to issue order of recovery.
- (iii) Applicant has not been served with show cause notice against recovery by the Respondents.
- (iv) There is no nexus between job done by the applicant and passing of Hindi examination.

8. In so far as legal submissions are concerned, applicant has placed reliance on White Washer's case (supra) and argued that recovery is not permissible.

9. Point :- (i) The consequence of failure of a candidate to pass the Hindi examination conducted by the Ad hoc Board that the increment shall not be granted, was never told to the applicant.

Discussion :- The applicant's submission that applicant was never told the consequence of failure to pass examination is utterly false on applicant's own showing the stipulation contained in the order of appointment. The record shows that applicant has placed on record copy of appointment order which is at Exhibit 'B', pages 24 & 25. Para 5 of the order contains the condition, which is already quoted in foregoing paragraph 2(d). Therefore ground referred to in foregoing para 7(i) has no merit.

10. Point :- (ii) Respondent no. 1, Superintendent, E.S.I.S Hospital, Mohannagar, Chinchwad, Pune has ordered recovery, who is not competent to issue order of recovery.

Discussion :- In so far as the aspect of recovery to be ordered by competent authority is concerned, communication of the decision of recovery is done by the Superintendent. In fact recovery is already directed by the Commissioner. The Respondents have already placed on record the facts namely, Commissioner, E.S.I.S has already ordered recovery of excess payment to be done. Even the order granting ACP is set aside by the Commission or of E.S.I.S. Therefore ground referred to in para 7(ii) has no merit.

11. Point :- (iii) Applicant has not been served with show cause notice against recovery by the Respondents.

Discussion :- In so far as the aspect of recovery being done without notice of show cause is concerned, it is pertinent to note that applicant was not entitled to earn the increment. The increments were apparently granted either inadvertently or negligently and it may attract action against those who have violated rules. However, applicant is not entitled either for increment nor can she claim any exemption from recovery on the ground whatsoever. Moreover, recovery is not in the nature of a penal action for misconduct. On the other hand, it is in consonance with condition of service, i.e. and as a condition on which the order of appointment was issued and as per the recruitment rules. Therefore, applicant is not entitled to claim notice of show cause as a necessity under any mandatory provisions of law. Moreover, whether a notice of show cause, irrespective as to whether the order has civil consequences should have been shown from any rules. Applicant could have shown that notice of show cause was requirement of rules, which applicant

has failed to show. In the case of present nature, where the recovery is being done toward excess payment, principles of natural justice do not apply as an inherent requirement. Therefore point referred to in foregoing para 7 (iii) has no merit.

12. Point :- (iv) There is no nexus between job done by the applicant and passing of Hindi examination.

Discussion :- In so far as ground contained in para 7(iv) is concerned, it impinges upon the Recruitment Rules. Applicant has not challenged the Recruitment Rules on the ground of its constitutional validity or legality on the grounds whatsoever. Moreover, having joined employment upon accepting said condition and having served for over 16 years, now applicant is estopped from challenging said condition. Moreover said condition is uniformly applied to all Government servants for more than five decades. Hence, the challenge that condition has no nexus with the job is a chance submission and does not have any legal foundation.

13. In so far as the aspect of precedents relied by both sides are concerned, this Tribunal is undoubtedly bound by tests laid down in White Washer's case (supra). Those five tests are quoted below:-

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

14. Learned Chief Presenting Officer has relied upon the judgment in the case of HIGH COURT OF PUNJAB & HARYANA & ORS Vs. JAGDEV SINGH. It has to be tested whether what is the effect of said judgment on the facts of this case.

15. It is well settled that the five tests are now crystalized and those are settled the law. The judgment in the case of High Court of Punjab & Haryana & Others Vs. Jagdev Singh, carves out an exception, which is narrated in para 11 thereof. Said paragraph No.11 is quoted below for ready reference:-

“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.”

16. Now the Law, as to in which situation, if the amount is paid in excess can be recovered and when amount cannot be recovered has fully crystalized.

17. In the present case, the reply filed by the State clearly demonstrates that at the time of appointment, it was notified to the applicant that applicant has to pass the examination and the

result of failure to pass examination is retold, through G.A.D's circulars dated 10.6.1976 & 25.5.1981.

18. Learned C.P.O had argued that whenever benefits of increment or A.C.P is given, every Government servant is required by rules apart from the fact to furnish an undertaking that in the event it is found that any amount is paid in excess or it is found that Government servant is not entitled to receive the amount, it shall be recoverable and shall have to be refunded, and without such undertaking no arrears are paid. He has further argued that applicant has not shown that any such undertaking is not given.

19. Learned Advocate for the applicant has not argued showing as to how on facts the judgment relied upon by the learned C.P.O is not applicable to the facts of present case. In fact this silence speaks.

20. The judgment relied upon by the learned C.P.O will not apply only if it is shown on facts that the amount were paid to the applicant unconditionally. In fact, when it was fully notified to the applicant that a Government servant who does not pass the language examination earn increment unless he passes the examination or is granted exemption or he crosses 45 years of age. Thus applicant was not entitled to receive yearly increment, is a consequence which is very well retold, as well it is well known matter of public knowledge to every Government servant.

21. Admittedly, applicant is below 45 years of age as per the age shown in the Original Application, has not passed the examination and has not been granted exemption.

22. Thus, applicant's case is covered by the exception recognized by the judicial precedents, in case of the judgment in Punjab & Haryana High Court employees case (supra) and also as discussed, except condition No. (iii) from White Washer's case, quoted in foregoing paragraph no. 15.

23. In the result, by coherent reading of White Washer's case Civil Appeal No. 11527 of 2014 and case of High Court of Punjab & Haryana & Ors, Civil Appeal No. 3500/2006, recovery which is older than five years from the date of order ought not to be done and all other benefits including grant that of scheme of A.C.P also can be recovered.

24. In the result, OA is partly allowed as follows:-

- (i) Recovery of increment paid to the applicant prior to five years of the date of order, i.e. prior to January, 2009 should not be done. All other recoveries are not touched and shall be done.
- (ii) Original Application is accordingly partly allowed.

Sd/-  
**(A.H Joshi, J.)**  
**Chairman**

**Place : Mumbai**  
**Date : 26.10.2017**  
**Dictation taken by : A.K. Nair.**