

MAHARASHTRA ADMINISTRATIVE TRIBUNAL, MUMBAI**ORIGINAL APPLICATION No.342 of 2016****District : Palghar**

Shri Prakash Laxman Hotkar,)
 Age : 61 years, Occ. Retired as Group Instructor,)
 R/at. F-301, Jaimala Apts., Dhananjay Nagar,)
 Nile-More-Gaon, Nala Sopara (W), Dist.Palghar.)

...Applicant

Versus

1. The Principal, Industrial Training)
 Institute Mumbai, Sane Guruji Marg,)
 Mumbai - 11.)
2. The Joint Director of Vocational Educ.)
 And Training, Regional Office, 49,)
 Kherwadi, Mumbai - 51.)
3. The Accountant General, Maharashtra-1)
 Pratistha Bhawan, M.K. Marg,)
 Mumbai-20.)
4. The Additional Treasury Office (Pension))
 Palghar, O/at Ground Floor, Surya)
 Colony, Bidco Road, Palghar (W).)
5. The State of Maharashtra, through)
 Principal Secretary, Higher & Technical)
 Education Department, Mantralaya,)
 Mumbai 32.)

.....Respondents

Shri A.V. Bandiwadekar, Advocates for Applicant.

Shri N.K. Rajpurohit, Chief Presenting Officer for Respondents.

CORAM : SHRI R.B. MALIK (MEMBER-JUDICIAL)

DATE : 09.03.2017

JUDGMENT

1. This Original Application is brought by a Retired Group Instructor of ITI raising the dispute about the downward revision of his gratuity (to the extent of Rs.21,285/-), commutation of pension



(to the extent of Rs.25,917/-) and pension from November, 2012 to October, 2016 (Rs.45,673/-). For all practical purposes he wants the *status quo ante* to be restored such as it stood pursuant to the order to 14.09.1999.

2. I have perused the record and proceedings and heard Shri A.V. Bandiwadekar, the learned Advocate for the Applicant and Shri N.K. Rajpruohit, the learned C.P.O. for the Respondents.

3. The Applicant joined the Government service as Instructor (Class-III) on 13.10.1975. On 03.10.1985, he came to be appointed by nomination as Group Instructor in the pay-scale of Rs.500-900 by the order of Respondent No.2, Joint Director of Vocational Education and Training. It may be mentioned here that the first Respondent is the Principal of the Instructor Training Institute, ITI, the third Respondent is the Accountant General, Maharashtra - I, the fourth Respondent is the Additional Treasury Officer (Pension), Palghar, the fifth Respondent is the State of Maharashtra in the department of Higher and Technical Education. The record shows that by the order a copy of which is at Exb.R1, dated 24.02.1986, page 80 of the Paper-Book, the Applicant's pay was fixed at Rs.560 in the pay-scale above referred to. His pay-scale as per the 5th Pay Commission w.e.f. 01.01.1986 in the pay-scale of Rs.5500-175-9000 was fixed at Rs.6900. It is an admitted position that after completing 12 years of services as Group Instructor, the applicant was granted two tier promotion and his pay-scale was fixed at Rs.6500-10500 and even as per the affidavit-in-reply, it was from 12.10.1997 for which the orders were made on 14.09.1999.

4. As per the order made by the second Respondent on 14.09.1999 just referred to a copy of which is at Exb.R2, page 82, the actual fixations was at Rs.7300 and that was in accordance with the G.R. of 08.03.1999 of the Finance Department.

5. There is a G.R. dated 19.07.2010 at page 32 of the P-B and even according to the Respondents thereunder the revision of the pay of the applicant was effected in the pay-scale of Rs.7500-250-12000 and as already mentioned above his basic pay was fixed at



Rs.7500. Under the 6th Pay Commission, the Applicant was fixed at Rs.9300-34800 and significantly this time a grade pay of Rs.4600 was also given to him. I have advisedly emphasized on this aspect of the matter because as I shall be presently pointing out that this dispute relates to the grade pay which for all practical purposes has given rise hereto. Now, that pay-scale was fixed w.e.f. 01.10.2006 for which a document was annexed to the affidavit-in-reply filed by the In-charge Principal of the Respondent No.1 on behalf of the Respondent Nos.1,2 and 5. It is at page 84 of the P-B.

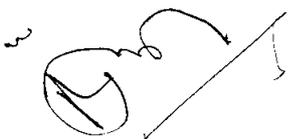
6. It is again a document based indisputable fact as a fact that the applicant agitated the claim for grade pay of Rs.5200 instead of Rs.4600 for which he apparently sought sustenance from the G.R. dated 05.07.2010 of the Finance Department. Now, at this stage itself it needs to be mentioned that till quite a while even the Government took the stand vis-a-vis the Applicant that his was an isolated post but it was thereafter that the stand was changed and according to the Government there were promotional openings to the post of Group Instructor like the applicant were the post of Vice-Principal and Assistant Apprenticeship Advisor (Technical). The G.R. dated 05.07.2010 pertains to isolated post and according to the Government and at this stage, it also needs to be mentioned that even till quite late in the day when the matter became substantially Part-Heard before me and I gave certain directions in the nature of clarification as to the promotion of the Applicant, an additional affidavit-in-reply came to be filed by Shri Dilip Bhokare, Inspector in the office of the second Respondent, Vocational Education and Training office. I had raised the specific queries as to why, if the applicant's was not an isolated post, he was not considered for promotion. The explanation given by way of affidavit-in-reply in effect is that the applicant did not possess the required qualification as per the Recruitment Rules. A copy thereof has been annexed at Exb.AA-1, page 98 of the P-B. They are called as the Recruitment Rules for the post of Group Instructor / Store Superintendent in ITI Institutes / Centers. The appointment to the said post would be made either by promotion from amongst the Class-III instructional staff in the Government Industrial Training Institutes / Centers and for that minimum experience of 5 years of teaching was necessary. Another source of appointment was by



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way of nomination from amongst the candidates who possess the qualification therein mentioned with regard to age, educational qualification of SSC or equivalent with mathematics and science and / or second class diploma in appropriate branch of the Board of Technical Examinations or its equivalent with two years experience or a diploma in appropriate branch of B.T.E. or its equivalent with 3 years experience. The third criteria was as set out in Rule 1 (B) (c) which Shri B.A. Bandiwadekar mentioned as one which the applicant falls within. It is that he should possess a National Trade Certificate in the respective trade or its equivalent with 5 years experience. There are other eligibility criteria which I do not think it is necessary to closely examine but according to the Respondents there under the Applicant did not qualify for the promotion and hence he was not given the promotion. It is not possible for me to entirely agree with the Respondents and the learned C.P.O. as to this limited aspect of the matter. Regardless of whatever be the ultimate outcome of this O.A. as already mentioned above, the stand of the Respondents have been initially that the Applicant's was an isolated post and they, therefore, must never have examined his case from the stand point of promotional aspect of the matter and in all probability, therefore, there was no mention thereof in the affidavit-in-reply as earlier filed. No doubt, the latest affidavit was filed in response to the direction of this Tribunal but even in that case it was in my opinion not open to try and introduces a case which contradicts the core aspect of the Respondents case otherwise. But then this conclusion does not necessarily mean, as I shall be presently pointing out, that the case of the Applicant is necessarily accepted. But the things shall become clearer as the discussion progresses. I have already mentioned above that the case of the Respondents is that it was belatedly realized that the applicant's post was not an isolated one and in that sense there was an over payment of grade pay. As a consequence, the Finance Department's G.R. of 05.07.2010 was not applicable in case of the Applicant. According to the Respondents the Applicant was not entitled even for notional increment. The Applicant retired on superannuation on 31.10.2012. It is common ground that initially when the matter was forwarded for pay fixation as a step in aid to working out the pensionary figures, the office of the third Respondent did not do so because according to them the



same was already done before long but ultimately they took a decision on the said matter and in accordance with the directions of the third Respondent vide Exb. I & J at pages 44 and 45, the second Respondent was directed to make necessary arrangements to pay downwardly revised pensionary benefits after making due adjustments of the pension already paid. There were further directions to recover excess payments and it was pursuant thereto that the fourth Respondent addressed a communication to third Respondent intimating as to how the said order is being implemented. That order is at Exb. A page 22 of the P-B; the copies of each of the Exhibits I & J came to be forwarded to the Applicant also resulting in a spate of representations their against.

7. Regardless of the ultimate outcome of this O.A., it does appear quite clearly that the Applicant has not been able to rebut the case of the Respondents about the initial fixation having been made by mistake. The Applicant has raised several issues including a few relating to various provisions of the Maharashtra Civil Services (Pension) Rules, 1982. I shall deal therewith presently but having perused the record and proceedings hereof, I am quite clearly of the opinion that the case of the Respondents that the post of the Applicant was an isolated post and, therefore, in the matter relating to grade pay their indeed was an over payment is something that has been established. I, therefore, uphold the case of the Respondents that the post of the Applicant was not an isolated post and, therefore, there was an instance of over payment by mistake as far as the Applicant was concerned under all three heads set out at very threshold.

8. Now, turning to the Pension Rules, the Applicant has referred to Rules 26, 27 and 131 thereof. Rule 26 deals with what can be described as the course of action to be adopted if the pensioner did not come true to the test of "future good conduct". Rule 27 deals with the issue of the right of the Government to withhold or withdraw the pension of the pensioner / the Government employee in the event a departmental or judicial proceeding were pending. The case of the Applicant has been that both the provisions envisaged the compliance with the Rules of natural justice before the pension was downwardly revised. I do not quite agree with the

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Applicant in this behalf because the circumstance envisaged by Rule 26 and 27 of the Pension Rules and the present facts are quite distinct and different. This aspect must have become clear by the discussion made just now. I would therefore hold that no sustenance could be taken by the Applicant from Rules 26 and 27 of the Pension Rules.

9. However, as far as the Rule 131 is concerned, I think there is substance in the case of the Applicant. For ready reference. The said provision deserves to be fully reproduced.

“Rule 131. Revision of pension after authorization

(1) Subject to the provision of rules 26 and 27, pension once authorized after final assessment shall not be revised to the disadvantage of the Government servant, unless such revision becomes necessary on account of detection of a clerical error subsequently.

Provided that no revision of pension to the disadvantage of the pensioner shall be ordered by the Head of Office without the concurrence of the Finance Department if the clerical error is detected after a period of two years from the date of authorization of pension.

(2) For the purpose of sub-rule (1), the retired Government servant concerned shall be served with a notice by the Head of Office requiring him to refund the excess payment of pension within a period of two months from the date of receipt of notice by him.

(3) In case the Government servants fails to comply with the notice, the Head of Office shall, by order in writing direct that such excess payment, shall be adjusted in installments by short payments of pension in future, in one or more installments as the Head Office may direct.

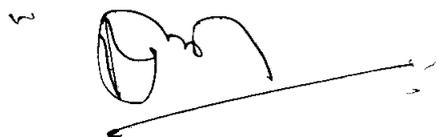
10. The bare perusal of the Rule 131 of the Pension Rule would make it clear that in the first place there shall not be any revision of pension to the disadvantage of the Government servants and if it were to be so then it has to be upon detection of the fact that it was a clerical error. I can safely proceed on the basis that non clerical

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errors which here we are concerned with cannot be revised to the disadvantage of the Pensioner. Further the proviso lays down that there shall not be any revision of pension to the disadvantage of the pensioner without concurrence of the Finance Department but again the words "if clerical error.....of pension" would make it clear that the Rule emphasizes the fact that only clerical error can be made subject to the downward revision and that too within the framework of Rule 131 of the Pension Rules. Here still further, revision has been made after a period of two years from the date to authorization of pension which would become clear from the fact that the Applicant retired on 31.10.2012 and the impugned pay revision leading up to effecting the revision of pension was made as late as in September, 2015.

11. Proceedings further in analyzing the Rule 131 of the Pension Rule, Rule 131 (2) envisages service of a notice that too by the Head of the Office asking the said pensioner to refund the excess payment within a period of two months from the date of receipt of that notice and only in the event he failed to do so recourse could be had to sub-rule 131 of the Pension Rules. In this O.A., I am not concerned with what is open even now for the Respondents to do and I would, therefore, express no view thereupon but then in the set of facts in this O.A., compliance with Rule 131 of the Pension Rules was a must and I must repeat that here it is not a case of clerical error. Therefore, allowing all latitude to the Respondents their impugned action cannot be sustained and that would be so by reason of the fact that by the time impugned action was taken not only had the Applicant retired on superannuation but a period of more than two years had also elapsed and, therefore, even if there may or may not be any amount of substance otherwise in the case of the Respondents, I think they will have no real cause against the Applicant.

12. Assuming, however the Respondents were justified in the action that they took and this is only an assumption and nothing more the issue is as to whether in any case it was open to the Respondents to make recovery in the manner they have done from the Applicant. It is quite clear that the Applicant was a Group -C or Class-III employee. The issue is as to whether in the set of facts



as they are and there being not even an allegation of the Applicant having played any sharp practice much less fraud and in the presence of the clear case of the Respondents that it was their fault because of which over payment took place, could the recovery be still ordered. In this behalf I should have nothing of my own to say because this issue is fully governed by the law laid down by the Hon'ble Supreme Court in **Civil Appeal No.11527/2014 (arising out of SLP (c) No.11684/2012) State of Punjab and Ors V/s. Rafiq Masih (White Washer) etc. dated 18.12.2014.** In that matter also the issue arose in the context of public servants having become beneficiaries of the mistake committed by the Government and as a result of the same unintentional mistake they having received over payment beyond their due. There also the employees could not be held guilty of sharp practice or fraud. The Government's move to recover the amount of the over payment ultimately took the Government as appellants before the Hon'ble Supreme Court. Their Lordship were pleased to observe that in such a set of facts the issue before the judicial forum would be is to whether it would be iniquitous to an extent that the recovery would be unfair. Their Lordship considered this aspect of the matter from various angles and ultimately laid down certain important principles which are fully applicable hereto. It was held by relying upon the earlier judgment of the Hon'ble Supreme court that in case the employee from whom the recovery was to be made belonged to lower rungs of service the likelihood would be that he would have spent that money and, therefore, from Class-III and Class IV (Group-C and Group-D employees) such a recovery be not made. Similarly, no recovery should be made from retired employees. In para 12, their Lordships had been pleased to observe as follows :-

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments mistakenly been made by the employer, in excess of their entitlements. 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 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 retired 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."

It would become very clear from I and II of the above principles laid down by the Hon'ble Supreme Court that there should be no recovery from the Applicant herein.

13. The Respondents have annexed to their last affidavit-in-reply a document in Marathi which is an undertaking (Vachanpatra). This two and half line document contains some kind of an undertaking that in case of any over payment the Applicant would be willing to get it adjusted and in short he would suffer recovery being made from him.

14. Now on one side this is the document which the Respondents seek to rely upon in support of their case while on the other side there is law laid down by the Hon'ble Supreme Court. While it is no doubt true that the issue of undertaking was not involved in Rafiq Masih case but then the law laid down is very clear inter-alia about the mandate against the recovery of over payment from retired Group-C employees. Here the fact that the Applicant belonged to Group-C and not Group-A or Group-B employee is significant and so also is significant, the fact that by



the time he had been asked to make the repayment, he had already retired. Further, the requirement of Rule 131 of the Pension Rule is a peculiarity of this particular O.A. For all these reasons, I am afraid the impugned order is unsustainable and so also are unsustainable any other orders that the impugned order would be based on. It appears that the recoveries have been made from the Applicant and, therefore, as a consequence of the above findings the said amounts will have to be refunded to the applicant and his pension will have to be reworked out as if the impugned order was not made.

15. The order herein impugned and all the orders based where upon, the said order was made stand hereby quashed and set aside. The amounts, if any, recovered from the Applicant be refunded to him by the concerned Respondents within a period of four weeks from today failing which, the said amounts shall carry interest of Rs.12 PCPA from the date of recovery till repayment. The pension of the Applicant will be reworked out on the basis that the impugned order did never exist and if in that behalf any monetary benefits accrues to the Applicant, the same shall be paid to him within the period above referred to. This Original Application is allowed in these terms with no order as to costs.

Sd/-

(R.B. Malik)
Member (J)
09.03.2017

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