

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.863 OF 2018

DISTRICT : MUMBAI

Ms. Anita Jethwani.)
Adult, Indian Inhabitant,)
Occu.: Senior Assistant at Directorate of)
Medical Education & Research,)
St. Georges Hospital, Mumbai 400 001)
and residing at C/502, Vaibhav Apartment)
Plot No.1259, Old Prabhadevi Road, Worli,)
Mumbai - 400 025.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through Principal Secretary in the)
Department of Medical Education &)
Drugs, Mantralaya, Mumbai - 32.)
2. The Director of Medical Education &)
Research, having office at St. Georges)
Hospital Compound, Mumbai - 1.)...**Respondents**

Mr. C.R. Sadashivan, Advocate for Applicant.

Ms. S.P. Manchekar, Chief Presenting Officer for Respondents.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 19.11.2019

19/11/2019

JUDGMENT

1. The Applicant has challenged the impugned order dated 12.06.2017 whereby after retirement, the recovery of Rs.8,55,625/- is sought from the retiral benefits invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

2. Shortly stated facts giving rise to this application are as under:-

The Applicant is spinster and physically challenged. She joined Government service as Junior Clerk on 06.06.1989. Later, during the course of tenure, she was promoted to the post of Senior Clerk and then Senior Assistant. She stands retired on 30.09.2015 on attaining the age of superannuation as Group 'C' employee. Till the date of retirement, there was no communication to her for passing Marathi Language Examination. It is only after retirement by communication dated 04.06.2016, she was informed that she failed to clear Marathi Language Examination within three opportunities in terms of G.R. dated 01.01.1993, and therefore, liable to refund the excess payment of increments paid to her totaling to Rs.8,55,625/-. Thus, the recovery is sought towards the increments paid to her from 1989 till the date of retirement. Ultimately, by order dated 12.06.2017, she was directed to refund Rs.8,55,625/- so that her pension papers should be processed. The Applicant has challenged the impugned action recovery in the present O.A. contending that the same is arbitrary and impermissible in view of the decision of Hon'ble Supreme Court in **Civil Appeal No.11527/2014 arising from SLP No.11684/2012 (State of Punjab and Ors. Vs. Rafiq Masih and Ors.) decided on 18th December, 2014**. She, therefore, prayed to quash the impugned order dated 12.06.2017 and for direction to Respondents to release her pension.

3. The Respondents opposed the application by filing Affidavit-in-reply on behalf of Respondent No.3 *inter-alia* denying the entitlement of the Applicant to the relief claimed. It is not in dispute that the Applicant was appointed in 1979 as Junior Clerk and was promoted to the post of Senior Clerk and then Senior Assistant. It is also not in dispute that Applicant stands retired as Group 'C' employee on 30.09.2015. The Respondents sought to contend that the Applicant was required to pass Marathi Language Examination within three chances, but she failed to do so in terms of Marathi Language Examination Rules, 1987. Because of her failure to pass Marathi Language Examination, her increments were required to be withheld until she passes the examination or is exempted from passing the same. However, increments were released. The Applicant was aware of the same, but she continued to avail the increments. It was noticed after retirement, and therefore, the recovery of Rs.8,55,625/- is sought towards the excess payment on account of increments wrongly paid to her from December, 1989. The Respondents thus sought to justify the impugned order and prayed to dismiss the O.A.

4. Shri C.R. Sadashivan, learned Advocate for the Applicant urged that, in view of decision of Hon'ble Supreme Court in **Rafiq Masih's** case (cited supra), the recovery after retirement of the employee is impermissible and the issue is squarely covered by the parameters laid down by Hon'ble Apex Court in the Judgment. He further submits that after retirement, it would be very harsh and iniquitous to recover such huge amount from the retiral benefits of the Applicant who is physically challenged.

5. Per contra, Ms. S.P. Manchekar, learned Chief Presenting Officer sought to contend that the Applicant was required to pass Marathi Language Examination within three chances, but she failed to do so. As she failed to pass Marathi Language Examination, her increments were required to be withheld, but the same was availed by

Mr. Manoj

the Applicant knowingly that she did not pass Marathi Language Examination, and therefore, not entitled to the same. As such, according to learned CPO, the Applicant herself was at fault, and therefore, the Judgment in **Rafiq Masih's** case will not apply.

6. Undisputedly, the Applicant retired as Group 'C' employee. She is spinster and physically challenged. It was also equally true that in terms of Rule No.5 of Marathi Language Examination Rules, 1987, the Applicant was required to pass Marathi Language Examination within three chances and failing to which, the increments were required to be withheld until she passes the examination or exempted from passing the examination. There is no denying that the Applicant failed to clear the Marathi Language Examination, but it is the Department who granted increments instead of withholding the same. Now, the question is whether in such situation, the recovery of excess payment paid to the Applicant from December, 1989 till retirement is permissible in law.

7. It is no more in *res-integra* that the recovery of excess payment made to the employee during the tenure of his service is not permissible after retirement. The Hon'ble Supreme Court held that, it would be iniquitous and arbitrary for employer to recover wages wrongly paid to the employees where no fraud can be attributed to the employee and the payment is made mistakenly by the Department. After considering its various decisions, in Para No.12 of the Judgment, the Hon'ble Supreme Court held as follows :-

"12. It is not possible to postulate all situations 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."*

8. Admittedly, the Applicant retired as Group 'C' employee and the recovery is sought after retirement. Besides, the said excess payment has been made for a period in excess of five years before the order of recovery is issued. This being the position, the Applicant's case squarely fall within Clauses (i), (ii) and (iii) of Para No.12 of the Judgment of Hon'ble Supreme Court.

9. True, in terms of Marathi Language Examination Rules, 1987, the Applicant was not entitled for increments and Department ought to have withheld the increments. However, it is the Department who failed to take timely action for withholding the increments and released increments in favour of Applicant from 1989. In other words, it was the mistake of the Department to release increments and no fraud can be attributed to the Applicant. No doubt, the Applicant herself did not inform the Department that because of non-passing of examination, she is not entitled to increments and she appears remained silent. However, the silence of the Applicant itself would not exonerate the Department from its obligations and failure to take timely action of withholding the increments. As such, it was the negligence of the Department and mistakenly, increments were

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released from 1989. In such situation, in my considered opinion, it would be very harsh, iniquitous and arbitrary to recover such a huge amount from retiral benefits. It would be almost impermissible for an employee to bear a financial burden of a payment received wrongfully for a long span of time. Needless to mention that the Government employee is primarily dependent on his wages and pension. If the deduction is made from pension, it would be very difficult for such employee to provide for the needs of survival. It is nowhere the case of the Respondents that because of non-passing of Marathi Examination, the Applicant was not able to discharge the duties properly or there was any deficiency in service rendered by her. Indeed, during the course of service, she was promoted as a Senior Clerk and later as Senior Assistant. As such, there are lapses on the part of Department itself, and therefore, after retirement, it will be very harsh and unjust to recover excess payment made towards increments.

10. As stated above, the Hon'ble Supreme Court had carved out few situations ([i] to [v]) wherein recovery would be impermissible in law. Here, it would be material to note that, as per Clause (v), in any other case which is not covered by Clause (i) to (iv), if in the opinion of the Court, the 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, then recovery is impermissible. In the present case, the excess payment has been made because of release of increments from 1989 and at no point of time, the Department raised any objection. It is the Department which mistakenly went on releasing the increments. It is only after retirement, mistake is realized and recovery is sought. The Applicant is physically disabled spinster and except pension, she has no other source of livelihood. Therefore, in my considered opinion, the present case also falls within the parameters of Clause (v) of Para No.12 of the Judgment of Hon'ble Supreme Court and recovery is impermissible.

11. The totality of aforesaid discussion leads me to sum-up that the impugned order is not sustainable in law in the teeth of Judgment of Hon'ble Supreme Court in **Rafiq Masih's** case and O.A. deserves to be allowed. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The impugned order dated 12.06.2017 is quashed and set aside.
- (C) The Respondents are directed to release retiral benefits of the Applicant, as per her entitlement within two months from today.
- (D) No order as to costs.

Sd/-

(A.P. KURHEKAR)
Member-J

Mumbai
Date : 19.11.2019
Dictation taken by :
S.K. Wamanse.

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