IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NO.820 OF 2016

DISTRICT : NASHIK

Shri Dilip M. Diwane.)
Age : 58 Yrs, Worked as Refrigeration)
Operator in the Office of the Regional)
Dairy Development Officer, Nashik,)
Government Milk Scheme, Trymbak Road,)
Nashik and residing at Flat No.8, Satyam-)
Park, Tidke Nagar, Untwadi, Nashik – 9.)**...Applicant**

Versus

1. The Accounts Officer.)
Pay Verification Unit, Nashik in the)
Office of Joint Director of Accounts)
& Treasuries, Nashik.)

2. The Regional Dairy Development)
Officer, Nashik, Govt. Milk Scheme,)
Trymbak Road, Nashik.)

3. The General Manager.)
Govt. Milk Scheme, Ahmednagar,)
Having Office at Industrial Estate,)
Plot No.110/B-2, Ahmednagar – 1.)

4. The State of Maharashtra.)
Through Principal Secretary,)

(Dairy Development), Animal)
Husbandry, Dairy Development &)
Fisheries Department, Mantralaya,)
Mumbai - 400 032.)...**Respondents**

Mr. A.V. Bandiwadekar, Advocate for Applicant.

Ms. S.T. Suryawanshi, Presenting Officer for Respondents.

PER : R.B. MALIK (MEMBER-JUDICIAL)

DATE : 13.06.2017

JUDGMENT

1. This Original Application (OA) calls into question the order dated 30.1.2014 (Exh. 'B', Page 24 of the Paper Book (PB)) whereby recovery to the extent of Rs.11,21,569/- was claimed from the Applicant by the Respondent No.3 – General Manager, Government Milk Scheme for the alleged overpayment on account of mistaken grant of Time Bound Promotion under the G.A.D. GR dated 8th June, 1995 (1995 GR) by the order dated 25.2.2010 w.e.f.1/10/1994.

2. I have perused the record and proceedings and heard Mr. A.B. Bandiwadekar, the leaned Advocate for the Applicant and Ms. S. Suryawanshi, the learned Presenting Officer for the Respondents.

3. The 1st Respondent is the Accounts Officer, Pay Verification Unit, Nashik in the office of Joint Director of Accounts and Treasuries there at Nashik. The 2nd Respondent is the Regional Dairy Development Officer, Nashik. The 3rd Respondent as already mentioned above is the General Manager, Government Milk Scheme, Ahmednagar and the 4th Respondent is the State of Maharashtra in Animal Husbandry, Dairy Development and Fisheries Department.

4. It will be appropriate in my view to read at the outset the 1995 GR, a copy of which is at Exh. 'F' (Page 29 of the PB). It is dated 8th June, 1995. The preface points out that, in so far as the Group 'C' and Group 'D' employees of the State Government were concerned, they were getting stagnated for want of promotional avenues, and therefore, it was decided to give them the benefit of what can be described as "12 years service" whereafter they would be entitled thereunder to pecuniary benefits. Under the said GR, after 12 years of regular service, the benefit of immediately higher post would be given and certain details have been mentioned therein in Clause 2. The said Scheme came into effect from 1.10.1994. It was necessary thereunder, to have the benefit of the said Scheme for the employee, to be eligible for promotion on

the basis *inter-alia* of performance, seniority, eligibility, education qualification and departmental examination, etc. Those who came to be appointed by direct recruitment or by promotion would be entitled to the benefit of the said Scheme after 12 years of regular service. Those that got two promotions or two or more promotions would not be entitled to the benefit thereof. The clause (य) needs to be reproduced.

> "(य) या योजनेअंतर्गत पदोन्नती मिळाली तरी कर्मचा-याचे नाव कनिष्ठ (मुळ) संवर्गाच्या जेष्ठता सुचीत राहील आणि सेवाप्रवेश नियमातील तरतुदीनुसार उपलबध रिक्ततेत योग्यवेळी नियमीत पदोन्नतीसाठी (Functional Promotion) त्याचा विचार करण्यात येईल. नियमित पदोन्नतीस अपात्र ठरलेल्या कर्मचा-यास या योजनेचा लाभ मिळणार नाही. त्याचप्रमाणे नियमित पदोन्नती नाकारलेल्या कर्मचा-यास देखील या पदोन्नतीचा लाभ मिळू शकणार नाही. याआधीच त्यांना (In-Situ) पदोन्नती दिली असल्यास मुळच्या पदावर पदावनत करण्यात येईल. तशा आशयाचे बंधपत्र कर्मचा-यांना लिहून दयावे लागेल. मात्र देण्यात आलेल्या आर्थिक लाभांची वसुली केली जाणार नाही.''

5. It is, therefore, very clear that an employee who was found unfit for promotion or who refused the regular promotion, would not be entitled to the benediction of the said Scheme and such an undertaking would have to be taken from the said employee.

6. Vide Exh. 'D' (Page 27 of the PB) dated 21st May, 1992, the Applicant who was appointed on 5.7.1978 to the post of Refrigeration Operator was promoted on temporary basis (तात्पुरत्या स्वरूपात) to the post of Chargeman (Class III) in the given pay scale.

7. However, by a communication of 27.12.1992, the Applicant made a request for reversion to his original post because post promotion, he was posted at Chandwad which did not in the manner of speaking suit the health of his family members. By the order dated 25th June, 1993, a copy of which is at Exh. 'E' (Page 28 of the PB), the 2nd Respondent reverted the Applicant to his original post.

8. The above discussion would make it quite clear that, much before the 1995 GR came into effect from 1.10.1994, the Applicant had been promoted and then reverted already and post reversion, he was working in his original post when the said GR came into effect.

9. Vide Exh. 'G' (Page 31 of the PB), by an order of 25th February, 2010, the Applicant was given Time Bound Promotion from 1.10.1994. It appears quite clearly from the various documents on record that the Applicant was to retire on 31st December, 2015. The Pay Verification Unit

took objection to the grant of the Time Bound Promotion to the Applicant because he had refused promotion. There are documents to that effect which are indisputable, and therefore, on the basis thereof, by the impugned order dated 25th March, 2015, the Applicant was directed to suffer recovery of Rs.11,21,569/-. It was provided in the said order that an amount of Rs.10,000/- p.m. would be deducted for 10 months and the balance of Rs.10,21,569/- would be recovered from his retiral benefits in a lump sum at once. This is the order that is under challenge before me.

10. It is absolutely clear from the record that, there is absolutely no allegation against the Applicant of any questionable move or conduct like fraud, etc. in the matter of taking the benefit of the Time Bound Promotion. Therefore, one can safely presume that it was as case of official mistake at the most.

11. The Applicant held Group 'C' post.

12. The issue, therefore, is as to whether in the facts and circumstances of the case, the order of recovery is sustainable. It is again an indisputable factual position that, on 9.9.2011, the Applicant executed an undertaking

whereby he undertook to refund to the Government any amount in excess received by him as a result of incorrect fixation of pay or any excess payment detected in the light of discrepancies noticed subsequently. It needs, however, to be noted that, below this undertaking, there is no acceptance as such officially made by any authority.

13. The above discussion must have made it quite clear that the issue is only as to whether in the facts and circumstances of the case, the order of recovery made against the Applicant could be sustained.

14. Mr. A.V. Bandiwadekar, the learned Advocate for the Applicant relied upon **State of Punjab and others Vs. Rafiq Masih (White Washer) and others (2015) 2 SCC (L & S) 33 = (2015) 4 SCC 334**. That particular matter is an authority on the validity of a State action for recovery of the amount paid in excess to the employee without any fault of his. Perusal of **Rafiq Masih** (supra) would make it quite clear that, therein the employees were given monetary benefits which were in excess of their entitlement and that was upon a mistake committed by the authorities. It was clearly found that the employees themselves were not guilty in any manner whatsoever. It was held by Their Lordships that, merely on account of the fact that the relief

of those monetary benefits was based on mistaken belief will not necessarily be a complete answer to the question involved (See Para 4). Their Lordships were, however, then pleased to lay down the parameters of fact situations wherein the employees who were beneficiaries of wrongful monetary gains may not be compelled to refund the same. In Para 8, Their Lordships observed that, between the two parties, if a determination was rendered in favour of the party, which was weaker of the two, without any serious detriment to the other which was truly a welfare state, the issue resolved will be in consonance with the concept of justice. Para 8 in fact needs to be fully reproduced.

> "**8.** As between two parties, if a determination was 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 will 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 employee concerned. If the effect of the recovery from the employee concerned 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 doctrine of equality with all its dynamics was then discussed by Their Lordships. Thereafter, the reference was made to certain earlier Judgments and in Para 12, it was observed 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."

16. The Applicant is as already mentioned above, a Class III employee (Group 'C'). He also fell within Clause II of the above quote from **Rafiq Masih**, as the events have proved and he has retired on 31st December, 2015 and in as much as in the present set of facts, the Applicant cannot be held guilty of any sharp practice and he did not suppress anything from his employer and he is in the evening of his life, it would be in my view, iniquitous and harsh to such an extent as would out weigh the equitable balance of the right to recovery of the Respondents, and therefore, Clause V in **Rafiq Masih** (supra) gets attracted.

17. Ms. Suryawanshi, the learned Presenting Officer (PO), however, invited reference to an unreported Judgment of the Hon'ble Supreme Court in **Civil Appeal No.3500/2006 (High Court of Punjab & Haryana and others Vs. Jagdev Singh, dated 29th July, 2016)**. That was a case of a Civil Judge who was appointed in the year 1987. In 2001, the pay scales of that cadre came to be allowed for the said party. The recommendation of 1st National Judicial Pay Commission (Shetty Commission) came to be accepted by the Apex Court and consequent steps were taken by the Government of Haryana. The revisions of pay scales took place w.e.f. 1.1.1996 and it was ultimately found that, excess payment was made to the Respondents of the Hon'ble Supreme Court. In the

meantime, the said Civil Judge had retired and the argument was that post retirement, the recovery be not made. In that matter, an undertaking was given by the said party regarding refund of any excess amount, if paid. In Para 10, Their Lordships referred to **Rafiq Masih's** case and reproduced what I have reproduced hereinabove. In Para 11 of **Jagdev Singh** (supra), Their Lordships observed that Clause II of the above extract, would not apply to a situation where an undertaking was given and that Clause was for recovery from a retired employee or employees, who were due to retire within one year of the order of recovery because they had given an undertaking. It is, however, quite clear that as far as the other aspects of **Rafiq Masih** is concerned, including more particularly the fact that the mandate of **Rafiq Masi**h would apply in case of Group 'C' and Group 'D' employees would still remained in-tact. The Civil Judge who was a party before the Hon'ble Supreme Court in **Jagdev Singh** (supra) was obviously a Super Class-I Officer. That common knowledge could also be invoked.

18. In so far as Group 'C' employees are concerned, in **Sushil Kumar Yadunath Jha Vs. Union of India & Anr. : AIR 1986 SC 1636** needs to be relied upon. That was relied upon by this Tribunal presided over by the then Vice-Chairman in **OA 697/2006 (Ms. Narmada G. Ghule**

Vs. The State of Maharashtra & 2 Ors., dated 11.06.2007). In Para 9, **Sushil Kumar Jha** was referred to, which held that, in so far as the undertakings are concerned in relation to the lowly placed employees, they are in no position to bargain with their employers and that aspect of the matter has got to be borne in mind.

19. In **OA 342/2016 (Shri Prakash L. Hotkar Vs. The Principal, Industrial Training Institute Mumbai and 4 others, dated 9.3.2016)**, I had an occasion to determine the same issue or at least more or less the same issue in the course of the discussion, I referred to Rules 26, 27 and 131 of the Maharashtra Civil Services (Pension) Rules, 1982. Rule 131 was reproduced in Para 9 thereof which I can usefully reproduced here as well.

> "**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.
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> "**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."

20. I held that, in the facts and circumstances, such as they were, recovery could not be made, but in Para 12 of the said Judgment, I proceeded on the basis that the recovery could still be asked for and I relied upon **Rafiq Masih** (supra) and held that the Establishment would not be in a position to sustain its move to make the recovery.

21. It is, therefore, very clear that in the facts and circumstances of the case, the order of recovery is unsustainable. However, granting all latitude to the Respondents, the issue is as to whether they can claim the

recovery of the entire amount right from 1994 till actual payment. By way of decided cases, there is an authority to hold that they cannot do so for a period in excess of three years in accordance with the provisions of the Limitation Act. In support of this proposition, my attention was invited by Mr. Bandiwadekar to **OA 1418/2009 (Shri Shivdas L. Naik Vs. The State of Maharashtra and Anr., dated 24.12.2010)** and **OA 608/1999 (Smt. Vansashri A. Parchure Vs. The State of Maharashtra & 2 Ors., dated 31.1.2000)**. Therefore, examine it from any angle, I do not think, the order of recovery can be sustained.

22. The learned PO lastly relied upon **District Collector & Chairman Vs. M. Tripura Sundari Devi : 1990 SCR (2) 559 = 1990 SCC (3) 655**. That was a matter where the issue arose in the context of appointment to a certain post mistakenly. The present facts, as already discussed above are entirely different.

23. The upshot, therefore, is that, this OA must and in fact succeeds. The order herein impugned stands 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 it shall carry an interest of Rs.12% p.a. from the date of recovery till repayment. The Pension of the

Applicant be reworked out, if need be and the Respondents shall in that matter proceed on the basis that the impugned order never existed and do everything necessary within the above referred period. The Original Application is allowed in these terms with no order as to costs.

Sd/-

(R.B. Malik)
Member-J
13.06.2017

13.6.17

Mumbai
Date : 13.06.2017
Dictation taken by :
S.K. Wamanse.
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