

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH**

ORIGINAL APPLICATION NO 876 OF 2014

DISTRICT : PUNE

Dr Suman W/o Balkrishna Saste,)
Occ: Lecturer/Assistant Professor,)
Presently working under Department)
of Bio-chemistry,)
B.J Medical College, Pune,)
Dist-Pune.)...**Applicant**

Versus

1. The State of Maharashtra)
Through Secretary,)
Medical Education & Drugs)
Department, Mantralya,)
Mumbai 400 032.)
Copy to be served on C.P.O,)
M.A.T, Mumbai.)

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2. The Director of Medical)
Education & Research,)
4th floor, St.Georges Hospital)
Compound, Near C.S.T,)
Mumbai.)...**Respondents**

Shri J.S Deshmukh, learned advocate for the Applicant.

Shri K.B. Bhise, learned Presenting Officer for the Respondents.

CORAM : Shri Rajiv Agarwai (Vice-Chairman)

DATE : 11.03.2016

ORDER

1. Heard Shri J.S Deshmukh, learned advocate for the Applicant and Shri K.B. Bhise, learned Presenting Officer for the Respondents.

2. This Original Application has been filed by the Applicant challenging order dated 13.9.2012 issued by the Respondent no. 2 and order dated 3.11.2012 issued by the Respondent no. 3 ordering recovery of Rs. 1,40,040/- for excess payment made to her for the period from 24.9.1988 to 13.10.2001. The Applicant is seeking Selection Grade with effect from 14.10.2009 and is also seeking continuity in service from 24.9.1980 and

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pensionary benefits. The Applicant is also seeking voluntary retirement 3 months after expiry of notice of voluntary retirement was given by her on 3.8.2014.


3. Learned Counsel for the Applicant argued that the Applicant was appointed as Lecturer in Bio-Chemistry on the recommendation of Maharashtra Public Service Commissioner (M.P.S.C) by G.R dated 14.10.1993. By order dated 13.9.2012, the Applicant was granted Selection Grade w.e.f 14.10.2009 after completion of 16 years of service after selection by M.P.S.C. The Applicant was granted ~~higher~~ ^{Senior} pay scale from 24.9.1988, after completion of 8 years of service as Lecturer, though her appointment during that period was without recommendation of M.P.S.C. This was as per G.F dated 26.2.1991, which provided for granting a senior scale of Rs. 3000-5000 to the Lecturers working in the pay scale of Rs. 700-1600 after completion of 8 years of regular service. After completion of 16 years of regular service, Selection Grade is made applicable. The Applicant was continuously in service from 1980 and accordingly given senior scale from 24.9.1988. Learned Counsel for the Applicant stated that by order dated 18.7.2009, senior scale granted to her was withdrawn and excess payment of Rs. 99,168/- was recovered from her. The Applicant is now granted Selection Grade from 14.10.2009 after completion of 16 years of service, after selection by M.P.S.C. The benefit of Selection Grade is

not yet paid to the Applicant and she is asked to refund the excess payment she had received on account of grant of senior scale from 24.9.1988 till 13.10.2001, as she is held eligible to get senior scale only from 14.10.2001, i.e. 3 years after her appointment by M.P.S.C. Learned Counsel for the Applicant argued that the Applicant is eligible to be considered in service from 24.9.1980 and on that basis no recovery can be ordered. Even if it is held that the Applicant was not eligible for senior scale from 24.9.1988, no recovery can now be ordered as per the judgment of Hon. Supreme Court in the case of **STATE OF PUNJAB & ORS Vs. RAFIQ MASIH etc** in **CIVIL APPEAL NO 11527/2014**. Learned Counsel for the Applicant argued that the Applicant is entitled to count her service from 14.10.1980 for the purpose of pension. He cited the judgment of Hon'ble Bombay High Court, (Aurangabad Bench) in W.P no 2074/2010 in support of his claim.

4. Learned Presenting Officer (P.O) argued that the Applicant was appointed as Lecturer w.e.f 14.10.1980 without recommendations of the Maharashtra Public Service Commission. She was a 'back door' entrant, whose appointment was not in accordance with the recruitment rules. Constitution Bench of Hon'ble Supreme Court in the case of **SECRETARY, STATE OF KARNATAKA Vs. UMADEVI (2006) 4 SCC 1**, has held that unless the appointment is in terms of the relevant

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rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. Learned Presenting Officer argued that such an illegal appointment cannot be counted for treating such 'back door' service as qualifying service for pensionary purpose or for granting senior grade. Senior Grade can be granted on completion of eight years of regular service. Learned Presenting Officer argued that the Applicant's service pursuant to her appointment on 18.9.1980 was not regular service. She was appointed on the recommendations of M.P.S.C only on 14.10.1993. She was clearly not eligible to be granted senior scale after 8 years of irregular service. G.R dated 26.2.1991 makes it very clear that Lecturer in the pay scale of Rs. 700-1600 is entitled to be give senior scale of Rs. 3000-5000 on completion of 8 years of service after regular appointment. Learned Presenting Officer argued that Rule 33 of the Maharashtra Civil Services (Pension) Rules, 1982, empowers the Government to interpret these Rules. Government has issued Circular dated 3.11.2008, interpreting Rule 33 of the Maharashtra Civil Services (Pension) Rules, 1982. It is clarified that the temporary or ad hoc service before regular appointment can be counted only if such an appointment was also regular. Learned Presenting Officer argued that ad hoc / temporary appointment without following recruitment rules cannot be allowed as qualifying service in the light of the interpretation of Rule 33 of the M.C.S (Pension)



Rules, 1982 and in view of the decision of the Hon'ble Supreme Court in UMADEVI's case (supra) that illegally appointed persons do not get any rights, whatsoever. Hon'ble Supreme Court has also held in paragraph 54 of the judgment that judgments which run counter to the principles settled by it will stand denuded of their status as precedents. Learned Presenting Officer argued that on this basis, the Applicant is not eligible to seek regularization of his service, by quoting other judgments. Counting service for pensionary benefits and also for getting senior scale/selection grade will for all practical purpose mean regularization of services of the Applicant from 14.9.1980, which is impermissible in view of the judgment of the Constitution Bench of the Hon'ble Supreme Court in UMADEVI's case (supra).

5. Learned Presenting Officer argued that the Applicant is occupying a Class 'A' post, and getting a high salary. If recovery of Rs. 1,40,000/- is made from her, it is not going to cause any hardship to her. He argued that if the judgment of Hon'ble Supreme Court in RAGIQ MASIH's case (supra) is read as a whole, it is clear that reliefs given by Hon. Supreme Court are based on equity and are applicable only to Group 'C' & group 'D' posts. This judgment is by a bench of two Judges. It has not overturned other judgments of Hon'ble Supreme Court by coordinate benches. He argued that in the case of **CHANDI PRASAD UNİYAL & ORS Vs. STATE OF**

UTTRAKHAND & ORS, (2012) 8 SCC 417, it was held that the excess payment made due to wrong/irregular pay fixation can be recovered. Learned Presenting Officer argued that there is a fit case, where the recovery should be allowed, as it will not cause any undue hardships to the Applicant.

6. Learned Presenting Officer argued that the Applicant had continued to work in her post, despite giving notice of voluntary retirement. By her conduct, she has acquiesced in continuing in service and the notice of voluntary retirement has become infructuous. In any case, the reasons for rejecting her notice are legal and proper.

7. It is seen that the Applicant is seeking following reliefs viz:-

- (i) Her service from 24.9.19080 may be counted for continuity, pensionary and other benefits and she has sought quashing of order dated 26.3.2014 in the relief clauses (e) and (f). Accordingly she is seeking Selection Grade from 24.9.1996 (clause g).
- (ii) She has challenged recovery of excess payment made to her between 24.9.1988 to 13.10.2001 amounting to Rs. 1,40,040/-.



- (iii) She is seeking voluntary retirement on expiry of 3 months after the notice dated 3.8.2014, which was given by her.

8. The Applicant was appointed as Biochemist on purely temporary basis by the Dean, B.J Medical College, Pune on 19.8.1977. She was then appointed as Lecturer for some time in 1979 and again appointed as Biochemist on 22.8.1979. These facts are narrated in paragraph 5 of the affidavit in reply of the Respondents dated 24.11.2014. She was 'promoted' as Lecturer by order dated 18.9.1980 and joined on 24.9.1980. It is, however, very clear that her appointment as Biochemist or Lecturer in Biochemistry was not as per rules. The post of Lecturers (now called Assistant Professor) in Government Medical Colleges are to be filled on the basis of open competition conducted by the Maharashtra Public Service Commission. The Applicant's appointment as Lecturer w.e.f 24.9.1980 was not on the recommendations of M.P.S.C nor was it based on open competition. The Applicant has challenged the communication dated 26.3.2014, which according to her deny continuity of service from date of her initial joining on the post of Lecturer. This is clear from the relief sought in clause (e). The communication dated 26.3.2014 is at Annexure 'C' (page 39 of the Paper Book). The subject is "आयोग अपुरस्कृत सेवा सलग धरून त्याबाबतचे फायदे मिळण्याबाबत.". It is clear that the Applicant was seeking continuity of

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service before she was appointed as a Lecturer on 14.10.1993 on the recommendation of M.P.S.C. In effect such continuation in service from 24.9.1980 would in effect mean regularizing her service from 24.9.1980. Learned Presenting Officer has relied on the judgment of Hon'ble Supreme Court in UMADEVI's case (supra) stating that such illegal service cannot be regularized. It is seen that Hon'ble Supreme Court has observed in the aforesaid judgments as follows:-

“Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. (emphasis supplied).

It is further observed by Hon'ble Supreme Court that:-

“When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases in consultation with the Public Service Commission.”

It is quite clear that the Applicant, who was not selected in 1980 by M.P.S.C following proper procedure of selection, cannot seek regularization of her service before her regular appointment w.e.f 14.10.1993. The Applicant's request seeking continuation of service from 24.9.1980 is clearly untenable in the light of the judgment of Hon'ble Supreme Court in Umadevi's case.

9. The Applicant is claiming that for the purpose of pensionary benefits her ad hoc service before she was regularly selected by M.P.S.C may be treated as qualifying service. She has cited judgment of Hon'ble Bombay High Court (Aurangabad Bench) in W.P no 2074 of 2010. It is a fact that Rule 3 of Maharashtra Civil



Services (Pension) Rules, 1982 gives powers to interpret rules by the Government. Rule 3 reads:-

“3. Right to interpret:

Government reserve to themselves the right of interpreting these rules.”

State Government has issued circular dated 3.11.2008, interpreting various pension rules. Interpreting Rule 33, it is mentioned in clarification at 3(अ) that:-


“अ) शासकीय कर्मचाऱ्याची पूर्वीची नियुक्ती नियमित स्वरूपाची असावी, म्हणजेच त्या शासकीय कर्मचाऱ्याची संबंधित पदासाठी विहित करणाऱ्या आलेल्या नियुक्ती नियमांच्या तरतूदीची (उदा. वयोमर्यादा, शैक्षणिक अर्हता, महाराष्ट्र लोकसेवा आयोगामार्फत/निदेश मंडळामार्फत नियुक्ती इत्यादीबाबीची) पूर्तता करून नियुक्ती झालेली असावी.”

It is usual practice in the Government that even a person regularly appointed to any post is appointed on temporary basis. Such a person can seek appointment elsewhere and in that situation, his earlier service can be counted for pensionary benefits. The Applicant's earlier services were clearly not regular. It cannot therefore be counted for pensionary purpose. Hon'ble Supreme Court has held in UMADEVI's case (supra) that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same could not confer any right to the appointee. The Applicant obviously cannot get the right to count her

Irregular service for pensionary benefits. Hon'ble Supreme Court has also held in paragraph 54 of the judgment in UMADEVI's case (supra) that decision of various courts which run counter to the principles settled by it in UMADEVI's case (supra) will stand denuded of their status as precedents. The case of the Applicant is fully covered by the judgment of Hon'ble Supreme Court in UMADEVI's case and she is not entitled to any benefit of her irregular service, including pensionary benefits. The prayer of the Applicant to quash and set aside orders dated 26.3.2014 has to be rejected. The reliefs sought in prayer clauses (e), (f) and (g) are also rejected. As the Applicant was not in regular service till 14.10.1993, the question of granting senior scale from 24.10.1988 to her in terms of G.R dated 26.2.1991 does not arise. Para 1 of the aforesaid G.R reads:-

“(1) Every Lecturer in the existing scale of 700-1600 will be placed in senior scale of Rs. 3000-5000 if he/she has
(a) completed 8 years of service after regular appointment.”

It is quite clear that appointment (promotion) by order dated 18.9.1980 was not a regular appointment for the Applicant. She could not have been given senior scale with effect from 24.10.1988. The Applicant was appointed on regular basis by G.R dated 14.10.1993 and



would be eligible to get senior scale only w.e.f 14.10.2001. While granting Selection Grade to the Applicant on completion of 16 years of regular service from 14.10.2009, the Applicant claims that the Respondents have asked the Applicant to refund the excess payment wrongly made to her during the period 24.10.1998 to 13.10.2001. In relief clause (b) & (c) the Applicant is challenging recovery of this excess payment, which according to her comes to Rs. 1,40,040/-. The Applicant has cited judgment of Hon'ble Supreme Court in the case of RAFIQ MASIH (supra). In para 7 of the judgment, Hon'ble Supreme Court has observed that:-

“7. Having examined a number of judgments rendered by this court, we are of the view that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with in cases where such recovery would result in a hardship of a nature which would far outweigh the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where it would be iniquitous to recover the payment made.”

10. Learned Presenting Officer argued that the recovery of excess payment is not barred in all cases and in cases where no hardship is caused, recovery could be




effected. Discussing Syed Abdul Qadir Vs. State of Bihar (2009) 3 SCC 475, Hon'ble Supreme Court has observed in para 11 of the judgment that:-

“The logic of the action in the instant situation is iniquitous or arbitrary or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent that a Government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family.”

Learned Presenting Officer argued that reference in Syed Abdul Qadir's case as well as in the case of Shyam Babu Verma, Col. B.J Akkara, all are with reference to employees in the lower rungs of service. Learned Presenting Officer argued that in the present case, the Applicant is working as Group 'A' officer, and recovery of Rs. 1,40,040/- from her would not cause any hardship to her.

11. Learned Presenting Officer further argued that the Applicant is not eligible to be granted Selection Grade on completion of 16 years of regular service as she does



not hold the doctorate in the subject of Biochemistry. She was granted Selection Grade by mistake w.e.f 14.10.2009. The said benefit has been withdrawn by order passed in the year 2014. The Selection Grade was granted to the Applicant by order dated 3.11.2012 as mentioned by the Applicant in para 8 of the Original Application. The excess amount paid to the Applicant is now sought to be recovered. Learned Presenting Officer argued that Rs. 1,40,040/- is the amount wrongly paid to her by pay fixation done on 3.11.2012 on grant of Selection Grade to the Applicant w.e.f 14.10.2009. Even as per RAFIQ MASIH's case, the excess payment can be recovered as the period is less than 5 years. The Applicant's claim that this recovery is for the period 1988 to 2001 is not correct. These facts are mentioned in para 7.1, 8.1 and 9 of the affidavit in sur-rejoinder dated 1.10.2015.

12. It is clear that the amount which is sought to be recovered (Rs. 1,40,040/- as per the claim of the Applicant) is due to excess payment made to her on account of pay fixation by order dated 3.11.2012 on grant of Selection Grade to her w.e.f 14.10.2009. The Applicant does not hold Ph.D degree in the relevant subjects, which is required for Assistant Professors, not holding medical degrees, as per the guidelines issued by the Indian Medical Council. The period for which recovery

is sought is less than 5 years from the date of recovery and recovery is permissible even under MASF's case.

13. The Applicant has challenged the decision of the Respondents not to accept her notice of voluntary retirement unless she refunds excess payment. It has been held that she is liable to refund excess payment due to wrong fixation of her pay by granting her Selection Grade from 14.10.2009 in the year 2012. The Applicant had given notice of 3 months dated 3.8.2014. She has, however, continued to work on the post on rejection of her notice of voluntary retirement. Her notice, has therefore, become infructuous. In any case, the Respondents can insist that she refunds excess amount paid to her before her request for voluntary retirement could be considered.

14. Having regard to the aforesaid facts and circumstances of the case, this Original Application is dismissed with no order as to costs.

Sd-

(Rajiv Agarwal)
Vice-Chairman

Place : Mumbai

Date : 11.03.2016

Dictation taken by : A.K. Nair.