

(2017) 03 BOM CK 0028

In the Bombay High Court

Case No : Writ Petition No. 6191 of 2016

Dr. Ravindra s/o Shamrao Darunte

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 10-03-2017

Acts Referred:

Constitution of India, 1950 — Article 16, Article 226
Maharashtra Civil Services (Pension) Rules, 1982 — Rule 134-A

Citation : (2017) 3 AIRBomR 563 : (2017) 3 ALLMR 383

Hon'ble Judges : T.V. Nalawade and Sangitrao S. Patil, JJ.

Bench : Division Bench

Advocate : Mr. Gajanan G. Kadam, Advocate, for the Petitioner; Smt. R.P. Gaur, A.G.P, for the Respondent Nos. 1 to 5; Mr. S.R. Dheple, Advocate, for the Respondent Nos. 6 and 7

Final Decision : Dismissed

Judgement

Sangitrao S. Patil, J .—Rule, returnable forthwith. With the consent of the learned counsel for the contesting parties, heard finally.

2. The learned counsel for the petitioner submits that the petitioner, who was working as a Medical Officer, retired on 31.07.2015. After receiving information from respondent nos. 6 and 7 i.e. Chief Executive Officer and District Health Officer, respectively of Zilla Parishad, Aurangabad, respondent no.3 i.e. the Accountant General (A & E) passed an order dated 12.05.2016 withholding the amount of Rs.6,65,718/from death-cum-retirement gratuity and pension of the petitioner, on the ground that it was liable to be recovered from the petitioner, on account of excess payment made to him due to wrong fixation of his pay. According to the learned counsel for the petitioner, the mistake in fixation of pay of the petitioner was on the part of respondent nos.6 and 7. It was not because of any fraud played or misrepresentation made the petitioner that he got any excess amount. Therefore, relying on the judgments in the cases of Syed Abdul Qadir and Ors. v. State of Bihar and Ors. (2009) 3 SCC 475, Shyam Babu Verma

and Ors. v. Union of India (UOI) and Ors. (1994) 2 SCC 521 and State of Punjab v. Rafiq Masih (2015) 4 SCC 334, as well as the unreported common judgment/order of this Court in Writ Petition No. 7814/2014, Vilas s/o Ganpatrao Mahajan v. State of Maharashtra and others and the conneted Writ Petitions, decided on 02.07.2015 and Writ Petition No.11228/2015, Dr.Nivruti s/o Baliram Kalyan v. The State of Maharashtra and others, decided on 21.12.2015, the learned counsel for the petitioner submits that the order dated 23.12.2015 passed by respondent no.7 and consequential order dated 12.05.2016 passed by respondent no.3 being illegal, may be quashed and set aside and the said respondents may be directed to pay the death cum retirement gratuity of the petitioner, as has already been fixed.

3. Respondent nos. 6 and 7 strongly opposed the petition by filing reply. The learned counsel for respondent nos.6 and 7 submits that the petitioner is not entitled to get benefits of the judgments referred to above. He submits that the petitioner was not a Class III or Class IV employee. At the time of fixation of his pay on 11.01.2010, the petitioner had given an undertaking that any excess payment due to incorrect fixation of pay or any excess payment detected in the light of discrepancy noticed subsequently will be refunded by him to the Government either by adjustment against future payments due to him or otherwise. He, further, pointed out to the consent letter dated 16.02.2016, executed by the petitioner assuring that he would refund the amount of excess payment or allow respondent nos.6 and 7 to recover that amount from his gratuity. The said undertakings have been produced with the reply. The learned counsel referred to Rule 134A of the Maharashtra Civil Services (Pension) Rules, 1982, ("Pension Rules", for short) where under, respondent nos.6 and 7 were empowered to recover the amount of excess payment made to the petitioner because of wrong pay fixation. Relying on the judgment in the case of High Court of Punjab & Haryana & Ors. v. Jagdev Singh Civil Appeal No.3500 of 2006, decided by the Apex Court on 29.07.2016, he submits that the petitioner is liable to refund the amount of excess payment received by him on account of wrong fixation of his pay and therefore, respondent nos.6 and 7 have rightly passed an order for recovery of the above mentioned amount and respondent no.3 also has rightly passed an order for recovery of the said amount from the gratuity and pension of the petitioner. He, therefore, prays that the petition may be dismissed.

4. All the judgments cited by the learned counsel for the petitioner, referred to above, except that of Dr.Nivruti s/o Baliram Kalyan (supra), pertain to either Class III or Class IV employees. Considering the status of those Class III or Class IV employees, it was observed by the Hon''ble Supreme Court that when the excess payment was made because of the mistake on the part of the employer and not as a result of any fault on the part of the employee, and in case such an employee is asked to refund the amount of excess payment, when he is either retired or on the verge of retirement, he would be put to suffer a great hardship. The Hon''ble Supreme Court summerised the following situations, wherein recoveries by the employers are stated to 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 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."

5. The above mentioned situations were considered by the Hon'ble Supreme Court in the case of High Court of Punjab & Haryana v. Jagdev Singh (supra). In that case, the petitioner was appointed as a Civil Judge (Junior Division) on 16.07.1987 and was promoted as an Additional Civil Judge on 28.08.1997. He came to be compulsorily retired and certain amount was required to be recovered towards excess payment made to him. He tried to evade recovery of that amount, by relying on the judgment in the case of State of Punjab v. Rafiq Masih (supra), the Hon'ble Apex Court rejected his claim with the following observations :

"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."

6. In the present case also, the petitioner, who was a Medical Officer, has given an undertaking while opting for the revised pay scale that he would refund the excess amount, if any, in case it is noticed that it was paid to him because of wrong pay fixation. There is nothing in the petition that because of recovery of the excess payment made to him, he would be put to suffer any hardship. It is common knowledge that the Medical Officers, after retirement start private medical practise. The petitioner has not disclosed any impediment in his way in starting private medical practise. The possibility of his earning by private medical practise cannot be ruled out. In fact, it was necessary for the petitioner to make out a specific case in the petition itself by pleading his financial condition and resultant hardship to which he would be subjected in the event of recovery of excess payment made to him. The petition is totally salient on this vital ground, which was one of the considerations before the Hon'ble Supreme Court in the

case of State of Punjab v. Rafiq Masih (supra), for banning recovery of excess payment made to the employees, who are retired or on the verge of retirement.

7. In the case of Class III or Class IV employees, considering their meager income, it can be presumed that they would be put to suffer a great hardship, in case they are compelled to refund the amount of excess payment, which was made to them because of wrong pay fixation by the employer and without there being any fault on their part. Such presumption cannot be raised in respect of the present petitioner who was not a Class III or Class IV employee and who has the potentials of earning by practicing medicine after retirement.

8. Rule 134A of the Pension Rules, 1982, reads as under :"

134 A Recovery and adjustment of excess amount paid - If in the case of a Government servant, who has retired or has been allowed to retire,

(i) it is found that due to any reason whatsoever an excess amount has been paid to him during the period of his service including service rendered upon reemployment after retirement, or

(ii) any amount is found to be payable by the pensioner during such period and which has not been paid by or recovered from him, or

(iii) it is found the amount of licence fee and any other dues pertaining to Government accommodation is recoverable from him for the occupation of the Government accommodation after the retirement.

then the excess amount so paid, the amount so found payable or recoverable shall be recovered from the amount of pension sanctioned to him.

Provided that, the Government shall give a reasonable opportunity to the pensioner to show cause as to why the amount due should not be recovered from him:

Provided further that, the amount found due may be recovered from the pensioner in instalment so that the amount of pension is not reduced below the minimum fixed by Government.)

The above mentioned Rule also empowers to the Government to recover the excess amount paid to the Government servant, because of wrong pay fixation or otherwise. The petitioner has totally failed to make out a case for getting exemption from applicability of this Rule to him.

9. In the case of Dr.Nivruti s/o Baliram Kalyan (supra), there was no undertaking given by the petitioner for refund of the excess payment. Rule 134A of the Pension Rules was not referred to in that case. Consequently, the said case would not be applicable to the facts of the present case. In view of the distinguishing facts of the present case, the other judgments cited by the learned counsel for the petitioner would be of no help to the petitioner to restrain respondent nos.3, 6 and 7 from making recovery of the amount of excess payment on account of

wrong pay fixation.

10. In the above circumstances, we are not inclined to grant the reliefs claimed by the petitioner against the impugned order dated 23.12.2015 passed by respondent no.7 and the order dated 12.05.2016 passed by respondent no.3 for recovery of excess payment made to the petitioner. The writ petition is devoid of merits and is liable to be dismissed. The Writ Petition is accordingly dismissed. Rule is discharged. No costs.