
(2015) 07 BOM CK 0046
In the Bombay High Court
Case No : Writ Petition No. 9932 of 2014

Uttam

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 07-07-2015

Acts Referred:

Citation : (2015) 07 BOM CK 0046

Hon'ble Judges : S.V. Gangapurwala, J;V.K. Jadhav, J

Bench : Division Bench

Advocate : S.S. Thombre, for the Appellant; S.D. Shelke, A.G.P., Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

S.V. Gangapurwala, J—Rule. Rule made returnable forthwith. With the consent of parties, taken up for final hearing.

2. Mr. Thombre, the learned counsel for the petitioner states that, the petitioner was appointed as junior clerk in the year 1992. The petitioner has passed Lower Standard Departmental Examination and Higher Standard Departmental Examination. After the period of twelve years of continuous service the petitioner was given benefit of assured progress scheme vide order dated 16.05.2006. The said benefit was granted with effect from 01.10.2004.

3. The learned counsel further submits that, when the promotional post became available, the petitioner was called for interview. The petitioner appeared before the Advisory Committee, as the petitioner was eligible for promotion. However, on 21.10.2011 the letter is issued to the petitioner stating that the petitioner is not eligible for promotion and as such junior to the petitioner was given promotion. It was further directed to recover the amount paid by virtue of higher pay scale which was given to the petitioner from 18.01.2010. The pay scale of the post of senior clerk was withdrawn and was directed to be recovered from 07.06.2010. The learned counsel submits that, the petitioner has filed

representations. The learned counsel submits that, the action of the respondent No. 3 in promoting juniors to the petitioner and not considering the petitioner for promotion is erroneous. There are no adverse reports against the petitioner. Except one Departmental Enquiry No. 17 of 2010, there is no other factor which could come in the way of the petitioner in not getting promotional post. When the petitioner is already considered for the payment of in service assured progress scheme, the petitioner is eligible to be promoted. According to the learned counsel, the confidential reports are also not properly appreciated. They are to be considered for last five years. The learned counsel relies on the judgment dated 18.12.2014 of the Apex Court in a case of State of Punjab and others Vs. Rafiq Masih (White Washer) etc. in Civil Appeal No. 11527 of 2014.

4. Mr. Shinde, the learned counsel for respondent Nos. 2 and 3 submits that, at the relevant time the promotional posts were not available and after completion of twelve years, the petitioner was granted benefit of in service assured progress scheme as per the policy. However, when post became available, the petitioner was not found eligible to be promoted to the said promotional post. As such the pay scale granted of the promotional post is rightly withdrawn. The learned counsel submits that, it is not withdrawn since 01.10.2004, it is only when the petitioner was considered not fit to be promoted and from that date only said promotional pay scale's recovery is made. According to the learned counsel the Committee has considered all relevant factors and thereafter has arrived at proper decision. No illegality has been committed.

5. We have considered submissions canvassed by the learned counsel for respective parties.

6. This Court would not sit in appeal over the decision taken by the advisory committee. It would only consider whether the decision making procedure is followed or not. The petitioner was considered for the promotional post when the post became available. The Committee considered confidential report, the Departmental Enquiry and all other relevant factors and held that the petitioner is not eligible to be promoted. We do not find any illegality in the same.

7. It is stated that, the petitioner is subsequently promoted. We are not concerned with the said aspect in the present writ petition.

8. The Apex Court in a case of State of Punjab and others Vs. Rafiq Masih (White Washer) etc. referred supra has laid down following principles, wherein the recovery is held 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."

It is not disputed that, the petitioner is a Class III employee. The petitioner would come within the ambit of clause (i) as is referred to in the judgment of the Apex Court in a case of State of Punjab and others Vs. Rafiq Masih (White Washer) etc. referred supra. As such, recovery is not permissible. It would also be clear that higher pay scale was granted not on account of misrepresentation on the part of the petitioner.

9. In the light of the above, the impugned order to the extent of claiming recovery from the petitioner stands quashed and set aside. The writ petition accordingly is partly allowed.

Rule accordingly is made absolute in above terms.