

(2024) 08 BOM CK 0036

Bombay High Court (Aurangabad Bench)

Case No: Writ Petition No. 13629 Of 2018

Sanjiv Chintaman Surve

APPELLANT

Vs

New India Assurance Company
Ltd Through Regional Manager
And Others

RESPONDENT

Date of Decision: Aug. 13, 2024

Acts Referred:

- General Insurance Business (Nationalisation Act), 1972 - Section 16(1)(g)

Hon'ble Judges: Ravindra V. Ghuge, J; Y. G. Khobragade, J

Bench: Division Bench

Advocate: N.N.Desale, M.R.Deshmukh

Final Decision: Allowed

Judgement

Ravindra V. Ghuge, J

1. Rule. Rule is made returnable forthwith and heard finally by the consent of the parties.
2. The Petitioner has put forth prayer clause B and C, as under :-

“B. By issuing appropriate writ of mandamus or any other writ in like nature, the impugned order dated 03.08.2018 passed by Respondent No.1 may kindly be quashed and set aside and further Respondents may kindly be directed to pay amount of Rs.31,77,840/- and Rs. 25,90,148/- is recovered from retirement benefit and remaining recoverable amount Rs.5,87,692/- from the pension of the Petitioner with interest as per law within two weeks.

C. By issuing appropriate writ of mandamus or any other writ in like nature, the respondent authorities may kindly be directed to pay differences of increment and payment deducted from the recovered from retirement benefit and remaining recoverable amount of Rs.5,87,692/- from the pension of the Petitioner."

3. The Petitioner has superannuated as a Development Officer after putting in 33 years of service. He joined on 01.01.1984 and has superannuated on 28.02.2018. On 16.03.2018, after his superannuation, the Respondent Insurance Company issued a notice to the Petitioner for revising the pay scale and reducing the increments already granted. The Petitioner did not respond to the said notice. On 03/08/2018, which is almost after 6 months of his superannuation, the impugned order was passed by the Company informing the Petitioner that his basic salary will be fixed at Rs.15,650/-, by reducing it from Rs.52,000/-, with retrospective effect after implementation of Cost Control Measures. It was further set out in the said order that an amount of Rs.31,77,840/-, will have to be recovered from the Petitioner. The entire amount of Rs.25,90,148/- of his retiral dues, payable to the Petitioner, was adjusted against the recovery. Further action of recovery is thereafter initiated for recovering an amount of Rs.5,87,692/-.

4. The Insurance Company has filed its affidavit in reply. It is contended that the amount recoverable from the Petitioner has been fixed at Rs.31,77,840/-. His terminal dues were Rs.25,90,148/-. These dues are adjusted against the amount recoverable. It is further contended that Cost Control Measures were introduced under clause 11 of the Development Officer's Scheme. Each Development Officer is required to maintain his 'cost ratio' within the limits stipulated in Sub Clause 'C' of Clause 17 under paragraph 3. If the cost ratio of the Development Officer for a particular performance in a year, exceeds a stipulated limit, such cost that exceeds the limit, is to be adjusted against 'non-core' allowances payable to him. If a Development Officer fails to maintain the cost ratio and exceeds the limit for the 3rd successive performance year, he is liable for deduction in his basic pay scale.

5. It is stated in the affidavit in reply that the performance of the Petitioner as a Development Officer, was below the mark. There were several complaints against him regarding the nature of his working. Vide an order dated 23.06.2008, his salary was reduced by 5 increments, which is termed in the affidavit as 5 decrements, in the month of March 2009.

6. It is further contended that on 27.02.2018, which is one day prior to the superannuation of the Petitioner, he was apprised about the cost control analysis for the period 2003-2004 to 2016-2017. The record from 2003 onwards was dug out on 27.02.2018. Considering that the expenditure in the cost ratio was beyond 10%, the

Department calculated the recoverable amount of Rs.31,77,840/-. The said communication dated 27.02.2018, was served upon the Petitioner. The Petitioner submits that he received this notice on 28.02.2018, when he was on his way out and superannuated that fore-noon.

7. The learned Advocate for the Company draws our attention to the pleadings in the affidavit in reply, more specifically paragraph No.7, wherein it is stated that the Company deemed that the Petitioner has accepted the action of the employer and the reduction of his salary scale to the basic scale of Development Officer Grade II @ Rs.15,650/-, retrospectively. He was called upon to verify the correctness of the calculations within 2 weeks. He failed to respond and hence the Company presumed that he had no objection to the aforesaid figures and the cost control measures.

8. It is further contended that the service of the Petitioner was liable to be terminated with 30 days notice as he continued to exceed stipulated cost limit. However, a lenient view was taken. After the Petitioner superannuated on 28.02.2018, he was given a letter of "good gesture" by the concerned Branch Manager. Since the Petitioner's bad behaviour and on account of his bad performance, the impugned order has been passed. Section 16(1)(g) of the General Insurance Business (Nationalisation Act), 1972 was made applicable to the Petitioner.

9. The learned Advocate for the Respondent/Company has relied upon the following judgments :-

[1] **State of Punjab and Others Vs. Rafiq Masih (White Washer) and Others** [(2015) 4 SCC 334],

[2] **Kiran Kirit Solanki Vs. The State of Maharashtra and Others** [2019 SCC Online Bombay 1401]

[3] **Mandeep Singh Kohli and Others Vs. Union of India and Others** [2021(1) Mh.L.J.370]

[4] **Tarachand Vs. State of Maharashtra, through it's Secretary and Others** [(2020) 2 AIR Bom.R 670 = (2021) 2 Mh.L.J.319]

10. In the light of the above cited reports, the learned Advocate for the Petitioner submits that the Law is crystallized that if the Petitioner is at fault and has been an under performer or has behaved in a bad manner, the employer can resort to such deduction of amount. Our attention is drawn to the judgments delivered in Mandeep Singh and Tarachand (supra), to which one of us (Ravindra V.Ghugre, J.) is a party, to support the contention that once an undertaking is executed by an employee, such deduction or recovery is permissible.

11. The learned Advocate for the Petitioner has relied upon **Rafiq Masih** (supra) and **Syed Abdul Qadir and others Vs.State of Bihar and others**, 2009(3) SCC 475.

12. We have perused the General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Scheme, 1976, more specifically paragraph Nos.[39]-11 Cost Control, [46]-13 - Increments, paragraph No.[60]5. These provisions read as under :-

[39] 11. Cost Control-

(1) Every Development Officer shall work with such cost as to maintain his cost ratio within the limits stipulated in sub-clause (c) of clause (17) of paragraph 3.

(2) If the cost ratio in respect of a Development Officer for a particular performance year exceeds the stipulated limits, the non core allowance payable to him in the following performance year shall be reduced to the extent of the amount by which his cost ratio exceeded the stipulated limits.

(3) If in respect of a Development Officer, cost ratio is in excess of stipulated limit for second performance year in succession, he may be issued a letter of warning that in events of his cost ratio exceeding stipulated limits for third or subsequent performance years in succession, his non-core allowance shall continue to be reduced in the following years to the extent necessary to bring his cost ratio within stipulated limits and, if there are no non-core allowance to be reduced he shall be liable to decrements in basic pay as indicated in the Table below sub-paragraph (4).

(4) If in respect of a Development Officer cost ratio is in excess of stipulated limit for the third or subsequent performance years in succession, the non - core allowance payable to him if any, in the following performance year shall be reduced to the extent of the amount by which his cost ratio exceeded the stipulated limits.

Provided that if no non-core allowance are payable to him or the amount of non-core allowance payable to him in the year following such third or subsequent successive performance years is less than the excess cost, decrements shall be effected to such Development Officer as per table below from the (40) "relevant appraisal date" to provide him an opportunity to conform to the stipulated limits of costs."

[46] 13. Increments :-

"(1) Every Development Officer who was in service on the 1st day of April, 1990 and had completed twelve months of continuous service in the month of April

1990 or earlier, shall be granted an increment in his scale of pay from the 1st day of April, 1990.

(2) A Development Officer with effect from the 1st day of April, 1991 shall be granted on the appraisal date an increment provided he has completed twelve months of continuous service from the date of his appointment or from the last appraisal date, as the case may be ;

Provided that no increment shall be granted to a Development Officer who is liable to decrement from the relevant appraisal date in terms of paragraph 11.

Explanation : For the purpose of this paragraph, "twelve months of continuous service" means a period of duty equal to twelve months excluding the period of extra-ordinary leave.

[46.1] (3) A Development Officer who has reached the maximum of the revised scale of pay as applicable to Development Officer Grade 1, may subject to the conditions that he :

(a) fulfills the stipulated cost ratios under paragraphs 11,11A and 13 of the said Scheme, in the previous performance year, and,

(b) is otherwise eligible for drawing normal grade increment, and ;

(c) is found to have a satisfactory work record,

be granted for every three completed years of continuous service after reaching such maximum a stagnation increment equal to the last increment drawn by him in the revised scale of pay, subject to a maximum of three (d) increments. Authority competent to grant such stagnation increments shall be any Officer not below the rank of Deputy Manager, specifically authorised for the same.

Provided that such 3rd (e)stagnation increment shall be granted on completion of three years from the date of receipt of 2nd stagnation increment or from the first day of the month following the date of publication of this Scheme in the Official Gazette which ever is later.

Explanation : For the purpose of this paragraph continuous service means a period of duty excluding period of extra ordinary leave."

[60] (5) :-

“(5) Notwithstanding anything contained in the foregoing sub-paragraphs -

(a) where the penalty of dismissal is imposed on a Development Superintendent, an Inspector Grade I or Inspector Grade II-

(i) who has been convicted of an offence, committed in the course of his employment and which offence, in the opinion of the Corporation or the Company, as the case may be, involves moral turpitude, or

(ii) for any act involving violence against the management, or other officers or employees, or any riotous or disorderly behaviour in or near the place of employment.

the gratuity payable to him shall stand wholly forfeited, and

(b) where the penalty of compulsory retirement, removal from service, or dismissal is imposed on the person concerned for any act involving the Corporation or the Company, or both, in financial loss, the gratuity payable to him shall stand forfeited to the extent of such loss.”

CONCLUSIONS

13. In view of the above, the following factors are decisive :-

[a] The Petitioner superannuated on 28.02.2018.

[b] A notice dated 27.02.2018, was served on him on 28.02.2018, on the day of retirement.

[c] A communication dated 16.03.2018 was served on him, after his retirement.

[d] Order of adjusting his entire retiral benefits of Rs.25,90,148/-was passed on 03.08.2018, after 5 months of his retirement.

[e] 6 months after his retirement, his basic pay of Rs.52,000/- per month approximately was reduced to Rs.15,650/- per month approximately.

[f] It is specifically stated in paragraph No.5 of the affidavit in reply by the Company that the Petitioner's performance was always below the mark and there were several complaints against him. A stigma has been attached to his service, without holding a departmental enquiry.

[g] It is alleged that he exceeded the stipulated limits of cost ratio.

[h] The action of reducing his basic salary due to his bad performance during the period 2003-2004 to 2016-2017, was given effect after his retirement.

[i] No enquiry has been conducted by issuing a charge sheet to the Petitioner as regards his purported bad performance and his performance being under rated, due to which an amount of Rs.31,77,840/-, was to be recovered from him.

[j] No charge against the Petitioner has been proved and there was no quantification of the amount to be recovered from him, by following a lawful procedure.

[k] An undertaking was taken from the Petitioner on 27.03.2018, which is after one month of his retirement.

[l] The said undertaking was in the nature of a confession purportedly given by the Petitioner in which it is stated as under :-

“I am in receipt of your letter Dt.16.03.2018 in above connection. I have gone through the same and admit that the contention raised by you is correct.

I am agreeing with the premium and cost figures mentioned in it.

I express my sincere thanks for giving me the opportunity to represent. You are kindly requested to release my terminal dues at the earliest.”

[m] On 18.07.2018, the resettlement of his PF and gratuity dues was carried out.

[n] The proviso below clause [46] 13. Increments, purports that no increment shall be granted to a Development Officer who is liable to decrement from the relevant appraisal date in terms of paragraph 11. Such liability has to be fixed. This is done by the Respondent, without any enquiry after the Petitioner's retirement.

14. It is, thus, apparent that a severe action of taking away Rs.31,77,840/- and wiping out all the terminal benefits of the Petitioner, was initiated after his retirement without conducting a departmental enquiry as regards his purported under-rating and bad performance. This amount has been taken away from the Petitioner on the ground that he exceeded the cost ratio for a period of almost 14 years from 2003-04 to 2016-17. This conclusion was drawn 5 months after the retirement of the Petitioner in 2018. His lifetime earnings have been taken away by the Respondent Company without adhering to the principles of natural justice. A mere notice would not be enough to conclude that he was an under performer and his performance was always below the mark and that he exceeded the cost ratio for 14 years.

15. We have reproduced the undertaking in the foregoing paragraph. We agree with the contention of the Petitioner that after one month of his retirement, when his entire service benefits / retiral dues were at stake, he was called upon to make a statement and had no option but to succumb to the pressure of the Company. We have dealt with this issue in Tarachand Vs. State of Maharashtra, wherein we have relied upon the law laid down in Syed Abdul Qadir (supra) and Rafiq Masih (supra) and have concluded in paragraph Nos. 10, 11 and 12 as under :-

“10. Considering the above, the case of the petitioner would be squarely covered by the judgments delivered by the Hon'ble Apex Court in the matter of Syed Abdul

Qadir Vs. State of Bihar, [MANU/SC/8491/2008 : (2009) 3 SCC 475] and State of Punjab and Others etc. Vs. Rafiq Masih (White Washer) etc., [MANU/SC/1195/2014 : 2014(14) SCALE 300. In the judgment delivered by the Hon'ble Apex Court in the matter of State of Punjab and Others etc. Vs. Rafiq Masih (White Washer) etc., (supra) it has been observed in paragraph No.12, as under :

"12. It is not possible to postulate all situations of hardships, 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 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 recovery."

11. We have considered the impugned order of the learned MAT to the extent of upholding the action of the employer in seeking recovery of excess amounts paid, six years after his retirement. We find that the said conclusion would not stand the test propounded by the Hon'ble Apex Court in paragraph No.12 in the case of State of Punjab and Others Vs. Rafiq Masih (White Washer) etc, (supra) and considering the earlier law laid down in the matter of Syed Abdul Qadir Vs. State of Bihar (supra).

12. In view of the above, this petition is partly allowed. The impugned order dated 19.01.2016, issued by respondent No.2, shall stand set aside only to the extent of the recovery of excess amounts paid to the petitioner with retrospective effect. Needless to state, if excess amounts have been paid since the date of the impugned order, those amounts will have to be recovered from the petitioner."

16. We have dealt with the specific case of an undertaking extracted from an employee at the stroke of his retirement. Visualizing the situation which is not beyond speculation, that an employee who is demitting office on superannuation, is directed by the employer to execute an undertaking that he will consent to the recovery of amounts if there is an accidental overpayment. The mental condition of such employee is evident. In order to save his retiral benefits, he agrees to execute an undertaking and such undertaking is pressed into service by the employer for causing a recovery over a period of 2 decades. We have, therefore, concluded in Tarachand (supra) in paragraph Nos. 10 to 12 reproduced above.

17. It is not the case of the Respondent/Corporation that they ever initiated any enquiry for the below mark performance of the Petitioner or his underrated performance for 15 years. It is alleged that the Petitioner was violating the cost ratio. As noted above, an action of a huge magnitude of taking away the entire terminal dues on superannuation, to the tune of Rs.31,77,840/-, would strike a death kneel. In his old age, the entire retiral benefits having been wiped out. It is not beyond imagination that the Petitioner will be rendered to penury.

18. In the light of the above, this Writ Petition is allowed in terms of prayer clause B and C. We direct the Respondent Company to return the entire amount of Rs.25,90,148/- to the Petitioner, along with 6% interest p.a., within a period of 45 days from today.

19. Rule is made absolute in the above terms.