

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.10.2016

CORAM

THE HONOURABLE MR. JUSTICE R.SURESH KUMAR

W.P.No. 4527 of 2010

G.MANI

...Petitioner

-Vs-

1 THE DIRECTOR OF LOCAL FUND
AUDIT IV FLOOR KURALAGAM CHENNAI-104.

2 THE COMMISSIONER
GOPICHETTIPALAYAM MUNICIPALITY
GOPICHETTIPALAYAM ERODE DISTRICT. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling the records relating to the 2nd respondent in his order of recovery proceeding Na.Ka.No.12596/2008/F3 dated 06.07.2009 and quash the same as null and void; consequently direct the respondents to refund all withhold amount of Rs.36 623/- with 18% interest and pay all the benefits as per the advance increment paid for passing of account test from 16.11.1986.

For Petitioner : Mr.K.Sathishkumar
For R1 : Mr.P.Sanjay Gandhi AGP
For R2 : Mr.R.Neelakandan

O R D E R

The prayer in the writ petitioner is for a writ of certiorarified mandamus calling the records relating to the 2nd respondent in his order of recovery proceeding Na.Ka.No.12596/2008/F3 dated 06.07.2009 and quash the same as null and void; consequently direct the respondents to refund all withhold amount of Rs.36 623/- with 18% interest and pay all the benefits as per the advance increment paid for passing of account test from 16.11.1986.

2. The case of the petitioner is that he is a senior citizen and retired Government Servant retired from the respondent Municipality

as Junior Assistant on 30.12.2008. He had been in service for 37 years.

3. The further case of the petitioner is that the first respondent had sanctioned the petitioner's pension on 09.10.2009 and the petitioner's pension was calculated from the basic scale of pay with the amount of Rs.4609/- with effect from 01.01.2009. Meanwhile by communication dated 06.07.2009, the second respondent issued the impugned proceedings in Na.Ka.No.12596/2008/F3 dated 06.07.2009 without any notice by which, he passed an order for recovery and with holding of a sum of Rs.36,623/- from GPF amount and the order further states that the advance increment for passing the Accounts test was paid for the period from 16.11.1986 upto 31.12.2008 is refixed.

4. It is also the further case of the petitioner that without any notice or hearing, straight away, the impugned order was passed and on the same date, under the coercion and threat, a consent was obtained from the petitioner for the recovery of the said amount.

5. The petitioner, therefore, received only a sum of Rs.4,80,688/- as GPF excluding the payment of advance increment of Rs.36,623/-, that was paid to the petitioner for passing the Accounts Test.

6. Heard the learned counsels for the petitioner as well as the respondents.

7. The learned counsel appearing for the second respondent would submit that based on the order passed by the first respondent dated 18.6.2009, the second respondent Municipality passed the impugned order. According to the learned counsel, under the order dated 18.6.2009, the first respondent has directed the second respondent/Municipality to recover or withhold the said amount as advance increment paid to the petitioner already between the period 16.11.1986 and 31.12.2008 as excess payment after issuance of proceedings by the commission as well as with the consent of the petitioner.

8. The learned counsel appearing for the second respondent would further submit that therefore, only the excess payment by way of advance increment for the said period paid to the petitioner was withheld through the impugned proceedings issued by the second respondent as directed by the first respondent in his letter dated 18.6.2009. Therefore, the writ petition deserves no merit and therefore, it is liable to be dismissed, he submits.

9. The petitioner had worked nearly for 37 years in the second respondent Municipality without any blemish. The alleged excessive payment said to have been paid to the petitioner between 16.11.1986 and 31.12.2008 is only for his acquiring of qualification of passing

Accounts Test. Normally, if any additional qualification is acquired, it would enhance the ability of the Government servant. This kind of incentives are provided for those who acquired such qualification in order to encourage the Government servants to equip themselves for discharging their official duties in the best possible way. It is this kind of incentives cannot be treated as excessive salary or bounty.

10. Moreover, in this instant case, the first respondent though having found that the advance increment paid to the petitioner between the said period was an excessive payment of salary directed the second respondent to follow the procedure of issuance of proceedings by the commission and thereafter, after obtaining the consent from the petitioner, recovery proceedings can be made.

11. The learned counsel for the first respondent also support this communication issued by the first respondent. There is no evidence to show that even before arriving of such conclusion by the first respondent before the issuance of this communication dated 18.6.2009, there was any such notice or anything was heard from the petitioner.

12. Further, the second respondent however, passed the impugned proceedings on 06.07.2009 pursuant to the communication of the first respondent dated 18.06.2009 by obtaining the consent from the petitioner on the very same date i.e., 06.07.2009. But before obtaining such consent whether the proceedings was issued by the commission as has been directed by the first respondent in his letter dated 18.6.2009 is a moot question to be answered. But, the learned counsel appearing for the respondents have not produced or indicated before this Court of any documents to show that such procedure of proceedings should be issued by the commission has been complied with before proceed to petitioner to get his consent.

13. At this juncture, paragraph 5 of the writ affidavit of the petitioner can be usefully referred to wherein the petitioner had stated that the second respondent has got his consent for recovery by way of coercion and threat. It is the further averment of the petitioner in the said paragraph of the affidavit, that unless consent is given to the recovery order, the entire GPF will not be paid. The petitioner further said that only in such circumstances as no other way was available to the petitioner, he gave consent letter to the second respondent and had received a sum of Rs.4,80,688/- as GPF excluding the payment of advance increment of Rs.36,623/-

14. The learned counsel appearing for the petitioner would heavily rely upon the Judgment of the Hon'ble Supreme Court STATE OF PUNJAB V. RAFIQ MASHI (WHITE WASHER) AND OTHERS (2015) 4 SCC 334. In the said Judgment, the Hon'ble Apex Court after having considered various Judgments of the Supreme Court has ultimately,

held at paragraph 18 which reads thus:

"18. It is not possible to postulate all situations of hardship 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 hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).
- (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery. (Emphasis supplied)
- (iii) Recovery from the 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."

15. The learned counsel appearing for the petitioner would further submit that category 2 of paragraph 18 would squarely apply to the petitioner in the present case as the recovery from the retired employees or the employees, who are due to retire within one year of the order of recovery would be a bad one and therefore, on that score also, the impugned proceedings sought to recover from the petitioner or to withhold his GPF or pensionary benefits, is nothing but contra to the said dictum of the Hon'ble Apex Court and therefore, the learned counsel for the petitioner prays that the writ petition be allowed.

16. It is an admitted fact that the amount allegedly paid as excessive amount, according to the respondent was paid to the petitioner between the period from 16.11.1986 and 31.12.2008 as an incentive for the petitioner, who has qualified the Accounts Test, merely because he has forgone his promotional avenue, such a qualification acquired would not be erased or defeated and therefore,

the incentive paid cannot be treated as an excessive payment by way of incentive and therefore, on that score, the proposal made by the first respondent in the letter dated 18.6.2009 in the opinion of this Court, is unwarranted.

17. Further, as has been indicated in the said order dated 18.6.2009 of the first respondent, no previous proceedings of the commission was issued without which even assuming that the consent has been obtained from the petitioner that will not go against the rights of the petitioner as the law is well settled in this regard that if the particular thing has to be done in a particular manner, the same has to be done only in that manner not otherwise. Once the higher authority directs the lower authority to follow a certain procedure, the lower authority has to scrupulously follow the same, if any failure on that part, then the entire proceedings can be vitiated and therefore, the impugned proceedings issued by the second respondent dated 06.07.2009 without having complied with the said requirement as indicated in the communication of the first respondent dated 18.6.2009 would not stand in the legal scrutiny, accordingly, it is liable to be quashed and therefore, this Court has no hesitation to quash the said impugned order.

18. As has been indicated above, the excessive payment allegedly paid to the petitioner is only for his further qualification, he acquired during his service and that benefit could have very well be utilized by the respondents. Moreso, applying the ratio, especially paragraph 18(ii) of the said Judgment of the Hon'ble Apex Court cited supra, the move of the respondents to recover any amount from the retired employee or employee about to retire within one year would be a bad one and in such view of the matter also, the impugned order is liable to be interfered with.

19. In the result, the writ petition is allowed. The impugned order is quashed. It is open to the petitioner to make a representation to the respondents especially, the second respondent for release of the withheld amount, if such a request is received from the petitioner, it is for the second respondent to take a decision pragmatically taking into consideration of the aforesaid observations and discussions as well as the Supreme Court Judgment cited herein and pass a reasoned order.

20. With these observations and directions, the writ petition is allowed. No costs.

-sd/-

Assistant Registrar

/ TRUE COPY /

Sub-Assistant Registrar

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To

1 THE DIRECTOR OF LOCAL FUND
AUDIT IV FLOOR KURALAGAM CHENNAI-104.

2 THE COMMISSIONER
GOPICHETTIPALAYAM MUNICIPALITY
GOPICHETTIPALAYAM ERODE DISTRICT.

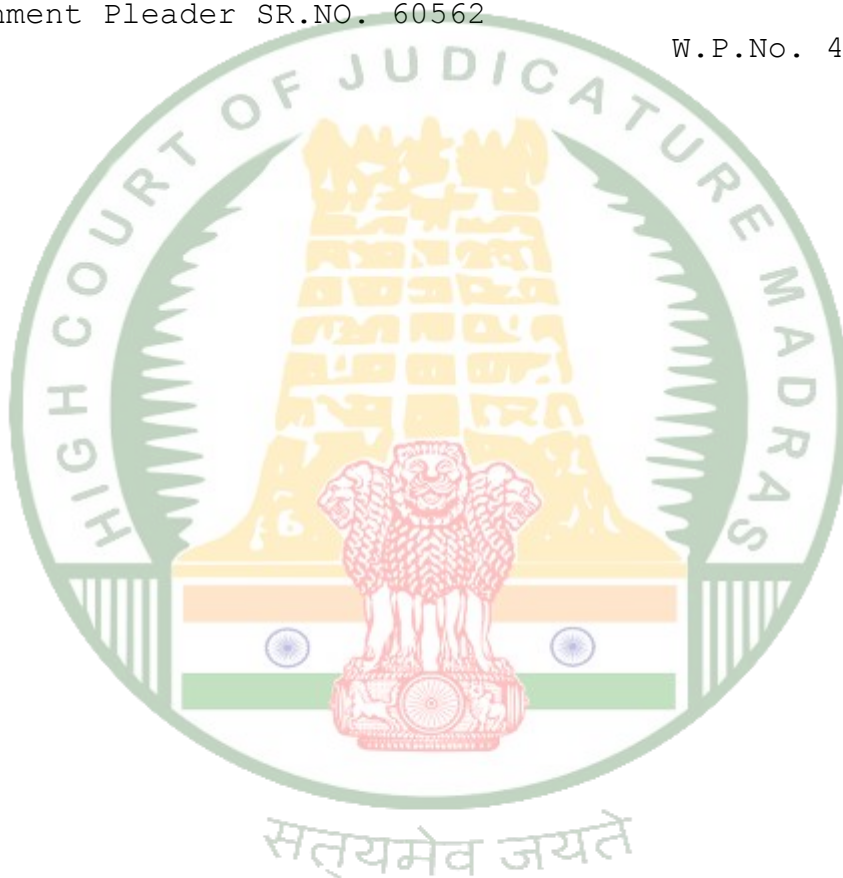
+1 cc to MR.K.SATHISH KUMAR Advocate SR.NO. 66708

+1 cc to Government Pleader SR.NO. 60562

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