

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 20.09.2016
Delivered On : 29.09.2016

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBBIAH

W.P.No.26455 of 2012
and M.P.Nos.1 and 2 of 2012

S.Viswanathan .. Petitioner

vs.

1.The Inspector General of Prison-cum-
Additional Director
General of Police,
Chennai.

2.The Superintendent of Prison,
Central Prison, Salem-7.

3.The Superintendent of Prison,
Central Prison,
Coimbatore.

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari Mandamus calling for the records of the second respondent issued in Ki.Si.1/auditing/2012 dated 12.07.2012, quash the same as illegal and arbitrary and consequently direct the respondents to restore status quo as on the day before issue of impugned order dated 12.07.2012 within a time frame.

For Petitioner : Mr.R.Bharathkumar

For Respondents : Mr.S.Gunasekaran
Additional Government Pleader

ORDER

This Writ Petition has been filed praying for issuance of a Writ of Certiorari calling for the records of the second respondent issued in Ki.Si.1/auditing/2012 dated 12.07.2012, quash the same as illegal and arbitrary and consequently direct the respondents to restore status quo as on the day before issue of impugned order dated 12.07.2012 within a time frame.

2. The case of the petitioner is that he was appointed as a Second Grade Warden by the Superintendent of Central Prison, Salem with effect from 22.07.1983 and subsequently, in the

year 2005, he was promoted as First Grade Warden (UG) and now promoted as Chief Head Warden at Hosur and presently transferred to Central Prison, Coimbatore. The petitioner would further state that based on the VI Pay Commission, he was paid a basic pay of Rs.4,220/- along with other allowances and his total monthly salary was Rs.9,136/- from January 2007 onwards and the said benefit was paid from January 2007 to June 2012 and the same has been stopped from the month of July 2012. While so, the second respondent issued proceedings in Ki.Si.1/auditing 2012 dated 12.07.2012 wherein it has been stated that as per the auditing report for the year 2009-2010, it was brought to the notice that fixation of salary and enhancements were wrongly done and the previous orders for fixation of salary for the petitioner are cancelled and the basic pay has been refixed from 01.01.2007 to 30.06.2012 and further, the excess salary paid has to be recovered in instalments of Rs.1300/- for 50 months from July 2012 onwards and the total excess amount calculated and ordered to be recovered from the petitioner as per the impugned order of the second respondent dated 12.07.2012 is Rs.65,103/-. Challenging the said order, the present writ petition has been filed.

3. When the matter is taken up for consideration, Mr.R.Bharathkumar, learned counsel appearing for the petitioner by placing reliance upon the judgment of the Hon'ble Supreme Court in State of Punjab and Others v. Rafiq Masih (White Washer) and Others [(2015) 4 SCC 334] would submit that as per the dictum laid down in the said judgment, recovery from employees to whom excess payment has been made for a period in excess of five years, before order of recovery is issued, is impermissible and in the instant case, excess salary has been paid for a period more than 5 years before issuing the order of recovery and therefore, recovery is impermissible in the light of the above cited judgment.

4. Mr.S.Gunasekaran, learned Additional Government Pleader appearing for the respondents has drawn the attention of this Court to the counter affidavit of the second respondent wherein the second respondent has given calculations as to how the amount was wrongly fixed and hence excess Pay and Dearness Allowance was recovered from the petitioner as per I.G's audit report and the recovery is not illegal or against natural justice and thus prays for dismissal of this writ petition.

5. Keeping the rival submissions, I have gone through the entire materials available on record.

6. No doubt, there is no dispute with regard to the fact that amount was excessively paid to the petitioner. The question arises for consideration is whether the excess amount which was paid for more than five years before issuing the order of recovery, could be recovered from the petitioner/employee or not? The judgment relied on by the

learned counsel appearing for the petitioner in State of Punjab and Others v. Rafiq Masih (White Washer) and Others [(2015) 4 SCC 334] gives a fitting answer to this issue. The relevant portion of the said judgment is extracted hereunder:

"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.

(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.

A reading of the above dictum, more particularly Para 18(iii) would show that if excess amount is paid for more than five years before the order of recovery is issued, then the employer has no right to recover the said amount. The petitioner herein falls within Clause (iii) mentioned in para 18 of the said judgment and hence in the light of the above said judgment, the impugned order is liable to be set aside.

7. In the result, this Writ Petition is allowed and the impugned order of the second respondent in Ki.Si.1/auditing/2012 dated 12.07.2012 is set aside and the respondents are directed to restore Status Quo as on the day before issue of impugned order dated 12.07.2012, within a period of six weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

jvm
To

1.The Inspector General of Prison-cum-
Additional Director General of Police,
Chennai.

2.The Superintendent of Prison,
Central Prison, Salem-7.

3.The Superintendent of Prison,
Central Prison,
Coimbatore.

+1cc to Mr.R. Bharathkumar, Advocate, S.R.No.56522
+1cc to the Government Pleader, S.R.No.56481

PVS(CO)
EU(07/11/2016)

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W.P.No.26455 of 2012

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