IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 29.12.2016

CORAM

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.44759 of 2016 and

W.M.P.No.38587 of 2016

S.Chandramoorthy .. Petitioner

-vs-

1. The Secretary to Government,
Home (Police II) Department,
Fort Saint George,
Chennai- 600 009.

2. The Director,
Vigilance and Anti Corruption
Chennai- 600 016. .. Respondents

Petition filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari, calling for the records of the respondents in connection with the impugned orders issued by the 2nd respondent in Na.Ka.No.Oo1/38618/16 dated 21.12.2016 and Rc.No.F1/38618/16 dated 21.12.2016 and quash the same.

For Petitioner : Mr.M.Muthappan
For Respondents : Mr.T.N.Rajagopalan
Special Government Pleader

ORDER

The petitioner has come forward with this Writ Petition as the petitioner was not given an opportunity before fixing the revision of pay and pay recovery order.

2.The case of the petitioner is that he was appointed in the post of Junior Assistant in 1995 on compassionate grounds and was subsequently promoted as Assistant. One Mrs.Elizabeth, the immediate junior to the petitioner, who was working as Special Assistant, has given a letter opting for reversion to the post of Assistant and permanently relinquished her right for promotion. Her relinquishment was accepted and she was reverted to the post of Assistant. But her name was retained at the top in the seniority list of Assistant. The petitioner and similarly placed persons have given representations to revise the seniority list of the said Mrs.Elizabeth and also filed a Writ Petition before this Court. This Court set aside the then prevailing seniority list and directed the respondents to place Mrs.Elizabeth at the bottom of the seniority list of Assistant. During the pendency of the Writ Petition, Mrs.Elizabeth was promoted as Superintendent and thereafter, the seniority list of Assistant was revised and hence, Mrs.Elizabeth was placed at the bottom of the list and reverted to the post of Assistant.

3.The petitioner was promoted as Superintendent and his pay was fixed pursuant to the VI pay commission. The petitioner has also requested for revision of seniority list and promotion on par with Mrs.Elizabeth and to notionally promote him as Superintendent from 28.05.2009. The 2nd respondent revised the scale of pay of the petitioner, as it has been wrongly fixed and directed to recover the amounts in 100 installments.

4. According to the petitioner, no show cause notice was issued prior to revision of scale of pay as well as prior to pay recovery order. The petitioner's salary was revised pursuant to the VI pay commission and the petitioner has not suppressed any material facts. When the impugned order does not disclose as to how the pay has been revised based on the audit objection, the petitioner is entitled to salary of Superintendent from 28.05.2009, on which date Mrs.Elizabeth was promoted. Pending his representation, the present impugned order has been passed.

5. In such circumstances, I am of the view that while the petitioner was promoted from the post of Assistant to that of Superintendent and his pay being revised with effect from 22.06.2009, by order dated 13.07.2009, it was made clear that, in future, if the fixation of pay was found to be wrong, the excess pay will be recovered from the salary and credited to the Government. Knowing this fact well, the petitioner accepted his promotion. The audit objection is also very clear that the petitioner's pay has been wrongly fixed.

6.Though it is contended that the petitioner is entitled to question the above fact, the Apex Court in Syed Abdul Qadir Vs. State of Bihar reported in (2009) 3 SCC 475 held as follows:

> "...
>
> Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-

affidavit, admitted that it was bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. The learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made." (emphasis supplied)

7.The above cited judgment was considered and referred to in (2015) 4 Supreme Court Cases 334 [State of Punjab and others Vs. Rafiq Masih (White Washer) and others] wherein it was held that the benefit of non-recovery cannot be extended to an employee, merely because, he was not accessory to mistake committed by the employer, or was not guilty of furnishing any factually incorrect information, or fraud or misrepresentation. In the above said decision, the Supreme Court has further stated as follows:

"...

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 an 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 employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or the 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."

8.The cases of recovery could be interfered only in cases where the Court has held in the earlier decision that if the employee was not aware and not informed about the recovery in the order, he is entitled to be heard. In the case on hand, the petitioner is already aware of the fact that in case of wrong fixation of pay, the amount would be recovered. The relevant portion of the order dated 13.07.2009 is extracted hereunder:

"...

6.If the pay fixation is found to be wrong in future, the excess paid pay and allowances will be recovered from the salary & credited to Government account."

9. The Hon'ble Supreme Court in the case of High Court of Punjab vs. Jagdev Singh (Civil Appeal No.3500 of 2006, dated 29.07.2016) has held as follows:-

''7. The Respondent challenged the action for recovery in writ proceedings under Article 226. The petition was allowed by the impugned judgment of the High Court. The High Court found substance in the grievance of the Respondent that the excess payment made to him towards salary and allowance prior to his retirement could not be recovered at that stage, there being no fraud or misrepresentation on his part.

8. The order of the High Court has been challenged in these proceedings. From the record of the proceedings, it is evident that when the Respondent opted for the revised pay scale, he furnished an undertaking to the effect that he would be liable to refund any excess payment made to him. In the counter affidavit which has been filed by the Respondent in these proceedings, this position has been specifically [1]admitted. Subsequently, when the rules were revised and notified on 7 May 2003 it was found that a payment in excess had been made to the Respondent. On 18 February 2004, the excess payment was sought to be recovered in terms of the undertaking.

9. The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time

when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.

10.In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc. this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer 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 recover."
> (emphasis supplied).

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.''

10. In the above judgment, it has been categorically stated that when an undertaking is given by an employee, the employer can recover the amount, it is not necessary that there should be a separate undertaking. It is clear from the order dated 13.07.2009 that the petitioner was aware of the fact that in case of wrong fixation of pay, the same would be recovered and hence, this Court is not inclined to accept the contention of the petitioner that he should be given an opportunity of hearing. In case of wrong fixation genuinely made without the fault of the employer, the same can be recovered. Otherwise, it would become a wrong precedence to other employees to claim similar benefits on the ground that the counter-part has been given higher wages and hence, they should also be given the same. In such view of the matter, this Court is not inclined to interfere in the order passed by the 2nd respondent.

11. The Writ Petition is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To:

1. The Secretary to Government,
   Home (Police II) Department,
   Fort Saint George,
   Chennai- 600 009.

2. The Director,
   Vigilance and Anti Corruption
   Chennai- 600 016.

+1cc to the Government Pleader, S.R.No.9

ppa(CO)
md(02/02/2017)

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