BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Orders Reserved on : 22.09.2016
Order pronounced on : 03.11.2016

C O R A M

THE HONOURABLE DR.JUSTICE **S.VIMALA**

Writ Petition (MD) No.13995 of 2014
and
M.P(MD) No.1 of 2014

J.Arumugam .. Petitioner

Vs.

1.The Management of
Tamil Nadu State Transport
Corporation (Kumbakonam) Ltd.,
Represented by its Managing Director,
Kumbakonam,
Thanjavur District.

2.The General Manager,
Tamil Nadu State Transport
Corporation (Kumbakonam) Ltd.,
Trichy Region,
Trichy.

3.The Assistant Manager (Personnel)
Tamil Nadu State Transport
Corporation (Kumbakonam) Ltd.,
Trichy Region,
Trichy.

4.The Administrator
Tamil Nadu State Transport Corporation
Pension Fund Trust
Thiruvalluvar Illam
Pallavan Salai
Chennai - 600 002. .. Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus calling for the records pertaining to the impugned order passed by the 3rd respondent in Ref;No.Nil dated 23.7.2014 in ordering recovery of Rs.2,21,637/- from the petitioner's gratuity towards unimplemented punishments of increment cut excess leave and also in refusing to settle his pension benefits on the ground that the petitioner did not remit the recovery amount to the respondents quash the same as illegal arbitrary and violative of Article 14 of the constitution of India and consequently direct the respondents to settle the petitioner's pension benefits including gratuity commutation amount Medical and Engineering colleges contribution and other attendant retiral benefits without making any recovery together with interest at the rate of 12% per annum payable to him with effect from 31.03.2014 to til the date on which the above benefits are settled to him and further directing the respondents to refund a sum of Rs.2,21,637/- already recovered from his gratuity.

For petitioner ... Mr.A.Rahul
For R1 to R3 ... Mr.D.Sivaraman

For R4 ... Mr.A.P.Muthupandian

O R D E R

Towards non-implemented punishment of increment cuts, whether recovery can be effected from the retirement benefits of the employee, after retirement on account of superannuation, is the issue canvassed, in this writ petition.

The petitioner served as Driver under the first respondent corporation with effect from 09.11.1986 and he retired from service with effect from 31.03.2014 and the petitioner challenges the order of recovery towards non-implemented punishment of increment cuts.

2.“Increment Cut” - the two diametrically opposite words, which send shock waves even to an earning employee (while in service) would certainly create and cause insurmountable problems to a retired employee, when the increment cut is effected from the retirement dues – so contending, this writ Petition has been filed, seeking to declare the action of the respondents in imposing recovery of Rs.2,21,637/- towards non-implemented punishment of increment cuts and recovering the said amount from the terminal benefits as illegal and consequently direct the respondents to settle and pay the amount due with interest 18% p.a. from the date of retirement till the date of payment.

3. When there is no certified standing orders and where there is only a model standing order, under which, there is no provision (in the model standing order) for recovery of amount towards non-implemented punishment of increment cut, the recovery is illegal, is the specific contention of the petitioner.

4.The pertinent contention raised by the petitioner is that the Disciplinary Authority should not have lost the sight of impending retirement at the time of passing the order, imposing the punishment of increment cut, and for the mistake committed by the Disciplinary Authority, the petitioner cannot be put to loss and inconvenience.

5.Learned counsel for the petitioner relied upon the following judgments in order to substantiate those contentions:-

i) W.P.(MD) No.9889 of 2007 (N.Jothi vs.Tamil Nadu State Corporation, Kumbakonam)

When the management ordered recovery of Rs.49,450/- from the retirement benefit of a Conductor towards non implemented punishment of increment cut, the impugned order is perverse and it is an outcome of imagination of a sick mind.

ii) [Petchimuthu vs. Managing Director, Tamil Nadu State Transport Corporation, Madurai] [W.P.(MD) No.12824 of 2012]

When an order of penalty was passed, it is the duty of a Disciplinary Authority to see how far it could be enforced.

iii) These two judgments were followed in W.P.(MD) Nos.12705, 13072, 13984 of 2010 by the order dated 01.08.2013 and the Writ Appeal filed by the Transport Corporation in W.A.(MD) No.52 to 54 of 2015, was dismissed on 24.02.2015.

iv) The order passed in W.P.(MD) No.9889 of 2007 and 12834 of 2012 have been complied with and no appeal has been preferred. These decisions are applicable to the facts of the case.

6.Learned counsel for the respondent relied upon decisions of this Court passed in W.P.(MD) No.11967 of 2012, in which, the judgments passed by this Court in W.P.(MD) No.9889 of 2007 (N.Jothi vs.Tamil Nadu State Corporation, Kumbakonam) and W.P.(MD) No.12824 of 2012 [Petchimuthu vs. Managing Director, Tamil Nadu State Transport Corporation, Madurai], were distinguished.

6.1.The decision No.1, i.e., Jothi's case was distinguished on the ground that the findings were rendered without reference to Rule position.

6.2.The decision No.2, i.e., Petchimuthu's case was distinguished on the ground that the Rule position, i.e., whether the common service Rules would apply to employees of Transport Corporation, was not gone into.

6.3.It was held in Ramasamy's case, referred to supra, that the common service rules provides for recovery of amount equivalent to that of penalty, when they were not able to be implemented and that by G.O.Ms.No.1373 Transport Department dated 02.12.1985, the common service rules are made applicable to the employees of Transport Corporation as per the decision of the Board of Directors, in the meeting held on 19.04.1986.

6.4.However, it is stated in the above G.O. that the common service Rules will be common for all employees except to workers, who are governed by Standing Orders, which will prevail over the service rules to ensure that the workers are in no way put in a disadvantages position. Therefore, according to the learned counsel for the petitioner, the applicability of common service Rules to the workers who are governed by Standing Orders was not considered in Ramasamy's case. In the Standing orders produced by the Corporation also, there is no provision to effect such recoveries.

7.Learned counsel for the petitioner would submit that the decision relied upon by the respondent cannot be taken as a binding precedent in view of the Division Bench judgment rendered in W.A.(MD) Nos.52 to 54 of 2015 dated 24.02.2015, under which, the decision taken by the Single Judge in W.P.(MD) Nos.12705, 13072, 13984 of 2010 has been confirmed. When there is a Division Bench judgment, according to law of precedent, it prevails over the judgment of a Single Bench. Therefore, the contention of the learned counsel for the petitioner has to be accepted.

8.Whether the decision taken by the Corporation to deduct the non implemented punishment of increment cut can be considered just and equitable in keeping with contemporary social conditions of the employee and the prevailing circumstances of his family, is the issue to be additionally considered. In other words, balancing the interest of the individual vis-a-vis the Corporation or the comparative power of the Individual employee vs. Corporation to balance the balance sheet i.e. the profit and loss account should be the additional criteria to decide the issue raised regarding the recovery.

8.1. This exercise has been done by the Hon'ble Supreme Court in the decision reported in (2015) 4 SCC 334 (State of Punjab and others vs. Rafiq Masih) in which it has been held that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made The recoveries would be impermissible in the following cases:

(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.

8.2.It is also pointed out that even though it is applicable only to Government employees, the constitutional philosophy underlying the decision should be made applicable to the petitioners and it should be declared that recoveries are illegal.

9.No doubt, the employee, who was found guilty and who was ordered to pay penalty has no legal right to say that there is no liability to pay. But, he can only plead for inability because of the impending and compelling circumstances, which would prevent him from paying the penalty. The latches, missing fore-thought, non consideration of the consequences of effecting recovery after retirement on the part of the employer should be considered by the Court in deciding whether to grant relief to the employee or to the employer.

In a case where there had been excess payment while the employee was in service and when that was sought to be recovered, the Hon'ble Supreme Court in ***Col. B.J. Akkara v. Government of India, (2006) 11 SCC 709***, held that such relief, restraining recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it.”

10.When this decision has been rendered, though while effecting recovery of excess payment already paid, especially with reference to employees in the lower rungs of society, the underlying principles has to be adopted and molded in case of recovery of the amount towards recovery of penalty after retirement. After retirement excepting age, many things diminishes by and large, i.e., the earnings, the respect, the health, the ability to do physical work, withstanding capacity and consequently the mental health. Parallelly in case of middle class/lower class families, the commitment towards the education, marriage, establishment of basic amenities to children, unforeseen medical expenses etc. increases. The future plans are made not only by the retired employee, but also by the members of the entire family, well in advance anticipating the receipt of retirement benefits. When there is an obstruction, that brings more disrespect to the retired employee.

In case of non recovery of penalty, the ***employer*** is not put into any loss, because it is not even an excess payment already made and not even an anticipated income that is lost. In any event, it is possible for a omnipotent Corporation to adjust its financial resources, which is not possible in the case of an individual employee.

11.In other words, this Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous and harsh to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

12.It is made clear that this finding should not be mistaken as a licence for the employees to commit mistakes and to escape from the penalty later on. The right to interpretation is that it should be construed as an eye opener to the Disciplinary Authority to impose appropriate punishment at the appropriate time, failing which, the employer loses the right to recover the amount.

13.In the result, the impugned order of recovery is set aside and thus, this Writ Petition is allowed. No costs. The respondent Transport Corporation is directed to settle all the terminal benefits of the petitioner without making any recovery within a period of six weeks from the date of receipt of a copy of this order. Consequently, connected Miscellaneous Petitions is closed.

Sd/-
Assistant Registrar (Writs)

/True Copy/

Sub Assistant Registrar

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To,

1.The Managing Director, The Management of
Tamil Nadu State Transport
Corporation (Kumbakonam) Ltd.,
Kumbakonam,
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2.The General Manager,
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Pension Fund Trust
Thiruvalluvar Illam
Pallavan Salai
Chennai - 600 002.

+1CC to Mr.D.Sivaraman, Advocate Sr.No.66069
+1CC to Mr.A.Rahul, Advocate Sr.No.65736

Gjm/SKN/21.12.16-7p-7C

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