BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 16.12.2016
CORAM:
THE HONOURABLE MR. JUSTICE R.SURESH KUMAR
W.P.(MD) No.195 of 2011
and M.P.No.1 of 2011

P.Subbian ... Petitioner

Vs.

1.The Managing Director,
Tamilnadu Civil Supplies Corporation Limited,
No.12 Thambusamy Street,
Keelpauk, Chennai-600 010.

2.The Regional Manager,
Tamilnadu Civil Supplies Corporation Limited,
Madurai Region,
Kuruvikaran Salai, Madurai-20. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari to call for the records relating to the impugned order passed by the 1st respondent in his proceedings Na.Ka.No.AE15/16662/2007 dated 09.08.2010 and quash the same as illegal.

For Petitioner : Mr.B.Saravanan
For Respondents : Mr.P.Seetharaman

O R D E R

The prayer in the writ petition is for a Certiorari calling the records relating to the impugned order passed by the 1st respondent in his proceedings in Na.Ka.No.AE15/16662/2007 dated 09.08.2010 and quash the same.

2. The petitioner, who is an Assistant Engineer (Mechanical), on attainment of superannuation, retired from service from the respondent Corporation on 30.11.2007. On his retirement, he was given all terminal benefits except the encashment of earned leave, which was accounted for 237 days, for which, an amount of Rs.2,19,329/- was accrued.

3.Subsequently, after the retirement of the petitioner, on 09.08.2010, the first respondent has issued the impugned order of recovery, by which, the recovery was sought for from the petitioner under four heads for a total sum of Rs.1,68,210/-. Challenging the said order, the petitioner has come out with the present writ petition with the aforesaid prayer.

4.Heard the learned counsel for the petitioner and the learned standing counsel for the respondents.

5.The learned counsel for the petitioner would submit that out of the four heads mentioned in the impugned order for recovery, insofar as the third item is concerned, which is the interest for housing loan advance to the extent of Rs.93,129/-, the petitioner has admitted that he has no objection in deducting the said interest towards the advance amount paid for housing loan to the tune of Rs.93,129/-. However, in respect of other heads, the learned counsel for the petitioner would contend that there is no proceedings whatsoever with regard to alleged loss, if any, under head Nos.1 and 2 as well as the difference of pay alleged to have been paid to the petitioner under head No.4, as the petitioner has been straight away served on the impugned order before which, the petitioner was not put on notice, no explanation was called for, no proceeding was initiated either to ascertain the loss or otherwise. Therefore, the learned counsel for the petitioner submits that the impugned order, which has been passed nearly after eight months of the retirement of the petitioner, that too without a prior notice, is bad in law.

6. In this regard, the learned counsel for the petitioner would heavily rely upon the decision of the Hon'ble Apex Court in 2015 (4) SCC 334 in the matter of State of Punjab and Others v. Rafiq Masih (White Washer) and others, wherein, the Hon'ble Apex Court has postulated five situations, where recovery by an employer would be impermissible in law. The said portion of the judgment referred to above is 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 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."

7. In view of the said categorical pronouncement and the law declared by the Hon'ble Apex Court, the petitioner being a retired employee cannot be proceeded for recovery, as made in the impugned order of the 1st respondent and therefore, he wants the writ petition to be allowed.

8. Per contra, the learned standing counsel for the respondents would submit that at the time of superannuation, the petitioner had given an undertaking dated 17.11.2007 to the respondents stating that he would accept the recovery, if any, noticed during the unaudited period from 01.07.2007 to 30.11.2007 and adjust the same from the earned leave encashment or terminal benefits payable to him. The said undertaking letter given by the petitioner has also been filed before this court. When that being so, the learned counsel for the respondent submits that the petitioner cannot now turn around and state that he would not be recovered any sum, which is payable by him to the Department.

9. The learned standing counsel on his part would rely upon the latest decision of the Hon'ble Apex Court dated 29.07.2016 made in Civil Appeal No.3500/2006 in the matter of High Court of Punjab and Haryana and others v. Jagdev Singh. The learned standing counsel would heavily rely upon Paragraph No.11 of the said judgment, which reads as follows:

"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. The learned counsel for the respondents would also submits that therefore, the law declared by the Apex Court in 2015 (4) SCC 334 cannot be applied to the facts of this case, as the petitioner has been put on notice that for the unaudited period, if anything found later on, that excess payment has been

made or any loss caused to the respondent Corporation by the act of the petitioner, then, there can be no further impediment for the respondents to recover the said amount to be unnotified. When that being so, the applicability of the judgment cited supra (2015 (5) SCC 334) cannot be made against the present facts of the case and only the latest judgment in Civil Apepal No.3500/2006 dated 29.07.2016 alone can be applied. Therefore, the respondent had every right to recover the said amount from the petitioner. Therefore, the impugned order is not suffered with any infirmities.

11. This Court have considered the rival submissions made by the respective counsel and the records placed before this Court for perusal.

12. The impugned order proceeds for recovery from the petitioner under four heads. The petitioner has admitted to repay the amount mentioned in 3rd head, namely, the interest for housing advance. In this regard, at paragraph No.7 of the affidavit filed in support of the writ petition, the petitioner has averred as follows:

> "I have no objection of deducting the interest on the advance amount paid towards the house loan to the tune of Rs.93,129/-".

13. Therefore, there can be no quarrel for recovering the said amount of Rs.93,129/- under third head. However, in respect of other heads, namely, 1,2 and 4, the petitioner is disputing the said amounts, as no such loss has occurred and on what basis these calculations have been made by the respondents have also not been communicated to the petitioner and in fact before making such calculations, the petitioner has not been put on notice. As has been rightly pointed out by the learned counsel for the petitioner, though the petitioner had given an undertaking before the retirement to the respondents that he would accept the recovery, if any noticed for the unaudited period, ie., from 01.07.2007 to 30.11.2007 such undertaking ipso facto, would not give a free hand to the respondents to make recovery under whatever head without giving a reasonable opportunity to the petitioner by putting him under notice and after ascertaining his views. The calculations or arrival at of the figure under various heads ought to have been made. Here, in this case, there is no proof to show that before the impugned order, such notice was issued. No such procedure was adopted by the 1st respondent for arriving at such a conclusion under head Nos.1, 2 and 4 under the impugned order. Therefore, in that view of the matter, this Court is of the considered view that the impugned order in respect of head Nos.1,2 and 4 is liable to be quashed and accordingly quashed.

14.However, insofar as the Head No.3, namely, interest for the housing advance, the impugned order is sustained and the respondents shall be entitled to adjust the said amount of Rs.93,129/- from the amount payable to the petitioner towards encashment of earned leave, which was also quantified by the respondents at Rs.2,19,329/-

15.Since the impugned order is quashed and the situation prevailed herein in respect of the present case is also squarely covered under clause 2 and 3 of Paragraph No.18 of the said judgment cited supra ie., 2015 (4) SCC 334, no further recovery can be made from the petitioner in respect of the other heads.

16.With these observations and directions, the writ petition is allowed in part. No costs. Consequently connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

/True Copy/

Sub Assistant Registrar

To

1.The Managing Director,
Tamilnadu Civil Supplies Corporation Limited,
No.12 Thambusamy Street,
Keelpauk, Chennai-600 010.

2.The Regional Manager,
Tamilnadu Civil Supplies Corporation Limited,
Madurai Region,
Kuruvikaran Salai, Madurai-20.

+2cc to Mr.B.Saravanan, Advocate in SR No.82052 & 81340
+1cc to Mr.P.Seetharaman, Advocate in SR No.81328

W.P.(MD) No.195 of 2011 and
M.P.No.1 of 2011
16.12.2016

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