

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.01.2017

CORAM:

THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

W.P.No.1751 of 2011

and

M.P.No.1 of 2011

Mrs.Savithri

.. Petitioner

vs.

- 1.The Secretary,
Government of Tamilnadu,
Finance (CMPC) Department,
Fort St.George,
Chennai - 600 009.
- 2.The Accountant General,
Department of Accounts & Entitlement,
Teynampet, Chennai - 16.
- 3.The Engineer in Chief (Buildings),
Building Organisation,
P.W.D., Chepauk,
Chennai - 600 005.
- 4.The Assistant Executive Engineer,
P.W.D.(Buildings & Construction),
Sub-Division,
Dharmapuri - 1.

सत्यमेव जयते
.. Respondents

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records relating to the proceedings of the fourth respondent in Se.Mu.No.Ko.3/2010 dated 28.12.2010 and proceedings No.FDC/2010/dated 28.12.2010 and to quash the same.

For petitioner : Mr.C.Prabakaran

For respondents 1, 3 & 4 : Mr.S.Navaneethan,
Additional Government Pleader

For 2nd respondent : Mr.V.Vijayshankar

ORDER

The petitioner has filed this Writ Petition for the relief stated above.

2. It is submitted by the learned counsel for the petitioner that the petitioner's husband was appointed on 1.5.1971 and his service was regularised on 1.5.1976 and he completed 10 years of service in the post of Work Inspector Grade-III on 1.5.1986. After completion of 10 years in the post of Work Inspector Grade III, he was moved to the post of Work Inspector Grade II on 1.5.1986 and he was awarded selection grade in the post of Work Inspector Grade II with effect from 1.5.1996 on completion of 10 years of service. Since he had been put to more than 10 years of service prior to 1.5.1988 and while he was working as Work Inspector Grade II as on 1.5.1988, his pay was advanced to that of the Work Inspector Grade-I under flexible complimenting scheme with effect from 1.5.1986 and the pay was further fixed in the Selection Grade Scale of Work Inspector Grade-I, on completion of ten years of service with effect from 1.5.1996 by the proceedings of the fifth respondent herein in proceedings No.F3-2002-No.263 dated 21.3.2002 and was allowed to monetary benefits on account of such fixation of pay. While that being the position, the third respondent passed the order dated 26.2.1998 for recovery of the excess amount by re-fixing the scale of pay without adhering to the rules properly. Aggrieved by the order, the petitioner's husband along with other Work Inspectors filed O.A.No.2717 of 1998 before the Tamilnadu State Administrative Tribunal, which has been transferred to this Court and renumbered as W.P.No.19692 of 2005. The Writ Petition was allowed in terms of O.A.No.993 of 2000 by this Court on 24.3.2006. After filing the Contempt Petition No.973 of 2006, it was brought to the notice of this Court that Order in O.A.No.993 of 2000 was set aside by the Division Bench of this Court and hence, the Contempt Petition was dismissed. Thereafter, the petitioners in the above Writ Petition preferred Review Application No.173 of 2007 in W.P.No.19692 of 2005 before this Court and the same is pending. While so, again on 21.3.2003, the third respondent passed a Recovery Order without giving notice to the petitioner's husband and revised the scale of pay. Aggrieved by that, the petitioner's husband filed O.A.No.1830 of 2003 before the Tribunal and the same has been transferred and renumbered before this Court in W.P.No.12614 of 2007 which is also pending before this Court. Under such circumstances, again the fourth respondent issued a recovery order revising the scale of pay on 17.3.2008 without any notice in his proceedings No.F.3/08 and passed an order for recovery of excess payment from 1.5.2006 to 29.2.2008. Hence, the

petitioner's husband preferred a Writ Petition No.7728 of 2008 before this Court and the same was dismissed as withdrawn pursuant to the order passed by the third respondent, rectifying the mistake and revising the scale of pay. The petitioner's husband was retired from service on 30.06.2008 and the pension payment order was also issued by the authorities concerned based on the above said scale of pay and he received the same as Work Inspector Grade II. Subsequently, the petitioner's husband died on 5.5.2010 in an accident and the pension payment order was also issued in favour of the petitioner by the second respondent. Accordingly, the petitioner has been receiving the pension. At this juncture, the fourth respondent passed an order revising the scale of pay by reducing the salary of petitioner's husband in his proceedings Se.Mu.No.Ko.3/2010 dated 28.12.2010 and another proceedings No.FDC/2010 dated 28.12.2010 and ordered to recover the excess pay. The impugned orders were passed pursuant to the Government Letter dated 12.5.2010 issued by the first respondent. As per the said Government Letter, the petitioner's husband is entitled to have the benefit of G.O.Ms.No.250 since he was moved to the next higher scale of pay prior to 1.6.1988. In view of the same, the impugned proceedings are liable to be set aside. In support of his contention, the learned counsel for the petitioner relied on the Judgment of the Hon'ble Supreme Court in State of Punjab & others Versus Rafiq Masih (White Washer) etc., reported in CDJ 2014 SC 1054 to the proposition that recovery if made from the employee, it would be arbitrary and iniquitous for the mistake of the employer.

3. The learned Additional Government Pleader appearing for respondents 1, 3 and 4 would submit that after following the appropriate Government Orders and Rules only, the respondents have passed the impugned orders and the same warrant no interference at the hands of this Court.

4. However, a letter signed by the Senior Accounts Officer/Legal Cell of the second respondent filed by the petitioner states that-

" The Department contends that the deceased Government Servant is eligible for the scale of pay of Rs.4300-6000 only in terms of Finance (CMPC) Department Letter No.47573/CMPC/2009-1 dated 15.5.2010. In this letter in para 2 also, Government have clearly stated that those who have moved to next higher scale prior to 1.6.88 under Flexible Complementary Scheme are entitled to higher revised scales. Thus, the deceased Government Servant who was moved to Work Inspector Grade II post with effect from 1.5.86 (i.e.) prior to 1.6.88 is entitled for

the higher pay scales specified in G.O.Ms.No.250 and this pay scale has already been admitted by this respondent.

However, not in agreement with the aforesaid proposition, the fourth respondent viz., Departmental authority seems to have issued the impugned proceedings dated 28.12.2010.

It is submitted that this respondent sticks to his earlier stand and the petitioner's husband is entitled to higher scale of pay."

A perusal of the above extract shows that the second respondent sticks to his earlier stand and that the petitioner's husband is entitled to higher scale of pay.

5. In the judgment relied on by the learned counsel for the petitioner, viz., State of Punjab & others Versus Rafiq Masih (White Washer) etc., reported in CDJ 2014 SC 1054 : 2015 (5) CTC 455, it has been held as follows:-

5. ... It would be pertinent to mention, that Librarians were equated with Lecturers, for the grant of the pay scale of Rs.700-1600. The above pay parity would extend to Librarians, subject to the condition that they possess the prescribed minimum educational qualification (first or second class M.A., M.Sc., M.Com. plus a first or second class B.Lib. Science or a Diploma in Library Science, the degree of M.Lib. Science being a preferential qualification). For those Librarians appointed prior to 3.12.1972, the educational qualifications were relaxed. In Sahib Ram Verma v. Union of India (1995) Supp.1 SCC 18, a mistake was committed by wrongly extending to the appellants, the revised pay scale, by relaxing the prescribed educational qualifications, even though the concerned appellants were ineligible for the same. The concerned appellants were held not eligible for the higher scale, by applying the principle of "equal pay for equal work". This Court, in the above circumstances, did not allow the recovery of the excess payment. This was apparently done because this Court felt that the employees were entitled to wages, for the post against which they had discharged their duties. In the above view of the matter, we are of the opinion, that it would be iniquitous and arbitrary for an employer to require an employee to refund the wages of a

higher post, against which he had wrongfully been permitted to work, though he should have rightfully been required to work against an inferior post. 12. 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 herein above, 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 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.

6. In the light of the aforesaid discussion and following the judgment of the Hon'ble Supreme Court in State of Punjab & others Versus Rafiq Masih (White Washer) etc., reported in CDJ 2014 SC 1054, the impugned order viz., br/K/vz;/nfh/3-2010 ehs; 28/12/2010 passed insofar as the recovery is concerned, is quashed. Consequently, it is open to the respondents to revise the petitioner's husband's scale of pay in accordance with law, Liberty is also granted to the petitioner to approach the authority concerned to revise the scale of pay of the petitioner's husband.

7. The Writ Petition is partly allowed. No costs.
Connected Miscellaneous Petition is closed.

-s/d-
Assistant Registrar(CSIV)

True Copy

Sub-Assistant Registrar

asvm

To

- 1.The Secretary,
Government of Tamilnadu,
Finance (CMPC) Department,
Fort St.George,
Chennai - 600 009.
- 2.The Accountant General,
Department of Accounts & Entitlement,
Teynampet, Chennai - 16.
- 3.The Engineer in Chief (Buildings),
Building Organisation,
P.W.D., Chepauk,
Chennai - 600 005.
- 4.The Assistant Executive Engineer,
P.W.D.(Buildings & Construction),
Sub-Division,
Dharmapuri - 1.

+1 cc to Mr.C.Prabakaran Advocate sr 1711
+1 cc to Mr.V.Vijayshankar Advocate sr 1749
+1 cc to the Government Pleader sr 2246

W.P.No.1751 of 2011
and
M.P.No.1 of 2011

nml (co)
aa22/03/2017