



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 03.01.2017

CORAM:

THE HON'BLE MR.JUSTICE S.VAIDYANATHAN

W.P. (MD) No.15955 of 2015

S.Arockiadas

... Petitioner

-vs-

The Assistatnt Elementary Education Officer,
Vadamadurai,
Dindigul District.

... Respondent

Prayer: Writ Petition is filed under Article 226 of the Constitution of India for issuance of a Writ in the nature of Certiorari, calling for the records relating to the impugned order passed by the respondent in his proceedings in Na.Ka.No.881/A1-2015 dated 07.08.2015, re-fixing the petitioner's salary with retrospective effect from 01.01.2006 and for consequential recovery without notice and quash the same as illegal.

For Petitioner : Mr.M.E.Ilango

For Respondent : Mr.S.Satish Kumar
Addl. Govt. Pleader

O R D E R

The petitioner has come forward with this writ petition, seeking to quash the impugned order dated 07.08.2015 passed by the respondent in Na.Ka.No.881/A1-2015, by which, the earlier fixation of salary of the petitioner stood cancelled and the same was unilaterally re-fixed with retrospective effect from 01.01.2006 with direction to the petitioner to repay the excess amount paid to him from 01.01.2001 till date.

2. The case of the petitioner is that his scale of pay was revised by the respondent in Na.Ka.No./A1/2012 dated 31.07.2012 and his scale of pay was notionally revised with effect from 01.01.2006 by extending actual monetary benefits from 01.01.2011. At that time, it was also clarified that the petitioner need not pay the excess amount, if already received. But to the contrary, by the impugned order dated 07.08.2015, it has been stated that the respondent's pay has been wrongly fixed and the same has to be recovered from him.



3. To consider the issue involved in this case, it is worthwhile to refer to the judgment of the Apex Court reported in (2015) 4 Supreme Court Cases 334 [State of Punjab and others Vs. Rafiq Masih (White Washer) and others] wherein it has been 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."

4. However, in the subsequent judgment, 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, 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).

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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.''

5. In the above judgment, it has been categorically stated that when an undertaking is given by an employee that the employer can recover the amount, **then it is not necessary that there should be a separate undertaking. Admittedly, in this case, there is no such undertaking in the earlier order dated 31.07.2012, granting monetary benefit to the petitioner, to the effect that in case of wrong fixation of pay, the same could be recovered.** Moreover, the impugned order has been passed without hearing the petitioner and hence, this Court is inclined to interfere with the impugned order dated 07.08.2015.

6. Accordingly, this Writ petition is allowed and the impugned order dated 07.08.2015 is set aside. The matter is remitted back to the respondent and it is open to the respondent to pass appropriate orders after affording an opportunity of hearing to the petitioner. Since the petitioner has already retired from service, the whole exercise shall be completed within a period of two months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(Crl.side)

/True copy/

Sub Assistant Registrar

To:

The Assistant Elementary Education Officer,
Vadamadurai, Dindigul District.

+1cc to Mr.M.E.Elango, Advocate SR.NO.569

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