BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED:18.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MRS.JUSTICE J.NISHA BANU

W.P(MD).No.996 of 2014
and
M.P.(MD).No.2 of 2014

S.Jothinathan ... Petitioner

Vs

1.The State of Tamil Nadu
rep.by its Secretary to Government,
Finance Department,
Chennai-09.
2.The Subordinate Judge,
Subordinate Court,
Dharapuram,
Thiruppur District.
3.The Principal,
Institute of Tools and Die Engineering,
Dindigul-03,
Dindigul District. ... Respondents

This Writ Petition is filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus to call for records in pursuant to the impugned order passed by the second respondent in proceedings D.No.804/2013 dated 06.12.2013 and quash the same and consequently direct the respondents to grant monetary benefits in accordance with the existing rules.

For Petitioner :Mr.S.I.A.Bhagadur sha
For R.1 :Mr.N.S.Karthikeyan
Additional Government Pleader
For R.2 :Mr.N.Mohideen Basha
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ORDER

[Order of the Court was made by **J.NISHA BANU,J.**]

This Writ Petition has been filed against the order of the second respondent dated 06.12.2013, whereby, he has ordered for recovery of excess payment granted to the petitioner.

2. It is the case of the petitioner that he was appointed as typist on 05.11.2008 by the Principal District Judge, Erode based on the employment seniority and posted in the 1st Additional Munsif Court, Bhavani in the existing vacancy place and he was granted time scale of Rs.3200-85-4900. Subsequently, he was transferred to several Courts in Erode District and continued

his service under the control of the District Principal Judge, Erode. The appointment was made under Rule 10(A)(1) of the Tamil Nadu Subordinate Service Rules. Subsequently, as per the orders of the State Government, the Tamil Nadu Public Service Commission conducted a special qualifying test to the petitioner and such of those similarly placed persons in the State and appointed them in the regular time scale of pay on regular basis and on 07.06.2012, the petitioner was relieved from judicial department and appointed as typist in the third respondent institution. As per the Fundamental Rule 26(a) 13(vii), the annual increment and other allowances were granted to the petitioner, while working in the judicial department.

2.1. While so, after so many years, a show cause notice was given to the petitioner by the second respondent as to the recovery of the excess payment granted to him by way of increment dated 18.03.2013 which also stated that based on the Letter No.1127 of the Principal District Judge, Thiruppur, dated 06.02.2013, recovery proceedings were initiated by the second respondent. Thereafter, the petitioner was constrained to send a detailed representation to the Principal District Judge, Thiruppur, on 25.04.2013 through the third respondent seeking exemption to recover the amount from the petitioner. Subsequently, on 26.04.2013, the third respondent forwarded the representation to the Principal District Judge, Thiruppur, but the impugned order of recovery was passed by the second respondent which is under challenge before this Court.

3. It is the case of the petitioner that before passing the impugned order no opportunity was given to him to put forward his defence and therefore, the order impugned in this Writ Petition is liable to be set aside.

4. *Per contra,* the second respondent through his counter affidavit would submit that a sum of Rs.35,530/- plus allowances was sought to be recovered by the respondents, based on the audit report and the Office Memorandum issued by the Principal District Judge, Tiruppur, in D.No.1127/13 dated 06.12.2013 directing the second respondent to collect the excess payment from the petitioner and to remit the same to the proper head of account under intimation to him and only based on that, the impugned order has been passed by the second respondent.

4.1. However, the second respondent would contend that as per the Fundamental Rule, the employees appointed under Rule 10(a)(1) should be paid minimum scale of pay and increment should not be sanctioned every year and as soon as the one year period is over, the petitioner should be ousted for a day or two in a year and again, he would be appointed in the service. They are not entitled for the other benefits enjoyed by the regular employees and these conditions were intimated in their appointment orders.

4.2. However, the petitioner was sanctioned with the subsequent yearly increment till date. His increment was sanctioned after fixation of his pay. Therefore, it appears that a communication was sent to the accountant general to regularise the payment made. It also appears that the petitioner was not ousted from service and his service was a continuous one.

4.3. It is also seen from the counter affidavit that the Principal District Judge called for explanation through Official Memorandum in D.No.66/12 dated 05.01.2013 for the audit objection of the above querry, for which, the second respondent submitted the reply on 17.01.2013 to the Principal District Judge, Thriruppur. It was stated that the excess payment to the petitioner does not arise as the last pay certificate and the Service Register were also sent to the new employee. It was also submitted that the petitioner was not ousted and hence, the periodical increments were sanctioned to him, for which also, the second respondent had given the relevant documents. It was also stated that by the second respondent that though such a reply was given to the Principal District Judge, he in turn, through his Official Memorandum in D.No.1127 of 2013 dated 06.02.2013 directed the second respondent to collect the excess payment from the petitioner and remit the same to the treasury under the proper head of account with due intimation to him.

5. Heard the submissions of the learned Counsel for the petitioner as well as the learned Counsel for the respondents.

6. It is seen from the records that the petitioner has not been ousted and re-employed as contemplated under 10(a)(1) of the Fundamental Rules and his service was a continuous one and therefore, the periodical increments were granted to him by the respondents consciously as there was no break in service. It is also seen from the records that all these aspects were also entered in the Service Register of the petitioner as to the increments sanctioned. More importantly, in the case on hand, it is not the case of the respondents that the petitioner has misrepresented or made any false claim by which the excess payment was granted to him.

7. In this connection, it is apt to mention a decision reported in ***(2015) 4 SCC 334, State of Punjab and Others Vs Rafiq Masih (White Washer) and Others,*** wherein, many of the judgments in relation to recovery has been discussed and conclusively, considering the various aspects, the Apex Court laid down certain parameters, where, recovery cannot be effected. The operative portion of the judgment is usefully extracted below:-

> (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 employees who are due to retire within one year of 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 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 effected from the

employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of employer's right to recover."

8. Therefore, on facts, we are satisfied that the case of the petitioner falls within the parameters laid down by the Apex Court as mentioned above. In other words, the petitioner is a 'group-c' employee and recovery cannot be ordered to be recovered by the respondents herein from the petitioner on account of excess payment granted to him. For the foregoing reasons, the order impugned in this Writ Petition is liable to be set aside.

9. In the light of the above, the order impugned in this Writ Petition stands set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(RTI)

/TRUE COPY/

Sub Assistant Registrar

To

1.The Secretary to Government,
The State of Tamil Nadu
Finance Department,
Chennai-09.
2.The Subordinate Judge,
Subordinate Court,
Dharapuram,
Thiruppur District.
3.The I Additional District Munsif,
Bhavani.
4.The principal District Judge,
Erode.
5.The Principal District Judge,
Tiruppur.
6.The Principal,
Institute of Tools and Die Engineering,
Dindigul-03,
Dindigul District.

+1 cc to MR.S.I.A.K.Bhagadursha, ADVOCATE, SR NO: 3109

ssm
sva/jm/sar3/15.02.2017/4p/8c