

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :06.08.2018

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.21182 of 2017

and

W.M.P.Nos.22079 & 22080 of 2017

and

W.M.P.Nos.5884 & 11751 of 2018

R.Lourdhumary

...Petitioner

vs

- 1.The State of Tamil Nadu,
rep.by its Secretary,
Finance(BPE)Department,
Fort St.George,
Chennai - 600 009.
- 2.The Director of Medical Education,
Kilpauk, Chennai - 600 010.
- 3.The Dean,
Government Rajiv Gandhi General Hospital,
Chennai - 600 003.
- 4.The Superintendent,
Government Thiruvotteeswarar Hospital of Thoratic
Medicine,
Otteri,
Chennai - 600 012.
- 5.The Principal Accountant General(A&E)
Tamil Nadu,
Chennai - 600 018.
- 6.The Branch Officer,
The Office of the Principal Accountant General(A & E)
Tamil Nadu,
Chennai - 600 018.

..Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records relating to the proceedings of the 5th respondent vide No.Pr.AG(A & E)/PEN,

P20/12019220/1/R2019220, dated 03.08.2016, in so far as it relates to the "Remarks in Admissibility Report" and the consequential order of the 4th respondent vide Mu.Mu.No.496/Ne1/2017, dated 05.06.2017, quash the same and direct the respondents 4 to 6, to restore the Grade Pay of Rs.4,400/- with effect from 06.07.2007 and pay the pension accordingly.

For Petitioner : M/s.K.Kanimozhy
for Mr.N.Rajan

For Respondent : M/s.A.Sri Jayanthi,
Spl GP for R1 to R4
Mr.V.Vijay Shankar for R5 & R6

O R D E R

The order of Recovery issued by the respondents in respect of excess payment made in favour of the writ petitioner is under challenge in this writ petition.

2.The writ petitioner was appointed as Telephone Operator in the Medical Department on 07.06.1986. His services were regularized and selection Grade also was granted on completion of 10 years of service in the post of Telephone Operator. Subsequently, on 06.07.1997, Special Grade was granted on completion of 20 years of service. Accordingly, the Scale of pay as applicable to the writ petitioner had been fixed by the respondents.

3.The learned counsel for the writ petitioner made a submission that there was no misrepresentation or otherwise on the part of the writ petitioner in respect of the fixation of pay. The pay fixation was done by the establishment as per the Government orders in force. This being the factum of the case, after the retirement, the writ petitioner was served with an order of Recovery, stating that an excess payment was paid to him. The writ petitioner was allowed to retire from service on 30.06.2016. The recovery order has been passed without any show cause notice or an opportunity to the writ petitioner and therefore, the same is in violation of the principles of natural justice.

4.The learned Special Government Pleader appearing on behalf of the respondents opposed the contention by stating that an excess payment was made on account of wrong fixation of salary to the writ petitioner and therefore, there is no infirmity as such in respect of the impugned order of recovery.

5. Admittedly, the order of recovery had been issued after the retirement of the writ petitioner. This apart, there was no misrepresentation or otherwise on the part of the writ petitioner. Under these circumstances, the respondents are at liberty to correct the misconducts if any in the fixation of pay. In other words, if the pay as applicable to the writ petitioner had been wrongly fixed, then the respondents are at liberty to correct the same and pay the correct scale of pay and pensionary benefits as per the rules in force. However, the excess payment made cannot be recovered from the writ petitioner in view of the fact that the writ petitioner is a retired employee and the Hon'ble Supreme Court of India in the case of State Of Punjab & Ors vs Rafiq Masih [2015 (4) SCC 334] . The Hon'ble Supreme Court laid down the legal principles in the matter of recovery in paragraph No.18 of the Judgement, which is extracted hereunder:

"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.

6. In view of the legal principles settled by the Hon'ble Supreme Court of India, the recovery of excess payment cannot be made in respect of the retired employees. This being the factum of the case, the order impugned passed by the 5th respondent vide No.Pr.AG(A & E)/PEN, P20/12019220/1/R2019220, dated 03.08.2016 and the consequential order of the 4th respondent vide Mu.Mu.No.496/Nel/2017, dated 05.06.2017 are quashed and the respondents are directed to correct the mistakes, if any in the scale of pay. However, the excess payment if any made, cannot be recovered.

7. Accordingly, the writ petition stands allowed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary,
State of Tamil Nadu,
Finance (BPE) Department,
Fort St. George,
Chennai - 600 009.
2. The Director of Medical Education,
Kilpauk, Chennai - 600 010.
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Medicine,
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5.The Principal Accountant General (A&E)
Tamil Nadu,
Chennai - 600 018.

6.The Branch Officer,
The Office of the Principal Accountant General (A & E)
Tamil Nadu,
Chennai - 600 018.

+1cc to M/S.N.Rajan, Advocate Sr.53906
+1cc to Mr.V.Vijay Shankar, Advocate Sr.54346
+1cc to the Government Pleader Sr.54419

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srg 27/08/2018



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