IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:25.04.2018

CORAM

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

W.P.Nos.12013 of 2013
and M.P.Nos.1 of 2013

1.P.Loganatha Krishnan (Deceased)

2.L.Thilagavathy

3.L.Sakthivel

4.L.Ganesan

5.Sangeetha

...Petitioners

(P2 to P5 are substituted as LRs of deceased P1-P.Logantha Krishnan, as per order dated 10.02.2017 by MSJ, in WMP.No.2903 of 2017 in W.P.No.12013 of 2013).

Vs.

1. The State of Tamil Nadu
   rep. by the Director of Local Fund Audit,
   Kuralagam,
   Chennai-108.

2. The Commissioner,
   Erode Corporation,
   Erode.

3. The Assistant Commissioner of Municipalities,
   Zone-I,
   Erode Corporation,
   Erode. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus calling for the records in pursuant to the impugned orders issued by the 1st respondent in proceeding Ni.Mu.No.TPV (2)/24072/2011 dated 17.11.2011 and in proceeding Ni.Mu.No.18934/pe.o.sa(2)/2012 dated 16.08.2012 and the consequential order of the 3rd respondent in proceeding

Na.Ka.No.C1/277/2012 dated 14.02.2012 and quash these three orders as far as the refixation and recovery is concerned and direct the respondents to repay the recovered amount of Rs.1,09,957/- and restore the original fixation of 01.06.1988 and further direct the respondents to pay the interest for the belated payments of pensionary benefits.

For Petitioner : Mr.Swadhi Subramanian,
for Sasikala Subramaniam

For Respondents: Mr.J.Pothiraj
Special Government Pleader for R1.

Mr.M.Raja Mathivanan (for RR2 & 3)

O R D E R

The original petitioner herein was employed as Sanitary Supervisor in the second respondent Corporation and he took voluntary retirement and stood retired from service from 30.06.2011. According to the original petitioner, he had served for more than 40 years and took voluntary retirement. After his retirement, pension proposals were submitted and due to certain audit objections, the petitioner was informed that his pay has been wrongly fixed during his period of employment and an excess amount to the tune of Rs.1,09,957/- has also been paid and therefore on the basis of the audit objections, the excess payment had been recovered from the DCRG payable to the petitioner and also his pension was reduced on the basis of reduced pay scale.

2.The orders dated 17.11.2011, 14.02.2012 and 16.08.2012 passed by the respondents in reducing the pay scale of the petitioner and consequent recovery are impugned in the writ petitions.

3.The learned counsel for the petitioner would at the outset submitted that there was no prior notice issued to the original petitioner and after the retirement, some discrepancy was noticed by the first respondent and on the basis of above objections alone, the pay of the original petitioner was re-fixed to his detriment and thereby pension benefit was reduced and also consequential recovery was ordered. The action of the respondents therefore is violative to the established principles of natural justice. Particularly, in view of the fact that the pay on pension were sought to be re-fixed after the retirement of the employee. Therefore, the learned counsel would submit that on the ground of violation of principles of natural justice alone, the writ petition is to be allowed.

4.The learned counsel for the petitioner would also rely on the order passed by this Court in similar circumstances in W.P.No.33570 of 2012 dated 15.11.2017. In the said order, the learned Judge has considered the similar submissions and the objections, allowed the writ petition after following the order passed by the Hon'ble Supreme Court of India. The learned counsel would draw the attention of this Court to the paragraphs 4 to 7 of the order, which is extracted hereunder:

> “4.The learned counsel for the petitioner would submit that the order of recovery dated 09.06.2012 which is impugned in the writ petition, is vitiated for more than one reason.
>
> (i)No notice was given to the petitioner before the impugned order was passed.
>
> (ii)The so called excess payment made to the petitioner was not due to any misrepresentation on the part of the petitioner and therefore, such recovery, that too after the retirement of the petitioner cannot be valid.
>
> (iii)The learned counsel would submit that the issue raised in the writ petition is directly covered by the law laid down by the Hon'ble Supreme Court of India, in the case of State of Punjab and others Vs.Rafiq Masih (White Washer) and others, reported in 2015 4 SCC 334. The Hon'ble Supreme Court of India has clearly held in the said judgment in paragraph 18, which is extracted below:-
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> “18.It is possible to postulate all situations of hardship which would govern employees on the issue or 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 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."

According to the learned counsel for the petitioner is a retired employee and also belong to Group C service and therefore the case of the petitioner would be directly covered under sub clause(i) and (ii) of paragraph 18 of the judgment, passed by the Hon'ble Supreme Court of India.

5.Upon notice, the learned Additional Government Pleader appearing for the respondents entered appearance and filed a counter affidavit. In the counter, it is stated that the recovery was issued on the basis of certain audit objection, as the petitioner was wrongly fixed in the selection grade. According to the learned counsel, certain wrong entries made in the service book of the petitioner which resulted in excess payment being paid to the petitioner.

6.In any event, it was not the fault of the petitioner when some wrong entries were made in the service register. It was not the case of the respondent either that there was an active misrepresentation on the part of the petitioner while the pay scale was fixed and payment made.

7.In the said circumstances, this Court is in agreement with the submission made by the learned counsel for the petitioner that the claim of the petitioner is covered by the law laid down by the Hon'ble Supreme Court of India, in the aforesaid decision. Therefore this Court has no hesitation in allowing the writ petition. During the course of arguments, it was submitted by the learned counsel for the petitioner that the amount sought to be recovered was paid by the petitioner to the Department. If that is a fact, the following order is issued. The impugned order Na.Ka.No.99/A1/2011, dated 09.06.2012 is set aside. The respondents are directed to refund the amount recovered from the petitioner, within a period of two months from the date of receipt of a copy of this order."

5.Upon notice Mr.J.Pothiraj, learned Special Government Pleader entered appearance for the first respondent and filed detailed counter. According to the counter affidavit of the first respondent, once the employee is retired, normal verification is conducted with regard to the correctness of the pay fixed from the date of appointment to till the date of retirement, because the pension is being calculated based on the pay last drawn by the employee. Therefore, in the instant case, when a verification was done, it might have been noticed that the pay of the original petitioner, was fixed wrongly. Therefore, the erroneous fixation was rectified and the excess payment was recovered. The petitioner therefore cannot have any valid objections to the new fixation of pay and also recovery of the excess payment made.

6.During the pendency of the writ petition, the original petitioner died and the legal heirs of the petitioner were brought on record. In consideration of the submissions of the learned counsel and also in consideration of the law laid down by the Hon'ble Supreme Court of India, which has been followed by this Court in the aforesaid order as extracted supra, the issue raised in the present writ petition is squarely covered by the above legal principle laid down.

7.It is an admitted position that before re-fixing the pay of the employee, no notice was issued and the re-fixation had been done only after the retirement of the employee. It was not the case of the respondents that the employee concerned had mis-represented for wrong fixation of pay even assuming the fixation to pay was not correct. In the absence of such allegation, this Court does not see any justification for re-fixing the pay of the employee after his retirement and an order in recovery of excess payment made.

8. In any event, as rightly contended by the learned counsel for the petitioner that the issue squarely covered by the aforesaid decisions and therefore, this Court does not think that the respondents have any valid case for resisting the claim of the petitioners.

9.When an adverse order has been passed against a public servant, the Government is expected to follow the minimum requirement of complying with the basic principles of natural justice. In this case, when the employee took retirement after serving more than 30 years from the Public Corporation, his pay had been re-fixed behind his back and for whatever reasons such action on the part of the authorities concerned cannot be countenanced in law or on facts. Moreover, in this case, the original petitioner himself had died and the family members had been brought on record. Therefore, this Court is of the view that there will not be any useful purpose in remitting the matter back to the authorities concerned for issuance of notice before re-fixing the pay of the petitioner, as the family members would not be in a position to represent the case with regard to any anomaly in the pay fixation of the deceased employee.

10.In view of the above, this Court has no hesitation in allowing the writ petition. Accordingly, the writ petition is allowed. The impugned orders in Ni.Mu.No.TPV(2)/24072/2011 dated 17.11.2011, Ni.Mu.No.18934/pe.o.sa(2)/2012 dated 16.08.2012 and Na.Ka.No.C1/277/2012 dated 14.02.2012 are hereby set aside and the respondents are directed to refund the amount of Rs.1,09,957/- which was recovered from the DCRG and the pensionary benefits from the deceased employee to the petitioners herein and also restore the original fixation as it stood before the impugned orders came to be passed and calculate the pension benefits on such basis and pay the petitioners, the pension with arrears as admissible. The above direction of this Court shall be complied with by the respondents within a period of eight weeks from the date of receipt of copy of this order. No costs. Consequently, connected miscellaneous petition is also closed.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

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To
1.The State of Tamil Nadu
rep. by the Director of Local Fund Audit,
Kuralagam,
Chennai-108.

2.The Commissioner,
Erode Corporation,
Erode.

3.The Assistant Commissioner of Municipalities,
Zone-I,
Erode Corporation,
Erode.

+1 CC to Govt. Pleader sr 31323.
+1 CC to Mr.M. Rajamathivanan, Advocate sr 30646.
+1 CC to Mr.R. Premnarayanan, Advocate sr 30650.

W.P.Nos.12013 of 2013
and M.P.Nos.1 of 2013

SJ(CO)
SP(11/05/2018)