

In the High Court of Judicature at Madras

Dated : 22.02.2018

Coram

THE HONOURABLE MR.JUSTICE SATRUGHANA PUJAHARI

W.P.No.19611 of 2013

and

M.P.No.1 of 2014

J.Kasthuri

... Petitioner

Vs.

1.The Commissioner
Chennai Municipal Corporation
Rippon Buildings
Park Town
Chennai - 600 003.

2.The Accounts Officer (Pension)
Chennai Municipal Corporation
Rippon Buildings
Park Town, Chennai - 600 003.

... Respondents

Prayer : Petition filed under Article 226 of the Constitution of India, issue a Writ of Certiorarified Mandamus, calling for the records of the second respondent pertaining to his proceedings in Pothu.Thu.Na.Ka.No.B/2/Special.1/12 and quash the order dated 02.05.2012 and consequently direct the respondents to re-imburse the amount of Rs.45,346/- which was deducted from the petitioner's Family Pension, along with an interest at the rate of 18%.

For Petitioners : Mr.R.Sivakumar

For Respondents : Mr.C.Ravichandran

सत्यमेव जयते
Standing Counsel for R1 & R2

O R D E R

This writ petition has been filed by the petitioner, who happens to be the widow of a superannuated employee, challenging the reduction and recovery from the family pension granted to her on 02.05.2012 and also for quashment of the said order and with a prayer to return the amount already recovered as the same has been illegally, arbitrarily deducted from her pension without any notice and also with a prayer to restore the original pension which she was getting.

2.It appears from the averments of the writ petition that the husband of the writ petitioner who was working as a gardener with the Respondents, superannuated from the service on 01.07.2005. After superannuation he was released with the pension order. But, thereafter he having expired, his wife was issued with the family pension payment order by the Government indicating in the pension payment order, her entitlement of pension from 11.06.2006, i.e., next date of death of her husband at the basic pay of Rs.2009/- with dearness allowance and reduced pension from 01.07.2010 till her life or remarriage at the rate of Rs.1275/-. The aforesaid entitlement of pension was never disputed by the petitioner and she at no point of time challenged that she was entitled to family pension at a higher rate. However, the Authority instead of releasing her the pension at the reduced rate after 01.07.2010, continued with release her pension at the earlier basic pay of Rs.2009/- till 02.05.2012 which she was not entitled to. When the aforesaid came to the notice of the respondents, they made reduction in her pension and released the pension at the rate of her entitlement from 01.07.2010 as mentioned in the P.P.O. and also started to recover the amount of pension released from her in 22 fixed monthly instalments. The aforesaid was never communicated to the petitioner. But, only on a representation being made and the petitioner having filed Writ Petition No.8757 of 2013, the order was communicated to her only on 11.04.2013. The petitioner thereafter came to challenge the said order in this writ petition to be illegal, arbitrary being violative of the principle of natural justice as no proper notice has been given and to quash the said order.

3.The aforesaid averment in the writ petition has been countered by the respondents vide their counter affidavit with the averment that the family pension payment order of the petitioner being very specific with regard to her entitlement and G.O. No.702 Finance (Pension) Department dated 07.10.1988 authorizing the respondents to recover the excess amount of pension paid, according to which, he pension overdrawn by the petitioner was recovered, the same cannot be said to be illegal, arbitrary and violative of the principle of natural justice. Therefore, this writ petition challenging the impugned order of recovery of the excess payment of pension made and also release of the pension according to the petitioner's entitlement, is devoid of merit.

4.It is contended by the learned counsel appearing for the writ petitioner that since the writ petitioner was not given notice of reduction of her pension and also recovery of any excess pension paid to the petitioner, the impugned order of recovery was illegal and improper being violative of the principle of natural justice. So also, he submits that even if the petitioner has been paid with any excess pension, the same could not have been realized from her pension as she had no contribution in release of the excess pension in her favour that too without any prior notice, more particularly when she is the widow of a Group 'D' employee. In support of his submission, the learned counsel appearing for the petitioner places reliance on a decision of the Apex Court in the case of State of Punjab and others vrs. Rafiq Masih (White Washer) and others, reported in (2015) 4 SCC 334, wherein the Apex Court in paragraph-18 have held 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 the employer, in excess of their entitlement. Be that as it may, 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 again 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 recovery."

Placing heavy reliance on the aforesaid decision of the Apex Court, it is submitted that the impugned order is liable to be quashed and the pension already recovered needs to be refunded in favour of the petitioner. So also, placing reliance on a decision of this Court in the case of D. Susairaj vrs. District Treasury Officer, reported in 2016 SCC Online Mad. 21903, it is submitted that the petitioner is also entitled to refund of the recovered pension, inasmuch as this Court in the similar facts and situation when a pension was wrongly fixed at a higher rate which was later on audit objection was reduced and the higher amount of pension already paid was ordered to be recovered, taking note of the case of Rafiq Masih (supra), directed refund of the amount already recovered, though did not interfere with the recovery of pension.

5. In response, learned counsel appearing for the respondents submits that such a contention is devoid of merit inasmuch as in the family pension payment order the entitlement of the family pension of petitioner was mentioned and, as such, it cannot be said that there was any reduction in the pension of the petitioner without any notice to her. However, when it came to the knowledge of the respondent that by inadvertence higher amount of pension was to the petitioner than her entitlement the impugned order of recovery was passed and the pension was released to her regularly according to her entitlement. The same, therefore, cannot be said to be violative of the principle of natural justice being suffering from vice of violation of the principle of audi alteram partem. So far as the recovery of the excess pension amount is concerned, no notice need be issued as the petitioner knowing well about her entitlement received the higher pension and did not point out to the authority she was entitled to the lesser pension and, as such, contributed to the release of the higher pension in her favour. When the petitioner has also contributed in getting the higher amount of pension and G.O. No.702 Finance (Pension) Department dated 07.10.1988 authorizes the Government to recover the excess amount which was also explicitly known to the petitioner on her request though at a later stage, the realization of the pension amount cannot be found fault with. Hence, this writ petition filed challenging the same is devoid of merit and is liable to be dismissed, submits the counsel for the respondent.

6. Considered the submission of the learned counsel appearing for the writ petition, so also the averments made in this writ petition as well as the facts situation of the case and also the ratio of the decision laid down in this regard by the Apex Court as well as this Court in the decisions cited supra. It is an undisputed fact that the writ petitioner, a widow was in receipt of family pension and in her family pension order she was very well made aware of the entitlement of her pension at the rate at different point of time. The same is never disputed by the petitioner to be arbitrarily fixed. The petitioner accordingly was released with the said pension which she was receiving. According to the said pension payment order, on 01.07.2010, her pension in her favour, should have been reduced at the rate of basic pay of Rs.2009/- and dearness allowance, but the Authority by inadvertence appears to have continued with the release of the pension at the earlier rate, to which she was not legally entitled to. When the aforesaid came to the knowledge of the authority on 02.05.2012 they stopped the release of her pension at the earlier and released the pension at the rate to which she legally was entitled. Thereafter, the authority also passed the impugned order of recovery of the excess pension in view of G.O. No.702 Finance (Pension) Department dated 07.10.1988. No notice of such recovery was given to the petitioner prior to such recovery and, I am told, already substantial amount has since been recovered. Since the petitioner was made aware of the amount of pension to be received by her at different point of times in the pension payment order in advance, for stoppage of pension paid at a higher rate to which she was not entitled to and release of the same at the rate, to which she was entitled to no prior notice is required to be given. Therefore, the same cannot be found fault with on the ground of violation of the principle of natural justice. Hence, contention advanced that since the petitioner's pension has been reduced illegally and arbitrarily without notice, the same is illegal and liable to be quashed and the petitioner be released with the pension at the rate she was receiving before April 2010, appears to be devoid of merits.

7. Now, coming to the question of recovery of the pension amount, it appears that no prior notice was served on the petitioner before such recovery. But it appears that the petitioner was getting a higher pension, to which she was not legally entitled to. The same is justified on the ground that G.O. No.702 Finance (Pension) Department dated 07.10.1988 authorised the respondents to make such recovery. There is no manner of doubt that the said Government entitles the respondent to recover such higher amount disbursed to a pensioner. But, before such recovery, the person concerned ought to have been noticed and the recovery should have been made only after

hearing him. According to the respondent the same is not a requirement in the present case as the petitioner being aware of her entitlement in advance about a lower rate, went on receiving the excess amount and, as such, the notice to him could not have served any purpose and the same was an empty formality. However, this Court in the case of D. Susairaj (supra) in a similar facts situation placing reliance on the decision of the Apex Court in the case of Rafiq Masih (supra) have held the recovery of pension in such facts and situation should not have been ordered. The same is countered by the counsel for the respondents to be distinguishable on the ground that this petitioner had contribution on such excess payment and substantial amount of such excess payment has been recovered. Such a contention of the respondents to justify the recovery already made cannot be sustained as the petitioner cannot be said to have any contributed on the same. No doubt, the petitioner, who was earlier noticed with regard to her entitlement at a lower rate went on receiving the same. However, it cannot be lost sight of that pension are also increased on account of addition of dearness allowance and pay commission report. The pensioner is a widow of a Group 'D' employee. Therefore, her passive acceptance of higher amount of pension inasmuch as she had no active contribution in release of the excess pension in her favour, cannot be said to owing to her contribution. In such premises even if G.O. No.702 Finance (Pension) Department dated 07.10.1988 authorizes the Government to recover the excess amount paid, but considering the hardship and also the law laid down as aforesaid by the Apex Court in the case of Rafiq Masih (supra), the recovery order cannot be sustained.

8. Now, a question arises with regard to refund of the amount already made. It appears that in the similar facts and situation, this Court in the case of D. Susairaj (supra) placing reliance on a decision of the Apex Court in the case of Rafiq Masih (supra) has also ordered refund of the same. Hence, this Court though unable to accept that the reduction of excess pension without prior notice to the petitioner to be unsustainable inasmuch as the aforesaid cannot be said to be reduction of a pension, but release of the amount, to which the petitioner was actually entitled to, of which she was given prior notice in the family pension order. But far as the recovery of excess pension released in favour of the petitioner, the same cannot be sustained in view of the law laid down by the Apex Court in the case of Rafiq Masih (supra). Hence the order of recovery of pension is liable to be quashed, so also she is entitled to refund of the excess amount of pension recovered.

9. Accordingly, this writ petition stands allowed in part with the order of quashment of the order of recovery of the excess pension released in favour of the petitioner, communicated vide impugned order dated 02.05.2012 and also refund of the amount already recovered in her favour within a period of four months from the date of receipt of a copy of this order, positively. Needless to say that if the aforesaid amount is not refunded within the time stipulated to the petitioner, then the respondent is liable to pay interest at the rate of 9% per annum till the payment is made. The writ petitioner is also at liberty to approach this Court in an appropriate petition if the said amount is not paid. However, in the circumstances, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To

1. The Commissioner
Chennai Municipal Corporation
Rippon Buildings
Park Town
Chennai - 600 003.

2. The Accounts Officer (Pension)
Chennai Municipal Corporation
Rippon Buildings
Park Town, Chennai - 600 003.

+2 ccs to Mr.R.Sivakumar Advocate sr 13410
+1 cc Dr.C.Ravichandran Advocate sr 13909

W.P.No.19611 of 2013
and
M.P.No.1 of 2014

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