IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 16.07.2018
CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

W.P.No.46871 of 2006
and
M.P.Nos.2 of 2006 & 1 of 2009

V.Thirunavukkarasu ... Petitioner

Vs.

1.The State of Tamil Nadu through
its Secretary, Education Department
Fort. St. George, Chennai-9.

2.The Chief Educational Officer,
Villupuram District.

3.The District Educational Officer,
Tindivanam.

4.The Accountant General,
Accountant General office,
Teynampet, Chennai-18. ... Respondents

Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records relating to the order passed by the 4th respondent dated 30.04.2005 in A.G (A & E)/PEN/P11/4/T80-1900/Rtd./2004-2005/1297 said to have been deducted in pursuance of the order of the 4th respondent in proceedings in Na.Ka.No.4490/A2/05, dated 17.10.2005 and quash the same and consequently directing the respondents to pay Rs.1,91,893/- being the amount withheld by the 4th respondent with 18% of interest from the date of 31.03.2004 to the petitioner.

For Petitioner : Mr.A.R.Nixon
For R1 to R3 : Mr.P.Raja,
Government Advocate
For R4 : Mr.V.Vijaya Shankar

O R D E R

This writ petitioner has been filed by the petitioner challenging the impugned orders passed by the 4th respondent, in and by which the petitioner's retirement benefit viz., DCRG amount has been withheld by the respondents.

2. The petitioner was initially appointed as Primary School Headmaster on 18.10.1965 and subsequently, on 13.11.1979, he was promoted to as Tamil Pandit. Thereafter, on 22.10.2003, he was promoted as Headmaster and on attaining the age of superannuation, he retired from service on 31.05.2004.

3. It is stated by the petitioner that while he was working as Tamil Pandi from 13.11.1979 to 31.05.1988, there was no difference in the salary. The 1st respondent-Government has introduced new scale for Elementary School Head Master on the basis of the 5th pay Commission recommendation; however, there was no increase in the scale of pay of the petitioner as equal to the Elementary School Head Master. Hence, the petitioner made representation to the authority. Based on the petitioner's representation, the then Head Master had fixed the scale of pay of the petitioner in RC.Nos.94-95, dated 13.12.1994 and got arrears of the difference from 01.06.1988 to 30.11.1994, based on G.O.Ms.No.57, dated 28.01.1991, and the Government letter dated 08.11.1991. Subsequently, the petitioner got the salary without any problem.

4. While so, on 06.05.1988, the Coimbatore Audit Office made auditing of the school and passed a recovery order against the petitioner to the tune of Rs.25,358/-. However, the said audit objection was over ruled and set aside subsequently by order dated 29.01.2000 and the same was communicated to the 2nd respondent/CEO through proceedings in RC.No.2116/N/98. Further, the petitioner was eligible for Special Grade from 13.11.1999 and in this regard, on 19.03.2001 a proposal was sent by the then Headmaster to CEO. Subsequently, for the clarification sought for by the CEO, the Headmaster had given a reply on 28.01.2002. However, the CEO passed an order on 20.09.2002 rejecting the claim of the petitioner. Though the then Headmaster sent another letter dated 24.03.2003 stating that the audit objection had already been settled, the CEO rejected the same vide order 12.05.2003 referring a circular issued by the Director of School Education in Na.Ka.No.113275/C21/C6/98, dated 29.03.2002. Thereafter, the petitioner was promoted to the post of Headmaster and post at Government High School in Kapalampadi. However, the CEO once again sent a communication on 02.11.2003 to recover the alleged excess payment made to the petitioner. As the petitioner was promoted to the post of Headmaster, his Service Register Book was handed over to the District Educational Officer (DEO). While being so, on 31.05.2004 the petitioner retired from service on attaining the age of superannuation. Thereafter, the DEO re-fixed the pay of the petitioner on 18.11.2004. Aggrieved over the same, the petitioner preferred an appeal on 07.12.2004. Subsequently, on the advise of CEO, the then DEO re-fixed the pay of the petitioner as per Na.Ka.no.1806/Aa3/2004, dated 13.01.2005. In the subsequent pension proposal dated 01.03.2005 sent by the

DEO to the Accountant General, no recovery from the petitioner was mentioned. However, the Accountant General has deducted DCRG from the petitioner to the tune of Rs.1,91,893 as per order dated 30.04.2005. Before passing the said deduction order, no notice has been sent to the petitioner. Aggrieved over the same, the petitioner has made a representation to the Accountant General on 26.05.2005, but the said representation was returned with a direction to approach the DEO. Subsequently, the DEO has passed the order dated 17.10.2005 informed the petitioner about the deduction of the DCRG amount. Hence, the petitioner has come forward with the present writ petition.

5. The learned counsel appearing for the petitioner would submit that the DCRG amount is an accrued right provided under the statute and that cannot be taken away without following the basic principles of natural justice. In this regard, the learned counsel for the petitioner relied upon the decisions reported in *(2010) 3 MLJ 934 [P.Subramanian Vs. Government of TN)* and *(2015) 4 SCC 334 [State of Punjab and others Vs. Rafiq Masih (White Washer) and others].*

6. The issue raised in the present writ petition is, *whether the DCRG amount can be withheld by the Department after retirement and whether the Department has power to make recovery after retirement.*

7. Admittedly the petitioner was appointed in the year 1965 as Primary School Head Master and the petitioner retired from service on 31.05.2004. While he was working as Tamil Pandit, there was an issue with regard to the excess payment made to the petitioner. According to the petitioner, the said issue was settled in the year 2003 itself. However, after his retirement from service, the DCRG amount was withheld, without given any notice to the petitioner.

8. In this regard, it is appropriate to place reference in the judgment of the Hon'ble Supreme Court reported in *(2015) 4 SCC 334 [State of Punjab and others Vs. Rafiq Masih (White Washer) and others]*, wherein it has been held as follows:

> "10.In view of the aforestated constitutional mandate, equity and good conscience in the matter of livelihood of the people of this country has to be the basis of all governmental actions. An action of the state, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till

such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligation of the State, to citizens of this Country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India.

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, summaries 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 on 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 when 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.

9. It is also appropriate to extract hereunder the relevant portion of the decision of this Court reported in *(2010) 3 MLJ 934 [P.Subramanian Vs. Government of TN)*, wherein it has been held as follows:

28. In the present case, in a subsequent affidavit filed by the fifth respondent, it is stated that the petitioner has consented for recovery by letter dated 31.8.2005 both from the death *cum*- retirement gratuity and commuted value pension. Admittedly, by the time such letter was given, the petitioner has since long retired in the year 2004 and in his eagerness to get the pensionary amount, he was certainly in a lower bargaining power as a weaker party and there was no chance except to give such consent in order to get at least the balance amount for his livelihood and that cannot be a ground to take away the right which has already accrued to him and the respondents cannot be expected to take advantage of such weaker position of the petitioner after retirement. That was also the view expressed by P. SATHASIVAM, J., as he then was, in *S. Pappa v. Government of Tamil Nadu and Others (Supra)*, where His Lordship, while dealing with the provisions of the Tamil Nadu Recognised Private Schools Act, 1973, of course relating to the unemployed teachers who were downgraded for which consent was stated to have been given, made the following observations by referring to a judgment of the Supreme Court in *Central Inland Water Transport Corporation v. Brojo Nath Ganguly*, AIR 1986 SC 1571: (1986)3 SCC 156.

"*29*..... I have already observed that at the time of passing of the impugned Government Order, even according to the Government, there were thousands of qualified trained Secondary Grade Teachers waiting for employment. In such a situation, they have no other option except to accept and abide by all conditions mentioned in the agreement. Even though the said agreement is to be executed by the School Management and the teacher, the terms and conditions have been drafted and formulated by the Education Department of the Government. Undoubtedly, the unemployed teachers are in a position of unequality of bargaining power which is the result of great disparity in the economic strength of the contracting parties. In other words, among the two, one of the parties namely, the Secondary Grade(Junior) Teacher is a weaker party and he has no choice but to give his assent to a contract and to sign the same in token of his acceptance, however, unfair unreasonable and unconscionable a clause in that contract or form or rules as observed in the *Central Inland Water Transport Corporation v. Brojo Nath Ganguly, (supra)*. Asking the weaker party to execute an agreement which contains unconscionable clauses is void and not binding. In such a situation, this Court is competent to strike down the unfair and unreasonable terms in the agreement entered into between the parties who are not equal in bargaining power. This position has been enunciated by the Hon'ble Supreme Court in the following decisions:

(i) Central Inland Water Transport Corpn. Ltd. v. Brojonath (supra)

(ii) Delhi Transport Corporation v. D.T.C.Mazdoor Congress and others, (supra).

(iii) Uptron India Ltd. v. Shammi bhaki AIR 1998 SC 1681.

Even though it is stated by the learned Additional Advocate General that the said agreement is only between the teacher and the school Management, for the reasons mentioned above, irrespective of the agreement, I am of the view that the teachers are entitled to challenge the impugned Government Orders as violative of Article 14 of the Constitution of India and Section 23 of the India Contract Act. Accordingly, the contentions raised by the learned counsel for the petitioners on this aspect are well-founded."

(emphasis supplied)

29. Moreover, the death-*cum*-retirement gratuity is an accrued right provided under the statute and that cannot be taken away without following the basic principles of natural justice. This view is fortified by the decision of the Supreme Court in *Jaswant Singh Gill v. Bharat Coking Coal Limited and Others*, (2007)1 SCC (L&S)584, wherein it was held as under:

"The Rules framed by the Coal India Limited are not statutory rules. They have been made by the holding company of respondent 1. The payment of Gratuity Act was enacted with a view to provide for a scheme for payment of gratuity to the employees engaged *inter alia* in mines. The Act provides for a close-knit scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. A statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of a statute. The provisions of the Act, therefore, must prevail over the Rules."

In such view of the matter, looking from any angle, I do not see any justification on the part of respondents 4 and 5 in passing such order of recovery and effecting recovery of Rs.3,39,929/- from the pensionary benefits of the petitioner, especially death-*cum*-retirement gratuity and commuted value pension. Therefore, the writ petition is allowed and the impugned orders are set aside with a direction to the respondents to return the amount of Rs.3,39,929/- recovered from the petitioner with interest at the rate of 9% from the date of recovery till the date of repayment and the respondents are directed to restore the pay of the petitioner as it was originally fixed at Rs.1,760/- as per G.O.Ms.No. 1381, School Education Department, dated 5.10.1990 and subsequently, re-fix the pay and pay all consequential monetary benefits and fix the pension of the petitioner accordingly. Such orders shall be passed by the respondents within a period of twelve weeks from the date of receipt of a copy of this order. No costs. Consequently, M.P.No.2 of 2008 is closed.

10. In the present case, without any notice to the petitioner, DCRG amount was withheld after his retirement. Hence, the case of the petitioner squarely covered by the above cited Judgment, particularly Clause II and IV in para 18 of the decisions of the Hon'ble Supreme Court reported in *(2015) 4 SCC 334 [State of Punjab and others Vs. Rafiq Masih (White Washer) and others]*.

11. In view of the above discussion and the decisions cited Supra this Court is inclined to the set aside the impugned orders. Accordingly, the Writ Petitions is allowed and the impugned orders are set aside. The 3rd and 4th respondents are directed to refund the recovered DCRG amount to the petitioner, without interest, within a period of eight weeks from the date of receipt of a copy of this order. No costs. Connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS IX)

//True copy//

Sub Assistant Registrar

To

1.The State of Tamil Nadu through
its Secretary, Education Department
Fort. St. George, Chennai-9.

2.The Chief Educational Officer
Villupuram District.

3.The District Educational Officer
Tindivanam.

4.The Accountant General
Accountant General office
Teynampet, Chennai-18.

+1cc to Mr.V.Vijayshankar, Advocate SR.NO.47025
+1cc to Mr.A.R.Nixon, advocate SR.NO.46683
+1cc to Government Pleader SR.NO.47591

CA(CO)
sm:21.8.2018

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M.P.Nos.2 of 2006 & 1 of 2009