IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.A.No.2544 of 2018
and
C.M.P.Nos.20534 and 20535 of 2018

1.The Director of Treasuries and Account
Chennai - 600 015.

2.The Assistant Treasury Officer,
Kallakurichi, Villupuram District.

3.The Additional Assistant Elementary
Eductional Officer, Kallakurichi,
Villupuram District.

4.The District Treasury Officer,
Villupuram, Villupuram District.

5.The Secretary to Government
Finance (P.C) Department,
Fort St. George, Secretariat,
Chennai - 600 009. ..Appellants/Respondents 1,2,3,5,6

vs.

1.N.Durairaj ..1st Respondent/Petitioner

2.The Principal Accountant General (A&E)
Teynampet, Chennai-600 018. ..2nd Respondents/
4th respondent

Prayer: Writ Appeal is filed under Clause 15 of the Letters Patent, against the order made in W.P.No.33963 of 2016, dated 27.07.2017. Petition filed under Article 226 of the constitution of India for issuance of a writ of certiorarified Mandamus to call for the records relating to the proceedings in the report of D.T.A. Cell under item No.38 Thiru.N.Durairaj C.144943/ EDP SBI/ K.K.I. Vol 4 /16 pertaining to the petitioner concerned of the 1st Respondent herein and the consequential order in Na.Ka. No. 0030/ 2016/ A1 dated 11.07.2016 of the 2nd Respondent herein and quash the same and to direct the 1st and 2nd Respondents to pay the monthly pension which received by the petitioner prior to the impugend orders and further direct the Respondents to return the amount Recovered so far from the pension of the petitioner pursuant to impugned orders.

For Appellants : Mr.R.Udayakumar
Additional Government Pleader.
For R1 : Mr.K.Premkumar
For R2 : No Appearance

JUDGMENT

(Judgment of the Court was made by S.MANIKUMAR, J)

Challenge in this Writ Appeal is to the order of the Writ Court, dated 27.07.2017 made in W.P.No.33963 of 2016, by which the writ court set aside the impugned orders passed by the first and second respondent therein, and allowed the writ petition.

2. Submission and order of the Writ Court in W.P.No.33963 of 2016, dated 27.07.2017, are as hereunder:-

> "The writ petitioner is a State pensioner and challenging the order of recovery dated 11.07.2016, the present writ petition is filed.
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> 2.The learned counsel for the writ petitioner contended that the order of recovery has been issued without issuance of any show cause notice and providing an opportunity to the writ petitioner. Hence, the respondents have violated the principles of natural justice. This apart, the writ petitioner is a pensioner and a senior citizen, aged about 73 years and at this point of time, ordering recovery of pension even without providing an opportunity to the petitioner will affect his livelihood. This apart, the amount of pension was being disbursed as per the calculation of the competent authorities and absolutely there was no misrepresentation or otherwise on the part of the writ petitioner. Therefore, the writ petitioner is not at fault in revising the pension and he was receiving the pension based on the calculation adopted by the competent authorities in this regard. Such being the factum of the case, the writ petitioner cannot be faulted for the erroneous revision of pension.
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> 3.Be that as it may, this Court is of the view that irrespective of the fact whether the revision of pension was carried out in accordance with the rules or not, the respondents had granted the pension on monthly basis and now after a lapse of some years, it is impermissible to recover the same from the pensioners and such a recovery will strenuously affect the livelihood of the pensioners, more specifically at this age. Normally, an aged pensioner will be suffering from various ailments and the regular medical expenses are to be met out by these pensioners.
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> 4.Thus, this Court is of the view that the impugned order of recovery is not only in violation

of the principles of natural justice, but it is also unjust, in ordering recovery of excess pension from the old age pensioners.

5.The Hon'ble Supreme Court of India laid down the legal principles in the matter of recovery in the case of State of Punjab and others Vs. Rafiq Masih (White Washer) and Others reported in (2015) 4 Supreme Court Cases 334, wherein, his Lordships Jagdish Singh Khehar and Arun Mishra J.J, in paragraph No.18 of the judgment, while speaking for the Bench, laid down the principles in respect of the recovery, 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.As per the judgment cited supra, recovery from the retired employees are impermissible. Thus, by following the precedent laid down by the Hon'ble Supreme Court of India, the impugned order dated 11.07.2016 is unsustainable and the same is liable to be quashed.

7.Accordingly, the impugned order is quashed and the writ petition stands allowed. However no order as to costs. Consequently, connected miscellaneous petitions are closed."

3. Instant writ appeal is filed on the following grounds:-

"1. The order of the learned judge in quashing the order issued in Proceedings Na.Ka.No.0030/2016/A1, dated 11.07.2016 issued by the 2nd respondent therein viz., the Treasure Officer, Villupuram in connection with the recovery of the excess pension payment is not justifiable either in law or on facts and circumstances of the case.

2. The learned Judge ought to have seen that the writ petitioner has been sanctioned and paid excess amount for which he is not entitled for.

3. The learned Judge ought to have seen that the 1st respondent herein was given promotion as Elementary School Head Master and given enhanced fixation without following the Government clarification issued in letter No.14463/CMPC/2011-1 dated 05.01.2012.

4. The learned Judge ought to have seen as per the clarification issued Government in letter No.14463/CMPC/2011-1 dated 05.01.2012 the pay of the 1st respondent herein on his promotion ought to have been restricted to the first promotion that is Head Master, High School. But in this case the respondent herein has been given higher fixation in the cadre of Elementary School Head Master.

5. The learned Judge ought to have seen that the calculation of the writ petitioner pension is taken into consideration the scale of pay relevant to the post only and not the higher pay drawn by the respondent as per the clarification issued by the Government and Principal Accountant General Chennai letter No.87191/PC/2204-1 dated 12.01.2005 and in letter Pr.AG(A&E) Legal/MISC/34/12-13320/18476 dated 08.05.2014.

6. The learned Judge ought to have considered that though the pay of the writ petitioner has been fixed at the higher rate subsequently based on the clarification issued by the Government the respondent herein pay re-fixed and pension calculated. The respondent herein has contended that the Government order once issued cannot be altered by means of executive order. It is not correct. While issuing the Government Order dated gathered as a whole and when implemented if found to be not suitable for some category. In that circumstance executive order issued for correction and many occasion such orders issued and scrupulously followed. Therefore the respondent herein cannot find fault in the clarification.

7. The learned Judge ought to have considered that the respondent herein has been paid excess pension and the excess paid amount could be recovered from the petitioner without giving him any notice or getting his consent as per the instructions issued in G.O.Ms.No.702 Finance (PC) Department dated 07.10.1988 and Government letter No.72411 Finance (PGC) Department dated 10.08.2010.

8. The learned Judge ought to have been seen that the writ petitioner is a well-qualified teacher and in the event of granting an excess amount to him for which he is not legally entitled he ought to have report the fact to the authority concerned for correcting the error but the writ petitioner has not done so. But now when recovery order issued the writ petitioner opposes the recovery by submitting one ground or another.

9. The learned Judge ought to have seen that the appellants herein have acted upon as per the procedures and well within the ambit of rule provisions and hence the recovery order issued by the 4th appellant herein is well sustainable."

4. On the basis of the above grounds, Mr.R.Udayakumar, learned Additional Government Pleader appearing for the appellants, made submission.

5. Issue is squarely covered by the Judgement of the Hon'ble Supreme Court in State of Punjab and others vs. Rafiq Masih (White Washer) and others, reported in (2015) 4 SCC 334, which has been duly considered by the writ court.

6. There is no merit in this writ appeal and the same is dismissed. No Costs. Consequently, the connected civil miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

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To

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SKV(CO)
EU(14/12/2018)