BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 25.09.2018
CORAM
THE HON'BLE MR.JUSTICE M.M.SUNDRESH
AND
THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

W.A.(MD)No.1154 of 2018
and C.M.P.(MD) No.8336 of 2018

The Commissioner,
Madurai Corporation,
Arignar Anna Maligai,
Thallakulam,
Madurai - 2. ... Appellant/Respondent

Vs.

M.K.Sekar ... Respondent/Petitioner

Writ Appeal filed under Clause 15 of Letter Patent against the order passed by this Court in W.P.(MD)No.10823 of 2011 dated 09.02.2018.

Prayer in WP(MD)No. 10823/ 2011 :
Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a WRIT OF CERTIORARIFIED MANDAMUS, calling for the records relating to the impugned order passed by the Respondent in his proceedings No.B29/10609/2010, dated 14-05-2010 and quash the same as illegal in so far as the recovery of Rupees 7,928/- is concerned and consequently direct the Respondent to refund the family Pension recovered from the Petitioner from the month of April 2010 to till date within the period that may be stipulated by this Honourable Court.

For Appellant : Mr.K.Govindarajan

For Respondent : Mr.K.Ponnaiah
for M/s.Ajmal Associates

JUDGMENT
(Judgment of the Court was delivered by M.M.SUNDRESH,)

This Writ Appeal is directed against the order of the learned Single Judge by which the writ petition filed was allowed while setting aside the order impugned with a consequential direction to reimburse the amount paid wrongly by way of a pension.

2.The respondent's wife was working as a doctor with the appellant. Even during the services, she died in an accident. The services rendered by her was a pensionable service. Under the Pension Scheme the surviving spouse is entitled for pension.

Accordingly, the second respondent being an advocate was made eligible for pension. The pension was paid for the first seven years at 50%. There is no dispute over that. Even after 7 years 50% was paid as against the rule that 30% is eligible. Thus 20% excess amount was paid after seven years. Having found the mistake, steps were taken to recover the same as against the employees who received pension contrary to the rules. While taking action against the person who was responsible for the fiasco, recovery proceedings were made. One such order passed has been put into challenge under the present proceedings.

3.We make it clear that there is no dispute over the eligibility and the entitlement of the respondent to receive 30%. Therefore, the issue is only with respect to recovery sought to be made and made already. It appears that the recovery is being made by deducting the pension amount payable every month. Therefore, only a poultry sum is being deducted every month towards the wrong payment made. The learned Single Judge was pleased to allow the writ petition by placing reliance upon the order of the Hon'ble Apex Court in State of Punjab v. Rafiq Masih [(2015) 4 SCC 334]. While placing reliance on the said decision, the learned Single Judge came one step forward, directing the appellant to reimburse the amount already recovered from the respondent. This order is put to challenge in this Writ Appeal.

4.The learned counsel appearing for the appellant would submit that it is not the respondent alone but others are also facing the similar situation. They have complied with the orders passed. Now, recovery is being made from the pension paid to them every month. The respondent being an advocate is supposed to know the law. The decision of the Hon'be Apex Court in Chandi Prasad Uniyal v. State of Uttarakhand [(2012) 8 SCC 117] has been approved by the larger Bench in State of Punjab v. Rafiq Masih [(2014) 8 SCC 883]. Thereafter after answering the reference, the Division Bench of the Apex Court has passed orders by taking note of certain contingencies in State of Punjab v. Rafiq Masih [(2015) 4 SCC 334]. Therefore, the order of the learned Single Judge requires interference.

5.The learned counsel appearing for the respondent would submit that the contingencies mentioned in the decision of the Apex Court in State of Punjab v. Rafiq Masih [(2015) 4 SCC 334] would cover the case on hand. Even so, the recovery is made even after 5 years. It is not because of the fault of the respondent. Therefore, no interference is required.

6.In Chandi Prasad Uniyal v. State of Uttarakhand [(2012) 8 SCC 117], the Hon'ble Apex Court after taking note of the earlier proceedings held as follows:

"12. Later, a three-Judge Bench in Syed Abdul Qadir case [(2009) 3 SCC 475] after referring to Shyam Babu Verma [(1994) 2 SCC 521], Col. B.J. Akkara [(2006) 11 SCC 709] etc.

restrained the department from recovery of excess amount paid, but held as follows (Syed Abdul Qadir case [(2009) 3 SCC 475]:

> "59Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned Counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made.
>
> (emphasis added)"

We may point out that in Syed Abdul Qadir case [(2009) 3 SCC 475] such a direction was given keeping in view of the peculiar facts and circumstances of that case since the beneficiaries had either retired or were on the verge of retirement and so as to avoid any hardship to them.

13. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy.

14. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are

being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment."

On a reference made, the Larger bench of Hon'ble Supreme Court in State of Punjab v. Rafiq Masih [(2014) 8 SCC 883] held as follows:

"8. In our view, the law laid down in Chandi Prasad Uniyal's case [(2012) 8 SCC 417], no way conflicts with the observations made by this Court in the other two cases. In those decisions, directions were issued in exercise of the powers of this Court under Article 142 of the Constitution, but in the subsequent decision this Court under Article 136 of the Constitution, in laying down the law had dismissed the petition of the employee. This Court in a number of cases had battled with tracing the contours of the provision in Article 136 and 142 of the Constitution of India. Distinctively, although the words employed under the two aforesaid provision speak of the powers of this Court, the former vest a plenary jurisdiction in supreme court in the matter of entertaining and hearing of appeals by granting special leave against any judgment or order made by a Court or Tribunal in any cause or matter. The powers are plenary to the extent that they are paramount to the limitations under the specific provisions for appeal contained in the Constitution or other laws. Article 142 of the Constitution of India, on the other hand is a step ahead of the powers envisaged under Article 136 of the Constitution of India. It is the exercise of jurisdiction to pass such enforceable decree or order as is necessary for doing 'complete justice' in any cause or matter.

9.The word 'complete justice' was fraught with uncertainty until Article 142 of the Constitution received its first interpretation in Prem Chand Garg v. Excise Commissioner, U.P., AIR (1963) SC 996 which added a rider to the exercise of wide extraordinary powers by laying down that though the powers are wide, the same is an ancillary power and can be used when not expressly in conflict with the substantive provisions of law. This view was endorsed by a Nine-Judges Bench in Naresh Shridhar Mirajkar v. State of Maharashtra, (1966) 3 SCR 744 reiterated by a Seven Judge Bench in A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602 and finally settled in the Supreme Court Bar Association v. Union of India, (1998) 4 SCC 409.

10. Article 136 of the Constitution of India, confers a wide discretionary power on the Supreme Court to interfere in suitable cases. Article 136 is a special jurisdiction and can be best described in the words of this Court in Ramakant Rai v. Madab Rai, (2003) 12 SCC 395: (SCC p. 403, para 14)

"14...... It is a residuary power, it is extraordinary in its amplitude, its limits when it chases injustice, is the sky itself".

11.Article 136 of the Constitution of India was legislatively intended to be exercised by the Highest Court of the Land, with scrupulous adherence to the settled judicial principle well established by precedents in our jurisprudence. Article 136 of the Constitution is a corrective jurisdiction that vest a discretion in the Supreme Court to settle the law clear and as forthrightly forwarded in the case of Union of India v. Karnail Singh, (1995) 2 SCC 728, it makes the law operational to make it a binding precedent for the future instead of keeping it vague. In short, it declares the law, as under Article 141 of the Constitution."

After answering the reference the matter was taken up by the Division Bench in State of Punjab v. Rafiq Masih [(2015) 4 SCC 334], in which it has been 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, 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 employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from 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.

19. We are informed by the learned counsel representing the appellant- State of Punjab, that all the cases in this bunch of appeals, would undisputedly fall within the first four categories delineated hereinabove. In the appeals referred to above, therefore, the impugned orders passed by the High Court of Punjab and Haryana (quashing the order of recovery), shall be deemed to have been upheld, for the reasons recorded above.

20.The appeals are disposed of in the above terms."

7.The Apex Court while answering the reference has rightly played the role under Article 136 viz-a-viz 142 of the Constitution of Indian. Suffice it to state that this Court cannot exercise the power under Article 142 of the Constitution of India. After all, questions of recovery has to be seen only on factual situation. The Apex Court by the subsequent order has only given certain illustrations. Now, we are dealing with a case by which recovery is sought to be made against the spouse of the retired employee. The status of the deceased wife of the respondent being the doctor as against himself being a lawyer is not in dispute. Further, the decision in State of Punjab v. Rafiq Masih [(2015) 4 SCC 334] is made available to the Group C and Group D employees, certainly not against the well qualified doctor and lawyer. This is for the reason an employee who is at the bottom level finds it difficult to face the financial situation. Therefore, the aforesaid decision cannot be applied to the case on hand.

8.Further more, recovery has already been made substantially. Consequentially, further recovery is sought to be made in a piecemeal manner by deducting a small portion of the pension payable every month. Above all, recoveries are being made against the similarly placed employees. Thus, from the above we are of the view that no discretion can be exercised in favour of the respondent. There is no doubt either on fact or on law that the appellant is entitled for the excess amount paid. After all, this is a public money wrongly paid at the instance of an official. That is the reason why the recovery was accordingly made by way of deduction. It is to be seen that further pension is being paid at only 30%. Thus, in the light of the above, we are not in a position to concur with the view expressed by the learned Single Judge. Confirming the order would result in applying the same principle to numerous employees who have also been wrongly paid but whose pension is being deducted without any challenge.

9.In such view of the matter, while setting aside the order of the learned Single Judge we uphold the impugned order. Accordingly, the Writ Appeal stands allowed. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(Crl.side)

/True Copy/

Sub Assistant Registrar(CS-I)

To

The Commissioner,
Madurai Corporation,
Arignar Anna Maligai,
Thallakulam,
Madurai - 2.

+1CC to Mr.K.GOVINDARAJAN, Advocate, SR.No.86890
+1CC to M/S.AJMAL ASSOCIATES, Advocate, SR.No.86690

W.A.(MD)No.1154 of 2018
25.09.2018

SJ
ES/SKN/RSK/SAR 1/17.10.2018/7P/4C