

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.02.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAJA

W.P.No.21526 of 2009

A.Amerthian

...Petitioner

Versus

1. The State of Tamil Nadu
rep. by the Secretary,
Home Department,
Fort St. George, Chennai-9.

2. The Director General of Police,
Santhome, Chennai-4.

3. The Superintendent of Police,
Kanyakumari District,
Nagercoil.

... Respondents

Prayer: Writ Petition has been filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent in G.O. (D) No.98, Home (Police 3) Department, dated 30.1.2009, quash the same and direct him to grant 5% personal pay with effect from 1.9.98 by stepping up the petitioner's pay on par with that of his juniors.

For Petitioner : Mrs.Hema Sampath,
Senior Counsel
for Mrs.R.Meenal

For Respondents : Mr.K.Ravikumar, A.G.P.

O R D E R

The Writ Petition has been filed, challenging the order of the first respondent in G.O. (D) No.98, Home (Police 3) Department, dated 30.1.2009, quash the same and for further direction, directing the 1st respondent to grant 5% personal pay with effect from 1.9.98 by stepping up the petitioner's pay on par with that of his juniors.

2. Learned Senior Counsel appearing for the petitioner submitted that the petitioner was enlisted as Direct Grade I Police Constable in the Police Department on 01.02.1972 and thereafter, promoted as Head Constable on 03.03.1990 and awarded with Selection Grade in Head Constable on 24.6.1995. Subsequently, he was upgraded as Special Sub-Inspector of Police w.e.f. 1.6.2002. In the meantime, the petitioner suffered a Departmental Proceedings in PR.117 of 85 under Rule 3(b) of the Tamil Nadu Police Subordinate Services (Discipline and Appeal) Rules, while he was serving as Grade I Police Constable by the Superintendent of Police, Kanyakumari. Subsequently, he was dismissed from service w.e.f. 31.12.1984 A.N. Challenging the same, a Writ Petition in W.P.No.5833/1986 was filed before this Court. Subsequently, that was transferred to the Tamil Nadu Administrative Tribunal and renumbered as T.A.No.466 of 1992. In the meantime, he filed Review Petition and was reinstated into service on 11.11.1989 F.N. with a modified punishment of reduction in time scale of pay by two stages for a period of two years with cumulative effect by the Inspector General of Police (L&O), Chennai. The period of out of employment from 01.04.1985 to 10.11.1989 was also regulated as eligible leave.

3. The learned Senior Counsel for the petitioner further submitted that while so, the Tamil Nadu Administrative Tribunal by his order dated 03.04.2003 in T.A.No.466/1992 has set aside the order of dismissal and for the proved charges of unauthorised absence, the petitioner has been dealt with the punishment of denial of 50% of the back wages for the period of unemployment, stating further that the petitioner would be entitled for continuity of service. Thereafter, orders were issued treating the out of employment period as eligible leave i.e. from 01.01.1985 to 31.03.1985, 90 days Unearned Leave half pay and from 01.04.1985 to 10.11.1989 Leave Without Pay P). Thereafter, the Director General of Police, Chennai has passed an order stating that the petitioner may loose 5% P.P. of Rs.280/- which was already sanctioned w.e.f. 01.09.1998 in the category of Head Constable (SG) as per G.O.Ms.No.497, Finance Department, dated 05.09.1998. Consequently, his pay would be reduced by three stages w.e.f. 01.06.2002 i.e. the date of his upgradation as Special Sub-Inspector of Police (i.e. from 6950 to 6500). Thus, no financial implication would arise in the proposal of advancement of upgradation as Special Sub-Inspector of Police w.e.f. 01.06.1998 in respect of the petitioner.

4. The learned Senior Counsel for the petitioner also submitted that pursuant to the said order, an order of recovery has been passed on 16.07.2009 by the Superintendent of Police, Kanyakumari District, Nagercoil, the 3rd respondent herein on the basis of the revision of his pay as Special Sub-Inspector of Police from 01.06.2002 to 01.06.1998. Questioning the same, the

present Writ Petition has been filed.

5. The learned Senior Counsel for the petitioner further submitted that the petitioner has retired from service on reaching the age of superannuation on 30.04.2007 whereas the impugned order of recovery has been passed only on 16.07.2009, i.e. more than two years after his retirement. In support of her case, the learned Senior Counsel for the petitioner relying on a decision of the Hon'ble Supreme Court of India in State of Punjab and Others vs. Rafiq Masih (White Washer) and others reported in (2015) 4 Supreme Court Cases 334 submitted that recovery from the retired employee, or the employees who are due to retire within one year, of the order of recovery are unsustainable in law. Therefore, the learned Senior Counsel for the petitioner prays to allow the present Writ Petition.

6. A detailed Counter Affidavit has been filed by the respondents.

7. Learned Additional Government Pleader appearing for the respondents submitted that since in G.O.(D) No.98, Home (Police-3) Department dated 30.1.2009, the Government have ordered the advancement of upgradation of the petitioner as Special Sub-Inspector of Police from 01.06.2002 to 01.06.1998, the petitioner has to loose 5% Personal Pay of Rs.280/- which was already sanctioned w.e.f. 01.09.1998 in the category of Head Constable (Selection Grade) as per G.O.Ms.No.497, Finance Department, dated 05.09.1998. Therefore, his pay would be reduced by three stages w.e.f. 01.06.2002. Accordingly, his pay was reduced by revising the pay fixation already granted.

8. The learned Additional Government Pleader for the respondents further submitted that when the petitioner is not even entitled for 5% Personal Pay as on 01.09.1998 as Special Sub-Inspector of Police as per G.O.Ms.No.497, Finance Department, dated 05.09.1998, the impugned order passed by the 1st respondent dated 30.01.2009 and the consequential order making it clear that petitioner would loose 5% of Personal Pay of Rs.280/- which was already sanctioned w.e.f. 01.09.1998 in the category of Head Constable (Selection Grade) as per G.O.Ms.No.497, Finance Department, dated 05.09.1998 based on which the recovery order has been issued, cannot be found fault with.

9. This Court is unable to find any justification in the submission made by the learned Additional Government Pleader for the respondents. The reason being that the petitioner retired from service on reaching the age of superannuation on 30.04.2007 whereas the impugned order of recovery has been passed on 16.07.2009 i.e. after 2 years 4 months from his retirement stating that the upgradation as Special Sub-Inspector of Police

in respect of the petitioner is revised from 01.06.2002 to 01.06.1998. As the petitioner was already granted the status of Special Sub-Inspector of Police in Kanyakumari District w.e.f. 01.06.1998, he was also paid salary thereon. Subsequently, by G.O. (D) No.98, Home (Police 3) Department, dated 30.1.2009, the status of Special Sub-Inspector of Police conferred on the petitioner w.e.f. 01.06.1998 was postponed to 01.06.2002. By doing so, the 5% Personal Pay of Rs.280/- which was already sanctioned w.e.f. 01.06.1998 has been postponed to 01.06.2002 and the said amount also sought to be recovered. As rightly contended by the learned Senior Counsel for the petitioner, in an identical situation, the Supreme Court of India in State of Punjab and Others vs. Rafiq Masih (White Washer) and others reported in (2015) 4 Supreme Court Cases 334, more particularly, in paragraph 18, has 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 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 employee belonging to Class III and Class IV service (or Group C and Group D Service).

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

(iii) Recovery from the employee, 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.'

Therefore, while following the ratio laid down by the Supreme Court in the decision cited above that recovery from the retired employee, or the employees who are due to retire within one year, of the order of recovery cannot be allowed, this Court is of the view that the impugned order in this case is liable to be set aside.

10. In the result, the impugned order of recovery dated 30.1.2009 passed by the 1st respondent is set aside and the Writ Petition stands allowed. No costs.

-s/d-
Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

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To

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

2. The Director General of Police,
Santhome, Chennai-4.

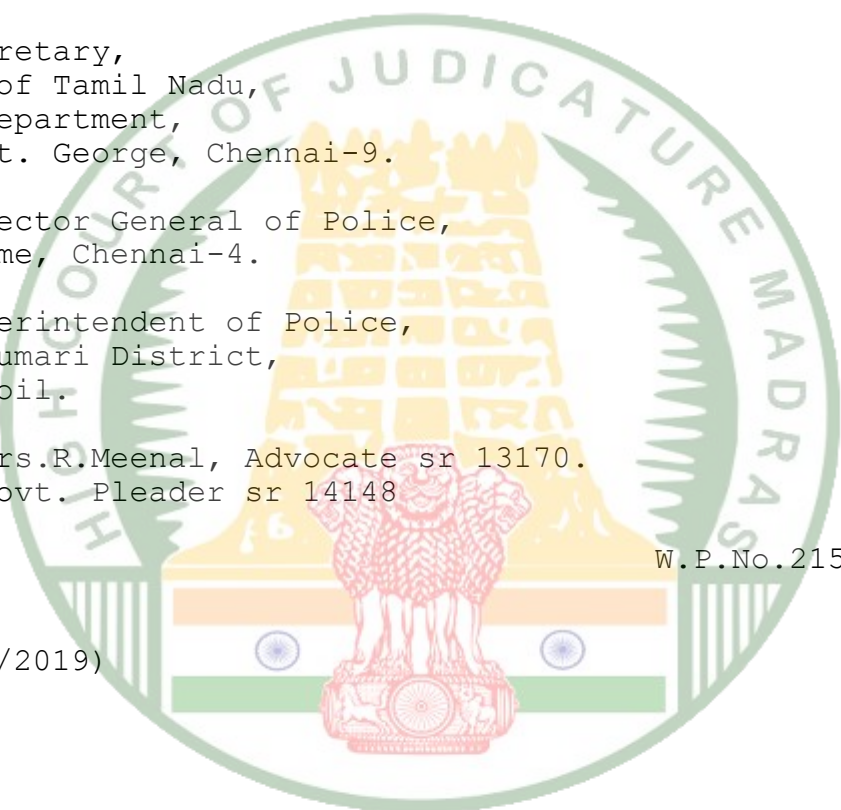
3. The Superintendent of Police,
Kanyakumari District,
Nagercoil.

+1 CC to Mrs.R.Meenal, Advocate sr 13170.

+1 CC to Govt. Pleader sr 14148

W.P.No.21526 of 2009

RR(CO)
SP(14/03/2019)



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