IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 30.10.2019

CORAM :

THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.NO.17706 OF 2016
AND WMP.NO.15409 OF 2016

1. S.Samuvel @ Velusamy (Died)
2. Ms.Stella Samuel
3. S.Joel
4. S.John Jaiker samuel
5. S.Jasper Kezia
   (P-2 to P5 are substituted as Legal heirs of P1
   vide order dated 14.09.2019 in WMP No.25728 of 2018)

... Petitioner

Vs

1. The Commissioner,
   Municipal Administration,
   Chepauk, Chennai - 5

2. The Assistant Director of Local Fund Audit,
   Tiruvannamalai,
   Tiruvannamalai (D.T).

3. The Commissioner of Municipality,
   Vandavasi Municipality,
   Tiruvannamalai (D.T).

... Respondents

Prayer :

Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorarified Mandamus to call for the records in pursuant to the impugned order of recovery passed by the 3rd respondent in proceedings in Na.Ka.No.P1/663/2016 dated 21.04.2016 and quash the same and consequently, direct the respondents to repay the amount already recovered with interest.

For Petitioner : M/s.Selvi Rajesh

For Respondents: Mrs.A.Shrijayanthi,
Special Government Pleader

O R D E R

The instant writ petition is for to call for the records in pursuant to the impugned order of recovery passed by the 3rd respondent in proceedings in Na.Ka.No.P1/663/2016 dated 21.04.2016. Consequently, seeking for a direction to the respondents to repay the amount already recovered with interest.

2. The petitioner was appointed as a Wireman in Ranipet Municipality in Vellore District on 04.08.1988. She was transferred to Vandavasi Municipality by proceedings dated 17.10.2000 in Na.Ka.No.212/2000/P1 on daily wage basis by the Regional Director of Municipal Administration. The service of the petitioner was regularized in the post of wireman with effect from 11.01.2001 at a consolidated pay of Rs.2,000/- p.m . An order of recovery was passed against the petitioner on 21.04.2016 stating that the petitioner had been wrongly regularized on 11.01.2001 and the correct date of regularization is 31.03.2006. Consequential order for recovery of amount has been passed by an impugned order dated 21.04.2016 in Na.Ka.No.P1/663/2016, which is now under challenge in this writ petition.

3. The learned counsel for the respondents has drawn the attention of this Court to the Counter Affidavit filed by them, wherein, a stand has been taken that the order of regularization was wrong because the petitioner was brought on regular pay scale only on 01.04.2006. It is also stated that when the pay scale was revised, the petitioner had given an undertaking that in case if it is found that excess amount has been paid to the petitioner then the petitioner would refund the money back.

4. The issue regarding recovery of excess amount paid by mistake of the employer isno longer res integra. The Hon'ble Supreme Court in 2015 4 SCC 334 in [State of Punjab and others Vs. Rafiq Masih (White Washer) and others} has observed as under :-

> 11. For the above determination, we shall refer to some precedents of this Court wherein the question of recovery of the excess amount paid to employees, came up for consideration, and this Court disallowed the same. These are situations, in which High Courts all over the country, repeatedly and regularly set aside orders of recovery made on the expressed parameters.
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> 12. Reference may first of all be made to the decision in Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475, wherein this Court recorded the following observation in paragraph 58:

"58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See Sahib Ram v. State of Haryana, 1995 Supp. (1) SCC 18, Shyam Babu Verma v. Union of India, (1994) 2 SCC 521, Union of India v. M. Bhaskar, (1996) 4 SCC 416, V. Ganga Ram v. Director, (1997) 6 SCC 139, Col. B.J. Akkara (Retd.) v. Govt. of India, (2006) 11 SCC 709, Purshottam Lal Das v. State of Bihar, (2006) 11 SCC 492, Punjab National Bank v. Manjeet Singh, (2006) 8 SCC 647 and Bihar SEB v. Bijay Bahadur, (2000) 10 SCC 99."(emphasis is ours)

13.First and foremost, it is pertinent to note, that this Court in its judgment in Syed Abdul Qadir's case (supra) recognized, that the issue of recovery revolved on the action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorized payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference because an action is iniquitous, must really be perceived as, interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements, and a variety of sundry expenses. Based on the above consideration, we are of the view, that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee.

14. In this context, reference may also be made to the decision rendered by this Court in Shyam Babu Verma v. Union of India (1994) 2 SCC 521, wherein this Court observed as under: "11. Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same."(emphasis is ours)

It is apparent, that in Shyam Babu Verma's case (supra), the higher pay- scale commenced to be paid erroneously in 1973. The same was sought to be recovered in 1984, i.e., after a period of 11 years. In the aforesaid circumstances, this Court felt that the recovery after several years of the implementation of the pay-scale would not be just and proper. We therefore hereby hold, recovery of excess payments discovered after five years would be iniquitous and arbitrary, and as such, violative of Article 14 of the Constitution of India.

15. Examining a similar proposition, this Court in Col. B.J. Akkara v. Government of India, (2006) 11 SCC 709, observed as under: "28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep

of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."(emphasis is ours) A perusal of the aforesaid observations made by this Court in Col. B.J. Akkara's case (supra) reveals a reiteration of the legal position recorded in the earlier judgments rendered by this Court, inasmuch as, it was again affirmed, that the right to recover would be sustainable so long as the same was not iniquitous or arbitrary. In the observation extracted above, this Court also recorded, that recovery from employees in lower rung of service, would result in extreme hardship to them. The apparent explanation for the aforesaid conclusion is, that employees in lower rung of service would spend their entire earnings in the upkeep and welfare of their family, and if such excess payment is allowed to be recovered from them, it would cause them far more hardship, than the reciprocal gains to the employer. We are therefore satisfied in concluding, that such recovery from employees belonging to the lower rungs (i.e., Class-III and Class-IV - sometimes denoted as Group 'C' and Group 'D') of service, should not be subjected to the ordeal of any recovery, even though they were beneficiaries of receiving higher emoluments, than were due to them. Such recovery would be iniquitous and arbitrary and therefore would also breach the mandate contained in Article 14 of the Constitution of India.

16. This Court in Syed Abdul Qadir v. State of Bihar (supra) held as follows:

"59. Undoubtedly, 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 appellant 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 appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."(emphasis is ours) Premised on the legal proposition considered above, namely, whether on the touchstone of equity and arbitrariness, the extract of the judgment reproduced above, culls out yet another consideration, which would make the process of recovery iniquitous and arbitrary. It is apparent from the conclusions drawn in Syed Abdul Qadir's case (supra), that recovery of excess payments, made from employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year of the date of his retirement on superannuation.

5. In the light of the above said judgment, the order of recovery issued against the petitioner is not sustainable in law and the same is hereby set aside. This writ petition is disposed of accordingly. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Commissioner,
Municipal Administration,
Chepauk, Chennai - 5

2. The Assistant Director of Local Fund Audit,
Tiruvannamalai,
Tiruvannamalai (D.T).

3. The Commissioner of Municipality,
Vandavasi Municipality,
Tiruvannamalai (D.T).

+1cc to Mr.P.Rajesh, Advocate, S.R.No.90651
+1cc to Mrs.A.Shrijayanthi,, Advocate, S.R.No.90113
+1cc to the Government Pleader, S.R.No.90397

W.P.No.17706 of 2016

VGI(CO)
CS/12/12/2019