

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.11.2018
Pronounced on : 15.03.2019

CORAM :

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No. 6000 of 2013
and
W.M.P.Nos.2 & 3 of 2013

A.Subbulakshmi ... Petitioner

vs.

1. The State of Tamil Nadu,
Rep. by the Secretary to Government,
Labour Department,
Fort St.George, Chennai - 600 009.
(R1 deleted vide order dated 05.09.2018)

2. The Commissioner of Labour,
DMS Complex, Teynampet,
Chennai - 600 006.

3. The Assistant Commissioner of Labour,
Salem.

4. The Deputy Commissioner of Labour,
Salem.

(R4 impleaded as per Court order dated 05.09.2018
in WMP.No.25727 of 2018) ... Respondents

Prayer : Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a writ of Certiorarified Mandamus, calling for the records on the file of the 3rd respondent relating to the impugned order dated 05.06.2009, bearing ref: Proc.No.A1/3542/2007-02 and quash the same and consequently direct the respondents to grant all the consequential benefits of promotion as per the original seniority, arrears of pay with interest.

For Petitioner : Mr. Bharatha Chakravarthy
for M/s.Sai Bharath

For Respondents: Mr.B.Anand
Government Advocate for R2 to R4

O R D E R

The challenge in the writ petition is to set aside the order dated 05.06.2009 passed by the Commissioner of Labour, DMS coumpund, Teynampet, Chennai in proceeding bearing reference No. Proc.No.A1/3542/2007-02.

Brief Facts:

2. The petitioner joined service as a Typist on 24.01.1985. She was promoted as an Assistant on 18.11.1988. She has also granted selection grade in the post of Assistant on 18.11.1992 and was given the Superintendent scale with effect from 15.02.2002.

3. An order dated 30.05.1989 was passed by the Joint Commissioner of Labour (Administration), promoting the petitioner as an Assistant. The order reads as under:-

"Order:

The service of the Junior Assistants/Typists/Steno-Typists mentioned in co./No/(3) of the Annexure to this order who were included in the panel drawn as on 15.03.1987 and promoted as Assistants under Rule 39(a)(1) of General Rules for Tamil Nadu State and Subordinate Service Rules, in the proceedings (2) and (5) read above are regularised in the cadre of Assistant with effect from the dates noted against each in col.5 of the Annexure.

Their seniority in the cadre of Assistant will be in the order of preference (i.e. according to the panel) as mentioned against each in col.(2) of the Annexure starting immediately below Tmt.Sakunthala, Assistant (sS.No.1053)

They are informed that they should qualify themselves in Labour and Factories Departmental Tests Part A and Part B otherwise they will not be eligible to draw second and subsequent increments, in the post of Assistant till such time, they pass the above Departmental Tests.

Encl.Annexure.

Sd/-

C.N.Viswanathan

Joint

Commissioner of Labour,

(Administration)

Madras.6."

The petitioner was promoted to Assistant even without passing the departmental tests.

4. The petitioner cleared the tests on 09.11.1991, i.e., after she was promoted as an Assistant on 18.11.1988. The result of the above mentioned order was that, some juniors who had passed the tests earlier were given promotions or were kept high in the seniority list. These promotions/revision in seniority list, were challenged and this Court by an order dated 28.02.2005 in a batch of writ petitions in WP.No.18861 of 2001, etc, have passed the following orders:

"14. In the light of our discussion and in view of the explanation offered by the Labour Department, particularly in the additional affidavit dated 06.02.2004 and in view of the principles laid down by the Supreme Court in S.P.Badrinath's case (cited supra), the order of the Tribunal is modified to the effect that seniority in the category of Assistants would have to be fixed by taking into account the date of appointment of Assistants in respect of those who are fully qualified as per the Special Rules, and the date of passing of the tests in respect of those who have acquired the test qualifications after their promotion as Assistants. The above direction of us in consonance with the law declared by the Supreme Court as well as the Fundamental Rule referred to above. All the writ petitions are disposed of accordingly. No Costs. Consequently, connected miscellaneous petitions are closed."

5. According to the petitioner, the effect of the order of this Court is only the seniority list had to be altered. The pay scale of the persons whose seniority was to be altered was not to be changed and there could not be any order of recovery. The Assistant Commissioner of Labour, Salem, passed an order dated 05.06.2009, wherein, the date of appointment of the Assistant, petitioner was shown as 09.11.1991. The said order also ordered for recovery of excess pay paid to the writ petitioner for the salary paid to him as an Assistant between 18.11.1988 to 09.11.1991, by re-fixing the pay scale at a lower level. This order has been challenged by the petitioner and filed the instant writ petition.

6. Heard the counsel for both the parties.

7. The petitioner placed his reliance on judgment dated 13.03.2012, of this Court in WP.No.27076 of 2009, in the case of S.suguna Vs. The Secretary, Labour Department, Secretariat, Chennai, wherein, this Hon'ble Court observed as under:-

"2. It has been stated that the petitioner had been recruited, on 07.12.1984, as a typist in the scale of pay of Rs.975-25-1150-30-1660. Thereafter, the petitioner, who was working as a typist in the Labour Department, had been temporarily promoted as an Assistant, on 08.02.1991. Her promotion had been regularized, on 03.11.1991, and she had been paid the scale of pay of any of Rs.1200-30-1560-40-2040. Thereafter, her scale of pay had been revised periodically. Later she was promoted to the post of selection Grade Assistant by an order dated 31.10.2002 and his pay scale had been fixed at Rs.50000-150-8000. By an order dated 18.08.2009. She was temporarily promoted to the post of Superintendent (upgrade) while so, the promotion of the petitioner and other similarly placed persons had been challenged before the Tamil Nadu Administrative Tribunal, Chennai. However, the Tribunal had dismissed the original Applications. The said order had been challenged before a Division Bench of this Court, in WP.No.18861 of 2001 etc, (batch). This Court by its order dated 28.02.2005, had modified the order passed by the Tribunal. Paragraph 14 of the said order reads as follows:-

"14. In the light of our discussion and in view of the explanation offered by the Labour Department, particularly in the additional affidavit dated 06.02.2004 and in view of the principles laid down by the Supreme Court in S.P.Badrinath's case (cited supra), the order of the Tribunal is modified to the effect that seniority in the category of Assistants would have to be fixed by taking into account the date of appointment of Assistants in respect of those who are fully qualified as per the Special Rules, and the date of passing of the tests in respect of those who have acquired the test qualifications after their promotion as Assistants. The above direction of us is in consonance with the law declared by the Supreme Court as well as the Fundamental Rule referred to above. All the writ petitions are disposed of accordingly. No Costs. Consequently, connected miscellaneous petitions are closed."

3. pursuant to the said order, the third respondent had passed the impugned order,

dated 01.10.2009, re-fixing the seniority and the pay scale of the petitioner, and had also ordered recovery of the excess amount of salary said to have been paid to the petitioner.

4. It is well settled position in law that excess salary, if any, paid to an employee, cannot be recovered, if it had not been paid based on the misrepresentation or fraud committed by the said employee. Therefore, the impugned order of the third respondent dated 01.10.2009, insofar as it relates to the recovery of the salary paid to the petitioner, is set aside." The said judgment applies to the present case.

8. The above mentioned order was challenged in WA.No.295 of 2013 dated 09.11.2012. The Division Bench of this Hon'ble Court dismissed the writ petition, wherein, this Court observed as under:-

"5. As rightly submitted by the learned counsel for the respondent, it is not as if the respondent has entered herself to the promotional post by making false representation and further, the re-fixation of seniority itself has been done by the appellants themselves. In pursuant to the same, the respondent has also worked in the said capacity. Therefore, the recovery as sought for by the appellants cannot be sustained in the eye of law. In such view of the matter, we do not find any error in the order of the learned single Judge."

9. The learned counsel for the petitioner also relied on a judgment, in the case of State of Punjab and others Vs. Rafiq Masih (White Washer) & Others reported in (2015) 4 SCC 334, wherein, the Apex Court observed as under:-

"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."

10. The judgment of the Hon'ble Supreme Court of India in (2015) 4 SCC 334 would not apply to the present case, because, the writ petitioner has attained her superannuation only after the impugned order was passed. However, the judgment dated 13.03.2012 in WP.No.27076 of 2009 in the case of J.Suguna Vs. The Secretary, Labour Department, Secretariat, Chennai, as confirmed by the Division Bench in WA.No.295 of 2013, will apply to the facts of the case. The petitioner has not made any misrepresentation for getting the promotion as Assistant. She cannot be penalized for being promoted as Assistant. She has worked as an Assistant and has been paid for it. There cannot be any form of recovery from the petitioner.

11. A perusal of judgment dated 28.02.2005, passed by the Division Bench in a batch of writ petitions being WP.No.18861 of 2001 etc., only directed re-fixation of seniority and as rightly pointed out by the learned counsel for the writ petitioner, it does not permit any recovery of excess pay, which has been paid to the employees who were promoted as Assistants, but not cleared the departmental test.

12. The prayer of the petitioner that his seniority could not be fixed from 1991 i.e., the date when she cleared the test, but it should be fixed from 18.11.1988, cannot be accepted in the light of the judgment dated 28.02.2005 of the Division Bench in the batch of

WP.No.18861 of 2001 etc., However, the order of recovery which has been passed in the impugned order cannot be sustained and consequently has to be set aside. The impugned order dated 05.06.2009 bearing reference No. Proc.No.A1/3542/2007-02, set aside to that extent. No Costs. Consequently, connected miscellaneous petitions are closed.

Sd/--

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

Pkn

To

1. The Commissioner of Labour,
DMS Complex, Teynampet,
Chennai - 600 006.
2. The Assistant Commissioner of Labour,
Salem.
3. The Deputy Commissioner of Labour,
Salem.

+1cc to M/s.Sai Bharath ,Advocate SR.No. 24868

W.P.No. 6000 of 2013

A.SK(12/04/2019)

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