

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 15.11.2019

Coram

The Honourable Mr. Justice D. KRISHNAKUMAR

W.P.No.9534 of 2013

K.Kailasam

...Petitioner

Versus

1.The Commissioner of
Municipal Administration,
Chepauk, Chennai - 600 005.

2.The Commissioner,
Erode Corporation,
Erode, Erode District.

3.The Assistant Director,
Local Fund Audit,
Erode Corporation,
Erode, Erode District.

...Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records of the third respondent in O.Mu.No.491/A2/2011 dated 28.11.2011 and in Ni.Mu.No.551/A2/2011 dated 16.12.2011 and the records of the 2nd respondent herein in his proceeding Na.Ka.No.P3/2159/2011 dated 16.12.2011 in so far as revising the scale of pay of the petitioner to the detrimental of the petitioner and granting monthly pension, DCRG, Commutation of Pension and other retirement benefits in the revised lesser scale of pay and quash the same and consequently, direct the respondents to forthwith pay the DCRG, Commutation of Pension, monthly pension and other retirement benefits including interest from 01.03.2008 till the date of realization on the scale of pay prevailing as on the date of retirement of petitioner without effecting revision of lesser scale of pay fixed in the aforesaid impugned orders of the 2nd and 3rd respondents together with interest at the rate of Rs.24% per annum from 01.03.2008 till the date of realization.

For Petitioner : Mr.K.Raja
For Respondents - 1 & 3 : Mr.J.Pothiraj,
Special Govt. Pleader
For Respondent - 2 : Mr.P.Srinivas

O R D E R

The relief sought for in the present writ petition is to call for the records of the third respondent in O.Mu.No.491/A2/2011 dated 28.11.2011 and in Ni.Mu.No.551/A2/2011 dated 16.12.2011 and the records of the 2nd respondent herein in his proceeding Na.Ka.No.P3/ 2159/2011 dated 16.12.2011 in so far as revising the scale of pay of the petitioner to the detrimental of the petitioner and granting monthly pension, DCRG, Commutation of Pension and other retirement benefits in the revised lesser scale of pay and quash the same and consequently, direct the respondents to forthwith pay the DCRG, Commutation of Pension, monthly pension and other retirement benefits including interest from 01.03.2008 till the date of realization on the scale of pay prevailing as on the date of retirement of petitioner without effecting revision of lesser scale of pay fixed in the aforesaid impugned orders of the 2nd and 3rd respondents together with interest at the rate of Rs.24% per annum from 01.03.2008 till the date of realization.

2. It is the case of the petitioner that he served as Revenue Inspector/Assistant and retired from service on 29.02.2008, on attaining the age of superannuation. Before his superannuation, vide proceeding dated 26.02.2008, the first respondent directed the second respondent to permit the petitioner to retire from service on attaining superannuation, as neither any disciplinary proceedings nor any criminal proceedings were pending against the petitioner. Though no such proceedings were pending against the petitioner, he was not paid the retirement benefits. सत्यमेव जयते

3 When the petitioner requested the second respondent for settlement of his retirement benefits, they stated that they would settle the same in normal course. Hence, the petitioner has filed W.P.No.7282 of 2008 before this Court seeking directions to the respondents to settle the retirement benefits to the petitioner along with 24% interest with effect from 01.03.2008 till the date of disbursement. The said writ petition was disposed of by this Court vide order dated 26.03.2008.

4 Thereafter, the second respondent issued a proceedings dated 31.07.2008 along with the Charge Memo dated 28.02.2008, Recovery Order, dated 28.02.2008 and order dated 29.02.2008, permitting the petitioner to retire from service, after withholding DCRG and encashment of earned leave to the tune of Rs.4,67,546/-. Challenging the aforesaid proceedings of the second respondent, the petitioner has filed a writ petition in W.P.No.21543 of 2008 before this Court and the same was allowed by this Court, vide order, dated 19.08.2009.

5 Against the order of this Court, dated 19.08.2009, the respondents filed a writ appeal in W.A.No.2206 of 2010 and the same was dismissed by the Division Bench of this Court vide order dated 28.03.2011. Further, the respondents preferred S.L.P (Civil) C.C.No.16802 of 2011 before the Honourable Supreme Court and the same was also dismissed on 21.10.2011. Since the respondents had not complied with the said order, the petitioner filed a Contempt Petition No.674 of 2010 before this Court. Thereafter, the respondents 3 & 2 vide impugned orders, dated 28.11.2011 and 16.12.2011 respectively, settled the DCRG, Commutation of Pension and monthly pension after revising the petitioner's scale of pay to his detrimental from 01.10.1984 till the date of his retirement. As per the revised scale of pay which is detrimental to the petitioner, he was sanctioned monthly pension at the rate of Rs.8,610/-, DCRG of Rs.3,18,219/-, interest on the payment of DCRG to the tune of Rs.1,07,997/- and commutation of pension of Rs.2,78,723/- after effecting recovery of Rs.25,911/- through the impugned orders, dated 16.12.2011.

6. Initially, the second respondent vide order dated 30.08.2011 sanctioned provisional pension of Rs.9,180/- fixed to the petitioner. However, the second respondent, vide impugned order dated 16.12.2011, reduced the said provisional pension to Rs.8,610/-. Aggrieved by the orders of the respondents 2 & 3, the petitioner has filed the present writ petition for the relief stated supra.

7. The learned counsel for the petitioner contended that prior to the passing of the impugned orders, the respondents 2 & 3 had not issued any notice to the petitioner. He further contended that the petitioner made representation dated 20.11.2012, to the respondents 2 & 3, however, the same is still pending. He also contended that subsequent to the retirement of an employee, the employer cannot pass any recovery proceedings to him since it is impermissible in law, however, here the respondents 3 and 2 passed the impugned orders dated 28.11.2011 and 16.12.2011 respectively, only after the date of retirement, on attaining superannuation. Therefore, the impugned is liable to be set aside. In support of his contention, he relied on the

judgement in State of Punjab & Others Vs. Rafiq Masih (White Washer) etc., reported in (2005) 4 SCC 334.

8. The learned Special Government Pleader appearing for the respondents 1 & 3 would contend that the second respondent had wrongly fixed the scale of pay to the petitioner from the year 01.10.1984. Thereafter, when audit objection was raised by the third respondent, the second respondent passed the disciplinary proceedings vide Na.Ka.No.P3/2159/2011 dated 16.12.2011. He would further contend that in the earlier round of litigation, the petitioner had challenged the proceedings of the second respondent dated 29.02.2008 in W.P.No.21543 of 2008 and by an order, dated 19.08.2009, this Court allowed the said writ petition. Challenging the said order, the second respondent preferred an appeal in Writ Appeal in W.A.No.2206 of 2010 and the same was dismissed by this Court on 28.03.2011 and the appeal preferred before the Apex Court in Appeal in C.P.No.16802 of 2011 was also dismissed by the Hon'ble Supreme Court on 21.10.2011. Thereafter, monthly pension of Rs.8,610/-, DCRG of Rs.3,18,219/- and interest on DCRG of Rs.1,07,997/- and Commutation of Pension of Rs.2,78,723/- were granted to the petitioner, after effecting recovery of Rs.25,911/-.

9 He would also contend that pursuant to the audit objection raised regarding fixation of pay to the petitioner, the second respondent passed the recovery proceedings. The audit objection is based on the records and as per rules only. Hence, the present writ petition is liable to be dismissed.

10. Heard both sides and perused the materials available on record.

11. The two points for consideration in the present writ petition are as follows:

(i) Was a recovery proceedings can be issued subsequent to the retirement on attaining superannuation ?

(ii) Whether the impugned orders passed by the second and third respondents violates the principles of natural justice?

12. As far as the first point is concerned, the decision rendered by the Honourable Supreme Court in the case of State of Punjab & Others Vs. Rafiq Masih (White Washer) etc., reported in (2005) 4 SCC 334, the Honourable Supreme Court 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."

The aforesaid decision is squarely apply to the facts of the case insofar as recovery is concerned.

13. In so far as the retiral pension benefits are concerned, the impugned orders, dated 28.11.2011 & 16.12.2011 passed by the third and second respondent respectively, suffers from legal infirmity for the reason that no opportunity was granted to the writ petitioner before passing the impugned order, fixing the revised pensionary benefits to the petitioner. Therefore, it is clear that the second and third respondents without following the principles of natural justice, passed the impugned orders.

14. To meet the ends of justice, this Court is inclined to pass the following order:

(i) The impugned proceedings issued by the second and third respondents are hereby quashed.

(ii) In so far as the revised pensionary benefits are concerned, the second respondent is directed to consider the petitioner's representation, dated 20.11.2012 afresh, and pass final order on merit and in accordance with law, after providing an opportunity to the petitioner, as expeditiously as possible, preferably within a period of four months from the date of receipt of a copy of this order.

15. With the above directions, the writ Petition is allowed.
However, there shall be no order as to costs.

Sd/--
Assistant Registrar (CS-VI)

// True Copy//

Sub Assistant Registrar

mrr

To

1.The Commissioner of Municipal Administration,
Chepauk, Chennai - 600 005.

2.The Commissioner,
Erode Corporation, Erode, Erode District.

3.The Assistant Director,
Local Fund Audit, Erode Corporation,
Erode, Erode District.

+1cc to Mr.P.Srinivas, Advocate, SR.No.95375.

+1cc to Mr.K.Raja, Advocate, SR.No.95163.

+1cc to Government Pleader, SR.No.95587.

PP (CO)
CSR: 28/01/2020

W.P.No.9534 of 2013

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