

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 28.02.2019

CORAM:
THE HONOURABLE MR. JUSTICE K.K. SASIDHARAN
and
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALU

W.A. No. 2679 of 2018
and
C.M.P. No. 21865 of 2018

1. The Commissioner,
Erode Corporation,
Erode.

2. The Assistant Commissioner of Municipalities,
Zone-1,
Erode Corporation,
Erode.

... Appellants/First &
Second Respondents

-vs-

1. The State of Tamil Nadu
Rep. by the Director of Local Fund Audit,
Kuralagam,
Chennai - 600 108.

... First Respondent/
First Respondent

Loganathakrishnan (Deceased)

2. L. Thilagavathy

3. L. Sakthivel

4. L. Ganesan

5. Sangeetha

सत्यमेव जयते

... Respondents/Petitioners

PRAYER : Writ Appeal filed under Clause 15 of Letter Patent,
praying to set aside the order dated 25.04.2018 made in W.P. No.
12013 of 2013.

Prayer in W.P.No.12013 of 2013

Writ Petition filed under Article 226 of the Constitution
of India, seeking for a Writ of Certiorarified Mandamus calling
for the records in pursuant to the impugned orders issued by the
1st respondent in proceeding Ni.Mu.No.TPV(2)/24072/11 dated
17/11/11 and in proceeding Ni.Mu.No.18934/pe.o.sa(2) dated
16.8.12 and the consequential order of the 3rd respondent in

proceeding Na.Ka.No. C1/277/12 dated 14/02/2012 and quash these three orders as far as the refixation and recovery is concerned and direct the respondents to repay the recovered amount of Rs.1,09,957/- and restore the original fixation of 1/6/88 and further direct the respondents to pay the interest for the belated payments of pensionary benefits.

For Appellants : Mr. M. Rajamathivanan

For Respondents : Mrs. A. Sri Jayanthi,
Special Government Pleader for R1

Ms. Swadhi Subramanian
(for R2 to R5)

J U D G M E N T

(Judgment of the Court was delivered by P.D. AUDIKESAVALU, J.)

The Second to Fifth Respondents are the legal representatives of one Loganathakrishnan, who voluntarily retired from service on 30.06.2011 from the First Appellant, viz., Erode Corporation. At the time of settlement of the terminal benefits of the said Loganathakrishnan, a sum of Rs.1,09,957/- was recovered from his Death Cum Retirement Gratuity (hereinafter referred to as the 'DCRG' for short). The reason stated for such recovery was that an objection had been raised during audit that an excess payment had been made in the scale of pay of the said Loganathakrishnan, with effect from 01.06.1988, which was noticed only at the time of his voluntary retirement from service.

2. According to the said Loganathakrishnan, the pension had been fixed taking into account the reduction in the scale of pay and the terminal benefits were released to him only on 21.01.2013 without any interest for the belated payment. It was also complained by him that the entire procedure followed in effecting the excess payment was in gross violation of the principles of natural justice inasmuch as no show cause notice had been issued to him before effecting the recovery. In the aforesaid circumstances, the said Loganathakrishnan filed W.P. No. 12013 of 2013 challenging the orders passed by the First Respondent and the Appellants reducing his scale of pay and the consequent recovery of excess payment, and had sought for consequential direction to repay the recovered amount of Rs.1,09,957/- and restore the scale of pay as it originally stood on 01.06.1998 and pay interest for the belated payment of the pensionary benefits. During the pendency of the Writ Petition, the said Loganathakrishnan died and the Second to Fifth Respondents, who are his legal heirs, were brought on record.

3. The Learned Judge, who heard the Writ Petition, after referring to the decision of this Court in K. Malarkodi -vs- Director of Elementary Education (Order dated 15.11.2017 in W.P. No. 33570 of 2012) that had followed the decision of the Hon'ble Supreme Court of India in State of Punjab -vs- Rafiq Masih (Whitewasher) [(2015) 4 SCC 334] by order dated 25.04.2018, held as follows:-

"9. When an adverse order has been passed against a public servant, the Government is expected to follow the minimum requirement of complying with the basic principles of natural justice. In this case, when the employee took retirement after serving more than 30 years from the Public Corporation, his pay had been refixed behind his back and for whatever reasons such action on the part of the authorities concerned cannot be countenanced in law or on facts. Moreover, in this case, the original petitioner himself had died and the family members had been brought on record. Therefore, this Court is of the view that there will not be any useful purpose in remitting the matter back to the authorities concerned for issuance of notice before re-fixing the pay of the petitioner, as the family members would not be in a position to represent the case with regard to any anomaly in the pay fixation of the deceased employee.

10. In view of the above, this Court has no hesitation in allowing the writ petition. Accordingly, the writ petition is allowed. The impugned orders in Ni.Mu.No.TPV(2)/24072/2011 dated 17.11.2011, Ni.Mu.No.18934/pe.o.sa(2)/2012 dated 16.08.2012 and Na.Ka.No.C1/277/2012 dated 14.02.2012 are hereby set aside and the respondents are directed to refund the amount of Rs.1,09,957/- which was recovered from the DCRG and the pensionary benefits from the deceased employee to the petitioners herein and also restore the original fixation as it stood before the impugned orders came to be passed and calculate the pension benefits on such basis and pay the petitioners, the pension with arrears as admissible. The above direction of this Court shall be complied with by the respondents within a period of eight weeks from the date of receipt of copy of this order. No costs. Consequently, connected miscellaneous petition is also closed. "

Aggrieved thereby, the Appellants have preferred this intra-court appeal.

4. We have heard Mr. M. Rajamathivanan, Learned Counsel appearing for the Appellant, Mrs. A. Sri Jayanthi, Learned Special Government Pleader appearing for the First Respondent,

Mrs. Swadhi Subramanian, Learned Counsel appearing for the Second to Fifth Respondents and perused the materials placed on record, apart from the pleadings of the parties.

5. While supporting the order under appeal, the decision of the Hon'ble Supreme Court of India in *State of Punjab -vs- Rafiq Masih (White Washer)* [(2015) 4 SCC 334] has been relied by the Learned Counsel for the Second to Fifth Respondents to contend that it would be inequitous and harsh to recover the amount excessively paid to a person, who has retired from service, at a distant point of time. It requires to be pointed out here that the aforesaid decision passed by the Two Judges Bench of the Hon'ble Supreme Court of India cited is a consequential order to the earlier order passed by a Three Judges Bench of the Hon'ble Supreme Court of India in the same case in *State of Punjab -vs- Rafiq Masih (Whitewasher)* [(2014) 8 SCC 883], in which it has been ruled that there is no principle that any excess payment to employees could not be recovered and the prior decisions in *Registrar of Co-operative Societies, Haryana -vs- Israil Khan* [(2010) 1 SCC 440] and *Chandi Prasad Uniyal -vs- State of Uttarakhand* [(2012) 8 SCC 417], supporting that view have been approved. It has also been explained therein that directions issued by the Hon'ble Apex Court in the exercise of powers under Article 142 of the Constitution relaxing the application of law was in view of the peculiar circumstances which do not comprise the ratio decidendi and therefore, do not make binding precedent. Viewed from that perspective, it can be seen that the subsequent judgment in *State of Punjab -vs- Rafiq Masih (Whitewasher)* [(2015) 4 SCC 334], were only containing illustrations where the Court had exercised its power under Article 142 of the Constitution and the same could not be taken as any ratio decidendi unconditionally exempting recovery from retired persons from the rigour of the law recognized in Section 72 of the Indian Contract Act, 1872, that a person to whom money has been paid by mistake must repay it.

6. At the same time, an excess payment made to an employee, even if he has retired from service, ought not to be recovered from him without issuing him a show cause notice and providing an opportunity to explain his position. The Writ Court has rightly found that there has been gross violation of the principles of natural justice in recovering the excess payment from the said Loganathakrishnan in this case, which vitiates the impugned action on this ground. However, that would not preclude the right of the employer to effect the recovery after complying with that procedure. As a matter of fact, referring to the decision of the Hon'ble Supreme Court of India in *State of Punjab -vs- Rafiq Masih (Whitewasher)* [(2015) 4 SCC 334], the Government of Tamil Nadu in G.O. Ms. No. 286, Finance (Pension) Department dated 28.08.2018, has issued detailed instructions providing the manner in which excess amount made to Government

Servants/ Pensioners/Family Pensioners have to be made.

7. It has been held by the Hon'ble Supreme Court of India in *Sudha Shrivastava -vs- Comptroller and Auditor General of India* [(1996) 1 SCC 63] that the death of an employee, during pendency of the proceedings, cannot deprive the legal heirs or legal representatives of their right to continue the proceedings and claim the benefits as the successors of the deceased employee. As a corollary of that legal principle, it would follow in the instant case that the mere circumstance that the said Loganathakrishnan died during the pendency of the Writ Petition cannot mean that the Second to Fifth Respondents, as legal heirs of the said Loganathakrishnan, would not be in a position to represent the matter with regard to anomaly in the fixation of his pay, as held by the Learned Judge in the order under appeal.

8. Accordingly, while concurring with the order of the Learned Judge in the Writ Petitioner insofar as it relates to setting aside the order Nos. TPV(2)/240727/2011 dated 17.11.2011 issued by the First Respondent and the order in R.C. No.C1/277/2012 dated 14.02.2012 issued by the Second Appellant, we further direct that the concerned authority shall issue show cause notice to the Second to Fifth Respondents along with a working-sheet on the calculation for the excess payment claimed to have been made to the said Loganathakrishnan in his scale of pay with effect from 01.06.1988 and after affording full opportunity of hearing to the them and considering each of the objections that may be raised by them, a reasoned order shall be passed on merits in accordance with law following the procedure laid down in the instructions in G. O. Ms. No. 286, Finance (Pension) Department dated 28.08.2018 issued by the Government of Tamil Nadu, uninhibited and uninfluenced by any of the earlier orders passed in this matter and the decision taken shall be communicated to the Second to Fifth Respondents. It is made clear that in the event of the concerned authority coming to the conclusion that the scale of pay of the said Loganathakrishnan has been incorrectly reduced or that the resultant amount deducted from his DCRG is in excess of the amount actually recoverable from him or that the pension amount had been erroneously paid at reduced rate, such differential amount due to him shall be paid to the Second to Fifth Respondents with interest at the rate prescribed under the relevant rules, and if no such rate of interest has been prescribed, at the rate of 7.5% per annum, from the respective dates on which those amounts had fallen due, till payment. The aforesaid exercise shall be completed expeditiously and a report of compliance in that regard shall be filed before the Registrar (Judicial) of this Court by 30.06.2019. It is needless to add here that the pension of the said Loganathakrishnan for future months, if revised, shall be paid at the enhanced rate to the Second to Fifth Respondents on the due dates.

9. In the result, the Writ Appeal is allowed in part and the order dated 25.04.2018 passed in W.P. No. 12013 of 2013 is modified that extent. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

vjt

To

1.The Commissioner,
Erode Corporation,
Erode.

2.The Assistant Commissioner of Municipalities,
Zone-1,
Erode Corporation,
Erode.

3.The Director of Local Fund Audit
to the Government of Tamil Nadu,
Kuralagam,
Chennai - 600 108.

+1cc to Mr.R.Prem Nagarajan, Advocate, S.R.No.19126
+1cc to the Government Pleader, S.R.No.19984
+1cc to Mr.M.Rajamathivanan, Advocate, S.R.No.19125

W.A. No. 2679 of 2018

KAN (CO)

rrs 21/03/2019

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