BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.06.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.(MD)No.20527 of 2015
and
M.P.(MD)No.2 of 2015

D.Sangu Vijaya ... Petitioner

-Vs-

1. The Director,
   Office of the Accountant General,
   Chennai-18.

2. The Treasury Officer,
   Madurai.

3. The Sub Treasury Officer,
   Office of Sub Treasury,
   Tirumangalam, Madurai District. ...Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, to call for the records relating to the third respondent in his proceedings Na.Ka.No.1125/2015/A3, dated 12.10.2015 and quash the same and further, direct the third respondent to remit the pension amount at the rate of Rs.14,034/- paid prior to the impugned order.

For Petitioner : Mr.PT.S.Narendra Vasan
For R1 : Mr.P.Gunasekarn
For R2 and R3 : Mr.D.Muruganantham, Additional Government Pleader.

ORDER

The writ petitioner, who is the family pensioner, has challenged the order of recovery issued by the third respondent in proceeding dated 12.10.2015.

2.The husband of the writ petitioner was employed in Forest Department and retired from service under Voluntary Retirement Scheme on 04.12.2003. The husband of the writ petitioner passed away on 03.05.2006. Thereafter, the family pension as applicable was fixed by the respondent establishment and the writ petitioner is receiving the family pension as per the fixation and revision of pension done by the competent authorities.

3.Under these circumstances, the impugned order of recovery has been issued by the Sub Treasury Officer in proceeding dated 12.10.2015, stating that an excess pension was paid to the writ petitioner to the tune of Rs.2,01,033/- (Rupees Two Lakhs One Thousand and Thirty Three Only) and the said excess pension is directed to be recovered from the writ petitioner.

4.The learned counsel appearing on behalf the writ petitioner states that no show cause notice or opportunity was given to the writ petitioner even to defend her case. This apart, the writ petitioner has not made any misrepresentation or otherwise in respect of fixation of family pension, if any paid. Contrarily, unilateral decision has been taken by the respondents based on audit objections and accordingly, the impugned order of recovery is issued.

5.The learned Additional Government Pleader appearing on behalf of the respondents 2 to 4 states that the recovery order has been passed based on the audit objections raised by the competent audit party. However, the third respondent provided an opportunity to the writ petitioner by way of issuing a notice in letter dated 12.10.2015. Thus, an opportunity was provided to the writ petitioner. This apart, the writ petitioner had also given a letter of consent to recover the excess payment.

6.Relying on the show cause notice issued to the writ petitioner as well as the consent letter given by the writ petitioner, the learned Additional Government Pleader made a submission that the impugned order is in accordance with the law and the procedures were also followed and the Writ Petition is liable to be dismissed.

7.This Court is of the considered opinion that the writ petitioner is a family pensioner. Even at the time of filing of the Writ Petition, the writ petitioner was aged about 62 years. The writ petitioner was not aware of the revision of pension or the pension amount paid to the writ petitioner in accordance with the rules. The show cause notice issued by the third respondent in proceeding dated 12.10.2015 is not even referred in the impugned order dated 12.10.2015. In the absence of any reference of such show cause notice in the impugned order, the statement made in the counter cannot be relied upon by the learned Additional Government Pleader. As per the Judgement of the Constitution Bench of the Hon'ble Supreme Court of India, in this case the respondents cannot substitute any reason in their counter statement, which is not stated in the impugned order or in the reasons provided in the impugned order. In other words, the respondent cannot make their case by way of filing a counter.

8.This being the legal principles settled by the Constitutional Bench of the Hon'ble Supreme Court of India, this Court is of the considered opinion that in the absence of any specific reference in the impugned order, regarding the show cause notice and in the absence of considering the explanations or any such undertaking in the impugned order, this Court cannot consider the statement made in the counter, which is not reflected in the impugned order.

9.This apart, the writ petitioner is a family pensioner. In the event of recovery of such huge amount of Rs.2,01,033/-, the same will affect the normal life of the family pensioner, during the old age. Family pensioner need more money for medical expenses and other expenses. Under these circumstances, such a huge amount of recovery will affect the livelihood of the family pensioner.

10.This apart, the Hon'ble Supreme Court of India, in the case of ***State of Punjab Vs. Rafiq Maish*** reported in ***(2015) 4 SCC 334*** 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 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."*

11.In view of the fact that the writ petitioner is a family pensioner, recovery of excess amount already paid cannot be recovered. The pay as well as the revision of pension can be done in accordance with the rules as well as with reference to the Government Order in force. In other words, mistakes or errors, if any occurred in the fixation of pay and revision of family pension, the same can be corrected in accordance with the rules in force.

12.This being the factum, the impugned order of recovery passed by the third respondent in Na.Ka.No.1125/2015/A3, dated 12.10.2015 is quashed.

13.With these directions, this Writ Petition stands allowed. No costs. Consequent, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar(CS)

Myr

To

1. The Treasury Officer,
   Madurai.

2. The Sub Treasury Officer,
   Office of Sub Treasury,
   Tirumangalam, Madurai District.

+1cc to M/S. PT.S.NARENDRAVASAN,Advocate, Sr.No.69827
+1cc to M/S. P.GUNASEKARAN,Advocate, Sr.No.70161
+1cc to M/S SPECIAL GOVERNMENT PLEADER, Sr.No.70252

W.P(MD)No.20527 of 2015
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