



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.06.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P. (MD) No.21633 of 2015

and

M.P. (MD) Nos.1 of 2015 and 3245 of 2016

Subburaj

... Petitioner

-Vs-

1.The Accountant General,
Government of Tamil Nadu,
361, Anna Salai, Chennai-600 018.

2.The Assistant Treasury Officer,
Peraiyur, Madurai District.

3.The Chief Secretary,
Government of Tamil Nadu,
Chennai-600 009

... Respondents

(R3 is suo motu impleaded vide Court Order dated 19.06.2019)

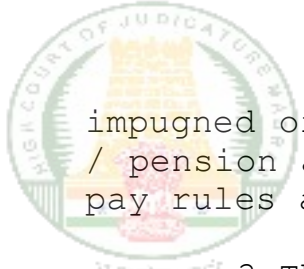
Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned order passed by the second respondent in Na.Ka.No.Nil/2015 dated 15.10.2015 and quash the same as illegal and consequently, direct the second respondent to refund the deducted payment in the month of October, 2015 for a sum of Rs.6,152/- to the petitioner.

For Petitioner : Mr.RM.Arun Swaminathan
For R1 : Mr.P.Gunasekarn
For R2 : Mr.C.Ramar,
Additional Government Pleader.

ORDER

The order of recovery dated 15.10.2015 issued by the second respondent is sought to be quashed.

2.The writ petitioner was holding the post of Headmaster at Panchayat Union Primary School at Permalpatti, Peraiyur Taluk, Madurai District and retired from service on 30.09.1996. The fixation of pay as well as the pension was granted to the writ petitioner at the instance of the establishment of the respondent Department. However, audit objections were raised in respect of the fixation of pay as well as the pension and consequently, the



impugned order of recovery was issued to recover the excess salary / pension already paid to the writ petitioner, in violation of the pay rules and the Government Orders in force.

3. The learned counsel appearing on behalf of the writ petitioner states that no show cause notice or opportunity was provided to the writ petitioner. Thus, the impugned order is in violation of the principles of natural justice. This apart, there is no misrepresentation or otherwise on the part of the writ petitioner.

4. The learned Additional Government Pleader appearing on behalf of the second respondent is unable to establish that an opportunity was provided to the writ petitioner.

5. Under these circumstances, this Court is of the considered opinion that any order, affecting the service rights or conditions of an employee, cannot be issued without providing an opportunity to the employee concerned. This apart, the writ petitioner is a pensioner and retired from service on 30.09.1996. The writ petitioner is now aged about 81 years. Under these circumstances, any further recovery from the pension of the writ petitioner would affect his normal livelihood.

6. The learned counsel appearing for the first respondent brought to the notice of this Court that the Hon'ble Supreme Court of India has fixed the ratio in the case of **Chandi Prasad Uniyal and others Vs. State of Uttarakhand and others** reported in **(2012) 8 SCC 417**, and the same is to be followed as precedent, wherein it has been held as follows:-

"14. We are concerned with the excess payment of public money which is often described as "taxpayers' money" which belongs neither to the officers who have effected overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. The question to be asked is whether excess money has been paid or not, may be due to a bona fide mistake. Possibly, effecting excess payment of public money by the Government officers may be due to various reasons like negligence, carelessness, collusion, favouritism, etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid / received without the authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such



situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment."

7. The three Judges Bench of the Hon'ble Supreme Court of India in the case of **State of Punjab and others Vs. Rafiq Masih (White Washer)** reported in **(2014) 8 SCC 883**, also reiterated the principles laid down in the case of Chandi Prasad Uniyal as stated above and held that the law laid down by the two Judges of the Hon'ble Supreme Court of India is to be followed as precedent in the matter of recovery of excess payment to the employees by the State or Union, wherein it has been held as follows:-

"7. In Chandi Prasad Uniyal's case (Supra), a specific issue was raised and canvassed. The issue was whether the Appellant-therein can retain the amount received on the basis of irregular/wrong pay fixation in the absence of any misrepresentation or fraud on his part. The Court after taking into consideration the various decisions of this Court had come to the conclusion that even if by mistake of the employer the amount is paid to the employee and on a later date if the employer after proper determination of the same discovers that the excess payment is made by mistake or negligence, the excess payment so made could be recovered. While holding so this Court observed at paragraphs 14 and 16 as under:

"14. We are concerned with the excess payment of public money which is often described as "taxpayers' money" which belongs neither to the officers who have effected overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. The question to be asked is whether excess money has been paid or not, may be due to a bona fide mistake. Possibly, effecting excess payment of public money by the government officers may be due to various reason like negligence, carelessness, collusion, favouritism, etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment."

16. The Appellant in the appeal will not fall in



any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the Appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However we order that excess payment made be recovered from the Appellants salary in 12 equal monthly instalments."

8. In our view, the law laid down in Chandi Prasad Uniyal's case, no way conflicts with the observations made by this Court in the other two cases. In those decisions, directions were issued in exercise of the powers of this Court Under Article 142 of the Constitution, but in the subsequent decision this Court Under Article 136 of the Constitution, in laying down the law had dismissed the petition of the employee. This Court in a number of cases had battled with tracing the contours of the provision in Article 136 and 142 of the Constitution of India. Distinctively, although the words employed under the two aforesaid provision speak of the powers of this Court, the former vest a plenary jurisdiction in supreme court in the matter of entertaining and hearing of appeals by granting special leave against any judgment or order made by a Court or Tribunal in any cause or matter. The powers are plenary to the extent that they are paramount to the limitations under the specific provisions for appeal contained in the Constitution or other laws. Article 142 of the Constitution of India, on the other hand is a step ahead of the powers envisaged Under Article 136 of the Constitution of India. It is the exercise of jurisdiction to pass such enforceable decree or order as is necessary for doing 'complete justice' in any cause or matter.

9. The word 'complete justice' was fraught with uncertainty until Article 142 of the Constitution received its first interpretation in Prem Chand Garg v. Excise Commissioner, U.P. MANU/SC/0082/1962 : AIR (1963) SC 996 which added a rider to the exercise of wide extraordinary powers by laying down that though the powers are wide, the same is an ancillary power and can be used when not expressly in conflict with the substantive provisions of law. This view was endorsed by a Nine-Judges Bench in Naresh Shridhar Mirajkar v. State of Maharashtra MANU/SC/0044/1966 : (1966) 3 SCR 744. It was further affirmed by a Seven Judge Bench in A.R. Antulay v. R.S. Nayak MANU/SC/0002/1988 : (1988) 2 SCC 602 and finally settled in the Supreme Court Bar Association v.



Union of India MANU/SC/0291/1998 : (1998) 4 SCC 409.

10. Article 136 of the Constitution of India, confers a wide discretionary power on the Supreme Court to interfere in suitable cases. Article 136 is a special jurisdiction and can be best described in the words of this Court in Ramakant Rai v. Madab Rai MANU/SC/0780/2003 : (2003) 12 SCC 395, "It is a residuary power, it is extraordinary in its amplitude, its limits when it chases injustice, is the sky itself".

11. Article 136 of the Constitution of India was legislatively intended to be exercised by the Highest Court of the Land, with scrupulous adherence to the settled judicial principle well established by precedents in our jurisprudence. Article 136 of the Constitution is a corrective jurisdiction that vest a discretion in the Supreme Court to settle the law clear and as forthrightly forwarded in the case of Union of India v. Karnail Singh MANU/SC/0636/1995 : (1995) 2 SCC 728, it makes the law operational to make it a binding precedent for the future instead of keeping it vague. In short, it declares the law, as Under Article 141 of the Constitution.

12. Article 142 of the Constitution of India is supplementary in nature and cannot supplant the substantive provisions, though they are not limited by the substantive provisions in the statute. It is a power that gives preference to equity over law. It is a justice oriented approach as against the strict rigors of the law. The directions issued by the court can normally be categorized into one, in the nature of moulding of relief and the other, as the declaration of law. 'Declaration of Law' as contemplated in Article 141 of the Constitution: is the speech express or necessarily implied by the Highest Court of the land. This Court in the case of Indian Bank v. ABS Marine Products (P) Ltd. MANU/SC/2046/2006 : 2006 5 SCC 72, Ram Pravesh Singh v. State of Bihar MANU/SC/4176/2006 : (2006) 8 SCC 381 and in State of U.P. v. Neeraj Awasthi MANU/SC/0358/2006 : (2006) 1 SCC 667, has expounded the principle and extolled the power of Article 142 of the Constitution of India to new heights by laying down that the directions issued Under Article 142 do not constitute a binding precedent unlike Article 141 of the Constitution of India. They are direction issued to do proper justice and exercise of such power, cannot be considered as law laid down by the Supreme Court Under Article 141 of the Constitution of India. The Court have compartmentalized and differentiated the relief in



the operative portion of the judgment by exercise of powers Under Article 142 of the Constitution as against the law declared. The directions of the Court Under Article 142 of the Constitution, while moulding the relief, that relax the application of law or exempt the case in hand from the rigour of the law in view of the peculiar facts and circumstances do not comprise the ratio decidendi and therefore lose its basic premise of making it a binding precedent. This Court on the quivive has expanded the horizons of Article 142 of the Constitution by keeping it outside the purview of Article 141 of the Constitution and by declaring it a direction of the Court that changes its complexion with the peculiarity in the facts and circumstances of the case.

13. Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the views expressed in the first two judgments and the latter judgment."

8. Thereafter, in the case of **State of Punjab Vs. Rafiq Masih** reported in **(2015) 4 SCC 334**, the Hon'ble Supreme Court of India 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."

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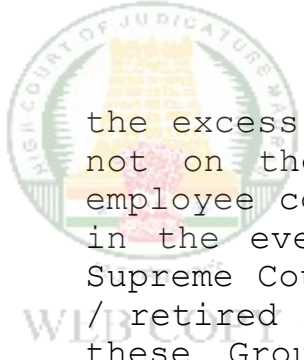
9. The learned counsel appearing on behalf of the Accountant General of Tamil Nadu brought to the notice of this Court that the law laid down by the three Judges Bench of the Hon'ble Supreme Court of India was not considered by the two Judges Bench of the Hon'ble Supreme Court of India in the case of Rafiq Masih as stated above. Thus, the judgment of the three Judges Bench is to be followed as binding precedent.

10. The principles regarding the binding precedent are well enumerated by the Constitutional Bench of the Hon'ble Supreme Court of India in the case of **National Insurance Company Ltd Vs. Pranay Sethi and others** reported in **2017 (10) SCC 450**.

11. In view of the legal principles in the matter of binding precedent as settled by the Constitutional Bench by the Hon'ble Supreme Court of India, the contentions raised by the learned counsel for the Accountant General is to be considered with reference to the full Bench judgment of the Hon'ble Supreme Court of India in the case of Rafiq Masih (White Washer) as stated above.

12. The fact remains that the Rafiq Masih case was decided by the two Judges Bench of the Hon'ble Supreme Court of India, during the year 2015. Thus, the said three Judges bench's judgment was followed by the two Judges bench in Rafiq Masih case as discussed above.

13. The retired employees are also not entitled to receive excess pension or pensionary benefits, which are all paid from the tax payers' money. The principles of law as already settled enumerates that excess payment, if any made from the tax payers' money, is to be recovered and to be deposited in the State Treasury. There cannot be any contrary opinion in this regard. No Government employee or retired employee is entitled for any unjust or unlawful enrichment from the taxpayers' money. Thus, the excess payment, if any made, undoubtedly is to be recovered from the employee / pensioner concerned. However, certain hardships and extraordinary circumstances are to be considered with reference to the Last Grade Servants alone. In this regard, the Two Judges Bench of the Honourable Supreme Court of India in the case of **State of Punjab and others vs. Rafiq Masih (White Washer) and others**, reported in **(2015) 4 SCC 334**, held that recovery from the Group-III and Group-IV employees as well as the retired employees are to be exempted from recovery in respect of



the excess salary / pension, if any paid, by the establishment and not on the basis of the misrepresentation or otherwise of the employee concerned. Considering the hardship that would be caused in the event of such recovery of excess payment, the Honourable Supreme Court has granted exemption only for the employees serving / retired from Group-III and Group-IV categories. During old age, these Group-III and Group-IV employees require more money for their medical expenses and for other domestic expenses. In the event of recovery of excess payment from the Last Grade Servants, the same will cause hardship to them and they may not be in a position to lead a normal life with lesser amount of salary / pension. Under these circumstances, the Honourable Supreme Court granted exemption to the Group-III and Group-IV employees from recovery in respect of the cases, where the excess payment was paid mistakenly by the employer concerned.

14. In the subsequent cases, the Honourable Supreme Court held that if there is any misrepresentation or otherwise on the part of the employee or any undertaking is given by such employees / pensioners, then the exemption may not be granted and the excess payment is to be recovered. Therefore, only in the event of an administrative error, regarding excess payment of salary / pension, exemptions are to be granted only for Group-III and Group-IV employees.

15. Considering the legal principles as well as the precedent settled by the Apex Court, this Court is of the considered opinion that even though the excess payment of salary / pension cannot be recovered from the Group-III and Group-IV employees as well as from the retired employees, the excess payment shall be recovered from the officials, who all are responsible and accountable for the erroneous fixation of pay or excess payment of salary / pension / other monetary benefits. The scope of legal principles is to be stretched in order to protect the tax payers' money. The legal principles settled by the Honourable Supreme Court in this regard are not to recover the excess payment paid to the Group-III and Group-IV employees. However, one has to consider that whether such taxpayers' money can be allowed to be spent in such a way. Judicious way of spending the taxpayers' money is the constitutional mandate. The State and the executives are duty bound to protect the tax payers' money and every penny spent must be accountable and any wastage of taxpayers' money is impermissible under the Constitution of India. With this perspective, this Court has to adopt a pragmatic approach to find out a solution to make good the financial loss occurred to the tax payers' money. Undoubtedly, as per the legal principles settled by the Apex Court, the excess payment of salary cannot be recovered from Group-III and Group-IV employees as well as retired employees. However, those excess monetary benefits paid must be recovered from the officials, who had committed negligence, lapse or dereliction of duty in the matter



of payment of excess monetary benefits to the employees and those officials are to be held responsible. That is the rule of law.

16. For instance, if the materials belonged to the Government are missing / stolen, the officials, who all are responsible and accountable, are to be directed to make good the financial loss occurred on account of such loss of materials or theft committed. The same analogy is to be adopted in respect of the payment of excess salary / pension to the employees concerned. Ratio is to be fixed proportionately for imposing recovery in respect of the employees, who all are responsible and accountable for such excess payment of salary / pension.

17. This Court has experienced many number of such litigations in the matter of fixation of scale of pay, wherein excess scale of pay and monetary benefits as well as arrears are paid to the employees with the connivance and collusion of the officials concerned. Mostly at District level, the authorities competent are misguided by the subordinates as well as by few employees. Under those circumstances, excess arrears of pay are claimed and disbursed. Only few cases were identified by the Audit groups. There are large number of such complaints that excess claims are made with the collusion of the officials. Therefore, it is mandatory on the part of the State Government to collect all those excess payments paid from the tax payers' money and to safeguard the interest of the State as warranted under the Constitution of India. Excess payment paid cannot be allowed to lapse as it would cause financial loss to the State Exchequer. Such a course cannot be adopted and it is in violation of the constitutional principles.

18. This being the approach to be adopted, the State Government must issue a comprehensive / consolidated instructions to all the officials concerned stating that in the event of wrong or erroneous fixation of pay and payment of excess salary / pension, the officials, who all are responsible for such excess payment, must be held liable and the excess amount is to be recovered proportionately from them for the purpose of compensating the financial loss to the tax payers' money. In this regard, an urgent action is imminent. Therefore, this Court is inclined to *suo motu* implead the Chief Secretary, Government of Tamil Nadu, Chennai-600 009 as a party respondent. Accordingly, the Chief Secretary, Government of Tamil Nadu, Chennai-600 009, is impleaded as third respondent in the present writ petition and Mr. C. Ramar, learned Additional Government Pleader, appearing for the second respondent, accepted notice for the newly impleaded third respondent.

<https://hcservices.ecourts.gov.in/CaseDetails>
19. The third respondent / Chief Secretary is impleaded in the present writ petition only for a limited purpose of issuing consolidated / comprehensive instructions / circular to all the



subordinate officials to ensure that in the event of wrong fixation of pay or excess payment of salary / pension, if any noticed, the officials, who are all responsible and accountable for such excess payment, have to compensate the financial loss occurred to the State Exchequer. In this regard, a show-cause notice is to be issued to all such responsible officials and on receipt of explanation from them, the grounds raised and the materials available are to be considered by the competent authorities and suitable orders are to be passed for imposing recovery proportionately on all the officials, who all are responsible for the excess payment and the financial loss occurred to the State Exchequer.

20. The competent authorities of the State Government are the custodian of the tax payers' money and they are the trustees. Thus, in the event of any lapse, negligence or dereliction of duty in the matter of payment of excess salary / pension to the employees, then all these officials must be held responsible and liable for the financial loss occurred to the State Exchequer.

21. This being the factum, in respect of the excess payment made to the employees / pensioners, wherever it is legally permissible, in those cases, the recovery of excess payment is to be made from the employee / pensioner concerned. In respect of the exempted employees, namely, Group-III and Group-IV as well as the retired employees, the excess payment made is to be recovered from the officials, who all are responsible and accountable for such excess payments.

22. Under these circumstances, the following orders are passed:

- i. The impugned order of recovery passed by the second respondent in Na.Ka.No.Nil/2015, dated 15.10.2015, is quashed.
- ii. The correct fixation of pay as applicable to the writ petitioner is to be effected and pension permissible is to be paid in accordance with the pay rules and the Government Orders in force.
- iii. The respondents are directed to conduct an enquiry in respect of such excess payments made to the writ petitioner and in the event of any error, lapse, negligence or dereliction of duty, then, all suitable actions are to be initiated against all the officials, who all are responsible and accountable for compensating the financial loss occurred to the State Exchequer by imposing recovery proportionately.
- iv. The third respondent / Chief Secretary to Government is directed to issue a comprehensive / consolidated instructions in this regard directing all the competent authorities of all the



Departments to recover the financial loss occurred to the State Exchequer on account of excess payment of salary / pension, arrears of salary etc., by following the procedures contemplated.

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23.With these directions, this Writ Petition stands disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar(CS)

Myr

To

1.The Assistant Treasury Officer,
Peraiyur, Madurai District.

2.The Accountant General,
Government of Tamil Nadu,
361, Anna Salai, Chennai-600 018.

3. The Chief Secretary,
Government of Tamil Nadu,
Chennai-600 009

+1CC TO M/S.P.GUNASEKARAN,ADVOCATE, SR.NO.70164

+1CC TO SPECIAL GOVERNMENT PLEADER, SR.NO.70254

W.P (MD) No.21633 of 2015

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