BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **18.12.2019**

CORAM:

THE HONOURABLE MR.JUSTICE **M.S.RAMESH**

W.P.(MD) No.17348 of 2018
and
W.M.P.(MD) No.15253 of 2018

S.Mariappan ... Petitioner

/vs./

The Deputy Collector/Regional Manager,
Tamilnadu Civil Supply Corporation,
Madurai Region,
Madurai. ... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, to call for the records in pursuant to the impugned order passed by the respondent in Se.Mu.No.E1/7877/2017 dated 16.07.2018 and quash the same as illegal.

For Petitioner : Mr.S.Chellapandian

For Respondent : Mr.R.Vijayakumar
Standing Counsel

ORDER

This Writ Petition is filed to quash the order dated 16.07.2018 passed by the respondent in Se.Mu.No.E1/7877/2017.

2.The petitioner herein while serving as Junior Assistant in the respondent corporation, was promoted as Assistant on 17.01.2018. While fixing the petitioner's scale of pay, it is claimed by the respondent that the petitioner's scale of pay was erroneously fixed from 03.11.2015 instead of 17.01.2018. Incidentally, the arrears of the salary from 03.11.2015 was also paid to the petitioner. Through the impugned order dated 16.07.2018, the respondent Corporation now seeks to recover the excess payment, on the ground, that it was erroneously paid to the petitioner.

3.The learned counsel appearing for the petitioner would submit that the petitioner was eligible to be notionally promoted from the year 2015 itself and therefore, cancellation of the notional promotion granted with effect from 04.11.2015 was improper.

4.On the other hand, the learned Standing Counsel appearing for the respondent would submit that the petitioner herein had given undertaking on 02.07.2018 stating that in case, there is any calculation error in the payment of arrears of notional promotion, he would settle the same to the respondent in one installment. The learned counsel would also submit that the petitioner is entitled to receive the payment for the post of Assistant only from the actual date, on which, he was promoted as Assistant ie., from 17.01.2018 and not prior to that and therefore, there is no infirmity in the order passed by the respondent.

5.The learned Standing Counsel would also submit that since the arrears of salary with effect from 03.11.2015 was paid immediately after the erroneous re-fixation of the petitioner's scale of pay for promotion from 17.01.2018, the present impugned order came to be passed on 16.07.2018, which is within a period of 5 years and as such, the Hon'ble Apex Court's decision in the case of ***State of Punjab and others Vs. Rafiq Masih (White Washer) and others*** reported in ***(2015) 4 Supreme Court Cases 334*** will not apply to the facts of the present case.

6.I have given careful consideration to the submission made by the respective counsel.

7.It is not disputed that the petitioner herein has been paid with the arrears pursuant to his promotion from the post of Junior Assistant to Assistant with effect from 03.11.2015. Under the Tamilnadu Civil Supplies Corporation Employees' Service Regulations, 1989, the post of Assistant has been classified under GROUP-III. This is not disputed by the respondent. The issue as to whether the recovery of excess payment made to GROUP-III employees is no more *res integra*, in view of the decision of the Hon'ble Apex Court in the *White Washer's* case. The Hon'ble Apex Court while dealing with various instances, where, the recovery was held to be impermissible in law, had also brought into its purview on the recovery sought to be made from the employees belonging to Class III and Class IV service (or Group C and Group D service).

8.This situation was postulated by the Hon'ble Apex Court by taking into consideration the fact that the recovery from the lower rung of employees, would result in extreme hardship to them, since they would have spent their entire earnings in the upkeep and welfare of their family and if such excess payment is allowed to be recovered from them, it would cause them more hardship, than the reciprocal gains to the employer. Therefore, the Hon'ble Apex Court thought it fit to bring such situations for recovery as impermissible in law, since it would be iniquitous, arbitrary and in breach of the mandate prescribed under Article 14 of the Constitution of India. On this predominant ground, the recovery order itself cannot be sustained.

9.One other ground which the petitioner intended to put forth before this Court is that, the action of recovery was within the period of 5 years from the actual payment and therefore, the decision of the Hon'ble Apex Court in the *White Washer's* case will not be applicable. The learned Standing Counsel also relied upon the decision of Hon'ble Apex Court in the case of ***High Court of Punjab and Haryana and others Vs. Jagdev Singh*** reported in ***(2016) 14 Supreme Court Cases 267*** and submitted that in the *Jagdev Singh* case, the employee was placed on notice that any payment found be have been made in excess would be required to be refunded and therefore, by applying the principles laid down therein, the recovery order requires to be sustained, in view of the undertaking given by the petitioner also in the present case.

10.Before addressing the issue as to whether the propositions laid down in *Jagdev Singh's* case could be made applicable to support the case of the respondent, it would be appropriate to have a further reading to the propositions laid down in the *White Washer's* case in this regard. While setting forth some of the situations of hardship in the *White Washer's* case, the Hon'ble Apex Court had thought it fit to place reliance on a few of its own decisions rendered in this regard.

11.In the case of ***Syed Abdul Qadir Vs. State of Bihar*** reported in ***(2019) 11 SCC 491***, the Hon'ble Apex Court held that when the excess unauthorised payment is detected with a short period of time, it would be open for the employer to recover the same. Such a short span of period was indicated to be for a period of 5 years. In the case of ***Shyam Babu Verma Vs. Union of India*** reported in ***(1994) 2 SCC 521:1994 SCC (L&S) 683:(1994) 27 ATC 121***, reference was made to the belated recovery action after a period of 11 years and the recovery made therein after an inordinate delay was also violative of Article 14 of the Constitution of India. In the case of ***B.J.Akkara Vs. Government of India*** reported in ***(2006) 11 SCC 709:(2007) 1 SCC (L&S) 529***, it was held that where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, the recovery can be sustained. In the light of these pronouncements, the Hon'ble Apex Court in *White Washer's* case had postulated various 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.

12.One such situation pertains to the recovery from the employees belonging to Class III and Class IV service. Though references were made to the decision in *Syed Abdul Qadir Vs. State of Bihar, Shyam Babu Verma Vs. Union of India* and *B.J.Akkara Vs. Government of India,* the decision in *White Washer's* case differentiated the situations pertaining to recovery from the employees among the Class of persons. While dealing with the recovery action taken by the employer within a period of 5 years, a clear description was drawn among the employees belonging to Class III and Class IV service and other employees, from whom, recovery was made for a period in excess of 5 years before the order of recovery. Such situations postulated in *White Washer's* case are 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 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.*

13.Therefore, when the Hon'ble Apex Court in *White Washer's* case had taken into consideration the limitations indicated in *Syed Abdul Qadir Vs. State of Bihar, Shyam Babu Verma Vs. Union of India* and *B.J.Akkara Vs. Government of India,* the *White Washer's* case thought it fit to restrict the limitation between the different Classes of employees. In other words, when the recovery order was made impermissible to the employer after a period of 5 years against other employees, such a limitation of 5 years was given up insofar as the Class III and Class IV employees are concerned. In justification to such a restriction, the Hon'ble Apex Court had also taken into account the hardship that might be caused to these employees in the lower rung of service and the consequences of breach of mandate contained under Article 14 of the Constitution of India.

14.In this background, the decision in *Jagdev Singh's* case relied upon by the learned Standing Counsel for the respondent was looked into. Reading of the said case clearly reveals that the decision in the *White Washer* case was neither water down nor distinguished. On the other hand, *Jagdev Singh* case upholds the propositions of *White Washer's* case and by applying the facts involved in that case, had held that action of recovery to be unsustainable. What was dealt with in *Jagdev Singh* case was on the recovery order made from a retired employee, who falls under the situation No.18(ii) of the *White Washer's* case. May be, if the retired employee was placed on notice that any payment found to have been made as excess is required to be refunded, subsequent recovery order could not be sustained.

15.In the instant case, the petitioner continuous to be as an Assistant in the respondent Corporation and when Class 18 (i) and 18 (iii) of the *White Washer's* case was not applied in *Jagdev Singh* case, it cannot be said that the decision would support the case of the respondent Corporation.

16.In the light of the foregoing reasons, this Court is of the view that the law has been well settled on the impermissibility of recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service) and therefore, the impugned order passed by the respondent in Se.Mu.No.E1/7877/2017 dated 16.07.2018 is hereby set aside.

17.Accordingly, Writ Petition stands allowed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar (AS)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

mm

+1 CC to M/s.S.CHELLAPANDIAN, Advocate (SR-105700[F] dated 18/12/2019)
+1 CC to M/s.R.VIJAYAKUMAR, Advocate (SR-105630[F] dated 18/12/2019

W.P.(MD)No.17348 of 2018
18.12.2019

JMN(09.01.2020) 5P : 3C