

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.10.2020

CORAM

THE HONOURABLE Mr. JUSTICE P.VELMURUGAN

W.P.No.19669 of 2006
and
M.P.Nos.2 of 2006 & 1 of 2008

V.Thanigaimalai

...Petitioner

Versus

1. The Engineer-in-Chief WRO & Chief Engineer (General), Public Works Department, Cheppakkam, Chennai - 600 005.
 2. Accountant General (Accounts & Entitlements) of Tamil Nadu (Pension-15), Teynampet, Chennai - 600 018.
 3. The Secretary to Government, Public Works Department, Secretariat, Chennai - 600 009.
 4. The Executive Engineer, Public Works Department, Buildings Construction & Maintenance Division, Vellore -4.
 5. The District Treasury Officer, Vellore.
- ...Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari to call for the records of the 1st respondent pertaining to the impugned circular issued in circular No.CI(2)/935/2001 dated 8.4.2002 and the records of the 4th respondent herein pertaining to the impugned proceedings in Lr.No.Nee 1/76/2006-1 dated 27.3.2006, Lr.No.Nee1/76/2006-3 dated 27.03.2006, Lr.No.E1/76/2006-4/ dated 28.3.2006 and the proceedings of the 2nd respondent in Pen 15/II/dated Nil and in P15/2/T8-184/REV/2006-2007/2254, PPO.No.C8296PW/ dated 07.06.2006 and quash the same.

For Petitioner : No representation
For Respondents : Mr.K.Magesh
Special Government Pleader
for R1, R3 to R5
Mr.Vijay Shankar
for R2

O R D E R

The challenge made in this writ petition is to the circular bearing No.CI(2)/935/2001 dated 8.4.2002 issued by the first respondent and the proceedings of the fourth respondent in Lr.No.Nee 1/76/2006-1 and Lr.No.Neel/76/2006-3 dated 27.3.2006 and Lr.No.E1/76/2006-4 dated 28.03.2006 and the proceedings of the second respondent in Pen 15/II dated Nil and P15/2/T8-184/REV/2006-2007/2254 and PPO.No.C8296PW/ dated 07.06.2006.

2.Despite several opportunities granted to the petitioner and his name having been printed in the cause list, there is no representation on his behalf either in person or through counsel. However, due to efflux of time, this Court is inclined to proceed with the matter on merits.

3.According to the petitioner, he served as Assistant Executive Engineer of Public Works Department and retired from service on 30.06.2001 on attaining the age of superannuation. He received his pensionary benefits. Subsequently, based on the circular of the first respondent dated 08.04.2002, the fourth respondent unilaterally refixed the pay of the petitioner and revised his pension and ordered for recovery of the alleged excess amount paid to him. It is the grievance of the petitioner that without giving any notice and providing an opportunity of hearing, the fourth respondent has taken such action and hence, the same is arbitrary, illegal and violative of the principles of natural justice. Hence, this writ petition.

4.On 28.06.2006, this Court while admitting the main writ petition, granted an order of interim stay in respect of recovery alone in MP.No.2 of 2006.

5.Upon notice, the respondents 1,3,4 and 5 filed a counter affidavit, wherein, it is inter alia stated that while fixing the pay of the petitioner in the Selection Grade scale of pay of Rs.9100-275-14050 by combining the services rendered as Selection Grade Assistant Engineer and Assistant Executive Engineer ordinary grade in the identical scale as per G.O.Ms.No.210, Personnel and Administrative Reforms (Per.S.) Department, dated 11.03.1987, the provision under Rule 4(3) of Tamil Nadu Revised Scale of Pay Rules, 1989 as ordered in

G.O.Ms.No.57, Finance (Pay Cell-II) Department, dated 28.01.1991 was given effect to; the said method of fixation was objected to by the Accountant General (Audit) and all the benefits accruing in the officiating post has to be availed before fixing the pay as per G.O.Ms.No.57, Finance (Pay Cell-II) Department, dated 28.01.1991, because the presumptive move to Special Grade in the lower substantive post (Assistant Engineer) is permissible, only after ordering actual move to Selection Grade in the higher officiating post (Assistant Executive Engineer) as the period of ten years have to be cleared by satisfying conditions for promotion; thus, the pay in the officiating post of Assistant Executive Engineer has to be fixed first on movement to Selection Grade and then compared with the pay on presumptive move to Special Grade in the substantive post of Assistant Engineer; consequently, the first respondent issued a Circular bearing No.C1(2)/935/2001, dated 08.04.2002 based on the communication in Letter No.7528'A'/A1/2002-2, dated 01.04.2002 sent by the Government, confirming the procedure as instructed by the Accountant General (Audit), Tamil Nadu; hence, the over paid amount was directed to be recovered from the individual, whose pay were not fixed in accordance with the rules and clarifications; accordingly, the amount excessively paid to the petitioner was ordered to be recovered fully from his pay commission arrears and partly from his pension as the individual already retired from service and received all retirement benefits. It is further averred therein that similar recovery orders issued on several others, are being implemented by recovering the amount from their pay in instalments. Stating so, the respondents submitted that the claim of the petitioner is unjust and therefore, the same is liable to be dismissed, so as to reduce the burden on the state exchequer.

6.The second respondent also filed a detailed counter affidavit stating that the pensionary benefits of the petitioner were authorised by this respondent taking Last Pay Drawn as Rs.11300/- vide PPO No.C.82960/PW; a Selection Grade Assistant Engineer in PWD Department, when promoted as Assistant Executive Engineer, is entitled for fixation of pay under both G.O.Ms.No.57, Finance (Pay Cell-II) Department, dated 28.01.1991 and G.O.Ms.No.210 P&AR (PS) Department dated 11.03.1987; as per Accountant General (Audit) report for the year 2002-03, it was intimated that the pay of the petitioner had been refixed downwardly, consequent on which a sum Rs.21803/- is pending to be recovered; hence, the fourth respondent proposed to recover the same from the 2nd and 3rd installment of VI Pay Commission Arrears, which remained unpaid at that time; and accordingly, his pensionary benefits were revised and the excess paid pay and allowances of Rs.21803/- and also the consequential excess paid Death-cum-Retirement Gratuity, Commute Value of Pension and pension, were directed to be recovered from the pension, without

the consent of the petitioner, as per G.O.Ms.No.702 Finance (Pension) dated 07.10.1988; and hence, the impugned orders passed by the respective respondents are in accordance with the relevant rules and the Government orders and the same do not call for any interference by this Court.

7. However, today, when the matter was taken up for consideration, Mr.K.Magesh, learned Special Government Pleader appearing for the respondents 1, 3, 4 and 5, on instructions, submitted that the pay of the petitioner was refixed as per the rules, based on which, he is entitled to receive his pensionary benefits. As regards the recovery of excess payment made, the learned Special Government Pleader fairly submitted that the same cannot be effected against the petitioner, in the light of the decision of the Supreme Court in State of Punjab and Others Vs. Rafiq Masih (White Washer) and others reported in (2015) 4 SCC 334, wherein, it was held as follows:

"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 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."

8.Considering the facts and circumstances of the case and having regard to the submissions made by the learned Special Government Pleader appearing for the respondents 1,3,4 and 5 and also taking note of the admitted fact that the petitioner is a retired employee of the respondent Department, whose case falls under the second category as delineated in the aforesaid decision, this Court is of the view that the petitioner is entitled to receive his pension and other monetary benefits, as per the revised pay. However, no recovery shall be effected by the respondents, with respect to the excess payment made to the petitioner.

9.Accordingly, this writ petition stands disposed of, directing the respondent authorities to pay pension and other monetary benefits to the petitioner, as per the revised salary, however, not to deduct any amount from the said payment, towards wrongful monetary gains. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

- 1.The Engineer-in-Chief WRO & Chief Engineer (General),
Public Works Department,
Cheppakkam, Chennai - 600 005.
- 2.Accountant General (Accounts & Entitlements)
of Tamil Nadu (Pension-15),
Teynampet, Chennai - 600 018.
- 3.The Secretary to Government,
Public Works Department,
Secretariat, Chennai - 600 009.

4.The Executive Engineer,
Public Works Department,
Buildings Construction & Maintenance Division,
Vellore -4.

5.The District Treasury Officer,
Vellore.

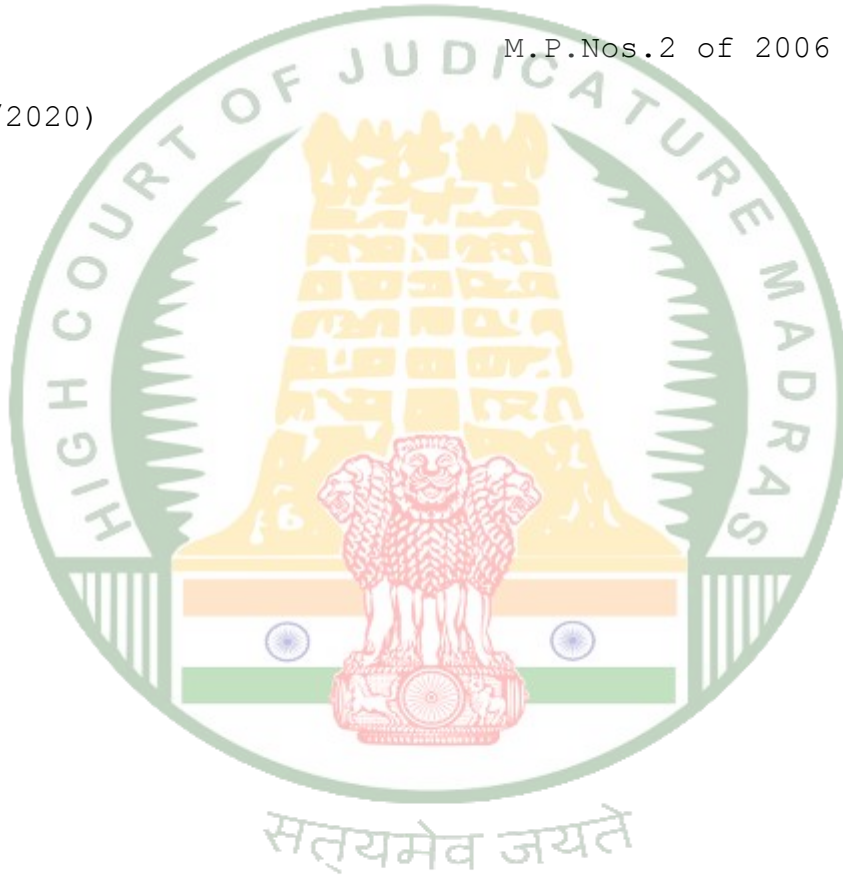
+1 cc to The Government Pleader, Sr.No. 34773

W.P.No.19669 of 2006

and

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SPD(CO)
RMP(01/12/2020)



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