

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 16.12.2020

C O R A M

The Hon'ble Mr. Justice SENTHILKUMAR RAMAMOORTHY

Writ Petition No.10915 of 2010 &
M.P.Nos.2 & 3 of 2010

D.Martin John

...Petitioner

vs.

1. The Superintendent of Police,
District Police Office,
Thanjavur.
2. The Accountant General (A&E) of Tamilnadu,
No.361, Anna Salai,
Chennai-600 018.
3. The Treasury Officer,
Thanjavur,
Thanjavur District.

...Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus to call for the records relating to the impugned order passed by the second respondent herein in his proceedings Pen4/V/Pt/139/09-10 dated 03.07.2009, No.PEN.EDP./SL.No.PA04481/PCR/2009-10 dated 09.03.2010, and the order of the first respondent in R.C.No.M3/Pen.45/2007 dated 01.04.2009 and quash the same and consequently direct the first respondent to treat the period from 19.03.2002 to 24.01.2007 as duty period for all purposes.

For Petitioner : M/s.G.Bala and Daisy

For Respondents : Mr.G.K.Muthukumar,

Spl. G. P. for R1 & R3

Mr.V.Vijayshankar for R2

O R D E R

An order dated 03.07.2009 of the second Respondent in respect of the recovery of an aggregate sum of Rs.1,60,555/- from the Petitioner is under challenge in this writ petition and a consequential direction is prayed for to treat the period from 19.03.2002 to 24.01.2007 as a duty period for all purposes.

2. The Petitioner joined in the Police Department as a Grade II Police Constable on 12.08.1971 and he was promoted as a Grade I Police Constable subsequently. On 14.05.1997, he was imposed with the punishment of compulsory retirement for being absent without permission during three separate periods. Being aggrieved by the said order, the Petitioner filed O.A.No.3421 of 1999 before the Tamil Nadu Administrative Tribunal. By order dated 19.03.2002, the Tamil Nadu Administrative Tribunal set aside the order of compulsory retirement and imposed the modified punishment of stoppage of increment for three years with cumulative effect. The said order further provided that the Petitioner is not entitled to back wages for the period of unemployment.

3. Meanwhile, pursuant to the order of compulsory retirement, the Petitioner received pension during the period from 14.05.1997 to 19.03.2002. Pursuant to the order of reinstatement, by order dated 06.05.2002, the Petitioner was called upon to repay the amounts received as terminal benefits as a condition precedent to reinstatement. This order was challenged by the Petitioner by filing O.A.No.2977 of 2002 before the Tamil Nadu Administrative Tribunal. By order dated 06.02.2003, the Administrative Tribunal concluded that the amount may be recovered from the Petitioner in 40 monthly installments because the Petitioner had four more years of service at the relevant point of time. Consequently, the Respondent was directed to reinstate the Petitioner, without delay, and recover the amount due in 40 monthly installments. The said order was challenged by the Respondents by filing W.P.No.477 of 2004. This writ petition was dismissed by order dated 12.12.2006 whereby this Court concluded that the first Respondent is entitled to recover the sum of Rs.1,60,555/- from the terminal benefits if the said amount could not be recovered earlier. Pursuant thereto, the Petitioner was reinstated by order dated 24.01.2007.

4. After the Petitioner reached the age of superannuation on 28.02.2007, a revised pension proposal was sent by the Police Department to the Accountant General on 12.10.2007. Based on such proposal, the pension payment order was issued to the Treasury Officer, Thanjavur under copy to the Petitioner on 25.02.2008. On account of non-recovery of the excess terminal benefits paid to the Petitioner earlier, a show cause notice was issued to the Petitioner on 01.04.2009 stating that a sum of Rs.85,354/- was adjusted towards the aggregate excess payment of Rs.1,60,555/- from the commuted value of pension and that there is an outstanding amount of Rs.75,201/- from the Petitioner. Accordingly, he was called upon to show cause as to why the outstanding amount of Rs.75,201/- should not be recovered from his DA on full pension. By letter dated 09.04.2009, the

Petitioner stated that he was directed to be reinstated by order dated 06.02.2003 of the Tamil Nadu Administrative Tribunal subject to recovery of the outstanding amount in 40 monthly installments. Notwithstanding such direction, he was reinstated into service only on 24.01.2007. Consequently, the Petitioner stated that he is entitled to wages for the period from 19.03.2002 to 24.01.2007. On the above basis, the Petitioner stated that the proposed recovery of Rs.75,201/- from his pension is illegal, arbitrary and unjust. Eventually, by the impugned order dated 03.07.2009, the Accountant General (Accounts & Entitlements) communicated to the Treasury Officer under copy to the Petitioner that the balance amount of Rs.75,201/- would be recovered from the pension amount of the Petitioner in suitable installments. The present writ petition was filed in these facts and circumstances.

5. I heard Mr.G.Bala, the learned counsel for the Petitioner; Mr.G.K.Muthukumar, the learned Special Government Pleader for Respondents 1 and 3; and Mr.V.Vijayshankar for Respondent 2.

6. The learned counsel for the Petitioner narrated the facts set out above. Although the punishment of compulsory retirement was modified by order dated 19.03.2002 to that of stoppage of increment for three years with cumulative effect, he pointed out that the Respondent insisted on the repayment of the entire sum of Rs.1,60,555/- as a condition precedent to reinstatement. Therefore, the Petitioner was constrained to file O.A.No.2977 of 2002 before the Tamil Nadu Administrative Tribunal. The said petition was allowed by order dated 06.02.2003 whereby the Respondents were directed to recover the amount in 40 monthly installments and not delay reinstatement on this account. The learned counsel emphasized that the Petitioner had four years of service left when the order dated 06.02.2003 was pronounced and that if the Respondents had complied with the order by reinstating the Petitioner, the amount due could have been recovered while the Petitioner was in service. However, the Respondents challenged the said order by filing W.P. No.477 of 2004. While the writ petition was pending, the order of the Administration Tribunal remained in force as an interim stay was not granted. Nevertheless, the Respondents did not reinstate the Petitioner until W.P. No.477 of 2004 was dismissed on 12.12.2006. Such reinstatement was effected on 24.01.2007, i.e. about 35 days before the date of retirement of the Petitioner.

7. With this preamble, the learned counsel for the Petitioner submitted that the focus of challenge is largely on the refusal of the Respondents to treat the period between 19.03.2002 [date of order directing directing reinstatement] to

24.01.2007 [actual date of reinstatement] as a duty period for all purposes. To put it differently, the Petitioner claims that he is entitled to full wages for this period because he was denied employment unjustly during the above mentioned period. By placing reliance on Fundamental Rules (FR) 54, the learned counsel contended that the Petitioner is entitled to wages for the above mentioned period in light of the order of reinstatement which was not challenged by the Respondents and attained finality.

8. On the contrary, Mr.Muthukumar, the learned Special Government Pleader submitted that the present writ petition is barred either by res judicata, or, at a minimum, by constructive res judicata. In order to substantiate this contention, he referred to and relied upon the order dated 06.02.2003 in O.A.No.2977 of 2002 whereby the Respondents were permitted to recover a sum of Rs.1,60,555/- in 40 monthly installments. He also pointed out that by order dated 12.12.2006 in W.P.No.477 of 2004, the right of the Respondents to recover the above mentioned amount was accepted by this Court. In fact, this Court permitted the Respondents to recover it from the terminal benefits of the Petitioner in case it was not possible to recover the same earlier. The said order dated 12.12.2006 in W.P.No.477 of 2004 was not carried in appeal by the Petitioner and, therefore, attained finality. In light of the said order, Mr.Muthukumar contended that the present petition to challenge the order of recovery dated 03.07.2009 and to treat the period prior to reinstatement as a duty period is not maintainable and is barred by res judicata or constructive res judicata. In support of this contention, he relied upon the judgment of the Hon'ble Supreme Court in Forward Construction Co. v. Prabhat Mandal, Andheri, (1986) 1 SCC 100 and that of the Division Bench of the Delhi High Court in Union of India v. R.K.Gupta, MANU/DE/3051/2009 (paragraphs 14-16).

9. The next contention of Mr.Muthukumar was that the Petitioner should have prayed for treating the period between 19.03.2002 and 24.01.2007 as a duty period in O.A.No.2977 of 2002 or by filing a miscellaneous petition in W.P.No.477/2004. In the alternative, the Petitioner should have initiated independent proceedings for such purpose at that point of time. Instead, the Petitioner allowed the said proceedings to attain finality. When recovery proceedings were initiated in terms of the order of the Division Bench, the Petitioner challenged such recovery proceedings and prayed for treating the aforesaid period as a duty period by way of consequential relief. Mr.Muthukumar contended that this course of action is clearly impermissible in law. He also pointed out that the Petitioner admittedly received excess payments but has continually refused to permit the recovery thereof by resorting to multiple

proceedings. As such, the Petitioner is disentitled to discretionary relief on account of his conduct. The last contention of Mr.Muthukumar is that the Petitioner would be unjustly enriched if it is held that he is entitled to wages for the period between 19.03.2002 and 24.01.2007.

10. I considered the submissions of the learned counsel for the respective parties and examined the materials on record.

11. By this writ petition, the Petitioner has challenged the communication dated 03.07.2009 of the second Respondent whereby it is proposed to recover the outstanding amount from the Petitioner's pension. He also prays that the period between 19.03.2002 and 25.01.2007 should be treated as a duty period for all purposes, and names and styles the same as a consequential remedy. As regards the first limb of the prayer, namely, the challenge to the recovery of a sum of Rs.1,60,555/-, as correctly contended by Mr.Muthukumar, the said prayer is clearly barred by res judicata in as much as the order dated 12.12.2006 in W.P.No.477 of 2004 permitted the Respondents herein to recover the sum of Rs.1,60,555/- from the terminal benefits of the Petitioner. The communication dated 03.07.2009 is pursuant to and in accordance with the order of the Division Bench of this Court. Consequently, the Petitioner is not entitled to challenge the communication dated 03.07.2009 as regards recovery.

12. This leads to the second limb of the prayer in the writ petition, namely, to treat the period between 19.03.2002 and 24.01.2007 as a duty period for all purposes. On this issue, the primary contention of the learned counsel for the Petitioner is that the Respondents failed to comply with the order dated 06.02.2003 of the Tamil Nadu Administrative Tribunal whereby the Respondents were directed to reinstate the Petitioner and thereafter recover the dues in 40 monthly installments. By refusing to comply with the said order, the Respondents unlawfully and unjustly deprived the Petitioner of 4 to 5 years of service, including all the benefits that would have accrued during the said period. The said contention is not completely devoid of merit. Nonetheless, there are other dimensions to this issue. Is the claim to treat the above period as a duty period really consequential to the impugned order of recovery? Upon perusal of the impugned order, it is evident that it has nothing to do with the manner in which the period preceding reinstatement should be treated. Therefore, in my view, this remedy is certainly not consequential to a challenge to the order of recovery. The objection of the learned Special Government Pleader was that this should have been prayed for in O.A.No.2977 of 2002 or by way of independent proceedings at the relevant juncture, i.e. at the time of reinstatement. In my

view, O.A.No.2977 of 2002 pertained to the recovery as a condition precedent to reinstatement, and the treatment of the period prior to reinstatement was a distinct issue. Nonetheless, it certainly should have been raised at least at the time of or shortly after reinstatement. Indeed, by proceedings dated 08.03.2007 of the Superintendent of Police, Thanjavur District, it was recorded that the period from 19.03.2002 to 25.01.2007 would be treated as a duty period for all purposes (without back wages). On that basis, this issue could have been raised around that time; however, the Petitioner raised the issue for the first time in response to the show cause notice dated 01.04.2009 as regards recovery of excess payments towards terminal benefits. This course of action is clearly an after-thought designed to frustrate the recovery and cannot be countenanced in discretionary public law proceedings.

13. There is another dimension as well. After the order of compulsory retirement was pronounced on 14.05.1997, the Petitioner was paid the terminal benefits prior to the order dated 19.03.2002 whereby the punishment was modified as stoppage of increment for three years with cumulative effect. Thus, the Petitioner received amounts that he was not entitled to. Pursuant to the order dated 06.02.2003, the Respondent was directed to recover the amount in 40 monthly installments but such recovery was not made until the Petitioner retired. As a result, the Petitioner retained the sum of Rs.1,60,555/- until the revised pension order was issued in the year 2009. Even at that stage, only a sum of Rs.85,354/- could be adjusted from the commuted value of pension. As regards the balance outstanding of Rs.75,201/-, the said sum has not been recovered till date. After the order of the Division Bench of this Court permitted the Respondents to recover the aforesaid amount from the terminal benefits of the Petitioner, the Petitioner chose to file the present writ petition and, in light of the interim order, has retained this amount till date.

14. In view of the aforesaid facts and circumstances, I am inclined to accept the contention of the learned Special Government Pleader that the Petitioner's conduct is blameworthy. At the same time, it cannot be said that the conduct of Respondents 1 and 3 herein is beyond reproach. In spite of being directed by the Tamil Nadu Administrative Tribunal to reinstate the Petitioner without insisting on the recovery of dues as a pre-condition, the Respondents failed to do so. By this process, they delayed the reinstatement until 24.01.2007, i.e. until 35 days from the date of retirement of the Petitioner.

15. Thus, the inequitable conduct of one party is broadly matched by the other but it is the Petitioner who seeks

equitable and discretionary relief in this proceeding. As dilated upon earlier, the Petitioner waited until proceedings were initiated, in terms of the order of the Division Bench, for recovery of the outstanding amount by way of the show cause notice dated 01.04.2009, which culminated in the impugned order, before setting up the "duty period" claim as a defence to recovery. This case also does not fall within the situations, outlined in paragraph 18 of State of Punjab v. Rafiq Masih, (2015) 4 SCC 334, wherein recovery would be interdicted on equitable grounds. Hence, when the facts and circumstances are considered cumulatively, including the fact that the Petitioner retained the excess payment for a considerable period of time by repeatedly challenging such recovery proceedings, I am not inclined to exercise discretion in favour of the Petitioner.

16. In the result, this writ petition fails and the same is dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1. The Superintendent of Police,
District Police Office,
Thanjavur.
2. The Accountant General (A&E) of Tamilnadu,
No.361, Anna Salai,
Chennai-600 018.
3. The Treasury Officer,
Thanjavur,
Thanjavur District. सत्यमेव जयते

+lcc to Mr.V.Vijay Shankar, Advocate, S.R.No.42073

+lcc to the Government Pleader, S.R.No.41567

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