

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 17.12.2020

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THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. No.35436 of 2016
and
W.MP.No.30499 of 2016

B.Padmavathy

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Petitioner

- Vs -

1.The Secretary,
Chennai Port Trust,
Chennai 600 001.

2.The Traffic Manager,
Chennai Port Trust,
Chennai 600 001.

..

Respondents

Writ petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of Mandamus, forbearing the respondents from reducing the salary of the petitioner and also from recovering Rs.2500/- from the salary of the petitioner in any manner except in a manner known to law and direct the respondents to continue to pay Rs.490/- being the family planning increment with effect from November 2015 onwards to till date and to refund the amount illegally recovered from the salary of the petitioner.

For Petitioner : M/S.S.Selvathirumuragan
For Respondents : Mr.Haja Mohadeen Gisthi

ORDER

This Writ petition has been filed by the petitioner to forbear the respondents from reducing the salary of the petitioner and also from recovering Rs.2500/- from the salary of the petitioner in any manner except in a manner known to law and direct the respondents to continue to pay Rs.490/- being the family planning increment with effect from November 2015 onwards to till date and to refund the amount illegally recovered from the salary of the petitioner.

2. According to the petitioner, she belongs to Scheduled Tribe community, and she was selected for appointment to the post of clerk by an order dated 21.07.1997 passed by the 2nd respondent and the said post was confirmed by an order dated 22.05.2002. Thereafter she was promoted as Junior Assistant and further promoted as Senior Assistant under regulation 10 of the Madras Port Trust Employees Regulations by an order dated 06.09.2006. Further she got promotion as Assistant Superintendent with effect from 07.09.2011. It is the further case of the petitioner that she is eligible and entitled to be appointed as Office Superintendent (Scheduled Tribe) in a backlog vacancy from 11.11.2003. Therefore, she made a representation to the 2nd respondent and requested to promote her to the post of Office Superintendent in the backlog vacancy which is the next promotional avenue, as there was no suitable candidates in the said community fit for promotion to the said post. In this regard, she had filed WP.No.9956 of 2014 and WP.No.11228/2016 before this Court and the same are pending. It is the grievance of the petitioner, that after filing those petitions, the respondents have issued a memo dated 28.04.2016, for production of original community certificate. However the petitioner has already submitted the same and the same has been verified and only thereafter prior promotions were granted to her. The petitioner was constrained to file WP.No.18047/2016 before the Hon'ble Division Bench of this Court and against the said order of the respondents and has obtained an order of stay. It is the further case of the petitioner that she is presently working in the post of Assistant Superintendent in the Madras Port Trust. Her grievance is that she underwent sterilisation operation in the month of May 1991 and she had been granted Family Planning increment of Rs.490/- with effect from 02.08.1997 and that the said increment was being paid to her only till October 2015. Thereafter, the respondents started recovering a sum of Rs.2500/- from her salary without issuing any notice to her and without hearing her. Challenging the said proceedings the present petition is filed.

3. Learned counsel appearing for the petitioner submitted that the petition has been filed to forbear the respondents from reducing the salary of the petitioner and also from recovering Rs.2500/- from the salary of the petitioner and further to direct the respondents to continue to pay Rs.490/- being the family planning increment with effect from November 2015 onwards to till date and to refund the amount illegally recovered from the salary of the petitioner. It is the submission of the learned counsel for the petitioner that the counter filed by the respondent, more especially, paragraph No.24 of the counter reveals that as per the Circular No. AO(CDN)/FP/2015/F dated 06.11.2015, the Family Planning Increment, which was granted to employees/spouses who had undergone sterilization operation

prior to appointment alone was stopped and recovery of amount paid towards Family Planning Increment is being recovered in instalments from February 2016 onwards. (*)**"It is the submission of the learned counsel for the petitioner that the petitioner had underwent sterilization operation in the year 1991 itself, much prior to entering into service and was granted the Family Planning Increment on 2.8.1997 itself and, therefore, the same cannot be recovered and the circular on which recovery has been said to have been ordered, is not at all applicable to the case of the petitioner."** It is the further submission of the learned counsel that even if any excess amount is paid by the respondents, for which the petitioner was not instrumental, the same cannot be recovered from the petitioner and in this regard, the decision of the Hon'ble Supreme Court in State of Punjab & Ors - Vs - Rafiq Masih (White Washer) & Ors. (2015 (4) SCC 334) has been pressed into service to submit that for the fault committed in excess payment, the same cannot be recovered from the petitioners in the absence of misrepresentation and fraud on the part of the employee.

4. Per contra, learned counsel appearing for the respondents submitted that in line with the circular the recovery has been effected. However, it is submitted by the learned counsel for the respondents that respondents may be permitted to pass orders on the representation submitted by the petitioner in accordance with law.

5. This Court bestowed its best attention to the contentions advanced by the learned counsel on either side and also perused the materials available on record as also the decisions relied on by the petitioner in support of his respective contention.

6. The whole gamut of the case lies in a narrow sphere - Whether the petitioner is eligible for the Family planning increment of Rs.490/- granted to the petitioner with effect from 02.08.1997 and whether recovery of the amount ordered is justified.

7. It is to be pointed out even at the outset that the above increment has been granted to the petitioner not on the basis of any misrepresentation, fraud or collusion on the part of the petitioner and it was granted to her by the respondents on account of the sterilization operation underwent by the petitioner.

8. In State of Punjab - Vs - Rafiq Masih (2015 (4) SCC 334), the Supreme Court had considered the case of recovery of amount, which is paid to an employee and the effect of the same

and has enumerated the circumstances in which the said recovery could stand justified. The relevant portion of the said decision is extracted hereunder for ready reference :-

"13. First and foremost, it is pertinent to note, that this Court in its judgment in Syed Abdul Qadir case [Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475 : (2009) 1 SCC (L&S) 744] recognised, that the issue of recovery revolved on the action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorised payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference because an action is iniquitous, must really be perceived as, interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements, and a variety of sundry expenses. Based on the above consideration, we are of the view, that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee."

(Emphasis Supplied)

9. As pointed out above, it is not the case of the respondents that on the basis of misrepresentation or fraud on the part of the petitioner, the family planning increment has been granted to her. Further, the circular on which reliance has been placed by the respondents to order recovery deals only with family planning before the person enters into service. **(**) In the case of the petitioner, she has undergone sterilization surgery prior to her entering into service and she has been granted family planning increment even as early as on 2.8.1997.".** Therefore, the said circular in no way would have any effect on the case of the petitioner and the family planning increment granted to the petitioner could not be stopped nor any payments made to her could be recovered.

10. For the reasons aforesaid, the impugned order passed by the respondents is quashed and the respondents are directed to keep paying the family planning increment to the petitioner and also to pay back the amounts that have been recovered from her. The said exercise shall be completed and payment made to the petitioner herein within a period of 12 weeks from the date of receipt of copy of this order. Consequently, connected miscellaneous petition is closed. No costs.

-s/d-

Assistant Registrar

Dated:09/03/2021

(*) (**) Corrected as per order of this Court dated 15/04/2021 made in W.P.No.35436 of 2016
Sd/-

Assistant Registrar (CS-VII)

Dated:12/05/2021

True Copy

Sub-Assistant Registrar

jrs

To

1.The Secretary,
Chennai Port Trust,
Chennai 600 001.

To be Substituted to the order
already despatched on 26/03/2021

2.The Traffic Manager,
Chennai Port Trust,
Chennai 600 001.

+1 cc to M/s.Selvathirumurgan Advocate sr.41635

W.P. NO.35436 of 2016

aa10/03/2021

srg 13/05/2021