BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED 12.03.2020

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THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P(MD)No.5346 of 2012
and
M.P.(MD)No.2 of 2012

K.Bhuvaneswari ...Petitioner

Vs

1.The Director of Public Health and
Preventive Medicine,
D.M.S.Complex, Chennai - 6.

2.The Deputy Director of Health Services,
Sivakasi Health Unit,
Poovananthapuram Vilaku,
Sivakasi, Virudhunagar District.

3.The Medical Officer,
Government Hospital,
Sivakasi.

4.The Senior Audit Officer,
O/o.The Accountant General of Tamil Nadu,
Lekha Parishka Bhavan,
A.G.S.Avenue,
Press Colony,
Mattuthavani Bus Stand,
Madurai - 625 007. ..Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus calling for the records in pursuant to the impugned order passed by the second respondent in proceeding Na.Ka.No.2641/C5/05 dated 06.12.2010 and the impugned order passed by the fourth respondent in proceeding PAG (CA) MDU/ISC IX/2011-12/484 dated 17.01.2012 and quash these orders and consequently direct the respondents to re-pay the recovered amount.

For Petitioner : Mr.B.Brijesh Kishore

For R-1 to R-3 : Mr.J.Gunaseelan Muthiah
Additional Government Pleader

For R-4 : Mr.P.Gunasekaran

ORDER

The Petitioner has filed this writ petition challenging the order dated 06.12.2010 passed by the second respondent, whereby and where the petitioner was directed to pay the excess payment of salary, pursuant to the order dated 17.01.2012 of the fourth respondent stating that the pay fixation of the petitioner is erroneous.

2.Heard the learned counsel appearing for the petitioner; the learned Additional Government Pleader appearing for the respondents 1 to 3 and the learned counsel appearing for the fourth respondent.

3.The case of the petitioners is that she was working as Health Visitor in Government Hospital at Sivakasi and her pay was fixed on 15.10.1998 as Selection Grade in the scale of pay for Health Visitor. Thereafter, based on the audit objection raised by the fourth respondent, the second respondent issued an order in proceedings dated 06.12.2010 stating that there was an excess payment of salary to the tune of Rs.6,300/- and directed the petitioner to pay the same immediately. According to the petitioner she had paid the amount on 06.09.2011. After the said payment, the Medical Officer issued a further notice stating that her scale of pay fixed on 15.10.1998 was erroneous and that further recovery will be imposed. Thereafter, the petitioner submitted her explanation to the second respondent stating that there was no error in her fixation of pay and hence, requested to drop further action of recovery. But, without considering the same, the second respondent directed the third respondent to recover the alleged excess amount from her salary. Hence, the present writ petition is filed.

4.The learned counsel for the petitioner would submit that the said recovery is not maintainable, since the petitioner was working from 1998 and passing a recovery order in the year 2012 stating that the pay fixation of the petitioner as on 15.10.1998 is erroneous, cannot be accepted now after a lapse of 14 years. He would further submit that the pay granted to the employees cannot be recovered after a lapse of many years and the re-fixation and reduction of pay cannot be done to the disadvantage of an employee after a lapse of 14 years. He would also submit that even assuming that excess payment has been made to the petitioner, the same cannot be recovered unless otherwise, it is shown that the petitioner has made some misrepresentation for getting the said excess salary. Hence, he prayed that the impugned order of the fourth respondent is liable to be set aside.

5. The learned Additional Government Pleader would submit that the pay of the petitioner fixed on 15.10.1998 as Selection Grade in the scale of pay for Health Visitor was erroneous and it was brought to the knowledge of the petitioner through the audit objection vide letter dated 02.11.2005 by the Senior Auditor, Madurai. He would further contend that since the excess salary had been paid to the petitioner, the respondents are justified in recovering the amount from the petitioner.

6. On perusal of the impugned order it is seen that the excess payment has been made to the petitioner from 15.10.1998. The said payment said to have been made to the petitioner is sought to be recovered by passing the impugned orders dated 06.12.2010 and 17.01.2012. It is well settled legal position that if excess payment is made to the petitioner on account of any misrepresentation on the part of the petitioner then the excess payment made to the said petitioner could be recovered. But in the instant case, no material is available to show that there was any misrepresentation on the part of the petitioner for receiving the excess payment. It is also not the case of the respondents that the said excess payment was made to the petitioner on some misrepresentation made by the petitioner. In such circumstances, I am of the considered view that the impugned orders are liable to be set aside.

7.Further, the Supreme Court in the decision reported in ***2009 (1) SCC 163 (Syed Abdul Qadir and Ors. v. State of Bihar and Ors. 2009 (1) SCC 163)*** at paragraph-28, has held as follows:

> *"28. Undoubtedly, the excess amount that has-been paid to the Appellants-teaches was not because of any misrepresentation or fraud on their part and the Appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fid mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the Appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned Counsel appearing on behalf of the Appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the Appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the Appellants teachers should be made."*

8. The Honourable Supreme Court in the case of ***State of Punjab and others and Rafiq Masih (White Washer) and others*** reported in

2015 (4) SCC 344, wherein, it has been categorically held that action of State in ordering recovery from an employee would be an order sustainable, so long as it is not rendered iniquitous to the extent that the action of recovery would be more unfair, wrongful, improper and more unwarranted when the corresponding right of the employer to recover the amount as recovered, would be having a harsh and arbitrary effect on the employees. While deciding the above case, the Honourable Supreme Court has categorised wherein the recoveries by the employees would be impermissible in law and in paragraph No.12 it has been held as follows:-

"12.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 used.

(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."

9.As the pay was fixed on 15.10.1998 after a long period of her retirement, the impugned orders have been passed after audit objection. The petitioner could not have manipulated the figures found in the salary slip and she cannot be held responsible for such act of wrong fixation. That apart, the petitioner has retired on 31.03.2013 and therefore, the impugned orders passed for recovery cannot be made sustainable. Hence, the impugned orders have to be quashed.

10. In view of the above stated position, the impugned orders of the second respondent dated 06.12.2010 and the fourth respondent dated 17.01.2012 are set aside and the writ petition stands allowed. The amount, if at all any recovered from the petitioner, has to be

refunded to her and the said exercise has to be carried out by the respondents within eight weeks from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

To

1.The Director of Public Health and
Preventive Medicine,
D.M.S.Complex, Chennai - 6.

2.The Deputy Director of Health Services,
Sivakasi Health Unit,
Poovananthapuram Vilaku,
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Mattuthavani Bus Stand,
Madurai - 625 007.

+1 CC to M/s.B.BRIJESH KISHORE, Advocate (SR-11479[F] dated 13/03/2020)

+1 CC to M/s.Special Govt.Pleader (SR-11785[F] dated 16/03/2020)

+1 CC to M/s.P.GUNASEKARAN, Advocate (SR-11938[F] dated 16/03/2020)

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SDS (18.06.2020) 5P-8C