



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 03.09.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P. (MD) Nos.26660, 26695 to 26697, 26699 & 26700 of 2019 and
W.M.P. (MD) Nos.22990, 23019, 23020, 23021, 23022, 23024 & 23023 of
2019

(Through Video Conferencing)

- 1.R.Sankarapandian ... Petitioner in WP(MD). 26660/ 2019
- 2.C.Chellamani ... Petitioner in WP(MD). 26695/ 2019
- 3.T.Palanikumar ... Petitioner in WP(MD). 26696/ 2019
- 4.M.Madhalai Packiyam ... Petitioner in WP(MD). 26697/ 2019
5. R.Jegadeesan ... Petitioner in WP(MD). 26699/ 2019
6. M.Nagarajan .. Petitioner in WP(MD). 26700/ 2019

Vs.

The Commissioner of Municipality
Paramakudi
Ramanathapuram District.

... Respondent in all Wps

COMMON PRAYER : Writ Petitions are filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records of the respondent ie., the Commissioner of Paramakudi Municipality in his ந.க.எண்.1260/2017/C1 நாள் 31.08.2017 and quash the same and consequently direct the Commissioner of Paramakudi Municipality to refund the amount already recovered within a time frame that may be fixed by this Court.

For Petitioners :Mr.S.Visvalingam

For Respondent :Mr.M.Kannan
Standing counsel



COMMON ORDER

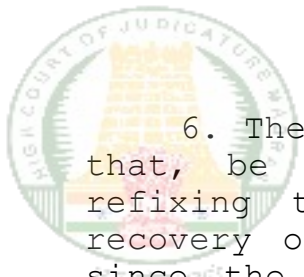
The issue raised in all these writ petitions are one and the same against the respondent Municipality. In order to give a quietus to the issue raised herein, with the consent of both sides, all these writ petitions were heard together and are disposed of by this common order.

2. All these writ petitioners have been appointed as last grade servant like, Watchman and had been working in that Municipality.

3. While so, on 26.08.2010, G.O.Ms.No.338 Finance (Pay Cell) Department was issued. Based on the guidelines and the import given in the said G.O., the salary paid to these writ petitioners have been revised by the respondent Municipality and accordingly, revised pay has been implemented and the same has been paid for several years to these petitioners. These petitioners had also been receiving such revised pay.

4. When that being so, the respondent Municipality, based on audit objection in respect of these petitioners' revised pay, has issued orders dated 31.08.2017 individually to all these writ petitioners stating that, due to the audit objection, the pay already fixed pursuant to G.O.Ms.No.338 dated 26.08.2010 had to be reviewed and if it is reviewed, there would be a reduction of pay to these petitioners. Consequently, the excess pay paid to these petitioners pursuant to the revised pay pursuant to G.O.Ms.No.338 had necessarily to be recovered. Therefore, in order to recover the said excess pay paid to these petitioners individually, these petitioners' consent/concurrence was sought for to the effect that, within how many installments such recovery could be made and such concurrence or consent/reply was sought to be made within seven days by these petitioners. Challenging such orders dated 31.08.2017 individually passed against each of the petitioners, in this batch of cases, these writ petitions have been filed with the aforesaid prayer.

5. Mr.S.Visvalingam, learned counsel for the petitioners, would submit that, pursuant to the impugned orders, which have been styled as show cause notices in the format letter, subsequently, each of the petitioners has given consent for revision of the pay as well as recovery of the amount from January 2018 onwards. He would further submit that, however, the petitioners had given such consent only in that circumstances, where they have been under compulsion to give such consent/concurrence, otherwise they were not aware of the legal right to refusal for giving consent for such recovery, in view of the law having been declared in this regard by the Hon'ble Supreme Court in the year 2014.



6. The learned counsel for the petitioners would further submit that, be that as it may, subsequently in January 2018, order refixing the salary of the petitioners and also consequential recovery of the excess pay have been made and in the meanwhile, since the very impugned communications itself, according to the petitioners, based on the legal advise, are bad in law, they chosen to file these writ petitions challenging the orders dated 31.08.2017 in these writ petitions.

7. The learned counsel for the petitioner has heavily relied upon the law declared by the Hon'ble Apex Court in **2015 (14) SCC 334** in the matter of **State of Punjab and others v. Rafiq Masih (White Washer) and others**, where, the learned counsel relied upon Paragraph No.18, which reads thus:

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.

19. We are informed by the learned counsel representing the appellant State of Punjab, that all the cases in this bunch of appeals, would undisputedly fall within the first four categories delineated hereinabove. In the appeals referred to above, therefore, the impugned orders passed by the High Court of Punjab and Haryana (quashing the order of recovery), shall be deemed to have been upheld, for the reasons recorded above.



20. The appeals are disposed of in the above terms."

8. By relying upon the said decision, the learned counsel for the petitioner would submit that, in view of the law, having been declared by the Hon'ble Supreme Court, as stated supra that recovery of excess pay from Class III and Class IV ie., Group C and Group D employees, like, the petitioners is impermissible in law, the present impugned orders seeking to recover the amount from the petitioners is bad in law. Therefore, the impugned orders to that respect have to be interfered with, he contended.

9. The learned counsel for the petitioners, however, has made a fair submission that, insofar as the fixation of pay or revision of pay, pursuant to the audit objection, which is also reflected in the impugned orders and consequential orders, the petitioners cannot have any valid objections and therefore, insofar as it relates to the revision and fixation of the pay, pursuant to the audit objection, the petitioners give up their challenge in these writ petitions and their only concern is recovery alone. Therefore, indulgence can be shown on the part of recovery from these petitioners by the respondent Municipality, he contended.

10. Per contra, the learned standing counsel for the Municipality raised the following objections:

(i) at the time of fixing the revised pay pursuant to G.O.Ms.No.338, it has been specifically stated that, at a later point of time, if the re-fixation of the pay to these petitioners found to be wrong or invalid, based on any audit objection, the pay now fixed would be revised and accordingly, the excess pay paid to the petitioners would be recovered.

(ii) That apart, after the audit objection, through the impugned communications only consent was sought for, within seven days from the petitioners to give their consent within how many installments such recovery could be made. In response to the same, each of the petitioners have given consent, which reads thus:

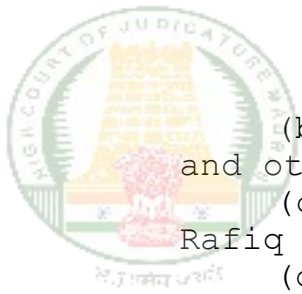
“பார்வையில் கண்டுள்ள இவ்வலுவலக அறிவிப்பில் கடந்த ஆண்டு 2012-13க்கான தணிக்கைத்தடையின் பத்தி எண். 4bக்கான பிடித்த தொகையை ஜனவரி-18 முதல் மாதந்தோறும் பிடித்தம் செய்துகொள்ளுமாறு பணிவுடன் கேட்டுக்கொள்கிறேன். மேலும், தணிக்கைத்தடையில் தெரிவித்துள்ளபடி புதிய ஊதியம் நிர்ணயம் செய்யவும் சம்மதிக்கிறேன்”

Similar consent have also been given by every petitioner.

(iii) Only pursuant to their consent since the recovery started, they cannot now turn around and say that, such recovery is bad in law.

(iv) the learned standing counsel would also make submissions by relying upon the following decisions:

(a) (2012) 8 SCC 417 [Chandi prasad Uniyal and others v. State of Uttarakhand and others]



(b) (2014) 13 SCC 598 [Union Territory, Chandigarh and others v. Gurcharan Singh and another]

(c) (2014) 8 SCC 883 [State of Punjab and others v. Rafiq Masih (Whitewasher)]

(d) 2016 SCConline Mad 33589 [S.Chandramoorthy v. the Secretary to Govt. and others]

(e) 2017 SCC online Mad 35571 [The District Treasury Officer v. D.Susairaj and another]

(f) (2018) 6 MLJ 513 [T.M.Madav Yadav v. Principal Secretary to the Government]

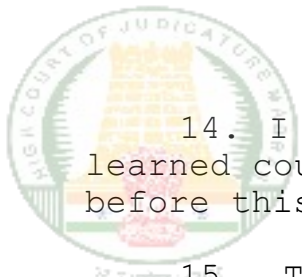
(g) 2018 SCC online Mad 6231 [M.Kandan v. Indian Bank and others]

(h) 2019 SCC online Mad 16765 [B.Usha v. Principal Labour Judge and Others]

11. By relying upon these decisions, the learned counsel for the respondents would submit that, no doubt the law has been declared by the Hon'ble Apex Court in White washer's case reported in **2015 (14) SCC 334** cited supra, however, subsequently in several cases, as enumerated above, depending upon the facts and circumstances of the particular case, contrary views have been taken by the Court and if we rely upon these decisions, certainly, in these cases, since consent have been given, admittedly, for the recovery of the excess amount paid to them based on the audit objection, it can very well be permissible and therefore, no interference is called for in the impugned orders either in the aspect of re-fixation of salary of the petitioners or in the aspect of recovery of the excess amount paid to them. Therefore, the learned counsel for the respondent Municipality would submit that, in view of the aforesaid legal position, for which, he relied upon the number of judgments enumerated above, the impugned orders would be sustained.

12. The learned standing counsel for the Municipality also made submissions that, the respondent Municipality is one of the financially weak Municipality and in order to meet the recurring expenditure being incurred by the Municipality every month, the municipality has to depend some earning as source.

13. In this regard, the huge money, which have to be recovered from each of the petitioners as excess payment would be a great help to the Municipality to meet to some extent their contingent expenses, which they incur every month. Therefore, looking from that angle also, the Municipality is badly in need of the money to be recovered from these petitioners. Therefore, on that ground also, the learned counsel would urge that, the impugned orders, insofar as the recovery is concerned, need not be interfered with.



14. I have considered all these rival submissions made by the learned counsel for the parties and have perused the material placed before this Court.

15. The petitioners, admittedly, had been working in the respondent Municipality as a last grade servant or Grade D employees or Group IV employees. Because their work is only as Watchman. Their salary is only minimum and with that salary, they have to meet both ends by running their family with a decent life.

16. When that being so, based on the Government Order in G.O.Ms.No.338 dated 26.08.2010, admittedly, the pay of these petitioners have been revised by the Municipality and revised pay was started paying.

17. These petitioners have also received the revised pay for some time and off-late, the audit has raised an objection for fixation of the revised pay and based on the audit objection, the Municipality has now come forward to refix the pay and also recover the excess pay.

18. Though, in these writ petitions, the petitioners have challenged the impugned orders on both aspects, namely, re-fixation of salary as well as the recovery of the excess salary, the learned counsel for the petitioners, during arguments, has confined that, the petitioners have no objection in proceeding with the fixation of the revised salary against these petitioners and from the date of fixation, they would be ready and willing to receive the revised salary. However, in respect of the recovery part is concerned, it is the objection of the petitioners that, if from these petitioners, heavy amount to the extent of nearly Rs.2 lakhs are recovered from their meagre salary every month, that too, after revised salary, that will have a bearing on the very survival itself. Therefore, the learned counsel for the petitioners has pointed out that, only visualizing these circumstances, the law has been declared by the Hon'ble Supreme Court in White washer's case cited supra.

19. Therefore, now, in respect of re-fixation of salary aspect is concerned, there is no controversy and in respect of the said aspect, the impugned communications and following which, the fixation orders passed by the respondent municipality dated 18.01.2018 can be considered to be sustainable one and accordingly, they can go ahead.

20. Now, the only issue is whether the Municipality is empowered to recover the excess pay paid to these petitioners, in the light of the law declared by the Hon'ble Apex Court in **2015 (14) SCC 334**. Though the learned counsel for the Municipality has relied upon number of decisions subsequently made by the Hon'ble Apex Court as well as this Court, in those cases, the issue was only in respect of the situation faced in the particular case. However, insofar as



the legal position, which was declared by the Hon'ble Supreme Court, in these circumstances, it was declared only in the Washerman's case reported in **2015 (14) SCC 334**.

21. The Hon'ble Supreme Court under Articles 141 and 142 of the Constitution of India declared the law at Paragraph No.18, which has already been quoted hereinabove.

22. There are five situations enumerated in the said paragraph 18 of the judgment of the Hon'ble Supreme Court, out of the five situations, situation No.1 is recovery from the employee belonging to Class III and Class IV services (or Group C and Group D Service)

23. Here in the case in hand, there is no quarrel that these petitioners are either Group D employees or Class IV employees, ie., last grade servants.

24. This is one of the situation found by the Hon'ble Supreme Court, where recovery of excess money, even if it is wrongly paid, would be impermissible in law.

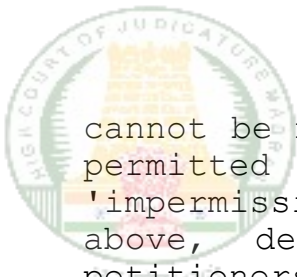
25. The language used by the Supreme Court is impermissible law, that means, the recovery from these category of people would not be permitted in law.

26. If this is the legal position, assuming that subsequent to the impugned orders, these petitioners have given their consent, though it was claimed by the learned counsel for the petitioners, on instructions, that, such consent was given out of sheer compulsion, assuming that if the said consent was given by these petitioners on their own, that would go or run against the legal right conferred on them. Therefore, such kind of legal right, having been conferred on them by virtue of law having been declared by the Hon'ble Supreme Court in the decision cited supra, cannot be taken away by way of either adoption of theory of acquiescence or waiver.

27. Law is well settled in this regard that the legal right of a citizen cannot be waived by doctrine of waiver or acquiescence. Therefore, it cannot be construed as a waiver of their right, which has been conferred on them, of course, by the judicial pronouncement of the Supreme Court cited supra.

28. Hence, this Court is of the considered view that, against the law declared by the Hon'ble Supreme Court in **2015 (14) SCC 334** (supra), in the context of Paragraph 18 of the judgment, no recovery can be made from Group C or Group D or Class III or Class IV employees.

29. When that being the position, since these petitioners are admittedly, either Class IV or Group D employees, such recovery



cannot be made by the respondent Municipality. If such recovery is permitted by this Court, that will be unlawful, once such a word 'impermissible law' is used by the Hon'ble Supreme Court, as quoted above, definitely, that would come to the rescue of these petitioners.

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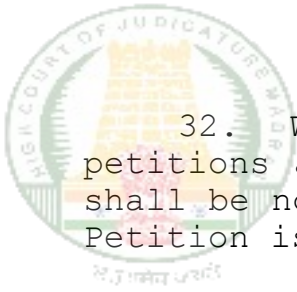
30. Insofar as the other ground that, the Municipality mainly depending the recoverable money from these petitioners is concerned, this Court do not wish to make any comment, because, if that is the reason for the Municipality for recovering excess pay paid to these Group D servants, then, it would be a very pitiable conditions, where the respondent Municipality is placed and therefore, that situation is to be confronted by the Municipality only with the Government, ie., the State Government, which is the ultimate authority to release fund for the local bodies, like, the respondent Municipality.

31. Therefore, for all these reasons and discussions made above, this Court is inclined to pass the following order in this batch of cases:

(i) That the impugned order and the consequential impugned fixation of revised pay as well as the consequential recovery to be made by the petitioners are concerned, those orders are invalid only in respect of recovery of excess pay paid to these petitioners.

(ii) It is made clear that in all other aspects, ie., fixation of revised pay from the date of fixation is concerned, it is not only based on consent given by the petitioners' side through the learned counsel, but also under law, such kind of revised fixation is permissible, which has been done only after giving notice to the petitioners. Therefore, that part of the impugned orders and consequential orders to the impugned orders are valid and sustainable.

(iii) As a sequel, the respondent Municipality are hereby issued a direction directing not to recover any excess pay paid to the petitioners, pursuant to the impugned communications or pursuant to subsequent orders. It is needless to mention that, in view of the said direction, the respondent Municipality shall also return or recredit the excess money already recovered till date pursuant to the impugned communication from each of the petitioners and such refund can be made by the respondent Municipality within a period of six months from the date of receipt of a copy of this order and this longer period of six months is given by this Court, because of the financial situation projected by the learned counsel for the respondent municipality.



W.P. (MD) Nos. 26660 etc Batch.,

32. With these observations and directions, these writ petitions are ordered to the terms indicated above. However, there shall be no order as to costs. Consequently connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2020

Sub Assistant Registrar (CS)

RR

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

The Commissioner of Municipality,
Paramakudi,
Ramanathapuram District.

+1 CC to M/s.M. KANNAN, Advocate (SR-15903[F] dated 04/09/2020)

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NR (21/12/2020) 9P : 3C