IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 21-01-2021

CORAM:

THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.No.2930 of 2008
and M.P.Nos.2 and 3 of 2008

1. G.Tamilarasi

2. Gnanamani

3. Amirthayogam

4. Tamilselvan ..Petitioners

-vs-

1. The Government of Tamil Nadu
Rep. by the Secretary to the Government,
Adhi Dravidar & Tribal Welfare Department,
Fort St. George, Chennai - 9.

2. The Director of Adhi Dravidar and Tribal Welfare
Chepauk, Chennai - 5.

3. The District Adhi Dravidar Welfare Officer
Cuddalore District, Cuddalore.

4. The Accountant General
Teynampet, Chennai - 18.

5. The Headmaster
Govt. Nandanar Boys Higher Secondary School,
Chidambaram, Cuddalore District. ..Respondents

Writ petition filed under Article 226 of Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records of the third and fourth respondent issued in Na.Ka.No.W7/73438/2000, dated 24.12.2001 by the third respondent and in AG(A&E)/PEN PO9/3/G30-578 FP/2003-2004/3388, dated 31.07.2003 issued by the fourth respondent and quash the same and issue a consequential direction to the respondents to restore the pay of the deceased Government servant namely S.Gnanasekaran at Rs.1760/- in the scale of pay of Rs.1640-2900 with effect from 1.6.88 and fix corresponding pay with effect from 1.1.1996 and fix last drawn pay and the amount of pension and arrears and to release the amount of gratuity of Rs.2,23,829/- with interest at the rate of 18% per annum to the petitioners.

For Petitioners : Mr.R.Saseetharan

For Respondents : Ms.K.Bhuvaneswari
AGP for R1 to R3 and R5
Mr.V.Vijay Shankar for R4

ORDER

The prayer sought for herein is for a writ of Certiorarified Mandamus calling for the records of the third and fourth respondent issued in Na.Ka.No.W7/73438/2000, dated 24.12.2001 by the third respondent and in AG(A&E)/PEN P09/3/G30-578 FP/2003-2004/3388, dated 31.07.2003 issued by the fourth respondent and quash the same and issue a consequential direction to the respondents to restore the pay of the deceased Government servant namely S.Gnanasekaran at Rs.1760/- in the scale of pay of Rs.1640-2900 with effect from 1.6.88 and fix corresponding pay with effect from 1.1.1996 and fix last drawn pay and the amount of pension and arrears and to release the amount of gratuity of Rs.2,23,829/- with interest at the rate of 18% per annum to the petitioners.

2. The first petitioner is the wife of the deceased Government servant, i.e., the teacher worked in the fifth respondent school. The second, third and fourth petitioners are the daughter and sons of the deceased employee.

3. The deceased employee one, S.Gnanasekaran was working as B.T.Assistant at Government Nandanar Boys Higher Secondary School, Chidambaran, i.e., the fifth respondent. While so, during service, he died suddenly on 21.06.2005. The petitioners herein are the only legal heirs of the deceased employee, for whom, while paying the terminal benefits, on his death, the Gratuity to the extent of Rs.2,23,829/- has been withhold for the alleged reason that, during the service of the deceased employee, the pay fixed on him was subsequently found to be a wrong fixation and the objection was raised by the Audit and accordingly, it seems that, there had been proceedings issued by the respondent Department, not only against the deceased employee, but also nearly about 130 people similarly placed and as against the said decision to fix a new scale of pay, i.e., the reduction in pay scale, they filed applications before the Administrative Tribunal, where on the ground of violation of principle of natural justice, those orders passed by the respondent Department seems to have been set aside and the

matter was remanded back to the respondent for reconsideration.

4. In this context, after having reconsidered the same, the respondent, i.e., the third respondent has passed an order on 24.12.2001, whereby the earlier order passed, fixing the reduced pay scale to the deceased employee was confirmed and accordingly, the pay was revised and the excess amount allegedly paid to the employee from 01.01.1996 to 31.08.1998 and from 01.03.2000 to 31.12.2001 was calculated and directed to be recovered. Subsequently, the employee deceased on 21.06.2002, therefore at the time of paying the Death-cum-Retirement benefits to the employee to and in favour of the legal heirs who are the petitioners herein, the respondent Department, after having retained the Gratuity amount to the extent of Rs.2,23,829/- has paid only the remaining amount and also accordingly, they refixed the pay scale of the deceased employee, thereby correspondingly, the family pension benefits also had been revised, resultantly, these legal heirs are getting only the reduced family pension. Therefore, aggrieved over the said action taken on the part of the respondents and by challenging the order passed by the third respondent, dated 24.12.2001 and the consequential order passed by the fourth respondent, dated 31.07.2003, this writ petition has been filed by the petitioners, who are the legal heirs of the deceased employee for the aforesaid prayer.

5. Heard Mr.R.Saseetharan, learned counsel appearing for the petitioner who would submit that, the issue raised in this writ petition has already been decided in number of writ petitions, where, the similarly placed employees like the deceased employee, had been decided and in this context, the learned counsel for the petitioners is able to cite a decision made by a learned Judge of this Court in W.P.No.20952 of 2007, dated 15.12.2017 in the matter of one P.Murugesan v. The Government of Tamil Nadu, Rep. by the Secretary to the Government, Adhi Dravidar & Tribal Welfare Department, Chennai-9 and others. According to the petitioner's counsel, the said writ petitioner is also one among the 131, who have been dealt with along with the deceased employee in this case, whose salary has been refixed and accordingly, the salary has been drastically reduced as that of the salary of the deceased employee, in this case, the family pension payable to the first petitioner has also been correspondingly reduced. By relying upon this decision, the learned counsel would submit that, once the issue raised in the writ petition has already been concluded by a decision of this Court referred to above, the similar benefit can be extended to the petitioners herein also, he contended.

6. However, Mr.V.Vijay Shankar, learned counsel appearing for the fourth respondent and the learned Additional Government

Pleader appearing for the other respondents would submit that, fixation of salary, which is impugned herein, in respect of the deceased employee, whose legal heir are the petitioners herein is concerned, it was fixed by deducting the wrong fixation already been made or excess payment already been paid to all the employees numbering 131.

7. Though an opportunity was given to the deceased employee, pursuant to the direction issued by the Tribunal, no defence or explanation or reply had been given to the show cause within two weeks period as permitted by the Tribunal by the decease employee, therefore the respondents proceeded to issue orders, accordingly, the third respondent passed the order impugned, whereby the pay has been refixed for the deceased employee and other persons and therefore the said fixation since has been made by following the due process of law by giving an opportunity to the deceased employee on that ground, it cannot be assailed.

8. The learned counsel would further submit that, whether the deceased employee was holding the post, for which he received the salary during the relevant period itself is a question and therefore based on what post he held, the pay was fixed and accordingly, what has been the excess payment paid to him was sought to be recovered and since this employee deceased in the meanwhile during service, there had been no scope of recovering the amount, except to retain the retiral benefits, therefore, the Death-cum-Retirement Gratuity has been retained or withheld by the respondents and accordingly, the said withholding of the amount towards recovery of the excess payment cannot be said to be an infirm one. Therefore, both the orders passed by the third respondent as well as the fourth respondent which are impugned herein are very well sustainable and hence, the writ petition is liable to be dismissed, they contended.

9. Insofar as the order passed by the learned Judge referred to above, in a similar writ petition is concerned, the learned counsel for the respondents would submit that, as against which, if appeals are preferred, it cannot be said that, the said order has become final and therefore, on that basis, decision cannot be made in this writ petition, they also contended.

10. I have considered the said rival submissions made by the learned counsel appearing for the both sides and have perused the materials placed before this Court.

11. First of all the issue raised in the writ petition as has been rightly pointed out by the learned counsel appearing for the petitioner has already been decided in number of cases and one such order has been placed before this Court made in

W.P.No.20952 of 2007, dated 15.12.2017 in P.Murugesan's case referred supra.

12. In the said case, the learned Judge, having exhaustively discussed the issue has ultimately concluded in the following terms :

> "15.In view of the above narrated facts, this Court has no hesitation to allow the writ petition as the petitioner has made out a clear case for grant of relief in his favour. Accordingly, the Writ Petition stands allowed. The impugned orders in Na.Ka.W.7/73438/2000 dated 12.04.2001 issued by the 3rd respondent and in Na.Ka.No.A1/580/01 dated 24.5.2004 by the 5 th respondent and in No.AG (A&E)/PEN P09/5/M45-464/RTD/2004-2005 dated 2.9.2005 by the 4th respondent are set aside. There shall be a consequential direction to the respondents to restore the pay of the petitioner to the original status and his pension has to be calculated on the basis. The petitioner is entitled to arrears of such re-calculation. The respondents are also directed to refund the amount recovered from the petitioner's retirement benefits. The above directions shall be complied with by the respondents within a period of ten weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed."

13. In view of the said conclusion arrived at by the learned Judge and after having gone through the reasoning given by the learned Judge in the said order, I am in respectful agreement with the same and accordingly, I feel that these writ petitioners are also entitled to get the same benefits.

14. That apart, insofar as the recovery is concerned, the Hon'ble Supreme Court in State of Punjab v. Rafiq Masih (White Washer) reported in 2014 (8) S.C.C.833, in para 12, has 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 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 employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from 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."

15. In the four situations enumerated by the Hon'ble Supreme Court, one such situation is that, whatever be the reason for excess payment, the same cannot be recovered from a retired employee.

16. Here in the case in hand, the employee deceased and after his demise, now only the legal heirs are struggling to get the retiral benefits as well as the family pension benefits. Therefore, if any recovery is sought to be made from a deceased employee, that too, from the retiral benefits like Gratuity, certainly that could be impermissible, in view of the law having been declared by the Hon'ble Supreme Court in White Washer's case cited supra. Therefore, for that reason also, this Court feel that, the impugned order sought for recovery of the amount and thereby the consequential impugned order passed by the fourth respondent to retain the Gratuity amount to the extent of Rs.2,23,829/- is also impermissible and therefore, for that reason also, the impugned orders are liable to be interfered with.

17. Therefore, for all these reasons, this Court feel that, the writ petitioners are entitled to get the relief as they sought for in this writ petition.

18. Accordingly, this writ petition is allowed. However, there shall be no order as to costs. Consequently, connected

miscellaneous petitions are closed. It is made clear that, the petitioners are entitled to get the pay and pension arrears, pursuant to the allowing of this writ petition, however, they are not entitled for any interest.

I

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

tsvn

To

1. The Secretary to the Government
   Government of Tamil Nadu
   Adhi Dravidar & Tribal Welfare Department,
   Fort St. George, Chennai - 9.

2. The Director of Adhi Dravidar and Tribal Welfare
   Chepauk, Chennai - 5.

3. The District Adhi Dravidar Welfare Officer
   Cuddalore District, Cuddalore.

4. The Accountant General
   Teynampet, Chennai - 18.

5. The Headmaster
   Govt. Nandanar Boys Higher Secondary School,
   Chidambaram, Cuddalore District.

+1cc to Mr.R.Saseetharan, Advocate, S.R.No.3512
+1cc to Mr.v.Vijay Shankar, Advocate, S.R.No.3191
+1cc to the Government Pleader, S.R.No.3717

W.P.No.2930 of 2008

GPL(CO)
RGA(17/08/2021)