IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.07.2021

CORAM:

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.No.28270 of 2019

R.Jegatheeswaran ... Petitioner

Vs.

1.The Assistant Director of Local Fund Audit,
Local Fund Audit Department,
Combined Finance Department Complex,
Nandanam, Chennai – 600 035.

2.The Commissioner of Municipal Administration,
75, Santhom Highway,
M.G.R.Nagar,
Chennai – 600 028.

3.The Commissioner,
Udumalaipet Municipality,
Tiruppur District. ... Respondents

PRAYER: Writ 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 orders of the 1st respondent proceedings in MPV(1)/28777/2013 dated 19-11-2013 and proceedings in Na.Ka.No.3316/2013/B2 dated 01.04.2014 issued by the 3rd respondent and proceeding in Ni.Mu.No.29275 dated 16-09-2014 issued by the 1st respondent, consequently direct the respondents to refund the deducted amount Rs.38,343/- with interest of 12% to the petitioner and refix the pension of the petitioner as per order of the 3rd respondent's proceeding in Na.Ka.No.4461/09/C1 dated 07-08-2009 from July 2013 and pay all consequential arrears expeditiously within a reasonable time.

For Petitioner : Mr.L.G.Sahadevan
for Mr.E.Sathiyaraj

For R1 & R2 : Mr.K.V.Sajeev Kumar
Government Counsel

For R3 : Mr.B.Anand

ORDER

By consent of both the parties, this writ petition is taken up for final disposal.

2. The petitioner herein was appointed as Junior Assistant on 08.06.1979 and subsequently promoted as Assistant on 14.03.1988. On his request, he was thereafter reverted to the post of Junior Assistant by consent with effect from 18.02.1997. On completion of 30 years of service, he was awarded 3% Incentive Increment/Super Grade on 07.08.2009. Consequently, the petitioner was receiving excess salaries. In this background, the petitioner had retired from services on 30.06.2013.

3. The first respondent herein, through the impugned order dated 19.11.2013, had stated that since the petitioner had relinquished his promotion, he will not be entitled for the 3% Incentive Increment/Super Grade and accordingly, directed the third respondent to revise the petitioner's salary and recover a sum of Rs.38,343/-. The petitioner is aggrieved against such recovery.

4. The learned counsel for the petitioner placed reliance on the decision of the Hon'ble Supreme Court in the case of State of Punjab & Others etc Vs Rafiq Masih (White Washer) etc, reported in 2015 (4) SCC 334 and submitted that the recovery of excess salaries paid to the retired employee is impermissible. On this ratio, the petitioner also relied on the decision of the Madurai Bench of this Court in the case of J.Jeyaraj Vs The Chief Engineer (Agriculture Engineering) and others, passed in W.P(MD).No.6044 of 2016 dated 19.06.2019.

5. The learned Government Counsel appearing for the first and second respondents submitted that since the petitioner had relinquished his promotion, he ought not to have been paid the 3% Incentive Increment/Super Grade. It is on the basis of the objections of the Local Fund Audit Department, the third respondent had recovered the excess salaries paid.

6. The learned counsel for the third respondent adopted the arguments of the learned Government Counsel and submitted that they were acting only on the basis of the audit objection and therefore, the recovery cannot be found fault with. It is also his submission that the Local Fund Office, in the impugned order, had directed them to obtain a letter of consent from the petitioner and accordingly, the petitioner had also given his consent and therefore, the recovery cannot be found fault with.

7. The Hon'ble Supreme Court, in White Washer Case (supra), had categorically held that the recovery of excess salaries from

the retired employee is impermissible in law, particularly when the fault was on the part of the employer.

8. It is not in dispute that the excess salaries paid, pursuant to the 3% Incentive Increment period, was not due to the fault of the employee. As such, recovery of excess amount cannot be permitted, in view of the well-laid decision of the Hon'ble Supreme Court in White Washer's case.

9. The learned counsel for the respondents had submitted that the petitioner had given a consent for recovery of such excess payments. This aspect has been considered by the Hon'ble Division Bench of this Court in the case of Tamil Nadu Civil Supplies Corporation Vs P.Ganesh Rao, passed in W.A.No.207 of 2019 dated 24.01.2019, whereby, it was held that such consent would not entitle the employer to recover the excess payments, in view of the law laid down by the Hon'ble Supreme Court in White Washer's case.

10. The decision of the Hon'ble Division Bench of this Court came to be followed, among with other decisions, by a learned Single Judge of this Court in the case of J.Jeyaraj (Supra) and the relevant portion of the order reads as under:-

> ''4.The learned counsel for the petitioner submitted that no recovery can be made after retirement, that too after a lapse of nine years from the date of retirement. In support of his contention, the learned counsel relied upon a judgment in the case of State of Punjab and others .vs. Rafiq Masih(White Washer) and others reported in (2015) 4 Supreme Court Cases, 334, which stipulates the mode of recovery. The learned counsel also relied upon a judgment of a Division Bench of this Court in the case of The Special Officer Vs. S.Kadiresan, reported in (2014) 8 MLJ 385, wherein also it is held that no recovery can be made after retirement. Therefore, following the said decisions, the orders passed by the respondents dated 23.12.2015 and 05.02.2016 are liable to be quashed. The learned counsel further added that the petitioner has no objection for refixation of the monthly pension and he is challenged only the recovery proceedings.
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> 5.The learned counsel for the Petitioners also brought the notice of this Court to the order of this Court made in W.P(MD)No.2647 of 2014, dated 19.8.2016 in the case of D.Susairaj v.s. The District Treasury Officer, Perambalur and another, wherein, this Court at paragraph 10, has held as follows:
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> > ''10.Even though it has been claimed, by the first respondent, that the Petitioner had given his

consent for recovery, the said consent cannot be taken into serious consideration, as the Petitioner had raised objections against the recovery, in his representations made to the authority concerned. It is also clear from the decision of the Supreme Court, made in State of Punjab and others .vs. Rafiq Masih (White Washer) and others reported in (2015) 4 SCC 334 that no recovery can be made from a retired employee''

6.Such an issue was also considered by the Division Bench of this Court in W.A(MD)No.638 of 2012, dated 12.3.2018, in the case of the Executive Engineer, Public Works Department,(Machinery Sub-Division)Chennai and another. vs. P.Karuppaiah, wherein, in para 4 it is held as follows:

''4.In the instant case, the Writ Court noted that without issuing notice to the respondent/Writ Petitioner, recovery was sought to be effected and it is not sustainable as it amounts to violation of principles of natural justice. In such circumstances, the Court would have remand the matter to the authorities for fresh consideration giving them liberty to issue show cause notice. We are to take a decision as to whether such course has to be adopted in the present appeal. The legal position as pointed out in the aforementioned decision leads to a conclusion that the respondent/Writ Petitioner is liable to make good the excess payment received by him, in the light of the undertaking. However, in the peculiar facts and circumstances of the case, the Petitioner having retired from service, the recovery of the excess amount of around Rs.20,000/-(Rupees twenty thousand only) shall not made.''

7.The Division Bench of this Court in Tamil Nadu Civil Supplies Corporation, represented by its Managing Director, No.12, Thambusamy Road, Kilpauk, Chennai-600 010 and another. vs. P.Ganesha Rao and in yet another case in W.A.No.207 of 2019, dated 24.1.2019, has passed an order on the same lines, which affirms that there shall not be any recovery and at paragraph Nos. 5 to 8, it is held as follows:

''5.The learned counsel for the appellants would strenuously contend that the judgement of the Honourable Supreme Court in Rafiq case(cited supra) should not be applied, because the writ Petitioner/respondent himself has consented for recovery of the amount and once he has consented the government was completely at liberty to withhold the amount. He submitted that Rafiq's case (cited supra) will not be applicable, where the retired employee consented to the recovery of the amount, which has been paid in excess to him.

6.We are afraid that the said argument can hold water. There is nothing in the said judgement, which would state that if the employee consents, then the employer is at liberty to withhold such amount. The law laid down by the Honourable Supreme Court in Rafiq's case (cited supra) categorically states there cannot be any recovery from a retired employee. No amount of consent by a retired employee would permit the employer to withhold any amount. The law laid down by the Honourable Supreme Court is binding on all.

7.As per Article 141 of the Constitution of India, the law declared by the Honourable Supreme Court is binding on all Courts within the territory of India. The said judgement of the Rafiq's case (cited supra) is bind, which categorically states that there can be no recovery from a person, who has retired.

8.During the course of the arguments, G.O.Ms.No.286, Finance(Pension) Department, dated 28.8.2018 was brought to our notice. A perusal of the said Government Order would show that the Government has implemented the above said decision and issued a Government Order.''''

11. Thus, the very action on the part of the respondents in passing the impugned order of recovery, cannot be sustained, in view of the aforesaid decision.

12. There is yet another aspect in this matter, wherein, it is claimed that the 3% Incentive Increment/Super Grade was paid to the petitioner by deducting his salaries from 2009 till his date of superannuation, i.e., on 30.06.2013. The impugned order came to be passed in the year 2013, based on the audit objections alone. Admittedly, the respondents have not chosen to issue any Show Cause Notice proposing such recovery.

13. It is settled proposition that, when such recovery is sought to be made, particularly at this belated stage and the petitioner had also retired from his services, the Principles of Natural Justice requires for issuance of prior Show-Cause Notice, proposing such a recovery and calling for the objections of the employee on the proposal. This proposition has been reiterated in various decisions of the Hon'ble Supreme Court as well various High Courts. In the absence of such a Show-Cause Notice, the order of recovery cannot be sustained. On this ground also, the impugned order cannot be sustained.

14. For all the foregoing reasons, the impugned order dated 19.11.2013 passed by the first respondent is quashed. Consequently, there shall be a direction to the third respondent to refund the amount of Rs.38,343/- to the petitioner herein, and any other outstanding arrears, arising in consequence to quashing of the impugned order, if any, and accordingly re-fix the pension of the petitioner, within a period of eight weeks from the date of receipt of a copy of this order.

15. This Writ Petition stands allowed accordingly. No costs.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

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To

1.The Assistant Director of Local Fund Audit,
Local Fund Audit Department,
Combined Finance Department Complex,
Nandanam, Chennai - 600 035.

2.The Commissioner of Municipal Administration,
75, Santhom Highway,
M.G.R.Nagar,
Chennai - 600 028.

3.The Commissioner,
Udumalaipet Municipality,
Tiruppur District.

+1cc to Mr.B.Anand, Advocate, S.R.No.36508
+1cc to Mr.E.Sathiyaraj, Advocate, S.R.No.36647

GPL(CO)
CB(23/08/2021)