BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 27.10.2021
CORAM
THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**
W.P.(MD)No.3504 of 2016
and
W.M.P.(MD)Nos.3107 and 6748 of 2016

K.Valayanandham ... Petitioner

vs.

1.The District Treasury Officer,
Virudhunagar, Virudhunagar District.

2.The Regional Joint Director of
Collegiate Education,
Madurai, Madurai District. ... Respondents

PRAYER: Writ Petition filed under Article 266 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, to call for the records on the files of the first respondent pertaining to its order bearing in R.C.No.16091/Q1/2015 dated 07.01.2016 and to quash the same and consequently to direct the respondent to stop the recovery proceedings and not to insist the remittance of alleged excess payment made to the petitioner in previous years.

For Petitioner :Mr.S.C.Herold Singh
For Respondents :Mr.M.Linga Durai
Government Advocate

O R D E R

This Writ Petition is filed for issuance of a Writ of Certiorarified Mandamus, to quash the impugned order passed by the first respondent, dated 07.01.2016 made in R.C.No.16091/Q1/2015 and to direct the respondents to stop the recovery proceedings and to refrain the respondents from insisting the remittance of the alleged excess payment made to the petitioner in previous years.

2.The impugned order is an order issued by the first respondent directing the recovery of a sum of Rs.1,72,539/- towards excess payment of pension to the petitioner.

3.Heard Mr.S.C.Herold Singh, learned Counsel appearing for the petitioner and Mr.M.Linga Durai, learned Government Advocate appearing for the respondents.

4.The petitioner was posted as Librarian with effect from 02.07.1952 and he was permitted to retire from service on attaining superannuation as Librarian on 31.05.1985. It is not in dispute that the pension of the petitioner was authorized, based on the qualifying service. It is the case of the petitioner that as per the Government Order, the scale of pay for the post of College Librarian and the scale of pay fixed for Assistant Professor in the College are one and the same and therefore, the pension that was paid to the petitioner was based on the subsequent revisions of pay. Based on the Government order dated 15.12.2009, it is submitted by the petitioner that the revision of pay was granted to the pensioners, who retired as Readers, Lecturers and equal Cadres.

5.It is the case of the petitioner that the pension of the petitioner was fixed as Rs.23,200/- per month considering his pay band of Rs.37,400-67,000 and the academic grade pay of Rs.9,000/- at Rs.23,200/-, which is applicable to the post of Lecturer (Selection Grade). It is further stated that the petitioner's pension increased from Rs.13,560/- to Rs.23,200/- on par with Lecturer (Selection Grade) who had completed nineteen years from their initial appointment. Though the petitioner has produced before this Court only the Government Order vide G.O.Ms.No35, dated 19.01.1989, there is no reference to the subsequent revision of pay. It is contended by the petitioner that the first respondent passed a recovery order in arbitrary manner without giving any opportunity to the petitioner. It is further contended that the pension was disbursed to the petitioner as per the records available with the respondents and that the petitioner has never made any misrepresentation which has resulted in increase of pension amount. The petitioner also raised some grounds as against the decision of reducing the pension.

6.A Counter affidavit has been filed by the first respondent pointing out that as per the provisions laid down in G.O.Ms.No.702, Finance (Pension) Department, dated 07.10.1988, the first respondent is competent to recover the amount due, if it is found that there is over payment of pension/family pension. It is also stated that the petitioner was given a show cause notice narrating the details of recovery along with a working sheet with a request to offer his explanation within fifteen days from the date of receipt of notice.

7.It is further stated that sufficient time was given to the petitioner before recovery. However, the typed set of papers filed by the first respondent refers to a communication, dated 07.01.2016, which is not a show cause notice, but a direction to the petitioner to pay a sum of Rs.1,72,539/- towards excess payment. After the impugned order, dated 07.01.2016, a further communication was issued to the petitioner on 08.01.2016 to the effect that the excess amount to the tune of Rs.8,24,660/- was wrongly paid by way of pension and that the pension amount has wrongly fixed at Rs.23,200/-. Though the notice dated 08.01.2016 may be called as show cause notice, the decision is taken to recover a sum of Rs.8,24,660/- towards excess payment for the period from 01.04.1999 to 30.11.2015. A subsequent order dated 29.01.2016 was passed by the first respondent confirming the order that was proposed as per the previous communication, dated 08.01.2016.Unfortunately, the petitioner has not challenged the subsequent orders for recovery. Be that as it may, the impugned order challenged in the Writ Petition is an order of recovery, dated 07.01.2016, without any show cause notice or without affording an opportunity to the petitioner.

8.The learned counsel appearing for the petitioner relied upon a Judgment of the case of ***State of Punjab Vs. Rafiq Masih*** reported in ***(2015) 4 SCC 334***, wherein the our Honourable Supreme Court had an occasion to deal with similar orders of recovery and has held as follows:-

> *"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 iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."*

9.However, the Honourable Supreme Court in the case of ***High Court of Punjab and Haryana and others vs Jagdev Singh*** reported in ***(2016) 14 SCC 267***, after referring to the above judgment of Hon'ble Supreme Court in ***Rafiq Masih case*** reported in ***(2015) 4 SCC 334*** has held that the proposition held in Rafiq Masih case regarding recovery from retired employees cannot be applied to a situation, where the Officer, to whom the payment was made in the first instance, was clearly put on notice that any payment found to have made in excess can be recovered in future. Similarly, the Hon'ble

Supreme Court in the case of ***Chandi Prasad Uniyal and others vs State of Uttarakhand and others*** reported in ***AIR 2012 SC 2951***, has observed as follows:-

"16.We are concerned with the excess payment of public money which is often described as "tax payers money"which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism, etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without any authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

17.We are, therefore, of the considered views that except few instances pointed out in Syed Abdul Qadir case (2009 AIR SCW 1871) (supra) and in Col.B.J.Akkara(Retd.) case (2016 AIR SCW 5252) (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered."

10.In the present case, the learned Government Advocate appearing for the respondents has produced before this Court the undertaking given by the petitioner himself to the effect that in case any excess amount is paid towards pension, the petitioner agrees for reduction of such excess amount from the amount payable to him in future.

11.Having regard to the facts in the present case, this Court is of the view that the impugned order of recovery without prior notice or opportunity to the petitioner, is unsustainable. However, the subsequent show cause notice and the order for recovery cannot be held illegal in the absence of a challenge to the said proceedings. Though, this Court finds that the impugned order in the Writ Petition is liable to be quashed, it is unable to grant any further relief to the petitioner.

12.It is stated by the learned Counsel appearing for the petitioner that in the subsequent order for recovery, the amount that was claimed by the respondents in the order impugned in the Writ Petition is also included. Hence, this Court is of the view that the petitioner's interest will be protected, if he is permitted to file another Writ Petition challenging the subsequent order, dated 29.01.2016.

13.For the reasons stated above, the Writ Petition is allowed only on the ground that the impugned order is in violation of principles of natural justice. Hence, liberty is given to the petitioner to challenge the subsequent order, dated 29.01.2016. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

To

1.The District Treasury Officer,
Virudhunagar, Virudhunagar District.

2.The Regional Joint Director of
Collegiate Education,
Madurai, Madurai District.

+1 CC to M/s.S.C.HEROLD SINGH, Advocate (SR-32887[F] dated 27/10/2021)

+1 CC to M/s.SPL.GP (SR-33052[F] dated 28/10/2021)

W.P.(MD)No.3504 of 2016
27.10.2021

SR(CO)
KB(22.11.2021) 5P 5C