BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 25.04.2022

CORAM:

THE HON'BLE MR.MUNISHWAR NATH BHANDARI,
CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE PARESH UPADHYAY

W.A(MD)No.275 of 2022
and
C.M.P(MD)No.2684 of 2022

P.Ayyasamy ... Appellant /Petitioner

Vs.

1.The Joint Registrar of Co-operative Socieites,
Sivagangai,
Sivagangai District.

2.The Deputy Registrar of Co-operative Societies,
Public Distribution System,
Sivagangai,
Sivagangai District. ... Respondents/ Respondents

Appeal filed under Clause 15 of Letters Patent, against the order of this Court made in W.P(MD)No.20139 of 2016 dated 15.12.2021.

Prayer in WP(MD). 20139 of 2016 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a Writ of Certiorarified Mandamus calling for the records relating to the impugned recovery order issued by the 2nd respondent in his proceedings in Na.Ka.2645/2008/Pa.Tho dated 19.05.2016 and quash the same as illegal and consequentially to direct the respondents to pay the provisional pension in terms of Rule 69 of the Tamil Nadu Pension Rules 1978 within the period that may be stipulated by this Honble Court

For Appellant : Mr.M.Ajmal Khan, Senior Counsel
for M/s.Ajmal Associates

For Respondents : Mr.J.Ashok
Additional Government Pleader

JUDGMENT

(Judgment of the Court was made by the Hon'ble Chief Justice)

By this writ appeal, a challenge is made to the judgment dated 15.12.2021, whereby, the writ petition preferred by the petitioner/writ appellant to challenge the order dated 19.05.2016 to seek recovery of amount, was dismissed.

2. The learned counsel appearing for the writ appellant submits that an order for recovery of a sum of Rs.4,18,762/- was issued on 19.05.2016. The order aforesaid was passed after the retirement of the petitioner on 30.06.2008. Giving the facts of the case, it is stated that on the eve of retirement, the petitioner/writ appellant was placed under suspension and was not allowed to retire from service. The petitioner/writ appellant was served with three charge memos on 13.10.2008, 19.05.2009 and 23.02.2011. The charge memo dated 23.02.2011 was dropped by the proceedings dated 18.03.2015 while other two charge memos are pending. One charge memo dated 13.10.2008 ended with minor punishment of stoppage of increment of Rs.750/- for one year and the second charge memo dated 19.05.2009 ended up with imposition of the punishment of Rs.1,000/- for one year. As the petitioner was kept under suspension on 30.06.2008, he was granted subsistence allowance for the period between 01.07.2008 and 01.04.2016 for a period of 94 months. The order of suspension was revoked by the order dated 28.04.2016 and he was allowed to retire. The effective date of retirement was thus taken by the respondents to be 28.04.2016. The recovery order was subsequently issued on 19.05.2016 to seek recovery of Rs.4,18,762/-. It was alleging that the payment in excess within the period of suspension ignoring that the recovery of the amount paid to an employee retired from service is not permissible in view of the judgment of the Hon'ble Apex Court in **State of Punjab and others vs. *Rafiq Masih (White Washer) and others*** reported in ***(2015) 4 SCC 334.*** The learned Single Judge, however, dismissed the writ petition despite finding that the payment said to be in excess was not due to misrepresentation or fraud on the part of the petitioner/writ appellant and otherwise according to the writ appellant, it was not even excess payment so as to be recovered. In any case, the petitioner/writ appellant is to be seen by the judgment of the Apex Court in ***Rafiq Masih's case*** (supra). The prayer is to set aside the judgment so also the impugned order dated 19.05.2016 and allow the writ appeal.

3. The writ appeal has been contested by the learned Special Government Pleader who submits that the amount of subsistence allowance was paid to the petitioner/writ appellant in excess and therefore, realising the aforesaid immediately after the date of retirement, an order for recovery of the excess amount was issued on 19.05.2016 and taking into consideration that excess payment was

erroneously made to the petitioner/writ appellant, the learned Single Judge refused to call interference therein. Thus, his prayer is to dismiss the writ appeal while maintaining the order passed by the learned Single Judge.

4. We have considered the rival submissions of the parties and perused the records.

5. Facts pertaining to the case have been given in brief, thus, need not be reiterated as otherwise challenge to the judgment of the learned Single Judge shows that the order dated 19.05.2016 to seek recovery of a sum of Rs.4,18,762/- is to be seen merely reference to the judgment of the Apex Court in ***Rafiq Masih's case*** (supra). It is not in dispute that the order of recovery dated 19.05.2016 was issued after retirement of the petitioner who was, in fact, due for retirement on 30.06.2008, but was served with the order of suspension on the day of retirement itself and thus not allowed to retire on 30.06.2008. The order of suspension was, however, revoked on 28.04.2016 and the petitioner/writ appellant was allowed to retire on the said date. It is after the retirement of the petitioner/writ appellant, the order of recovery of a sum of Rs.4,18,762/- towards the subsistence allowance was issued on 19.05.2016. In view of the undisputed facts in regard to date of retirement and issuance of the order of recovery subsequent to it, the matter is squarely covered by the judgment of the Apex Court in ***Rafiq Masih's case*** (supra). Paragraph 18 of the said judgment is quoted herein for ready reference:-

> ''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 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.''

6. As per the ratio propounded by the Apex Court in the case supra, recovery of the excess amount is not permissible from a retired employee and therefore, the order of recovery should not have been allowed to stand. However, the writ petition was dismissed by the learned Single Judge, but finding that the issue is covered by the judgment of the Apex Court in ***Rafiq Masih's case,*** we set aside the judgment of the learned Single Judge so also the impugned order dated 19.05.2016. The recovery of the amount is not made permissible from a retired employee.

7. Accordingly, the Writ Appeal is allowed with the aforesaid. No costs. Consequently, connected miscelleneous petition is closed.

Sd/-

Assistant Registrar (W)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

bala/ssl

To

1.The Joint Registrar of Co-operative Socieites,
Sivagangai,
Sivagangai District.

2.The Deputy Registrar of Co-operative Societies,
Public Distribution System,
Sivagangai,
Sivagangai District.

+1 CC to M/s.AJMAL ASSOCIATES, Advocate (SR-21449[F] dated 26/04/2022)

+1 CC to M/s.SPL.GP. (SR-21697[F] dated 27/04/2022)

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