IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.12.2023

CORAM:

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.No.2041 of 2023
and W.M.P.No.2133 of 2023

K. Prabhakar ... Petitioner

Vs.

1.The Principal Accountant General,
Office of the Accountant General (A&E), Tamil Nadu,
No.361 Anna Salai,
Teynampet, Chennai – 600 018.

2.The Branch Officer,
Office of the Accountant General (A&E), Tamil Nadu,
Authorisation of Revision of Pension/Gratuity/Commutation
No.361 Anna Salai,
Teynampet, Chennai – 600 018.

3.The Joint Director,
Industrial Safety & Health Department,
Guindy, Kancheepuram,
Chennai – 600 032. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records of the 2nd respondent in No.AG(A&E)PEN P12/11225307/1/R1225307/337 dated 29.11.2022 quash the same and accordingly direct to the 2nd respondent to fix the correct pensionary benefits as per the Government order in G.O.No.107 dated 22.03.2008.

For petitioner	: Ms.A. Pramila
For R1 & R2	: Mr.S. Balaji, Standing Counsel
For R3	: Mrs.V.Yamuna Devi, Special Government Pleader

ORDER

Heard the learned counsel for the petitioner, learned Standing Counsel for the first and second respondents and the learned Special Government Pleader for the third respondent.

2. The petitioner herein was appointed as an Office Assistant (Special Grade) from 22.09.2014 onwards in the third respondent/Department. On attaining the age of superannuation on 30.04.2022, his pension proposal was processed based on his last drawn pay. Originally, the third respondent/Department had sent a pension proposal purely based on the last drawn pay of the petitioner which was

Rs.34,400/-. It was later realized that the Dearness Allowance in the case of the petitioner was calculated at 47% instead of 24%. When objections were raised from the Office of the Accountant General, the original pension proposal that was sent on 01.06.2022, was revised and fresh proposal was sent to the first respondent herein on 31.10.2023.

3. The learned counsel for the petitioner submitted that since the third respondent herein had already sent a proposal by taking into account the last drawn pay of the petitioner, they are now estopped from re-visiting the same and therefore, the petitioner is entitled for the calculation of the Dearness Allowance at 47%.

4. The learned Special Government Pleader appearing for the third respondent, however, submitted that the original proposal that was sent on 01.06.2022 to the first respondent herein, was a mistake since the Government Orders were not properly construed and in view of the clarification by the Government later that since the petitioner herein had opted to come to the revised pay scale after 01.01.2006, the Dearness Allowance can be calculated only at the rate of 24%.

5. Pending the Writ Petition, a clarification was sought for by the respondents to the Government, seeking for the applicability of the Dearness Allowance payable to the petitioner and by a Letter No.30196/Pay Cell/2023-1, dated 31.10.2023, it was clarified as follows:-

> **......** *"**2.** In the reference fourth cited clarification has been requested relating to fixation of revised pay as per G.O.Ms.No.234, Finance (Pay Cell) Department dated 01.06.2009 by taking into account the Dearness Allowance at 47% of pay as on 08.01.2008 as the petitioner had exercised option to refix his pay in the revised Pay Band on that date, being the date of award of Special Grade in the post of Office Assistant. However the provisions of G.O.Ms.No.234, Finance (Pay Cell) Department dated 01.06.2009 imply that Dearness Allowance has to be taken at 24% only (as included in the multiplication factor 1.86 irrespective of the date of option of refixation).*
>
> ***3.** In the reference 3rd cited, it has been clarified that in the case of employees opting to come under the revised scale on subsequent dates after 01.01.2006 the percentage of Dearness Allowance in the pre-revised scale of pay as on 01.01.2006 i.e. 24% percent should alone to be taken into account for the purpose of fixation of pay in the revised pay*

structure with reference to Rule 4 (1) (i) of Tamil Nadu Revised Scales of Pay Rules 2009. The same is enclosed herewith for reference.

***4.** Hence, I am to state that in the case of employees opting to come under the revised scale of pay on subsequent dates after 01.01.2006 24 percent of Dearness Allowance alone be taken for the purpose of fixation of pay in the revised pay structure with reference to Rule 4 (1) (i) of Tamil Nadu Revised Scale of Pay Rules 2009."*

6. Admittedly, the petitioner herein had opted to come into the revised pay scale only from 01.01.2006 and as clarified by the Government, the Dearness Allowance requires to be calculated only at 24%. Merely because a wrong calculation has been made earlier and a proposal was sent on 01.06.2022, it will not entitle the petitioner to take the plea of estoppel, particularly, when the respondents have realized the mistake and have also sent a revised proposal later on 31.10.2023. Thus, in view of the clarification issued by the Government on 31.10.2023, the claim of the petitioner to calculate the pension by deriving the Dearness Allowance at 47%, cannot be sustained.

7. At this juncture, the learned Special Government Pleader submitted that since the excess payments have been made from 01.01.2008, they are entitled to recover the same and as per the proceedings of the third respondent herein dated 31.10.2023, the amount requires to be recovered from the petitioner in one lump sum.

8. To such a plea, the learned counsel for the petitioner submitted that owing to the mistake of the Department in having paid the excess amount, recovery is impermissible, in view of the decision of this Court passed in WP.No.6945 of 20222 dated 26.06.2023.

9. The Hon'ble Supreme Court in the case of ***'State of Punjab Vs. Rafiq Masih (White Washer)'*** reported in ***'(2015) 4 SCC 334'***, has held that recovery of any excess payment made owing to the mistake of the concerned Department, particularly from Group C or Group D employee or when the recovery sought to be made is for more than five years and if the concerned person is a pensioner, such a recovery is impermissible in law.

10. The decision of the Hon'ble Supreme Court has been followed by me in various decisions including the case in WP.No.6945 of 20222 dated 26.06.2023, relied upon by the learned counsel for the petitioner.

11. Thus, when it is not in dispute that the petitioner is a Group D employee, that he is a pensioner and that the excess payment has been made owing to the mistake of the Department, recovery of such an amount is impermissible.

12. Accordingly, the Writ Petition stands dismissed. However, the respondents shall not initiate any steps to recover the alleged excess payment, in view of the observations made in the foregoing paragraphs. No costs. Connected miscellaneous petition is closed.

14.12.2023

Index:Yes
Speaking order
Neutral Citation: Yes

Sni

M.S.RAMESH,J.

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To

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