IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.11.2023

CORAM:

THE HON'BLE MR.JUSTICE K.KUMARESH BABU

W.P.No.20381 of 2011
and M.P.No.1 of 2011
and W.M.P.No.23876 of 2016

M.Panaiyadian ... Petitioner

Vs

1.The State of Tamil Nadu,
represented by its Secretary,
Commercial Taxes (H1) Department,
Fort St.George,
Chennai – 600 009.

2.The Deputy Inspector General of Registration,
Salem Region, Salem.

3.The Accountant General (A&E)
Chennai – 600 018. ... Respondents

PRAYER:- Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari to call for the records relating to the impugned order passed by the 2nd respondent in his proceedings No.4502/A1/10-2, dated 27.06.2011 and quash the same as illegal with exemplary costs and pass such other orders.

For Petitioner : Mr.B.Vishnu Chelliya

For RR1 & 2 : Mr.S.Ravichandran
Additional Government Pleader
For R3 : Served – No appearance

ORDER

This Writ Petition had been filed challenging the order of recovery passed by the 2nd respondent dated 27.06.2011.

2. Heard Mr.B.Vishu Chelliya, learned counsel for the petitioner and Mr.S.Ravichandran, learned Additional Government Pleader appearing for the respondents.

3. The learned counsel for the petitioner submits that the petitioner was appointed as Junior Assistant in the Registration Department on 15.07.1971 and had retired from service on 31.12.2005 on attaining his age of superannuation. At the time of retirement, the petitioner was holding the post as Assistant Registrar. On the recommendation of the 5th Pay Commission, the petitioner's salary was refixed with effect from 01.01.1996 in the cadre of Sub-Registrar Grade– I which post he was holding at that time. On refixation of salary, further increments was also granted to him and

the petitioner was promoted as Registrar in the year 1998. After his superannuation, the petitioner had received his retirement and terminal benefits. But, however, vide proceedings dated 10.01.2006, the 2nd respondent without issuing any show cause notice had revised and refixed the pay of the petitioner from Rs.10,475/- per month to Rs.9,925/-. Based on such refixation, a recovery was ordered which was challenged by the petitioner in W.P.No.20359 of 2006.

4. He would submit that this Court by order dated 30.04.2010 allowed the Writ Petition and had directed to release the amount that had been retained from the petitioner's gratuity within a period of three weeks. Thereafter, a show cause notice was issued by the 2nd respondent seeking to recover a sum of Rs.75,914/- by proceedings dated 03.11.2010. According to him, the petitioner submitted a detailed representation opposing the said show cause notice.

5. The learned counsel for the petitioner had also taken me through the acknowledgment that had been received by him on the reply sent to the

show cause notice. He would submit that by the impugned proceedings dated 27.06.2011, the respondent had directed recovery of the said amount in 36 monthly installments. He would submit that the reference to the impugned order does not refer to the show cause notice that was issued to the petitioner and also the reply given by the petitioner. But, however, the proceeds to record that inspite of notice under Reference 4 which is dated 24.12.2010, the petitioner had not given any reply. He would submit that no show cause notice was received by the petitioner as indicated in the impugned order.

6. Countering his arguments, the learned Additional Government Pleader would submit that the petitioner had been wrongly paid excess salary. He would submit that the learned Single Judge while setting aside the order had observed that such recovery had been made without any notice to the petitioner and therefore, the show cause notice was issued to him on 03.11.2010, to which the petitioner had replied that it was necessary to deposit the amount and therefore, the order dated 24.10.2010 came to be passed. Reiterating the reply of the petitioner to pay the amount and since,

the petitioner had not paid the amount, the impugned order came to be passed to recover the amount in 36 monthly installments from the pension that has been paid to the petitioner. Therefore, he would submit that in the present case, all the necessary notices have been issued to the petitioner and there is no violation of principles of natural justice. He would contend that the petitioner cannot be allowed to unjustly enrich himself at the hands of the public exchequer and therefore, he would seek to dismiss this Writ Petition.

7. I have considered the rival submissions made by the learned counsels appearing on either side and perused the materials available on record before this Court.

8. It is an admitted case that the petitioner had superannuated on 31.12.2005 and was also permitted to retire from service. After his retirement from service, an order of recovery was sought to be made which had came to be challenged before this Court in W.P.No.20359 of 2006. It is pertinent to note that the learned Single Judge while allowing the Writ

Petition had held that the order of refixation which was passed 18 years back was sought to be retrospectively cancelled, that too after his retirement of service and that too with affording an opportunity to the petitioner. It is more pertinent to note that having found that the order is bad, the learned single Judge had directed repayment of the amount retained by the Department from him. It is also worthwhile to note that the learned single Judge of this Court has relied upon a judgment of Division Bench reported in ***(2006) 1 MLJ 143*** have come to such a conclusion. It is further noted that the learned Single Judge had not granted any liberty to the petitioner to initiate any proceedings to recover the said amount nor had the respondents sought liberty of this Court to initiate any such proceedings to recover the amount.

9. In such circumstances, it is not open to the respondents to initiate any recovery proceedings. Had it opined to initiate any such recovery proceedings, it ought to have approached this Court seeking modification of the order, to permit them to initiate recovery proceedings. As rightly submitted by the learned counsel for the petitioner, the show cause notice issued to the petitioner on 03.11.2010 and the reply sent by the petitioner

dated 24.11.2010 had not been referred to at all in the order impugned in this Writ Petition. In fact, a reading of the impugned order would show that the show cause notice was issued only on 24.12.2010 and the authority had indicated that no reply had been filed by the petitioner. On this ground alone, the impugned order is liable to be set aside. In view of the aforesaid reasons, the impugned order is liable to be interfered with.

10. Further it is imperative to note the judgment of the Hon'ble Apex Court rendered in ***State of Punjab and Others Vs Rafiq Masih & Others*** reported in ***(2015) 4 SCC 334*** (White washer's case) paragraph 18(2), wherein it was had held that there can be no recovery made from a retired employee even if such payment had been made by mistake at the hands of the employer. For better appreciation, the relevant paragraph is extracted hereunder.

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

11. In such view of the matter, in the present case, since, the petitioner had superannuated as early as on 31.12.2005 and the excess payment which is sought to be recovered was not account on misrepresentation of the petitioner, but, on the account of wrong procedure

that had been adopted by the respondent, for which the petitioner cannot be found fault with and such recovery cannot be made from the petitioner.

12. In fine, this Writ Petition is allowed and the order impugned in this Writ Petition is set aside. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

21.11.2023

gba
Index : Yes/No
Speaking order : Yes/No
Neutral Citations : Yes/No

To

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K.KUMARESH BABU,J.

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