IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.09.2023

Delivered on : 01 .11.2023

CORAM:

THE HON'BLE MR. JUSTICE D.KRISHNAKUMAR
And
THE HON'BLE MR. JUSTICE P.B.BALAJI

W.P.No. 11074 of 2023
and WMP.No.10946 of 2023
& WMP.No. 20298 of 2023

C.Kamalakannan ..Petitioner

Vs

1.The Central Administrative Tribunal -
Chennai Bench,
Rep by its Registrar,
Additional City Civil Court Building,
High Court Campus,
Chennai-600104.

2.Union of India,
Rep by its Secretary,
Ministry of Information and Broadcasting,
A Wing, Shastri Bhavan,
New Delhi -110001.

3.The Director General,
All India Radio,
Akasvani Bhavan,
Parliament Street,
New Delhi – 110001.

4.The Deputy Director General (E)
All India Radio,
Kamarajar Salai,
Chennai – 600004.

5.Pay and Accounts Officer,
All India Radio,
Mylapore, Chennai-600004. ..Respondents.

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for the records in connection with an impugned order passed by the 1st respondent Tribunal in O.A.No. 885 of 2016 and quash the same and consequently direct the respondents 2 to 5 not to recover any money as excess payment from the pension of the petitioner.

For Petitioner : Mr.D.Muthukumar
For M/s. Paul & Paul

For Respondents : Mr. C.Kulanthaivel, Senior Panel Counsel –R2 to R5
R1- Tribunal

<u>O R D E R</u>

<u>D.KRISHNAKUMAR, J.</u>

Challenging the order passed by the Central Administrative Tribunal, Chennai Bench in O.A.No. 885 of 2016, dated 01.03.2023, the petitioner has filed the present writ petition.

2. Brief facts:

2.1 The petitioner was originally appointed as a Clerk Grade II in the year 1974, and thereafter appointed as Announcer on 08.10.1986 and later he was appointed as program executive by way of direct recruitment and joined the post on 30.09.1989 in program executive by way of direct recruitment and joined the post on 30.09.1989 in All India Radio, Coimbatore.

2.2 The petitioner was granted three financial upgradations under the Modified Assured Career Progression (MACP) scheme on 16.04.2010. Subsequently after retirement of service, the 4th respondent issued an order to the petitioner informing that the petitioner's pay has been refixed and the third financial upgradation granted to him in the grade pay of Rs.6600/- with effect from 01.09.2008 has been withdrawn based on the directions issued by the PAO, AIR Chennai and accordingly his pay was refixed only with two financial upgradations. Challenging the said order, the petitioner has filed an application before the 1st respondent/Tribunal in O.A.No. 885 of 2016 and the came to be dismissed by the tribunal by order dated 01.03.2023. Challenging the same, the present writ petition has been filed.

3. The learned counsel for the petitioner has submitted that the petitioner had completed 30 years of service as on 01.09.2008 and thus he was eligible to be granted 3 financial upgradations under the Modified Assured Career Progression Scheme (herein after called as MACP scheme) as he had not received any promotions throughout his career and the petitioner was also granted MACP's in the grade pay of 5400/-, 5400/- and 6600/- in the pay bands of Rs.9300-34800, Rs.15600-39100 and 15600-39100 respectively. At the time of granting MACP, the petitioner has not furnished any undertaking to the respondent department.

4. The learned counsel for the petitioner has further submitted that when the petitioner was about to retire on 30.06.2011 on

attaining the age of superannuation, the respondent-department obtained an undertaking from the petitioner on 21.06.2011 to the effect that in case of any reverse decision taken by the Directorate in future with relation to granting grade pay of Rs.6600/- to him under the MACP Scheme, the petitioner would accept the same and only thereafter released all the pensionary benefits. On 18.06.2015, the 4th respondent issued an order to the petitioner informing that the petitioner's pay has been refixed and the third financial upgradation granted to him in the grade pay of Rs.6600/- with effect from 01.09.2008 has been withdrawn based on the directions issued by the PAO, AIR Chennai and accordingly his pay was refixed only with two financial upgradations.

5. The learned counsel for the petitioner has further submitted that the said refixation was effected by the respondents without giving any opportunity to the petitioner. Hence the petitioner has submitted representations to the respondents on various dates and the same were rejected by the 4th & 5th respondents by orders dated 18.06.2015, 26.08.2015 and 27.04.2016. Challenging the said

rejection order, the petitioner has filed an application before the tribunal in O.A.No. 885 of 2016, but the tribunal had dismissed the said application by order dated 01.03.2023 without considering the vital point that the said refixation was done after five years of the petitioner's retirement and therefore the order passed by the tribunal is liable to be set aside.

6. On the other hand, the learned senior panel counsel appearing for the respondent would submit that the petitioner was appointed as programe executive on direct recruitment on 30.09.1989. As per DOPT No. 350234/3/2008-Estt (D), dated 19.05.2009 "Regular Service" for the purpose of the MACPs shall commence from the date of joining a post on a regular basis either on direct recruitment basis or on absorption/re-employment basis. The petitioner was appointed as direct appointment as Programme Executive in the pay scale of Rs.2000-3500/- w.e.f 30.09.1989. Since the petitioner retired from service before completion of 30 years, he was not eligible for 3rd MACP in the grade pay of Rs.6,600/-

7. The learned senior panel counsel would further submit that in order to rectify the wrong fixation of the pay occurred in respect of the petitioner and in compliance with the undertaking given before the tribunal, the petitioner's pay was revised and accordingly, his pension was revised with a grade pay of Rs.5400/- at the entitled rate. Consequently, orders were issued to recover the excess amount of Rs.3,34,512/- paid to the petitioner from his pension.

8. The learned senior panel counsel would further submit that while issuing the MACP fixation vide Pay fixation statement under file No. CHEN. 10(2)2010-S/MACP(Prog.)/483, dated 08.06.2010 the petitioner was clearly put on notice the above pay fixation is subject to post audit and in the light of audit observation over payment, if any, shall be recovered from him in one lump sum. Therefore, the petitioner is bound to repay the excess payments received by way of pay and allowances and pension to which he was not entitled to. The Tribunal rightly rejected the claim of the writ petitioner, therefore, the impugned order does not warrant

interference and the present writ petition is liable to be dismissed.

9. Heard both sides and perused the materials available on record.

10. Admittedly, though the petitioner was originally appointed as Clerk Grade II in the respondent -department on 07.05.1974, he was appointed as program executive by way of direct recruitment in All India Radio, Coimbatore only on 20.09.1989 and retired on superannuation on 30.06.2011.

11. The contention of the respondent-department before the tribunal as well as this Court is that while issuing the MACP fixation vide Pay Fixation Statement under File No. CHEN.1092)2010-S/MACP(Prog.) /483, dated 08.06.2010, the petitioner was clearly put on notice that the above pay fixation is subject to post audit and excess payment paid if any, the same shall be recovered from him in one lump sum. The petitioner even requested his pay to be refixed as per AG audit objections before his retirement and gave an undertaking to refund any excess payments

if required. However, his pay was not refixed, and he retired with the same scale of pay. Therefore as per undertaking the petitioner has to repay the excess amount paid by the department which he is not actually entitled to.

12. The learned counsel for the petitioner has relied upon the recent order passed by the Hon'ble Division Bench of this Court in ***W.P.No.6997 of 2023, dated 06.03.2023 (The Chairman and Managing Director, BSNL, Janpath, New Delhi & Others Vs. K.Rajendran & another),*** wherein the Hon'ble Division Bench by relying upon the decision of the Hon'ble Supreme Court held that recovery order passed against the 1st respondent therein was impermissible**.** The relevant portion of the order is extracted below;

> *"11. We have carefully considered the submissions of the learned counsel appearing for the Writ Petitioners. We have gone through the material records and do not feel it is the case, which requires admission especially in exercise of Article 226 of the Constitution of India. It is not the case of recovery on the grounds of fraud or misrepresentation and it is the case of bonafide error committed in the year 2000, when the applicant/1 st respondent was still in service of the DOT. The law leading to recovery of excess payment has been settled by the Supreme Court in the judgment of State of*

Punjab and others vs. Rafiq Masih reported in (2015) 4 SCC 334. The Hon'ble Mr.Justice Jagdish Singh Khehar, as his lordship then was, had summarised the position of law in paragraph 12. It reads as follows:

"12. .. .. (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."

12. Two particular aspects had to be pointed out i.e., recovery from an employee in class – III & class – IV of the service is impermissible and from retired employees or from employees who are due to retire within one year of order of recovery. Perusal of the record shows that on the date on which order of revision was passed, the applicant/1 st respondent was in class – III category and therefore, he will come within the categorisation fixed in the "White Washer" case.

13. The other judgment of the Supreme Court that was relied on by the learned counsel is reported in (2016) 14 SCC 267 (High Court *of Punjab & Haryana and others vs. Jagdev Singh). It is no doubt true that the Court had held in paragraph 11 of the judgment cited above, excess payment can be recovered by the Department and Clause (ii) of the principles laid down in "White Washer" case are not applicable to the petitioner in that case. However, on a careful reading of the judgment especially paragraph 9 of the judgment shows that the Writ Petitioner in that case had given an undertaking at the initial instance itself and therefore, the Court had fixed him to the undertaking given and permitted recovery. This is clear from the last two lines of paragraph 11 where the Court observed as follows:*

> *"The Officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking".*

The undertaking relied upon by the applicant/1 st respondent in the present case, which is at page No.57 of the typed set of papers, shows that the applicant/1 st respondent had given an undertaking on 14.09.2016. By no stretch of imagination, can such an undertaking ensure in favour of the respondents/Writ Petitioners as the fixation is of the year 2000. We are not persuaded to hold the undertaking relates back to the time when he was still in service of the Department of Telecommunication. The Tribunal has analysed position of law properly and has applied the same. There is no perversity and illegality in the order passed by the Tribunal.

14. Consequently, the Writ Petition stands dismissed confirming the impugned order of the 2 nd respondent dated 27.07.2022. The direction given by the Tribunal should be implemented within *three months from the date of receipt of a copy of this order. It is open to the respondents/Writ Petitioners to recover the amount from the Officer who had fixed the salary erroneously. No costs. "*

13. In the present case, as discussed above, the respondent had granted three financial upgradation under MACP scheme to the petitioner vide order dated 16.04.2010 and thereafter, the respondent had obtained undertaking from the petitioner on the verge of his retirement on 21.06.2011 to recover the excess amount if any paid to the petitioner by the respondent. Subsequently, the petitioner was allowed to retire from service on attaining the age of superannuation on 30.06.2011 and he was granted entire terminal benefits and pensionary benefits without any deduction. The

respondent, after keeping quiet for five years, had issued recovery proceedings to the petitioner on 18.06.2015 to recover the grade pay of Rs.6600/- from the date of order passed under the scheme i.e. 16.04.2010, totaling a sum of Rs.3,34,512/- from his pension.

14. It is to be noted that the respondent had not deducted the said excess payment made to the petitioner under the scheme from

his terminal benefits. The respondent has not obtained any undertaking from the petitioner while granting financial upgradation to him i.e on 16.04.2010. Thus, we are of the considered view that it is a clear lapse on the part of the respondent-department in initiating prompt action to recover the excess amount paid to the petitioner before his retirement, despite having knowledge about the excess amount paid to the petitioner. The fact that the respondent had not obtained any undertaking from the petitioner on the date of granting financial upgradation in the year 2010 and failing to initiate recovery proceedings from the date of undertaking obtained by the respondent at the verge of his retirement ie. on 21.06.2011, but choosing to issue recovery proceedings after a period of five years, that too after settling entire terminal benefits to the petitioner, clearly mitigates against the respondent department. This Court finds some force on the contention of the learned counsel appearing for the petitioner.

16. Therefore, considering the lapse on the part of the respondent-department in initiating recovery proceedings and in

light of the decision rendered in Clause 12(iii) of the judgment by the Hon'ble Supreme Court cited supra ***(State of Punjab and others vs. Rafiq Masih, as reported in (2015) 4 SCC 334)***, we hold that the recovery order issued by the respondent on 18.06.2015 is impermissible in law. Consequently, the order of the tribunal, which directed the respondents to recover the excess amount previously paid to the petitioner is unsustainable in law and the same is liable to be set aside.

17. In the result, the impugned order passed by the tribunal in O.A.No. 885 of 2016, dated 01.03.2023 is set aside. The writ Petition is allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

[D.K.K., J.,] **[P.B.B., J.]**

01 .11.2023

Index:yes/no
Internet:yes
Speaking order/Non speaking order
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To

1. The Registrar,
The Central Administrative Tribunal -
Chennai Bench, Additional City Civil Court Building,
High Court Campus, Chennai-600104.

2. The Secretary,
Ministry of Information and Broadcasting,
'A' Wing, Shastri Bhavan, New Delhi -110001.

D.KRISHNAKUMAR, J.,
&
P.B.BALAJI, J.

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3.The Director General,
All India Radio,
Akasvani Bhavan,Parliament Street,
New Delhi – 110001.

4.The Deputy Director General (E)
All India Radio, Kamarajar Salai,
Chennai – 600004.

5. The Pay and Accounts Officer,
All India Radio,
Mylapore, Chennai-600004.

Pre-Delivery Order in
W.P.No.11074 of 2023
and
WMP.No. 10946 of 2023
& WMP.No. 20298 of 2023

01.11.2023