BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 31.07.2023

CORAM:

THE HONOURABLE **MR.JUSTICE S.S.SUNDAR**
and
THE HONOURABLE **MR.JUSTICE D.BHARATHA CHAKRAVARTHY**

W.A(MD)No.1229 of 2023
and
C.M.P(MD)No.9216 of 2023

1.The Government of Tamil Nadu,
Rep. by its Principal Secretary,
Health and Family Welfare Department,
Fort St. George,
Chennai – 600 009.

2.The Director of Public Health and Preventive Medicine,
D.M.S. Complex,
No.359, Anna Salai,
Chennai – 600 018.

3.The Deputy Director of Health Services,
Collectorate Complex,
Virudhunagar.

4.The Block Medical Officer,
Government Primary Health Centre,
Narikudi,
Virudhunagar District. ... Appellants/Respondents

Vs.

X.Shanthi ... Respondent/Petitioner

Prayer: Writ Appeal filed under Clause 15 of the Letters Patent, against the order dated 15.12.2021 passed in W.P(MD)No.19618 of 2018.

For Appellants :Mr.M.Lingadurai,
Special Government Pleader

For Respondent :Mr.S.Rajasekar

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JUDGMENT

(Judgment of the Court was delivered by **S.S.SUNDAR, J.**)

Heard Mr.M.Lingadurai, learned Special Government Pleader for the appellants and Mr.S.Rajasekar, learned counsel for the respondent.

2. This writ appeal is directed against the order passed by the learned Single Judge allowing the writ petition filed by the respondent/writ petitioner seeking for issuance of a Writ of Certiorari to quash G.O.(Ms.) No.5, Health and Family Welfare (L1) Department, dated 04.01.2017, by which, the first appellant sought to recover the pay benefits which was paid to the respondent/writ petitioner earlier.

3. The writ petitioner was appointed on 26.02.1990. Her appointment was regularized by relaxing her age. It is admitted that by proceedings dated 10.12.2003, the appointment of the writ petitioner was regularized with effect from the date of her appointment. On the ground that the relaxation was not in terms of Rule 5(a) of the Tamilnadu Public Health Subordinate Service Rules, the first appellant has passed the order impugned in the writ petition to recover the amount that was paid to the writ petitioner, who attained the age of superannuation long back.

4. The recovery is certainly contrary to the principles laid down by the Hon'ble Supreme Court in several judgments including the judgment in ***State of Punjab and Others v. Rafiq Masih (White Washer) and others*** reported in ***(2015) 4 SCC 334,*** wherein the Hon'ble Supreme Court has held as follows:

> "14. In this context, reference may also be made to the decision rendered by this Court in Shyam Babu Verma v. Union of India (1994) 2 SCC 521, wherein this Court observed as under: (SCC pp.525-26, para 11)
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> > "11. Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay

> Commission w.e.f. 1-1-1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 *but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from 1-1-1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same."*
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> (emphasis supplied)

It is apparent, that in *Shyam Babu Verma's case* (1994) 2 SCC 521, the higher pay- scale commenced to be paid erroneously in 1973. The same was sought to be recovered in 1984, i.e., after a period of 11 years. In the aforesaid circumstances, this Court felt that the recovery after several years of the implementation of the pay scale would not be just and proper. We therefore hereby hold, recovery of excess payments discovered after five years would be iniquitous and arbitrary, and as such, violative of Article 14 of the Constitution of India.

....

16. This Court in Syed Abdul Qadir v. State of Bihar(2009) 3 SCC 475 held as follows:(SCC p.491-492, para 59)

> "59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter- affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. *Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."*
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> (emphasis supplied)

Premised on the legal proposition considered above, namely, whether on the touchstone of equity and arbitrariness, the extract of the judgment reproduced above, culls out yet another consideration, which would make the process of recovery iniquitous and arbitrary. It is apparent from the conclusions drawn in *Syed Abdul Qadir's case*, that recovery of excess payments, made from employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year of the date of his retirement on superannuation.

....

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."

4. In view of the law settled by the Hon'ble Supreme Court in the above said case and few other judgments which are reported later, this Court is of the view that the learned Single Judge is right in allowing the writ petition. Therefore, this Court finds no merit in this writ appeal.

5. In the result, this writ appeal is dismissed. No Costs. Consequently, connected miscellaneous petition is closed.

[S.S.S.R., J.] **[D.B.C., J.]**
31.07.2023

Index : Yes / No
NCC : Yes / No

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S.S.SUNDAR, J.

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