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W.P.No.24904 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.01.2024

CORAM:

THE HONOURABLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

W.P.No.24904 of 2022 and
WMP.No.23837 of 2022

P.Vijayakumar

... Petitioner

Vs.

1.The Union of India rep. by
The General Manager,
Southern Railway,
Park Town, Chennai-3

2.The Senior Divisional Security Commandant,
Railway Protection Force,
Southern Railway, Trichy 620 001

... Respondents

PRAYER:

Writ petition is filed under Article 226 of the Constitution of India to issue a writ of certiorarified mandamus calling for records relating to the order of the second respondent made in No.SXT/P.500/Sett./2022 dated 29.03.2022 to quash the same and to consequently direct the respondents to forthwith re-pay/refund the retained amount of Rs.10,36,170/- with accrued interest at the rate of 18% per annum.

For Petitioner

: Mr.L.Chandrakumar

For Respondents

: Mr.R.Rajesh Vivekananthan,
Deputy Solicitor General of India



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ORDER

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This writ petition has been filed challenging the order dated 29.03.2022 thereby ordered to recover over payment from the petitioner's DCRG and CELS.

2. Heard, the learned counsel appearing on either side.

3. The petitioner was initially appointed as Constable of Railway Protection Force on 06.08.1981. While he was in service, a criminal case was registered as against the petitioner and in pursuant to the said case, he was arrested and remanded to judicial custody, due to which he was absent from duty. Therefore, he was charged for unauthorised absence between 24.08.1986 to 03.09.1986. Thereafter, he was imposed with penalty of dismissal from service. Aggrieved by the same, the petitioner filed appeal and the appellate authority modified the punishment of dismissal from service to that of reduction in time scale of pay to the minimum in the grade of Rs.855/- in the scale of Rs.825-1200 and the period of absence from duty be treated as *dies-non*. (no work no pay). Thereafter, he was reinstated into service on 17.09.1991. Finally, he was promoted as Assistant Sub Inspector of Police and



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retiered from service on attainment of age of superannuation with effect from

31.03.2022. Two days prior to his retirement, he was served with order dated 29.03.2022 thereby ordered to recover a sum of Rs.10,36,117/- on the ground that while processing the settlement dues of the petitioner, it was noticed in his service register that annual increments were granted during the interregnum period from the date of dismissal and reinstatement during the period between the years 1987 to 1991 as well as the revised penalty of reduction in pay was not implemented.

4. On perusal of the counter filed by the respondents revealed that the above order was passed in accordance with Rules 15(2) and 15(3) of Railway Service Pension Rules, 1993 that the over payment made to the petitioner is to be recovered or adjusted from his pensionary benefits. Further as per the Rule 1318 (FR 24) of the Indian Railway Establishment Code Volume II, the period of '*dies-non*' is to be treated as leave without pay. Hence, increment is not to be allowed to the petitioner. However, the petitioner was wrongly allowed increment from the year 1987 to 1991. It resulted in over payment to the tune of Rs.10,36,710/-.

5. Admittedly, the said order was passed without any notice and



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without affording an opportunity of hearing to the petitioner. That apart, the said amount was paid and there was no mis-representation and fault on the part of the petitioner in fixation of pay scale. As per Section 4 (1) (a) of the Payment of Gratuity Act, 1972, postulates for the payment of gratuity on termination on attaining the age of superannuation. Insofar as Section 4(1)(6) of the Payment of Gratuity Act, 1972 stipulates that notwithstanding anything contained in sub-section (i):

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused.

(b) the gratuity payable to an employee may be wholly or partially forfeited.

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part; or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude,

Provided that such offence is committed by him in the course of his employment,

6. In the case on hand, there was no such instances pending and the



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respondents have allowed the petitioner to retire on superannuation with effect

from 31.03.2022. Therefore, the order of recovery to the tune of Rs.10,36,170/-

from gratuity is impermissible in law. It is settled legal principle that undoubtedly the excess payment that has been paid to the petitioner was not because of any misrepresentation or fraud committed on the part of the petitioner and he had also no knowledge about for what reasons the said deduction has been effected. The excess payment made was the result of wrong fixation of pay, for which the petitioner cannot be held responsible as held by the Hon'ble Supreme Court of India in the case of ***Syed Abdul Qadir v. State of Bihar*** reported in (2009) 3 SCC 475. In the judgment of the Hon'ble Supreme Court of India in the case of ***State of Punjab and others Vs. Rafiq Masih (White Washer) and others*** reported in (2015) 4 SCC 334, it is held as follows:

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 hereinabove, we may, as a ready reference, summaries the following few situations, wherein recoveries by the employers, would be impermissible in law:



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(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 on 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 when 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 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.

7. Further, the above was executed by the DOPT [L.No.F.No. 18/03/2015-Esstt. \(Pay-1\)](#) dated 02-03-2016 as postulated in Article 142 of the Indian Constitution and the same was adopted in RBE No.72/2016 dated 22.06.2016. Hence the impugned order is bad in law, non-est and nugatory.

8. In view of the above, the impugned order cannot be sustained and the same is liable to be set aside. Accordingly, this writ petition is allowed and



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the impugned order of the second respondent made in

No.SXT/P.500/Sett./2022 dated 29.03.2022 is quashed. The respondents are directed to refund the retained amount of Rs.10,36,170/- forthwith to the petitioner. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

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Index :Yes/No

Internet : Yes/No

Speaking order/non-speaking order
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To

- 1.The General Manager,
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- 2.The Senior Divisional Security Commandant,
Railway Protection Force,
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Trichy 620 001

G.K.ILANTHIRAIYAN, J.

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