BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.04.2024

CORAM:

THE HONOURABLE **MR.JUSTICE R.SURESH KUMAR**

AND

THE HONOURABLE **MR.JUSTICE G.ARUL MURUGAN**

W.A.(MD)No.604 of 2024

D.Kanagaraj ... Appellant

-Vs-

1.The Principal Secretary,
Department of Health and Family Welfare,
Fort St.George, Chennai-9.

2.The Director of Medical Education,
Kilpauk, Chennai-10.

3.The Dean,
Thanjavur Medical College,
Thanjavur. ... Respondents

PRAYER: Appeal filed under Clause 15 of Letters Patent, praying this Court to set aside the order dated 12.01.2022 made in W.P.(MD)No.5816 of 2015 on the file of this Court.

For Appellant : Mr.R.Venkatesan

For Respondents : Mr.D.Sadiq Raja,
Additional Government Pleader

JUDGMENT

[Judgment of the Court was delivered by *R.SURESH KUMAR, J.*]

This Writ Appeal has been directed against the order passed by the Writ Court dated 12.01.2022 made in W.P.(MD)No.5816 of 2015.

2.The writ petitioner / appellant was working with the respondent Department and by order dated 14.09.2010, he has been promoted and posted as Librarian Grade-I.

3.For those, who have got such promotion, a condition was imposed as per the Service Rules, which was in vogue, that they have to pass Account Test for Subordinate Officer Part-I within two years from the date of joining in the post of Librarian Grade-I. Within two years and even beyond two years, the writ petitioner / appellant was not able to successfully complete the Account Test. That means he had made five attempts and he had failed in the Account Test.

4.In this context, there is a Government Order in G.O.(Ms)No.1120, Personnel and Administrative Reforms Department, dated 30.10.1984, under which, on what basis exemption can be given to the staff and officers, working in the Government establishment to take exemption from passing Account Test, had been provided.

5.Though the writ petitioner / appellant claims that he is entitled to get such an exemption under the said Government Order, no express order to that effect has been passed, giving such exemption to the writ petitioner / appellant. However, without having passed Account Test for Subordinate Officer Part I, he had received incentive increment, which is otherwise meant for those, who have passed such Account Test. Such a position was continued till his superannuation on 31.03.2015 and just 12 days prior to the superannuation, on 19.03.2015, a show cause notice had been issued to the writ petitioner / appellant, seeking explanation as to why the incentive increment given to the writ petitioner / appellant cannot be recovered, as he has received such incentive increment without having passed Account Test.

6.The writ petitioner had given a reply on 26.03.2015. Despite the same, recovery order has been passed on 27.03.2015, by which the amount paid by way of incentive increment for having passed for those, who have passed Account Test, is to be recovered from the writ petitioner, because admittedly, he has not passed the said Account Test.

7.Challenging the said recovery order, dated 27.03.2015, the writ petitioner had filed the said Writ Petition, which was decided by the Writ Court, by order dated, 12.01.2022, which is impugned herein.

8.Though it was contended by the learned counsel appearing for the appellant that under G.O.(Ms)No.1120, the writ petitioner / appellant is entitled to seek for exemption from writing Account Test, such an exemption order has not been expressly given by the respondent Department, giving such exemption to the writ petitioner / appellant.

9.At the same time, mistakenly, incentive increment, which is meant for those, who have passed Account Test, had been given or extended to the writ petitioner till his superannuation. Only at the last minute, the Department woke up and issued show cause notice only on 19.03.2015, which is 11 days prior to the superannuation of the writ petitioner / appellant, which falls on 31.03.2015. Accordingly, they issued recovery order on 27.03.2015.

10.In this context, even though the learned Additional Government Pleader for the respondents made an attempt to sustain the said order of the recovery, dated 27.03.2015 on the ground that despite the exemption has been enabled under G.O.(Ms)No.1120, such an exemption has not been given to him. Assuming that if an exemption is given to him from qualifying Account Test and if he failed in the Account Test, that would not automatically confer him any right of increment, which would otherwise be given only to those, who have passed such Account Test. Therefore, he is not at all entitled to seek advance incentive increment.

11.However, we are not impressed with the said submission made by the learned Additional Government Pleader for the simple reason that, the employee knew that he did not pass Account Test and no exemption in fact had been given expressly by any authority. Assuming that such exemption is given, that would not automatically confer any right on the person, who got such exemption to receive such incentive without having passed Account Test. Therefore, if the incentive increment is provided to the writ petitioner / appellant, it is an exemption on the part of the employer. Therefore, it cannot be fastened on the writ petitioner / appellant.

12.That apart, insofar as the recovery of excess payment is concerned, even if any exemption made by the employer, mandatory guidelines have been issued by the Hon'ble Supreme Court in ***State of Punjab and others Vs. Rafiq Masih (White Washer) and others*** reported in ***2015 (4) SCC 334***, in paragraph No.18, which reads 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 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.*

19.We are informed by the learned counsel representing the appellant State of Punjab, that all the cases in this bunch of appeals, would undisputedly fall within the first four categories delineated hereinabove. In the appeals referred to above, therefore, the impugned orders passed by the High Court of Punjab and Haryana (quashing the order of recovery), shall be deemed to have been upheld, for the reasons recorded above.

20.The appeals are disposed of in the above terms."

13.There are five situations mentioned by the Hon'ble Supreme Court, where in situation No.2, it has been made clear that recovery from the retired employees or the employees, who are due to retire within one year, of the order of recovery shall not be recovered.

14.Here, in the present case on hand, the writ petitioner / appellant was due to retire on 31.03.2015, since he has superannuated on that date, but only 4 days prior to that on 27.03.2015, the order of recovery was issued. Therefore, it is definitely, within one year period and this falls under Clause (ii) of paragraph No.18 of ***White Washer's*** case as stated supra. Therefore, since the Hon'ble Supreme Court made it very clear that these are all the situations, where recovery by the employer would be impermissible in law, such recovery cannot be permitted to be made.

15.Only on these grounds, by following the dictum of the Hon'ble Supreme Court in ***White Washer's*** case as stated supra, we feel that the order of recovery, dated 27.03.2015 cannot be sustained.

16.Further, this aspect since has not been considered by the learned Single Judge, especially, the law declared by the Hon'ble Supreme Court in ***White Washer's*** case has not been taken into account and therefore, dismissed the said Writ Petition, it requires interference at out hands. Ultimately, by following the ***White Washer's*** case, the impugned order passed by the Writ Court dated 12.01.2022 is set aside. As a sequel, the order passed by the 3rd respondent dated 27.03.2015 for recovery also is set aside. Resultantly, no recovery shall be made from the writ petitioner / appellant and if any recovery is already made, the same shall be returned back to the writ petitioner / appellant.

17.With these directions, this Writ Appeal stands allowed. No costs.

[R.S.K., J.] & [G.A.M., J.]
03.04.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes / No

Yuva

To

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