(2016) 03 BOM CK 0035

In the Bombay High Court

Case No : Writ Petition No. 5876 of 2015

Ujwala Wd/o Rupchand Thakre — APPELLANT

Vs

Divisional Controller, Maharashtra State Road Transport Corporation and Another — RESPONDENT

Date of Decision : 03-03-2016

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2016) 2 ALLMR 917 : (2017) 1 BCR 661 : (2016) 2 CLR 607 : (2016) 149 FLR 414 : (2016) 2 LLJ 228 : (2016) 4 MhLJ 379

Hon'ble Judges : Vasanti A. Naik;A.S. Chandurkar, JJ.

Bench : Division Bench

Advocate : V.G. Wankhede, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

A.S. Chandurkar, J.(Oral) - Rule. Rule made returnable forthwith. The writ petition is heard finally with the consent of the learned counsel for the parties.

2. The petitioner, who is the widow of one Shri Rupchand Thakre, has approached this Court challenging the communications dated 08/04/2015 and 16/04/2015 by which the respondents intended to recover certain amounts to which deceased employee was entitled under the provident fund scheme as well as towards gratuity. This recovery is sought to be made on the ground that the pay fixation of said employee had been wrongly done.

3. The husband of the petitioner was employed as a Conductor with the respondent No. 1 Corporation. He expired on 04/06/2014. The petitioner thereafter approached the respondents for receiving various service benefits including the amounts of gratuity and provident fund. On 08/04/2015 the respondent No. 2 issued a communication stating therein that the pay fixation that was effected with regard to the salary of the deceased employee was being cancelled and, therefore, it was necessary to recover an amount of Rs. 4,32,893/

from the amounts due and payable to the petitioner. By the subsequent communication dated 16/04/2015, the petitioner was informed to approach the concerned authorities and deposit the excess amount of Rs. 36,893/, failing which further steps would be taken in the matter. The petitioner has, therefore, impugned the aforesaid communications in the present writ petition.

4. Shri A.J. Pathak, the learned counsel for the petitioner, submitted that it was not open for the respondents to recover the amounts alleged to have been overpaid to the husband of the petitioner in view of the fact that the husband of the petitioner had expired on 04/06/2014 and the action of recovery was initiated on the basis of an office order dated 29/10/2014 issued in that regard. It was submitted that no steps whatsoever for recovering the alleged excess amount was initiated by the respondents during the lifetime of the husband of the petitioner. After his death on 04/06/2014, by an order dated 29/10/2014 his salary came to be refixed pursuant to which the recoveries were sought to be made. Placing reliance upon the judgment of the Hon''ble Supreme Court in the case of State of Punjab and others v. Rafiq Masih (White Washer) and others, (2015) 4 SCC 334, it was submitted that the husband of the petitioner was holding the post of Conductor which was a Class III post. He submitted that it has been held by the Hon''ble Supreme Court in the aforesaid judgment that in case of hardship, recovery of excess payment would be impermissible in law and the present is a case where the recovery if made would cause hardship to the petitioner, who was a widow. It is, therefore, submitted that the impugned communications are liable to be set aside.

5. Shri V.G. Wankhede, the learned counsel for the respondents, on the other hand, submitted that the writ petition does not deserve to be entertained, as an alternate remedy was available to the petitioner under the provisions of the Payment of Gratuity Act, 1972. It was also submitted that certain disputed questions arise for consideration and hence the writ petition may not be entertained. Relying upon the judgment of the Punjab and Haryana High Court in the case of Punjab State Power Corporation Limited, Patiala v. Employees'' State Insurance Corporation, Chandigarh and Anr. 2015 II CLR 449, it was submitted that the petitioner deserves to be relegated to avail the alternate remedy. Even otherwise, he submitted that as there was some over payment made to the husband of the petitioner, the same was liable to be recovered.

6. Having heard the respective counsel and having perused the impugned communications, we are of the view that the petitioner is entitled for grant of relief.

7. The rule with regard to availing an alternate remedy, if available, is not an absolute rule and is subject to exceptions, especially when it is found that the impugned action is against the law as settled by the Hon''ble Supreme Court. The facts of the present case are such that the petitioner cannot be relegated to avail the alternate remedy. The husband of the petitioner expired on 04/06/2014. After his death, on 29/10/2014 the respondents refixed the salary of the

husband of the petitioner. Thereafter, the excess payments were sought to be recovered. In Rafiq Masih (supra), the Hon''ble Supreme Court while referring to certain situations wherein recovery sought by the employer would be impermissible, held that recovery from the employees belonging to Class III and Class IV service as well as recoveries where the Court arrives at a conclusion that the recovery if made 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 were some such situations.

8. The present is a case where the recoveries if directed would be iniquitous, harsh and also arbitrary to the extent that the same would outweigh the equitable balance of the employer''s right to recover. As stated above, the entire exercise of refixing the salary of the petitioner''s husband as well as the consequent action of recovery was initiated after the death of the petitioner''s husband. This aspect itself renders the impugned communications iniquitous and harsh. Moreover, the husband of the petitioner was holding a Class III post with the respondents. It is not the case of the respondents that the petitioner''s husband was in any manner responsible for the over payment. In this background, therefore, by following the law as laid down by the Hon''ble Supreme Court in Rafiq Masih (supra) we find that the order of recovery of amounts from the petitioner would be impermissible in law.

9. Having found the impugned exercise of seeking to recover the amount of alleged excess payment from the petitioner to be contrary to the law laid down by the Hon''ble Supreme Court, the plea that an alternate remedy is available to the petitioner would pale into the background. Once it is found that the impugned action itself is contrary to the law as laid down by the Hon''ble Supreme Court, no useful purpose would be served in relegating the petitioner to avail the alternate remedy. The ratio of the judgment in Punjab State Power Corporation Ltd. (Supra) cannot be made applicable to the case in hand. Hence, we are inclined to exercise discretion by entertaining the writ petition.

10. In view of aforesaid, it is held that the impugned action seeking to recover the alleged over payment to the husband of the petitioner after his death is contrary to law. The communications dated 08/04/2015 and 16/04/2015 are quashed and set aside. The respondents shall release the amount of gratuity of Rs. 3,96,000/within a period of six weeks from today. Other unpaid dues, if any, shall also be paid to the petitioner within a period of eight weeks from today.

11. Rule is made absolute in the aforesaid terms with no order as to costs.