

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2487 OF 2006
WITH
CIVIL APPLICATION NO.2378 OF 2009
AND
CIVIL APPLICATION NO.11127 OF 2009

- 1.The Divisional Controller,
Maharashtra State Road Transport
Corporation, Division-Latur,
Dist.Latur,
2. The General Manager (Traffic),
Maharashtra Vahatuk Bhavan,
Central Office, Mumbai-08,
3. The Regional Manager,
Maharashtra State Road Transport
Corporation, Regional Office, CIDCO,
Aurangabad.

PETITIONERS

VERSUS

1. The Maharashtra State Transport
Kamgar Sanghatana,
Latur Division, MSRTC Office,
Through Divisional Secretary,
Shri Suryakant R.Naderge
2. Shaikh Raheman Shaikh Ismail,
Age-59 years, Occu-Nil,
R/o Jai Santoshi Mata Nagar,
Yenki Road, Udgir,
Tq.Udgir, Dist.Latur

RESPONDENTS

Mrs.R.D.Reddy, Advocate for the petitioners.
Mr.M.P.Gude, Advocate for the respondents.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 26/10/2015

ORAL JUDGMENT :

1. This petition was admitted by order dated 27/04/2006.

2. On 17/04/2009, this Court passed the following order :-

“1. Heard.

2. The recovery notices issued by the petitioner were held to be improper vide the impugned order dated 30,9,2005, rendered by the Industrial Court, Latur.

3. The learned Advocate for the petitioner states that the employees are now likely to be superannuated and the recovery will become impossible. Therefore, she seeks interim relief.

4. Mr.Yenge, learned advocate appearing for the Respondent is said to have been now in the panel of advocates of the petitioner and, therefore, Mr.M.P.Gude, learned advocate has filed vakilpatra for the Respondent. The name of Mr.Yenge, be deleted and he be deemed as discharged instead of Mr.M.P.Gude's appearance be shown.

5. The petitioner is at liberty to withhold the disputed amount from the final payments to be made to the members of the Respondent No.1 at the time of payment of the retiral benefits but not from the gratuity amount and such deducted amounts be invested so as to earn proper interest. The disbursement of such invested amounts shall be subject to final decision in the

petition. The final hearing of the petition is expedited and be scheduled for final hearing in the 2nd week of November, 2009."

3. The submissions of the learned Advocate for the petitioners can be summarized in brief as under :-

- [a] The Latur Division of the MSRTC was established on 02/05/1986.
- [b] The Government Auditor raised an objection on 27/12/2001 while conducting the Government audit.
- [c] The Government Auditor points out a loss of Rs.2,51,43,000/- caused to the petitioners on account of payment of wages for 3rd day working.
- [d] The report is that several employees have earned wages for 3rd day without actually working on the third day.
- [e] Notices were issued to 671 workers contending that they have illegitimately acquired the said amounts and the said amounts therefore deserve to be recovered from them.
- [f] A specimen copy of the notice dated 02/02/2005 is placed on record by which each of the employees concerned were directed to repay small/meager amounts. In the event, they are unable to pay, same was to be deducted in installments from their salaries.
- [g] The respondent/employees preferred Complaint (ULP) No.30/2005 for challenging the impugned notice dated 02/02/2005 seeking recovery against 671 workers.
- [h] By judgment dated 30/09/2005, the Industrial Court partly allowed the complaint and set aside the notice of recovery dated 02/02/2005.

- [i] A settlement was signed between the Union and the workers with the petitioner/Organization by which the drivers and conductors agreed to work on the 3rd day by taking some rest.
- [j] The abovesaid settlement dated 16/10/1999 has not been challenged or set aside.
- [k] The Industrial Court has framed issues and has answered issue No.2 and 4 against the petitioners.
- [l] Since the amounts to be recovered were meager, the petitioner/ Corporation did not initiate disciplinary proceedings against any of the workers.
- [m] Despite these workers having not worked on the 3rd day, each of them accepted the payment even for the 3rd day as the concerned officials marked their attendance for the same.
- [n] This petition deserves to be allowed and the impugned judgment and order deserves to be quashed and set aside.

4. Mr.Gude, learned Advocate has appeared on behalf of the respondents. His submissions are as under :-

- [a] The recovery notice dated 10/06/2005 is unsustainable.
- [b] The 3rd day payment made to the respondents/workmen in between 1991 and 2000 was sought to be recovered in 2005 after the passage of about 10-15 years.
- [c] Those workmen, who worked continuously for two days and did not get any rest, were legally permitted to take rest on the 3rd day and after taking rest, they have the liberty to work on the 3rd day for a short duration.
- [d] They never denied to work on the 3rd day.
- [e] Whenever they were present on the 3rd day, their attendance

was marked by the Officials and accordingly they have got their payments.

- [f] If the average of each of the workman, who have earned their 3rd day wages, is drawn, the amounts may not be more than Rs.4,000/- to 5,000/- .
- [g] No disciplinary proceeding has been initiated by the petitioners for allegedly refusing to work on the 3rd day.
- [h] There was no act of misrepresentation or fraud played by any of the workers.
- [i] It is not the allegation of the petitioners that the respondents have earned extra money by indulging in a fraud.
- [j] The petition be dismissed as the Industrial Court has arrived at a finding on facts.

5. I have heard the learned Advocates for the respective sides and have gone through the petition paper book with their assistance.

6. The respondent No.1/Union had preferred a Complaint alleging unfair labour practices against the petitioners. A stale dispute has been dug out by the petitioners on the basis of an audit report. In the absence of the respondents having acted fraudulently, the petitioners should have caused recovery of amount from the Officers, who have allotted the duties and marked the presence of these workers. Nothing has been placed on record to indicate that stringent action has been taken by the Corporation against its

Officers for wrongfully marking the employees as “present” on the 3rd day and facilitating the payment of wages for such 3rd day.

7. It is not in dispute that the respondents/employees have not committed any fraud with an intention of drawing or gaining more money which could be termed as an act of “unjust enrichment”. It is not the case of the petitioners as well, that the respondents have manipulated the records or have committed a fraudulent act so as to earn extra wages.

8. The pattern of working for 2 days continuously and taking rest on the 3rd day for a some time and then reporting for duties, is monitored by the concerned Officers of the petitioners. It is not its case that the Officers of the petitioner/Corporation have acted hands in gloves with the employees and have therefore marked their presence on the 3rd consecutive date of working so as to enable the payment of the 3rd day wage in the absence of any actual work performed.

9. The Industrial Court has framed the following issues while deciding the complaint :-

[1] Does the complainant proved that, the respondent has

shown favoritism or partiality to one set of workers, regardless of merits as alleged under Item 5 of Sch.IV of M.R.T.U. And P.U.L.P. Act. ? --- NO

[2] Does the complainant prove that, by issuing notice of recovery of wages, the respondent has committed unfair labour practice under Item 9 of Sch.IV of M.R.T.U. And P.U.L.P. Act ? --- YES

[3] Does the complainant prove that, the respondent has indulged in unfair labour practice under Item 10 of Sch.IV of M.R.T.U. And P.U.L.P. Act ? --- NO

[4] Whether the complainant is entitled for the relief claimed ? --- YES

[5] What order ? --- YES

10. The Industrial Court has considered the aspect that the drivers and conductors operate on long distance schedule for the past several decades. Such long distance schedules are to be monitored by arranging appropriate crew members at different places. If for any reason, there is no change in crew or if the crew is not arranged for a change, these employees have to work continuously and they returned back to the depot on the third day. The practice started at Latur Division by the Officers of Petitioner/ Corporation was that those who have done their long 2 days duty consecutively, they were marked present on the 3rd day despite the fact that they were taking rest.

11. The grievance of the petitioners is that their officers have joined hands with the employees and had marked them present and had accordingly paid them the wages for the 3rd day.

12. I have considered the impugned judgment of the Industrial Court threadbare. By way of an example, the 3rd day payment can be better understood as follows :-

“Suppose “A” employee starts duty on 1st Feb. at about 6.00 (i.e. 18.00 hours) from Latur to Pune scheduled trip and he reaches at Pune on 2nd February at about 2.00 a.m. (i.e. 14 hours) then it has to be presumed by the M.T.W. Act, that, he has completed 8 hours duty on 1st February that means “A” employee has completed his duty of 1st Feb. though he reaches at Pune on 2nd Feb. After reaching at Pune “A” employee halts at Pune, takes full day rest and then starts at 11.00 p.m. i.e. (23 hours) on the same day i.e. on 2nd Feb.”

13. I do not find any evidence on record by which it could be concluded that the drivers/bus conductors were hands in gloves with the Officers and they have acted fraudulently for earning more wages without working, which could be termed as an act of “unjust enrichment”.

14. The Motor Transport Workers Act, 1961 defines a “day” u/s

2(d), as under :-

“2(d) - “day” means a period of twenty-four hours beginning at midnight:

Provided that where a motor transport worker's duty commences before midnight but extends beyond midnight, the following day for him shall be deemed to be the period of twenty-four hours beginning when such duty ends, and the hours he has worked after midnight shall be counted in the previous day;”

15. The issue, therefore, is as to who was actually responsible if at all it is established that all these 671 workers were not present on the 3rd day, were marked “present” and hence they earned their wages for the 3rd day. The petitioners could have initiated a disciplinary proceeding in any appropriate manner as it could deem fit and proper to fix the responsibility of the abovesaid act. Needless to state, it was therefore the responsibility of the petitioner / Corporation to establish that these bus drivers and conductors were getting themselves marked present on the 3rd day without actually being present. No such disciplinary proceeding was initiated by the petitioners.

16. It is immaterial as to whether the amount sought to be recovered is small or large. The said amount can be recovered if it is

established that the same was paid to the worker as the worker had acted fraudulently to earn the extra amount. Neither has the petitioner established this aspect by an in house mechanism of conducting disciplinary proceedings, nor could it bring such evidence before the Industrial Court by which it could be established that each of these 671 workers deserve to be subjected to a recovery of amounts, excessively paid.

17. The Apex Court has dealt with a similar situation in the case of Syed Abdul Qadir and others Vs. State of Bihar and others, 2009 AIR (SCW) 1871 = 2009(3) SCC 475 and State of Punjab and others Vs. Rafiq Masih (White Washer) AIR 2015 SC 1267.

18. It would apposite to reproduce the observations of the Apex Court in the State of Punjab case (supra) from paragraph Nos.4 to 10 as under :-

“4. To answer the reference, the decisions need to be considered.

5. In Shyam Babu Vienna's case (Supra), this Court while observing that the Petitioners-therein were not entitled to the higher pay scales, had come to the conclusion that since the amount has already been paid to the Petitioner, for no fault of theirs, the said amount shall not be recovered by the

Respondent-Union of India. The observations made by this Court in the said case are as under:

“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. January 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 January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them.

(Emphasis supplied)

6. In Sahib Ram Verma’s case (Supra), (1995 AIR SCW 1780) (supra), this Court once again held that although the Appellant-therein did not possess the required educational qualification, yet the Principal granting him the relaxation, had paid his salary on the revised pay scale. This Court further observed that this was not on account of misrepresentation made by the Appellant but by a mistake committed by the Principal. In a fact situation of that nature, the Court was pleased to observe that the amount already paid to the Appellant need not be recovered. In the words of the Court:

“Admittedly the Appellant does not possess the required educational qualifications. Under the circumstances the Appellant would not be entitled to the relaxation. The principal

erred in granting him the relaxation. Since the date of relaxation the Appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the Appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which Appellant cannot be held to be fault. Under the circumstances the amount paid till date may not be recovered from the Appellant.”

7. In our considered view, the observations made by the Court not to recover the excess amount paid to the Appellant-therein were in exercise of its extra-ordinary powers Under Article [142](#) of the Constitution of India which vest the power in this Court to pass equitable orders in the ends of justice.

8. In Chandi Prasad Uniyal's case (AIR 2012 SC 2951 : 2012 AIR SCW 4742) (Supra), a specific issue was raised and canvassed. The issue was whether the Appellant-therein can retain the amount received on the basis of irregular/wrong pay fixation in the absence of any misrepresentation or fraud on his part. The Court after taking into consideration the various decisions of this Court had come to the conclusion that even if by mistake of the employer the amount is paid to the employee and on a later date if the employer after proper determination of the same discovers that the excess payment is made by mistake or negligence, the excess payment so made could be recovered. While holding so this Court observed at paragraphs 14 and 16 as under:

14. We are concerned with the excess payment of

public money which is often described as "taxpayers' money" which belongs neither to the officers who have effected overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. The question to be asked is whether excess money has been paid or not, may be due to a bona fide mistake. Possibly, effecting excess payment of public money by the government officers may be due to various reason like negligence, carelessness, collusion, favouritism, etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

16. The Appellant in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the Appellants were working would be responsible for recovery of the amount received in excess

from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However we order that excess payment made be recovered from the Appellants salary in 12 equal monthly instalments.

9. In our view, the law laid down in Chandi Prasad Uniyal's case, no way conflicts with the observations made by this Court in the **other** two cases. In those decisions, directions were issued in exercise of the powers of this Court Under Article [142](#) of the Constitution, but in the subsequent decision this Court Under Article [136](#) of the Constitution, in laying down the law had dismissed the petition of the employee. This Court in a number of cases had battled with tracing the contours of the provision in Article [136](#) and [142](#) of the Constitution of India. Distinctively, although the words employed under the two aforesaid provision speak of the powers of this Court, the former vest a plenary jurisdiction in supreme court in the matter of entertaining and hearing of appeals by granting special leave against any judgment or order made by a Court or Tribunal in any cause or matter. The powers are plenary to the extent that they are paramount to the limitations under the specific provisions for appeal contained in the Constitution or **other** laws. Article [142](#) of the Constitution of India, on the **other** hand is a step ahead of the powers envisaged Under Article [136](#) of the Constitution of India. It is the exercise of jurisdiction to pass such enforceable decree or order as is necessary for doing 'complete justice' in any cause or matter.

The word 'complete justice' was fraught with uncertainty until Article [142](#) of the Constitution received its first interpretation in *Prem Chand Garg v. Excise Commissioner, U.P.*: AIR (1963) SC 996 which added a rider to the exercise of wide extraordinary powers by laying down that though the powers are wide, the same is an ancillary power and can be used when not expressly in conflict with the substantive provisions of law. This view was endorsed by a Nine-Judges Bench in *Naresh Shridhar Mirajkar v. State* of Maharashtra : (1966) 3 SCR 744 reiterated by a Seven Judge Bench in *A.R. Antulay v. R.S. Nayak*, (1988) 2 SCC 602 : (AIR 1988 SC 1531) and finally settled in the *Supreme Court Bar Association v. Union of India* : (1998) 4 SCC 409 : (AIR 1998 SC 1895 : 1998 AIR SCW 1706).

10. Article [136](#) of the Constitution of India, confers a wide discretionary power on the Supreme Court to interfere in suitable cases. Article [136](#) is a special jurisdiction and can be best described in the words of this Court in *Ramakant Rai v. Madab Rai* : (2003) 12 SCC 395 : (AIR 2004 SC 77 : 2003 AIR SCW 5633), "It is a residuary power, it is extraordinary in its amplitude, its limits when it chases injustice, is the sky itself". Article [136](#) of the Constitution of India was legislatively intended to be exercised by the Highest Court of the Land, with scrupulous adherence to the settled judicial principle well established by precedents in our jurisprudence. Article [136](#) of the Constitution is a corrective jurisdiction that vest a discretion in the Supreme Court to settle the law clear and as

forthrightly forwarded in the case of Union of India v. Karnail Singh : (1995) 2 SCC 728, it makes the law operational to make it a binding precedent for the future instead of keeping it vague. In short, it declares the law, as Under Article [141](#) of the Constitution.”

19. The petitioner has placed reliance upon the judgment of the Apex Court in the case of Shree Digvijay Cement Co.Ltd and another Vs. Union of India and another, AIR 2003 SC 767. The facts of the said case under the Industries (Development and Regulation) Act and the Cement Control Order, 1967 are different and distinct from the facts in the present case.

20. The petitioner has relied upon the judgment of the Full Bench of the Punjab and Haryana High Court in the matter of Budh Ram and others Vs. State of Haryana and others, 2009(122) FLR 1053. The Full Bench has concluded that any benefit received or obtained by an employee by reasons of fraud, misrepresentation or any act of deception would disentitle such an employee from retaining the benefit which he has fraudulently acquired.

21. In the instant case, the petitioner has not established these factors before the Industrial Court as well as in any disciplinary

proceeding.

22. Needless to state, the amounts, if already deducted, are liable to be repaid to the respondents/employees. Considering the financial condition of the petitioner/Corporation, no interest would be payable on the said amount in the event the same is returned to the employees concerned within a period of 8 weeks from today.

23. In the light of the above, I do not find that the impugned judgment of the Industrial Court could be termed as being perverse or erroneous. This petition, being devoid of merit, is therefore dismissed. Rule is discharged.

(RAVINDRA V. GHUGE, J.)