

Sl4 10.9.2020
Ct.3
GSD
as

WPA 762 of 2018

Anima Mazumder

Versus

State of West Bengal & ors.

(Via Video Conference)

Ms. Sabita Khutia (Bhunya) For the petitioner.

Read the order dated 3rd September, 2020.

Learned advocate for the petitioner submits that she had contacted Mr. Subhrangshu Panda who had represented the State-respondents before the “Lok Adalat” on 22nd August, 2020.

However, Mr. Panda has stated that he had been briefed only to appear before the Lok Adalat and he has not been instructed to represent the State in this writ petition before the Court.

Direction for filing affidavit was given on 2nd February, 2018. Learned Counsel had represented the State on that date. No Affidavit-in-opposition has been filed till date. Noboday appears for the State-respondents.

I think, sufficient opportunity has been given to the State-respondents to oppose the application and I do not

deem it necessary to adjourn the matter any further only because the State-respondents are not represented.

The petitioner's husband was a primary teacher. He retired from service on 31.1.1994 and he died on 01.10.2016. The Provident Fund payment was made by the Respondent Authority on 6.6.2000. An amount of Rs. 57,139/- was deducted on account of alleged over-drawal. Being aggrieved, the petitioner has approached this Court by way of the present writ petition.

Learned Counsel for the petitioner submitted that recovery of excess payment cannot be made from the retiral benefits of an employee unless such excess payment was made to the concerned employee because of some misrepresentation or fraud on his part. In support of her submission, Learned Counsel relied on several decisions of this court and primarily on three Supreme Court decisions in the cases of **Shyam Babu Verma-vs.-Union of India, (1994) 3 SCC 521, Syed Abdul Qadir-vs.-State of Bihar, (2009) 3 SCC 475 and State of Punjab-vs.-Rafiq Masih, (2014) 8 SCC 883**. In paragraph 12 of the last of the said three judgments, the Hon'ble Apex Court observed as follows:-

“12. 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.”

I have also considered the decision of the Hon'ble

Apex Court in **Chandi Prasad Uniyal-vs.-State of Uttarakhand, (2012) 8 SCC 417**, which is to the effect that

except in few instances pointed out in **Syed Abdul Qadir (supra)** and in **Col. B. J. Akkara-vs.-Govt. of India, (2006) 11 SCC 709**, excess payment made due to wrong/irregular pay fixation can always be recovered. I have also considered the decision of the Hon'ble Apex Court dated 29 July, 2016 delivered in **Civil Appeal No. 3500 of 2006 (High Court of Punjab & Haryana-vs.-Jagdev Singh)** to the effect that if at the time of taking benefit of a revised higher pay scale or at the time of applying for pensionary benefits the concerned employee/officer gives an undertaking/declaration that he would be liable to refund any excess payment made to him, he would be bound by such undertaking/declaration. As and when the excess payment is detected by the employer/State, the same can be recovered from the concerned employee and the same can be deducted from the pensionary benefits released in favour of a superannuating employee if such excess payment is detected prior to releasing such benefits.

I have considered the contention of the petitioner.

In **Shyam Babu Verma (supra)**, although the Hon'ble Apex Court held that the petitioners were entitled to a

lower scale of pay than they actually enjoyed, yet, since they received a higher scale of pay due to no fault of theirs, the Hon'ble Apex Court held that it shall only be just and proper not to recover any excess amount which had already been paid to them. In **Syed Abdul Qadir (supra)**, the Hon'ble Apex Court observed that the relief against recovery is granted by Courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. However in a given case, if it is proved that the employee had knowledge that he was receiving payment in excess of what he was entitled to or in cases where the arrear is deducted or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, Courts may on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. In the facts of that case, the Hon'ble Apex Court found that the excess amount that had 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.

Accordingly, the Hon'ble Apex Court held that no recovery of the amount that had been paid in excess to the appellant teachers should be made.

In **Chandi Prasad Uniyal-vs.-State of Uttarakhand (supra)**, at paragraphs 14 and 15 of the judgment the Hon'ble Apex Court observed as follows:-

"14. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. 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 Government officers, may be due to various reasons 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 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.

15. We are, therefore, of the considered view

that except few instances pointed out in Syed Abdul Qadir case (supra) and in Col. B.J. Akkara case (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered.”

In **High Court of Punjab & Haryana-vs.-Jagdev Singh (supra)**, the Hon’ble Apex Court observed that if an employee had undertaken to refund any excess amount paid to him, such excess payment could be recovered from him.

In **Col. B. J. Akkara-vs.-Govt. of India, (2006) 11 SCC 709**, the Hon’ble Apex Court held that it has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee if the excess payment was not made on account of any misrepresentation or fraud on the part of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of a rule/order which is subsequently found to be erroneous. Such relief is granted by Courts not because of any right of the employees but in equity, in exercise of judicial discretion to relieve the employee from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in

the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship, relief is granted in that behalf. But where the employee was aware that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter is in the realm of judicial discretion.

Although apparently there seems to be some conflict in so far as the aforesaid judgments of the Hon'ble Apex court are concerned, on a careful analysis and harmonious reading thereof, in fact, in my opinion, there is no conflict. Thus, **Chandi Prasad Uniyal (supra)** and **Rafiq Masih (supra)** can be reconciled by reading the two judgments as laying down the proposition that even without fraud or misrepresentation on the part of an employee excess payment made to an employee can be recovered only up to one year before the retirement of the employee and not after that.

In so far as **Jagdev Singh's (supra)** case is concerned, the same is distinguishable on facts. In that case, the concerned judicial officer availed of the revised pay scale by furnishing a specific undertaking to the effect that any excess payment which may be found to have been made will be refunded to the Government either by adjustment against future payment due **or otherwise**. (emphasis is mine). The judicial officer was compulsorily retired from service on 12 February, 2003. On 18 February, 2004, a letter for recovery of excess payment was served on him. In those facts, the Hon'ble Apex Court upheld the recovery process and observed that the principle laid down in **Rafiq Masih (supra)** that recovery from retired employees or employees who are due to retire within one year of the order of recovery, would not apply.

In the present case, the declaration of **the petitioner's husband** was as follows:-

*"I do hereby agree that the payments of the monthly bills and arrear pay bills drawn in the revised scale of pay are 'Provisional' and are subject to subsequent adjustment and that the over-drawals, if any, in this regard be recovered forthwith from my **salary bill**" (emphasis is mine).*

The form of declaration clearly means that even at

the highest, recovery of excess payment could be made by the State from the salary bill of the **petitioner's husband** during the tenure of his service. In my opinion, such a declaration would not entitle the State to recover any overdrawals from the pensionary benefits of the **petitioner's husband**. Pensionary benefits are paid to a superannuated person by way of social welfare measure to enable him to live a life of dignity which is now recognized as a fundamental right of a citizen of India. Retiral benefits are not to be lightly interfered with. Any right of the employer to recover from the pensionary benefits of an employee any excess payment received by the employee due to no fault, fraud or misrepresentation on his part is to be strictly construed. Of course, it will be a different thing altogether if the employee has fraudulently induced the employer to make the excess payment. In such a case the employer's right to recover the excess payment from the pensionary benefits of the employee cannot be doubted since fraud unravels everything. Nobody has appeared on behalf of the State to argue that the **petitioner's husband** in the present case has received excess payment by practising fraud or making misrepresentation nor that the **petitioner's husband**

was conscious that he was receiving more than he was entitled to. Moreover, it is common knowledge that such declarations are signed by an employee under compelling circumstances with no real choice in the matter. As a Learned Judge observed in one case, the choice is like choosing between the devil and the deep sea. I also draw support from the decision of a Division Bench of this Court in the Court of Asitosh Bhattacharya-vs.-The State of West Bengal, (2015) 2 CLT 339, in which the Hon'ble Division Bench considered the decisions in Shyam Babu Verma (supra), Syed Abdul Qadir (Supra), Chandi Prasad Uniyal (supra) and Rafiq Masih (supra) and held that no recovery can be made from a retired employee who is due to retire within one year from the order of recovery.

In view of the aforesaid, no recovery could be made from the retiral benefits of the **petitioner's husband** and the withholding of the sum of Rs. **57,139/-** was clearly contrary to law.

The only other question is that whether the writ petition should be entertained in spite of delay of about **18** years in approaching this Court. In a judgment and order

dated 6 September, 2010 delivered in MAT 1933 of 2010 a Division Bench of this Court held that although the petitioner had approached the Court after a lapse of nine years, no third party right had accrued because of the delay and it was only the petitioner who suffered due to non-payment of the withheld amount on account of alleged over-drawal. Accordingly the Division Bench set aside the order of the Learned Single Judge by which the writ petition had been dismissed only on the ground of delay.

Following the Division Bench judgment of this Court adverted to above, I hold that it is only the **petitioner's husband** who suffered by reason of the wrongful withholding of the aforesaid sum from his retiral benefits. Although there has been a delay of about **18** years in approaching this Court, the same has not given rise to any third party right and allowing this writ application is not going to affect the right of any third party. It may also be noted that the Hon'ble Apex Court observed in its decision in the case of **Union of India-vs.-Tarsem Singh, (2008) 3 SCC 648** that relief may be granted to a writ petitioner in spite of the delay if it does not affect the right of third parties.

In view of the aforesaid, this writ petition succeeds. The concerned Treasury Officer is directed to release the amount of Rs. 57,139/- to the petitioner along with interest at the rate of 6 per cent per annum with effect from the date of issuance of Provident Fund Payment Memo. Such payment is to be made to the petitioner within a period of 8 weeks from the date of communication of this order.

Since no affidavit-in-opposition has been invited, the allegations contained in the writ petition are deemed not to be admitted.

WPA No. 762 of 2018 is accordingly disposed of. There will, however, be no order as to costs.

Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.

(Arijit Banerjee, J.)