HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
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RSA-3874-2014 (O&M)
Decided on 30.09.2024
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Avtar Singh Hothi ... Appellant

VS.

State of Punjab & Ors. ... Respondents
****

CORAM: HON'BLE MR.JUSTICE SANDEEP MOUDGIL
****

Present: Mr. Amit Gupta, Advocate for the appellant

Mr. Jaspal Singh Guru, AAG Punjab
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Sandeep Moudgil, J.

(1). This regular second appeal under Section 100 CPC preferred by the appellant is directed against the judgment dated 01.09.2010 passed by the Civil Judge (Junior Divn.), Gurdaspur dismissing the suit of the appellant-plaintiff and judgment and decree dated 25.03.2014 passed by the Addl. District Judge, Gurdaspur.

(2). The plaintiff, Avtar Singh Hothi, has a complex history with the defendant Department, commencing with his appointment on 17.08.1972, and subsequent confirmation on 18.08.1973. His salary was fixed at Rs. 1160/- effective 01.02.1980, within the pay scale of Rs. 825-25-850-30-1000-40-1200-50-1400-60-1580, accompanied by two advance increments. Pursuant to Order No. 6176 dated 19.09.1990, the plaintiff, along with two other secretaries of the District Cooperative Union, was selected under the Common Cadre Rules, 1989, resulting in change of his designation to Manager, District Cooperative Unions. Consequently, the plaintiff was deemed a part of the common cadre of defendant No. 5 from his initial appointment date i.e. 17.08.1972. Upon his retirement w.e.f. January 31, 1995, the plaintiff was not provided with retirement benefits, including gratuity and leave salary, by defendant No. 5. In response, the plaintiff filed a suit for mandatory injunction on April 2, 1996, which was decreed with costs vide judgment and decree dated 01.02.1999. Despite this, defendant No. 5 failed to provide the plaintiff with his retirement benefits. The plaintiff subsequently filed an execution, prompting defendant No. 5 to pass an order on April 20/21, 1999, fixing the plaintiff's pay. Notably, this order was issued more than five years after the plaintiff's retirement and approximately nine years after his inclusion in the common cadre of defendant No. 5, without providing the plaintiff with prior notice or an opportunity to respond.

(3). As per the order dated 20/21-4-1999 an amount of Rs.90,809/- was deducted from the gratuity and leave salary payable to the plaintiff. An amount of Rs.61,383/- only was paid to him in the Executing Court on 23/04/1999 and vide same order, the District Cooperative Union Gurdaspur was directed to take appropriate proceeding for recovery/adjustment of excess pay drawn by the plaintiff from 01/09/1990 to 31/01/1995. The executing court vide its order dated 25/08/1999 directed defendant No.5 to pay Rs.90,809/- to the plaintiff which was deducted by it on account of the alleged excess payment of salary. The defendant No.5 challenged the interim order dated 25/08/1999 before this Court which was dismissed vide order dated 27/10/1999. Thereafter, the Audit Officer, Cooperative Societies, Gurdaspur, vide its letter dated 01/02/2000 sent a report about the alleged excess pay drawn by the plaintiff from 01/09/1990 to 31/01/1995.

(4). On 13/04/2000 the defendant No.5 submitted a reference of arbitration dispute under Section 55 of the Punjab Cooperative Societies Act, 1961 against the plaintiff for recovery of Rs.71,457/- as alleged excess salary drawn by the plaintiff from 01/09/1990 to 31/01/1995 alongwith 18% interest. The dispute raised by the defendant No.5 before the Registrar Cooperative Societies was in contravention of its own order dated 21/04/1999 whereby it was specifically ordered and directed that the matter would be taken out by District Cooperative Union, defendant No.6. A parallel arbitration case for the recovery of the alleged amount of salary paid in excess to the plaintiff to the tune of Rs.71,457/- plus interest of Rs.56,707/- plus Rs.250/- as costs, totalling Rs.1,27,413/- was also raised before the Assistant Registrar, Cooperative Societies, Gurdaspur. The Assistant Registrar Cooperative Societies, Gurdaspur appointed the Inspector, Cooperative Labour and Construction Society, Gurdaspur as an arbitrator vide order dated 30/05/2000. The plaintiff was summoned vide order dated 21/08/2000. However, in the re-audit vide report dated 01/02/2000 it was alleged that the plaintiff has drawn the excess salary for the period 19/09/1990 to 31/01/1995. This report was got done at the behest of defendant No.5 in connivance with the Assistant Registrar, Cooperative Societies, Gurdaspur.

(5). The Additional Registrar (I) Cooperative Societies passed the impugned award dated 14/05/2001 which was challenged by the plaintiff in an appeal under section 68 of the Act which was dismissed by Registrar, Coop. Societies, Punjab. He filed revision petition before the Financial Commissioner, Cooperative, Punjab which too was dismissed vide order dated 20.12.2002. Aggrieved by such order, the appellant filed the civil suit.

(6). Before the trial court, the respondent-defendants contested the suit on the ground of jurisdiction of civil court is barred by Section 82 of the Punjab Cooperative Societies Act, 1961 as well as under Section 11 of the CPC; the appellant has not complied with provisions of Section 79 of the Act. The trial court framed the following issues:-

> *1. Whether the order dated 20.12.2009 passed by defendant No.2 and the orders dated 14.01.2001, 05.12.2001 and 20.12.2002 are biased, illegal, unlawful, ultra-vires, unconstitutional, against the principles of natural justice and not binding upon the Plaintiff ? OPP*
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> *2. If issue No.1 is proved, whether the Plaintiff is entitled to the declaration as prayed for? OPP*
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> *3. Whether the Plaintiff is entitled to the relief of permanent injunction as claimed? OPP*
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> *4. Whether the Jurisdiction of the Civil Court is barred by the Provision of Section 82 of the Punjab Cooperative Societies Act, 1961? OPD*
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> *5. Whether the territorial Jurisdiction of the Civil Court is barred in the matter? OPD*
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> *6. Whether the suit is bad for want of prior notice under section 79 of the Punjab Cooperative Societies Act, 1961? OPD*
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> *7. Whether the plaintiff has no cause of action? OPD*
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> *8. Relief.*

(7). The trial court dismissed the suit of the appellant observing that as per evidence on record, the appellant being Drawing and Disbursing Officer of the respondents fixed his pay scale at the rate of Rs.825-1580 as against his entitlement of Rs.725-1200 and thus had drawn salary in excess since 01.01.1990 to 31.01.1995 and as such, the legal right of the respondents to recover the amount drawn in excess by the appellant was never barred and therefore, the award passed against the appellant in arbitration case could not be disputed through filing the suit when the matter has already been settled.

(8). The appeal filed by the appellant-plaintiff was also dismissed vide judgment dated 25.03.2014 by affirming the findings of the civil court.

(9). Learned counsel for the appellant, inter alia, submits that the judgment passed by both the courts below suffer from material illegality and perversity. The observation that excess salary was drawn by the appellant being DDO is unsustainable because the salary drawn was confirmed vide resolution dated 30.05.1980 wherein pay scale was given to all the employees of the respondent No.5. He further submits that the courts below failed to appreciate the fact that no rule was quote to show that they can recover the excess amount paid to the appellant when such benefit was legally given to the appellant.

(10). Another argument raised is that before retirement of the appellant on 31.01.1995, the audit of District Cooperative Unit was conducted since 1990 to 1996 and in all such audit reports, no objection was raised regarding the excess payment of salary to the appellant and it was only on re-audit intentionally and motivatedly got done by the respondents and that too after 5 years of his retirement i.e. in February, 2000, it was reported that excess salary for the period 1990 to 1995 was drawn by the appellant. The courts below failed to consider this aspect that even before retirement, no objection/no due certificate was granted to the appellant which means that there was nothing due against the appellant.

(11). Learned State counsel countered the submissions made by the appellant by stating that there is no infirmity apparent in the judgments passed by the courts below and the same is based on the evidence adduced by the parties and law. He submits that the appellant manipulated the record while being DDO of the Society and due to which, he drew the salary to which he was not entitled to and when this fact was noticed in the audit in February, 2020, though after retirement of the appellant, the fraud played by the appellant came to light and the department started recovery proceedings against the appellant and such liberty was also given in the arbitration proceedings. Reliance was placed on ***Thomas Daniel vs. State of Kerala & Ors. (2022) LiveLaw SC 438*** to contend that if it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time or wrong payment, the matter being in the realm of judicial discretion, the courts may order recovery of amount paid in excess.

(12). Heard learned counsel for the parties and gone through the record.

(13). Learned counsel for the parties are ad idem to submit that the only substantial question of law that arises for consideration before this court is whether the recovery on account of wrong fixation of pay could be effected from the appellant keeping in view the fact that he retired in the year 1995 and recovery orders were passed in the year 2001.

(14). In this regard, reference can be made to ***Chandi Prasad Uniyal & Ors. vs. State of Uttarakhand & Ors. (2012) 8 SCC 417***. It may be noted here that the petitioners Chandi Prasad Uniyal and others were serving as Teachers and they approached High Court of Uttarakhand and then Supreme Court against recovery of overpayment due to wrong fixation of 5th and 6th

Pay Scales of Teachers/ Principals, based on the 5th Pay Commission Report. In the context noted above, Apex Court in Paragraphs 6, 7 & 8 of the decision rendered in ***State of Punjab vs. Rafiq Masih, (2015) 4 SCC 334***, has observed thus:-

> *"6. In view of the conclusions extracted hereinabove, it will be our endeavour, to lay down the parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In our considered view, the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee.*
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> *7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.*

> *8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. <u>If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover</u>."*

[Emphasis supplied]

(15). The parties are not in conflict on facts. Appellant's case is squarely covered by the aforesaid decision of Supreme Court. The appellant retired from service w.e.f. 31.01.2005 after rendering 22 years 5 months of service and even thereafter, no retiral/pensionary benefits were released to him and ultimately only on filing of civil suit and subsequent execution, the respondents granted such due benefits after more than 5 years of his retirement. It is also an admitted position of fact that the service record throughout remained with the respondents and no doubt, the appellant was the DDO, but the salary of the employees of the Society is paid as per the decision of the Managing Committee.

(16). The question that hinges on the respondents is why their lapse of payment of excess salary could not be detected in the preceding Audit reports from 1990 to 1996 and why it took five years for them to detect such error for which the appellant apparently cannot be held liable to pay. As far as the proceedings and liberty given by the Executing Court is concerned, it was on the assertion made by the respondents that liberty was given for recovery proceedings and that observation cannot be made the basis for recovery keeping in view the overall facts as placed before this Court.

(17). The Courts below or even the quasi-judicial authorities before whom the matter regarding excess payment was brought for recovery of Rs.71,457/-, there was no material placed to show that if any opportunity was given by the respondents to defend his case. It is well settled that before any recovery action is taken, a show-cause notice must be issued to the concerned employee which is missing in the present case. This notice should inform them of the decision to rectify the order that led to the overpayment, allowing the employee an opportunity to represent against the decision. In the wake of such circumstances, the recovery made from the appellant would be iniquitous and harsh to such an extent that it would far outweigh the equitable balance of employees' right to recover.

(18). Accordingly, this appeal is allowed and the judgment dated 01.09.2010 passed by the Civil Judge (Junior Divn.), Gurdaspur dismissing the suit of the appellant-plaintiff and judgment and decree dated 25.03.2014 passed by the Addl. District Judge, Gurdaspur are hereby set aside.

30.09.2024
V.Vishal

(Sandeep Moudgil)
Judge

1. Whether speaking/reasoned? ***Yes/No***
2. Whether reportable? *Yes/No*