

(2019) 02 CAL CK 0028

In the Calcutta High Court

Case No : Writ Petitions (Wp) No 19139 (W) Of 2018

Aloke Kumar Sarkar

APPELLANT

Vs

National Insurance Company Limited & Ors.

RESPONDENT

Date of Decision : 15-02-2019

Acts Referred:

Payment of Gratuity Act, 1972 — Section 5, 13
Code Of Civil Procedure, 1908 — Section 60
Constitution Of India, 1950 — Article 14

Citation : (2019) 02 CAL CK 0028

Hon'ble Judges : Arijit Banerjee, J

Bench : Single Bench

Advocate : Soumya Majumdar, Victor Chatterjee, R.L. Mitra. Ranjay De, Basabjit Banerjee

Final Decision : Disposed Off

Judgement

Arijit Banerjee, J

(1) The material facts of the case are that the petitioner joined service under the respondent No.1 (in short NICL) in or about October, 1979. He superannuated from service on 30 April, 2016 as Development Officer, Grade - I, (Marketing).

(2) By an inter-office communication dated 27 April, 2016 issued by the Administrative Officer of the Accounts Department of NICL, a copy whereof was marked to the petitioner, the terminal dues of the petitioner were assessed at Rs.18,47,456/- (Rs.11,86,035/- on account of Gratuity and Rs.6,92,380/- on account of Leave Encashment). After his superannuation, by a letter dated 2 May, 2016, the petitioner requested the respondent No. 2 being the Deputy General Manager, NICL to clear his retiral dues in terms of the communication dated 27 April, 2016.

(3) On 4 May, 2016, the petitioner received a communication from the respondents wherein a 'Revised' amount of terminal benefit to the tune of

Rs.10,07,325/- on account of Gratuity and Rs.5,87,356/- on account of Earned Leave Encashment was stated to be payable to the petitioner. No reason for the 'Revision' was not mentioned in the said communication.

(4) On the same day i.e. 4 May, 2016 the respondent No. 3 being the Branch Manager, Ballygunje branch of NICL issued a communication informing the petitioner that a sum of Rs.7,25,710/- was being recovered from the terminal dues of the petitioner as per direction of the Audit Department.

(5) The petitioner made representations to the respondents protesting against such recovery. Not having received any response, the petitioner has approached this Court by way of the present writ petition.

(6) Mr. Majumdar, learned counsel for the petitioner submitted that the petitioner has an unblemished service record, no disciplinary action was ever taken against him. The petitioner was never informed as to why the aforesaid recovery was being made from his retiral benefits. No opportunity was given to the petitioner to deal with any purported reason for such recovery. Such recovery has been made in flagrant breach of the principles of natural justice.

(7) When the writ petition was moved, by an order dated 4 October, 2018 the Regional Manager (Personnel) of NICL was added as a respondent in the writ petition and he was directed to file a report in the form of an affidavit in response to the allegations made in the writ petition. Such report was filed on 30 January, 2019. The stand of the Insurance Company in the said report may be summarized as follows:-

(a) By an e-mail dated 29.4.2016 the Insurance Company's office to which the petitioner was attached prior to his superannuation, was intimated that as per documents received from the Combined Audit Cell, the basic salary of the petitioner was to be decremented by three stages with effect from 01.04.2016. Accordingly, the gratuity and earned leave encashment payable to the petitioner on his superannuation were reduced proportionately.

(b) The recovery in the instant case pertains to dispute regarding incentive payment to the petitioner in lieu of brokerage. By an e-mail dated 10 July, 2013 the Ballygunge Branch of the Insurance Company to which the petitioner was attached was informed that for the purpose of giving incentive on co-insurance share it was necessary to have a letter from the insured addressed to the leader Insurance Company in connection with placement of percentage of share to another office and clearly mentioning the name of the Development Officer of the said office under whose code the share premium has been booked, failing which, no credit would be given to the Development Officer for incentive purpose. It was further mentioned that if any incentive was released on co-insurance share premium without the said document, the same was to be recovered.

(c) It has come to light that no such letter has been received from the insured in connection with placement of percentage of share of co-insurance business to

the petitioner for the entire period in question that is 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16. Hence, the petitioner was not entitled to receive the incentive that he was paid.

(d) The petitioner must have been aware of the aforesaid case. Hence, there cannot be any legitimate reason for the petitioner to be aggrieved.

(8) Mr. Majumdar, learned Counsel for the petitioner submitted as a legal proposition that any alleged over payment to an employee during his service tenure cannot be recovered from his retiral benefits unless such over payment was induced by some misrepresentation or fraudulent act on behalf of the petitioner. In support of this proposition, Mr. Majumdar relied on the decision of the Hon'ble Apex Court in the case of State of Punjab-vs.-Rafiq Masih, AIR 2015 SC 696. In the said decision, the Apex Court referred to its earlier decisions in Syed Abdul Qadir-vs.-State of Bihar, (2009) 3 SCC 475, Shyam Babu Verma-vs.-UOI, (1994) 2 SCC 521 and Col. B. J. Akkara (Retd.)-vs.-Govt. Of India, (2006) 11 SCC 709 and observed that recovery of any alleged over payment would be iniquitous and arbitrary if it is sought to be made after the date of retirement or soon before retirement. A period within one year from the date of superannuation should be accepted as the period during which the recovery should be treated as iniquitous. Hence, it would be justified to treat an order of recovery on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement or within one year of the date of his retirement on superannuation. At paragraph 12 of the reported judgment the 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."

(9) Mr. Majumdar also referred to Sec. 13 of the Payment of Gratuity Act, 1972 and Sec. 60 of the CPC in support of his submission that the gratuity payable to a retiring employee cannot be touched by the employer.

(10) Mr. De, learned Counsel, appearing for the Insurance Company reiterated the stand taken by the Company in its report filed in the form of affidavit. He further submitted that the petitioner must have been aware that he was receiving over payment and cannot feign ignorance. With full knowledge he received payment in excess of his entitlement which has resulted in his unjust enrichment. The Insurance Company deals with public money and it is the duty of the Company to recover the amount paid to the petitioner by way of incentive erroneously.

(11) I have considered the rival contentions of the parties. While an employer ordinarily would have the right to recover any excess payment made to an employee, the Courts have negated such right in cases where exercise of such power of recovery would result in gross injustice, inequity and unfairness. As observed by the Apex Court in Rafiq Masih (supra) allowing the employer to recover alleged over payment at or nearer the time of retirement of an employee would be iniquitous, arbitrary and violative of Art. 14 of the Constitution of India because it would be almost impossible for an employee to bear the financial burden of a refund of payment received wrongfully over a long span of time. In Syed Abdul Qadir (supra), at paragraphs 27 and 28 of the judgment the Apex Court observed as follows:-

"27. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee and (b) 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 rule/order, which is subsequently found to be erroneous. 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. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected 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. See *Sahib Ram vs. State of Haryana*, 1995 Supp. (1) SCC 18, *Shyam Babu Verma vs. Union of India*, [1994] 2 SCC 521; *Union of India vs. M. Bhaskar*, [1996] 4 SCC 416; *V. Ganga Ram vs. Regional Jt., Director*, [1997] 6 SCC 139; *Col. B.J. Akkara [Retd.] vs. Government of India & Ors.* (2006) 11 SCC 709; *Purshottam Lal Das & Ors., vs. State of Bihar*, [2006] 11 SCC 492; *Punjab National Bank & Ors. Vs. Manjeet Singh & Anr.*, [2006] 8 SCC 647; and *Bihar State Electricity Board & Anr. Vs.*

Bijay Bahadur & Anr., [2000] 10 SCC 99.

28. Undoubtedly, the excess amount that has been paid to the appellants - 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. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made."

(12) It is not the case of the Insurance Company that the petitioner induced the Company to make payment of incentive erroneously by making any misrepresentation or by practising fraud. The petitioner had no role to play in such alleged over payment. The Insurance Company also has not been able to demonstrate that the petitioner was definitely aware that he was receiving moneys on account of incentive which he was not entitled to. Statements have been made in the report of the Insurance Company to the effect that the petitioner 'must have been aware' of the over payment, 'there is hardly any scope to believe that he was not aware of the same' etc. No concrete evidence would be produced wherefrom it would appear that the petitioner was definitely conscious that he was receiving over payment or payment that he was not entitled to.

There is a good chance that the petitioner was not even aware that the necessary documents, in the absence of which incentive will not be credited to him, are not on record. I am inclined to give the benefit of doubt to the petitioner. I am of the view that at the time of the petitioner's retirement, no recovery could be made by the Insurance Company of alleged over payment made to the petitioner on account of incentive.

(13) It may also be noted that it appears from an internal communication of the Insurance Company annexed as Annexure R4 to the report filed on behalf of the Company that for the performance years 2011-12 and 2012-13 the co-insurance share was placed to the credit of the petitioner under instruction from the Mumbai Office of the Insurance Company. Hence, it appears that there was nothing irregular about the same.

(14) Further, Sec. 13 of the Payment of Gratuity Act provides that no gratuity payable under the Act, and no gratuity payable to an employee employed in any

establishment, factory, mine, oilfield, plantation, port, railway company or shop exempted under Sec. 5 shall be liable to attachment in execution of any decree or order of any Civil, Revenue or Criminal Court. The proviso to Sec. 60 of the Code of Civil Procedure protects gratuities allowed to pensioners of the Government or of any employer from attachment in execution of a decree of Court. If the gratuity payable to a retired employee cannot be touched even by way of an execution of a decree passed by a court of competent jurisdiction, a fortiori, the same cannot be touched unilaterally by the employer without adjudication by a competent forum.

(15) For all the aforesaid reasons, I am of the considered opinion that the recovery of the sum of Rs. 7,25,710/- from the retiral benefits of the petitioner was illegal. Such act of the respondent-Insurance Company cannot be sustained and is set aside. The Insurance Company is directed to refund to the petitioner the said sum of Rs. 7,25,710/- with interest at the rate of 8 per cent per annum from the date following the date of the petitioner's superannuation till the date of actual payment. Such payment shall be made within 8 weeks from the date of communication of this order to the respondent-Insurance Company. If such payment is not made within 8 weeks from the date of service of this order on the Insurance Company, the rate of interest shall stand enhanced to 12 per cent per annum.

(16) WP No. 19139 (W) of 2018 is accordingly disposed of, without however, any order as to costs.

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