

(2014) 07 AHC CK 0301

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 47777 of 2012

Daya Shanker Sharma

APPELLANT

Vs

U.P. Power Corporation Ltd.

RESPONDENT

Date of Decision : 01-07-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 7 ADJ 489

Hon'ble Judges : Manoj Kumar Gupta, J

Bench : Single Bench

Advocate : B.S. Pandey and S.K. Pandey, Advocate for the Appellant; Baleshwar Chaturvedi, Ayank Mishra, Usha Kiran, Sandeep Kumar Srivastava and S.C, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Manoj Kumar Gupta, J.—Petitioner had retired as Draftsman on 31.8.2004 from Dakshinanchal Vidyut Vitran Nigam Limited (for short "Nigam"). On 15.5.2006, a circular was issued by the U.P. Power Corporation Limited, Lucknow for making available a higher 3rd time scale of Rs. 8550-13500/- to certain draftsmen/Computer (Diploma holders), possessing qualification specified thereunder. Paragraph 2 of the circular mentions that under the previous Office Notification dated 18.12.1999, draftsmen are getting 3rd Time Scale of Rs. 6500-11000/- from 1.1.1996. Paragraphs thereof, states that there has been a longstanding demand from draftsmen/Computer (Diploma holders) that in view of the provisions under the service regulations for promotion to the post of Assistant Engineer under prescribed quota of 1.33%, they be granted 3rd Time Scale equivalent to the pay scale of the Assistant Engineers.

2. Paragraph 4 thereof provided that after considering the representation of the draftsmen/computer (Diploma holder) it has been decided that such of them, who possess minimum qualification for promotion to the post of Assistant Engineer under U.P. State Electricity Board Services of Engineers Regulation,

1970 and Uttar Pradesh State Electricity Board Engineers (Civil) Service Regulations, 1970 hereinafter, referred to as the Service Regulations, 1970", shall be entitled to 3rd Time Scale of Rs. 8550-13500/- w.e.f. 1.1.1996.

3. Paragraph 1 reproduces the prescribed qualifications for promotion to the post of Assistant Engineer, which are as under:

(a) Diploma in Electrical/Mechanical Engineering issued by Universities established in India by an Act of Central/State Government; or

(b) 3 Years Diploma in Electrical/Mechanical Engineering issued by the State Board of Technical Education, or

(c) 3 Years Diploma certificate from Government Arts and Craft College Lucknow

4. The petitioner, on issuance of Board Order dated 15.5.2006, much after his retirement on 31.8.2004, made a representation dated 16.10.2006 to the Nigam for being granted revised 3rd time scale of Rs. 8550-13500/-. The same found favour with the authorities and an Office Memorandum dated 2.11.2006 was issued granting 3rd Time Scale of Rs. 8550-13500/- to the petitioner w.e.f. 1.1.1996. The order, however, mentions that in case there is any error in the order fixing pay, then it shall be subject to amendment and further, in case any excess payment is made, the same shall be recoverable from the pensionary benefits. On basis of the said order, the petitioner received arrears of revised pay scale amounting to Rs. 2,09,911/- in February, 2007.

5. It seems that the matter came to the knowledge of the higher authorities that the benefit of 3rd Time Scale under Board Order dated 15.5.2006 has been given to certain retired employees, who do not possess qualification stipulated thereunder and whereupon, the Chief Engineer issued an order dated 9.9.2008 requiring the authorities to keep in abeyance the implementation of such orders till each case is scrutinized. It was further noted that in most of the cases, the officers who were not even authorised to issue order for pay fixation, have passed such orders. It was followed by Office Memorandum dated 6.10.2009 issued by Chief Zonal Engineer, by which earlier order dated 2.11.2006 relating to pay fixation of the petitioner in the revised scale, was cancelled. Another order of the even date was issued by the office of the Executive Engineer requesting Accounts Officer (Pension) to re-fix the pension/gratuity and other retiral benefits of the petitioner. Yet, another order dated 7.10.2009 by Executive Engineer required the petitioner to deposit Rs. 2,09,911/- paid to him in excess on account of wrong fixation of pay, by wrongly extending the benefit of Boards order dated 15.5.2006. Admittedly, in pursuance of the said order, the petitioner had deposited the requisite amount on 17.12.2009. After lapse of about three years, the petitioner has filed the present writ petition in the year 2012 for quashing the order dated 6.10.2009, whereby, earlier order dated 2.11.2006 was cancelled and the order of the same date requesting the Accounts Officer (Pension) to re-fix the pension of the petitioner and also the order dated 7.10.2009 directing recovery of Rs. 2,09,911/- and for a mandamus directing the

respondents to reimburse the petitioner to the extent of Rs. 2,09,911/- said to have been illegally recovered from him.

6. The respondents have filed counter-affidavit and supplementary counter-affidavit and with consent of learned counsel for the parties, the writ petition was heard finally as per Rules of the Court.

7. The first contention of learned counsel for the petitioner was that the petitioner, who possess Draftsman certificate of two and half years duration from Aligarh Muslim University, was rightly accorded the benefit of the Boards order dated 15.5.2006. It is contended that the qualification possessed by the petitioner fulfills the requirement laid down under the Service Regulations, 1970.

8. Perusal of the Appendix A and C to the Service Regulations, 1970 demonstrates that for being considered for promotion to the post of Assistant Engineer, the candidate should possess any one of the following qualifications:

(a) 3 Years Diploma in Electrical/Mechanical/Civil/Computer Engineering issued by the State Board of Technical Education, or

(b) Diploma in Electrical/Mechanical/Civil/Computer/Engineering issued by Universities established in India by an Act of Central/State Government, or

(c) 3 Years Diploma certificate from Government Arts and Craft College, Lucknow." (Under Uttar Pradesh State Electricity Board Assistant Engineers (Civil) Service Regulations, 1970)

9. Admittedly, the petitioner holds certificate in Draftsmanship (Mechanical) from Aligarh Muslim University, Aligarh. It is not a diploma course in Engineering and is thus not covered by qualifications stipulated under clause (a) and (b) mentioned above. It is also not a Diploma certificate from Government Arts and Craft College, Lucknow and thus, is not covered by clause (c). It is, thus, abundantly clear that the petitioner does not possess the qualification prescribed under the regulations for being promoted to the post of Assistant Engineer.

10. Learned counsel for the petitioner submitted that under the Uttar Pradesh Services of Engineers(Irrigation Department) (Group B) Rules, 1993, the certificate of draftsmanship possessed by the petitioner is recognized for promotion to the post of Assistant Engineer, and thus, the petitioner is entitled to its benefit. However, it is not disputed that petitioner is not an employee of the irrigation department. Therefore, these rules would not apply to the petitioner. Argument in this regard is wholly misconceived.

11. Learned counsel for the petitioner further submitted that under Office Memorandum dated 11.3.1970, two and half years Draftsman certificate from Aligarh Muslim University has been recognised for granting scale of Rs. 160-280/- to draftsmen. It is contended that the said Office Memorandum demonstrates that a draftsman holding such certificate is treated to be a fully qualified draftsman. It was, thus, argued that the qualifications prescribed under

the Service Regulations, 1970 should not be read in isolation but alongwith Office Memorandum dated 11.3.1970.

12. I have gone through the Office Memorandum dated 11.3.1970 and I find that it only relates to grant of scale of Rs. 160-280/- to draftsmen treating them to be fully qualified draftsmen under the Board, provided they possess any one of the qualifications mentioned thereunder. There is no dispute that the respondents have treated the petitioner as a fully qualified draftsman, as he possessed the draftsman certificate of two and half years duration from Aligarh Muslim University. However, for entitling the petitioner to 3rd Time Scale under the Boards order dated 15.5.2006 equivalent to the pay scale for the post of Assistant Engineer, it was essential that the incumbent should be having qualification, which would entitle him to promotion to the post of Assistant Engineer. Thus, only those draftsmen who are otherwise qualified for being promoted to the post of Assistant Engineer, but who could not be so promoted, have been given 3rd Time Scale equivalent to the pay scale for the post of Assistant Engineer. For the said purpose, the qualification prescribed under Office Memorandum dated 11.3.1970 for treating a person to be fully qualified draftsman, is of no relevance. Thus, the argument of learned counsel for the petitioner in this regard has no force and cannot be accepted. That being the position, the fixation of pay scale of the petitioner by order dated 2.11.2006 was erroneous and has been rightly cancelled by order dated 6.10.2009. The consequential order of even date requesting the Accounts Officer (Pension) to revise the pension and other terminal dues is also perfectly valid.

13. The next submission of learned counsel for the petitioner is that the order for recovery dated 7.10.2009 was wholly illegal, as there was no misrepresentation of any fact by the petitioner nor any fraud has been practiced. It is, thus, contended that even if the respondents were empowered to correct the mistake regarding fixation of 3rd Time Scale and the consequential order for revising the pension and other terminal dues, but it does not warrant recovery of the amount already paid to the petitioner under order dated 2.11.2006.

14. Controversy in this regard is no more res integra and now stands settled by various judgments of Apex Court, which were considered by this Court in Writ Petition No. 55887 of 2013, Onkar Nath Srivastava v. State of U.P., decided on 8.10.2013, wherein it was held as under:

9. Now very recently, the Apex Court in Chandi Prasad Uniyal and others v. State of Uttarakhand and others, 2012(3) UPLBEC 2057, has said that there is no such principle of law that wrong payment made to an employee can be recovered only in those cases where he is guilty of fraud and misrepresentation, and not otherwise. The Court has distinguished all its earlier decisions in Shyam Babu Verma (Supra), Sahib Ram (Supra), State of Bihar v. Pandey Jagdishwar Prasad, (2009)2 SCC 117 and Yogeshwar Prasad and others v. National Institute of Education Planning and Administration and others, (2010) 14 SCC 323. In paragraphs 9, 15, 16 and 18 of the judgment the Court has said:

9. We are of the considered view, after going through various judgments cited at the bar, that this Court has not laid down any principle of law that only if there is misrepresentation or fraud on the part of the recipients of the money in getting the excess pay, the amount paid due to irregular/wrong fixation of pay be recovered.

"15. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy."

"16. 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 situation. 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 of 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."

"18. Appellants 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 the excess payment made be recovered from the appellant's salary in twelve equal monthly instalments starting form October 2012. The appeal stands dismissed with no order as to costs. IA Nos. 2 and 3 are disposed of."

10. The Apex Court further held that decision in Shyam Babu Verma (Supra), Sahib Ram (Supra), Yogeshwar Prasad (Supra), etc. are all decided on their own facts and do not lay down any principle of law, restraining recovery of excess payment of salary from the concerned employee. On the contrary, in para 17 of the judgment the Court said that except few instances pointed out in Syed Abdul Qadir and others v. State of Bihar and others, (2009) 3 SCC 475 and in Col. B.J.

Akkara (Supra), excess payment due to wrong/irregular pay fixation can always be recovered.

19. The excess money received by petitioner is not anybody's private money but it has come from the coffer of public exchequer. It is a public money contributed by tax payers and hard earned money of public at large. If an excess money is allowed to be retained by a person who is not authorised, that would result in denying user and consumption of that money other than the purpose for which it is meant.

20. Administration, whether in executive or judiciary, holds public funds in trust and with responsibility of spending it strictly in the manner they are required to do so and not to enrich anyone or waste money by its unmindful, unauthorised and illegal acts. If any such thing has happened even if unknowingly and indeliberately, the administration is legally, morally and by any standard of civilised society, is bound to restore back such wasteful expenditure to the public exchequer so that it may thereafter be utilised in the manner and for the purpose, so prescribed. Any attempt on the part of administration to allow an employee to retain certain money, which the Administration has wrongly paid to him, though the employee was not entitled to the same, or, any act on the part of administration, in not realising the said amount from the employee, is liable to be treated as breach of trust. Such decision would amount to not only waste of public money but also an attempt to perpetuate an illegal act. It is not a private property to which one can show any attitude of charity and so called broad heart and magnanimity. This would be against any principle of administrative law. Simultaneously, an employee if retains something which he did not owe, he being also equally responsible to the public and public fund holding an office of trust, is bound to return/refund it.

15. In view of the above judgments, it cannot be accepted that recovery can only be made if there is fraud or misrepresentation. On the contrary, it has now been held that in case of erroneous fixation of pay, the order can be revised and excess payment should normally be recovered except for certain cases.

16. In the present case, the order dated 2.11.2006 itself provided that in case of wrong fixation, the order can be amended and amount paid in excess shall be recovered. The petitioner being conscious of the said condition, very fairly deposited the requisite amount on 17.12.2009. Though, the petitioner now claims that the aforesaid deposit was made under protest, but there is no evidence in this regard. It further seems that the petitioner felt content with the order passed by the authorities dated 7.10.2009 for recovery of excess amount but suddenly after about two and half years, he started corresponding with the authorities and thereafter, filed the present writ petition in the year 2012. In such circumstances, it is not a case where any fault can be attributed to the authorities, in recovering the excess amount, to warrant interference in exercise of power under Article 226 of the Constitution.

17. In the last, a feeble attempt was made on behalf of the petitioner to contend that in similar circumstances, one Ramesh Chandra Tiwari was granted promotion to the post of Assistant Engineer and, therefore, the action of the respondents in this regard is arbitrary and discriminatory. Assertion in this regard has been made in paragraph 21 of the writ petition and in paragraph 7 of the supplementary-affidavit.

18. I have perused the assertions made in these paragraphs and I find that the averments made are absolutely vague. In none of these paragraphs, it is stated that Ramesh Chandra Tiwari also possess the same qualification as the petitioner or that he does not possess the qualification prescribed under the Service Regulations, 1970 and yet he was promoted. In view of the above, plea of discrimination raised by the petitioner cannot be considered. Further, I am of the opinion that even assuming that Ramesh Chandra Tiwari was erroneously granted promotion, the same would not warrant grant of 3rd Time Scale to the petitioner, to which he was not entitled to. There is no estoppel in this regard against the respondents. Plea of negative equality is not tenable in law, as held by the Apex Court in the case of *State of West Bengal v. Dabasish Mukherjee*, (2011) 14 SCC 187, wherein it was held as under:

26. It is now well-settled that guarantee of equality before law is a positive concept and cannot be enforced in a negative manner. If an illegality or an irregularity has been committed in favour of any individual or group of individuals, others cannot invoke the jurisdiction of Courts and Tribunals to require the state to commit the same irregularity or illegality in their favour on the reasoning that they have been denied the benefits which have been illegally or arbitrarily extended to others. [See : *Gursharan Singh v. New Delhi Municipal Administration*, 1996 (2) SCC 459, *Union of India v. Kirloskar Pneumatics Ltd.*, 1996 (4) SCC 433, *Union of India v. International Trading Co.*, 2003 (5) SCC 437, and *State of Bihar v. Kameshwar Prasad Singh*, 2000 (9) SCC 94.]

27. This question was exhaustively considered in *Chandigarh Administration v. Jagjit Singh*, 1995 (1) SCC 745, wherein this Court explained the legal position thus : (SCC p. 750, para 8)

8.....The basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Generally speaking, the mere fact that the authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extra-ordinary and discretionary power of

the High Court cannot be exercised for such a purpose. By refusing to direct the respondent-authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law.

19. No other submission was made by learned counsel for the petitioner. In view of the discussions made above, the writ petition lacks merit and is dismissed.