
(2010) 11 AHC CK 0099

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 18358 of 2008

Dr. Avinash Chand Goel

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 29-11-2010

Acts Referred:

Contract Act, 1872 — Section 72

Citation : (2011) 7 ADJ 232 : (2011) 3 UPLBEC 2324

Hon'ble Judges : Sunil Ambwani, J; Jayashree Tiwari, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Heard Shri Ram Mohan, Learned Counsel for the Petitioner. Learned Standing Counsel appears for the State Respondents.

2. The Petitioner retired as Senior Medical Officer (Stores) serving in the office of Chief Medical Officer, Muzaffarnagar w.e.f. 21.12.2004. A letter was sent to him by Director (Pensions), Indra Bhawan, Lucknow on 31.5.2005, alleging that he was wrongly given the pay-scales w.e.f. 1.1.1986. He was directed by letter dated 14.12.2005, of Chief Medical Officer, Muzaffar Nagar to deposit Rs. 1,76,950/- for releasing the terminal benefits.

3. The Petitioner deposited Rs. 23,950/- on 26.12.2005, and thereafter in pursuance to the letter of the Chief Medical Officer, Muzaffarnagar dated 27.12.2005, he deposited the remaining amount of Rs. 1,53,000/-, as a condition for releasing his terminal benefits. The pension payment order was issued on 28.2.2006. The Petitioner made a protest to the wrong fixation and recovery and prayed for refund of Rs. 1,76,590/-, which was deposited by him under duress to avail the remaining terminal benefits. The representation dated 6.10.2006 has not been decided and instead a letter was sent by the Deputy Director of Pension to the Chief Medical Officer, Muzaffarnagar on 18.6.2007 informing him that the senior scale and the notional promotion on the post of

Joint Director were allowed to the Petitioner without approval of the competent authority.

4. Learned Counsel for the Petitioner states that the Petitioner was not required to deposit the excess amount nor any adjustment was allowed to be made in the pension payment order. The pay was wrongly fixed by the Respondents, by giving the pay-scales at the relevant time for which the Petitioner was not responsible. There is no allegation of misrepresentation or fraud played by the Petitioner in fixing the pay-scales, and thus the excess amount cannot be recovered after a long period of time at the time of settlement of the retiral dues. The counsel appearing for the Petitioner has relied upon the Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, 11 November, 2010, in which the Constitution Bench held that there is a difference between mistake of fact, and mistake of law. The true principle is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise, that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same. Where it is established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. There is no distinction between a tax liability and the liability u/s 72 of the Contract Act and in such case the question of estoppel does not arise. In paragraphs 28 and 29 the Supreme Court observed as follows:

28. The principle of estoppel which has been adverted to by the Privy Council in AIR 1949 297 (Privy Council) as disentitling the Plaintiff to recover the monies paid under mistake can best be illustrated by the decision of the Appeal Court in England reported in *Holt v. Markham*, (1923) 1 KB 504 where it was held that as the Defendant had been led by the Plaintiffs' conduct to believe that he might treat the money as his own, and in that belief had altered his position by spending it, the Plaintiffs were estopped from alleging that it was paid under a mistake; and this brings us to a consideration of point No. 2 above stated.

29. Re: (ii) Whether the principle of estoppel applies or there are circumstances attendant upon the transaction which disentitle the Respondent to recover back the monies, depends upon the facts and circumstances of each case. No question of estoppel can ever arise where both the parties, as in the present case, are labouring under the mistake of law and one party is not more to blame than the other. Estoppel arises only when the Plaintiff by his acts or conduct makes a representation to the Defendant of a certain state of facts which is acted upon by the Defendant to his detriment it is only then that the Plaintiff is estopped from setting up a different state of facts. Even if this position can be availed of where the representation is in regard to a position in law, no such occasion arises when the mistake of law is common to both the parties. The other circumstances would be such as would entitle a Court of equity to refuse the relief claimed by the

Plaintiff because on the facts and circumstances of the case it would be inequitable for the Court to award the relief to the Plaintiff. These are, however, equitable considerations and could scarcely be imported when there is a clear and unambiguous provision of law which entitles the Plaintiff to the relief claimed by him.

5. It is submitted that the Supreme Court has applied the same principle in respect of the repayment of the benefits drawn in pursuance to erroneous fixation of the pay-scales and the consequential benefits given to the Government servant without any misrepresentation on his part. In *B.N. Singh v. State of U.P. and Anr.* 1979 ALJ 1184 ; *Shyam Babu Verma and Others Vs. Union of India (UOI) and Others*, *Gabriel Saver Fernandes and Others Vs. State of Karnataka and Others*, and in *Surya Dev Mishra v. State of U.P. and Ors.* 2006 (1) ADJ 467 (AII)(FB) : 2006 (1) ESC 379 (AII)(FB) the same principle has been followed. The judgments in *Dr. Nahar Singh Pal v. State of U.P. and Ors.* Writ Petition No. 39693 of 2007 decided on 20.11.2008 and in *Rajendra Prasad Nigam v. State of U.P. and Ors.* 2007 (10) ADJ 413 (DB) by the High Court, also lay down the same principle of law.

6. It is stated in paragraphs 4 and 5 of the counter-affidavit of Shri Rajendra Kumar Pandey, Assistant Accounts Officer, Pension Directorate, U.P. Lucknow that after receiving the pension papers of the Petitioner, the office of the answering Respondent examined the pension paper and it was found that some mistake was committed by the department in wrongly calculating Petitioner's pay-scale and consequential recovery was directed. Paras 4 and 5 of the counter-affidavit is quoted as below:

4. That in reply to the contents of paragraph No. 4 of the writ petition, it is submitted that after receiving the pension paper of the Petitioner, office of the answering Respondent examined the pension paper of the Petitioner and it was found that there was some mistake committed by the department and wrongly calculated the Petitioner's pay-scale. Thereafter, the Respondent No. 3 Chief Medical Officer prepared a fresh pay fixation chart of the Petitioner and also calculated the excess amount which was already paid to the Petitioner. On the basis of the chart it was calculated by the Respondent No. 3 the Petitioner himself refund the excess amount of Rs. 1,76,950/- in the treasury on 15.4.2006.

5. That the contents of paragraph Nos. 5, 6, 7 and 8 of the writ petition are not admitted hence denied. In reply it is submitted that the Petitioner's pension matter finally decided on 12.8.2005 and the pay fixation of the Petitioner corrected by the Respondent No. 3 and the Petitioner himself requested to correct the salary of the Petitioner and the same has been accepted by the Respondent No. 3 and the Petitioner's pay-scale was corrected by the Respondent No. 3 on 12.8.2005 and on the basis of the corrected pay-scale pension of the Petitioner was fixed by the department. It is further submitted that amount which was mentioned by the Petitioner in the writ petition not admitted hence denied. In fact the exact amount is Rs. 3000/- which was

stopped by the answering Respondent. It is further submitted that on the basis of the correction order dated 14.12.2005 (Respondent No. 3) sent a proposal to the office of the answering Respondent.

7. In the present case the established principle of law, that a person cannot be asked to repay the amount, which was not due to him, but has been paid to him without any misappropriation or fraud, is squarely applicable. In this case the Petitioner had protested even to the alleged wrong fixation of the pay. He has given details of his entitlement for the correctness of the applicability of the pay-scale and the benefits to be drawn by him under the orders of the Supreme Court in Chandra Prakash's case in, which not only the seniority but consequential benefits were also allowed to be given to those medical officers who were to be given promotions. In such case, the principle of law "no work no pay" will not be applicable.

8. We do not find substance in the contention of learned Standing Counsel, that the Petitioner had voluntarily deposited Rs. 1,76,950/-, without any coercion or threat. The Petitioner retired on 21.12.2004. His retirement dues and pension were not paid to him. The Chief Medical Officer, Muzaffarnagar was warned by the Director (Pensions) in the letter dated 31.5.2005 that, he is responsible for fixation of pay on the basis of entries in service book. The pension payment order was issued after deducting Rs. 3000/- and Rs. 1,50,000/- towards commutation, and for directions not to pay any arrears unless Petitioner deposits the excess payment in lieu of pay fixations in the past. In these circumstances, in order to receive full amount of retiral dues, without which a pensioner can hardly survive, the Petitioner deposited the difference, and made a protest to the recovery.

9. For the aforesaid reasons, we allow the writ petition. The impugned orders dated 26.12.2005 and 15.4.2006 directing the Petitioner to deposit Rs. 1,76,950/-with interest which the Petitioner has deposited, is set aside. The Petitioner will be entitled to refund of the amount deposited by him, as above without any interest. His pending representation for considering him for notional promotion and consequential benefits in terms of the office orders dated 2.2.2005 and 2.3.2005 shall be considered expeditiously.