

(2018) 09 UK CK 0088

In the Uttarakhand High Court

Case No : Writ Petition (S/B) No. 415 of 2014, Writ Petition (S/B) No. 139 of 2016, Writ Petition (S/B) No. 167 of 2015, Writ Petition (S/B) No. 490 of 2015, Writ Petition (S/B) No. 107 of 2016, Writ Petition (S/B) No. 111 of 2016, Writ Petition (S/B) No. 130 of 20

Dr. Ramesh Prasad Nautiyal & others

APPELLANT

Vs

State of Uttarakhand & others

RESPONDENT

Date of Decision : 25-09-2018

Acts Referred:

Citation : (2018) 09 UK CK 0088

Hon'ble Judges : Rajiv Sharma, ACJ; Manoj Kumar Tiwari, J

Bench : Division Bench

Advocate : K.P. Upadhyaya, M.C. Pant, P.S. Rawat, Pankaj Negi, Pradeep Joshi

Final Decision : Allowed

Judgement

Manoj K. Tiwari, J.

1. Since common question of fact and law are involved in these petitions, therefore, all these writ petitions are being heard and decided by this

common judgment. However, for the sake of convenience, facts of WPSB No.415 of 2014, are being taken into consideration for disposal of these matters.

2. The relief, sought in WPSB No.415 of 2014, are as follows:-

(i) Issue a writ, order or direction in the nature of Certiorari calling for the records and quashing the impugned annexure 1 order dated 29.05.2014 and

annexure 2 order dated 27.10.2014 issued by the State Govt.

(ii) Issue a writ, order or direction in the nature of mandamus restraining the respondents from making any recovery from the petitioners of any

amount already paid to them in accordance with the law made by the State Govt.

3. The key facts, necessary for adjudication of the writ petition, are that the petitioners were given ad-hoc appointment as Ayurvedic Medical Officer

by Government of Uttar Pradesh by means of different Government Orders issued in the year 1988. The said appointment was for a period of one

year or till availability of regularly selected candidate through Public Service Commission, whichever is earlier. However, petitioners were permitted to

serve uninterruptedly till their services were regularized by successor State of Uttarakhand, w.e.f. 27.01.2006. Before State reorganization,

Government of Uttar Pradesh had issued a Government Order dated 05.02.1998 to Director, Ayurvedic & Unani Department, Uttar Pradesh in which

it was provided that ad-hoc service, rendered by Ayurvedic Medical Officers, shall be taken into account for computing eight years of continuous

satisfactory service, but they shall be given benefit of personal pay, only after regularization of their services. It was further clarified in the said order

that benefit of personal pay scale shall not be payable, merely on completion of eight years of continuous satisfactory service but it shall be payable

only after regularization of Ayurvedic Medical Officer.

4. On 04.08.2011, Principal Secretary, Department of Ayush, Government of Uttarakhand issued an order providing that after their regularization, ad-

hoc services rendered by Ayurvedic Medical Officers shall be taken into account for grant of personal/promotion pay scale which is payable upon

completing 8 / 14 years of service.

5. Since the aforesaid Government Order dated 04.08.2011 was not being implemented, therefore, some Ayurvedic Medical Officers filed writ

petition, being WPSB No. 396 of 2012, before this Court. The said writ petition was disposed of vide order dated 07.05.2013 in view of the statement

made by learned Standing Counsel for the State that the order dated 04.08.2011 conveys the decision of the State Government. The order dated

07.05.2013 passed in the said writ petition is extracted below:-

â??In the previous round of litigation, petitioners wanted the benefit of the decision of the State of Uttar Pradesh taken on 5th February, 1998

regarding grant of next higher scale of pay after completion of 14 years of service. On that writ petition, an order was passed directing the

Government to consider the said claim. The Government considered the said

claim and, by an order dated 8th April, 2011, rejected the claim on the ground that the petitioners have not completed 14 years of service after they became substantially appointed in the State. In the present writ petition, petitioners are contending, to which contention there appears to be no dispute, that before the petitioners were substantially appointed as Government employees, they worked for a considerable period of time as ad hoc employees. It has been contended that on 4th August, 2011, Government has taken a decision to give benefit of the decision dated 5th February, 1998 after counting the period of service rendered by an employee on ad hoc basis. No counter affidavit has been filed. Yesterday, learned Standing Counsel was asked to take instructions, whether the communication dated 4th August, 2011 conveys the decision of the Government. He has submitted that the same is the decision of the Government, which has been communicated by the Principal Secretary of the Department.

2. That bring the situation, we dispose of this writ petition by directing the Government to consider grant of the next higher scale of pay to the petitioners upon completion of 14 years of service in terms of the Government decision dated 4th August, 2011 as quickly as possible. But not later than three months from the date of service of a copy of this order upon the Principal Secretary of the Department.â??

6. Thereafter, State Government sought recall of the aforesaid order dated 07.05.2013 by filing an application (NO. 27 of 2014) on the ground that the order dated 4. 08.2011 issued by Principal Secretary, Department of Ayush, is not in consonance with the orders issued by the Finance Department on 08.03.2011, 07.04.2011 and 30. 10.2012 which contain the Government policy. The order dated 04.03.2014 passed by Division Bench on the said recall application is extracted below:-

â??In the application filed for recalling the order dated 7th May, 2013, the present Principal Secretary, Health is contending that the order issued by the then Principal Secretary, Health Shri Rajeev Gupta is not in consonance with the order issued by the Finance Department dated 8th March, 2011, 7th April, 2011 and 30th October, 2012. He has submitted that he is now, therefore, in a catch-22 situation, inasmuch as, the order of this Court dated 7th May, 2013 passed on Writ Petition (S/B) No. 396 of 2012 directed implementation of the order dated 4th August, 2011. It has now been accepted

that Shri Rajeev Gupta, the then Principal Secretary, Health, who had issued the said order, had issued the same on the basis of the written directions

given by the then Chief Minister of the State. In that view of the matter, Shri Rajeev Gupta, the then Principal Secretary, Health had hardly any scope

of doing anything else. It is contended by the learned Advocate General that the Honâ??ble Chief Minister while thus acting may not have taken into

consideration other Government Orders or the rules governing the subject and accordingly a mistake was committed. The learned Advocate General

wants us to adjudicate upon the same. We think that when such a decision has been taken by a person no less the Chief Minister of the Government,

the decision remains valid until the Cabinet of the Government expressly withdraws the decision and, thus, since the Cabinet has not yet taken express

decision to withdraw the direction contained in the order issued by Shri Rajeev Gupta, the then Principal Secretary, Health dated 4th August, 2011, we

direct the Chief Secretary of the State Government, Principal Secretary, and Secretary, Health to implement that order of the Principal Secretary,

Health of the Government of Uttarakhand, namely, Shri Rajeev Gupta, dated 4th August, 2011.

In view of the clarification as given, we direct the contempt petition to remain stayed for three months in order to ensure compliance of the direction

as above.â??

7. In the meantime, the matter was considered by the State Cabinet in its meeting dated 22.08.2014 and it was found that the Government Order dated

04.08.2011 is contrary to the Government Orders issued by the Finance Department. Accordingly, the Government Order dated 4. 08.2011 was

cancelled vide Government Order dated 29.05.2014 on the ground that (a) Ayurvedic Medical Officers cannot be treated as special class by granting

benefits which are not available to other Government employees and (b) in view of disagreement expressed by Finance Department, approval of State

Cabinet was necessary while issuing Government Order dated 04.08.2011, which was not taken.

8. Subsequently an application was filed seeking review of the orders dated 07.05.2013 and 04.03.2014 passed in WPSB No.396 of 2012 on the

ground that the order dated 04.08.2011, issued by Principal Secretary, Department of Ayush, has been revoked/cancelled. The said review application

was disposed of vide order dated 28.08.2014. The operative portion of the said order is extracted below:-

“We are afraid, order passed by this Court dated 07.05.2013 as well as order passed on the Recall Application dated 04.03.2014, cannot be

reviewed, merely, because subsequent to the passing of the orders under review order dated 04.08.2011 has been recalled. However, we find that it

was specifically made clear by this Court in the order dated 04.03.2014 that till decision is taken by the Cabinet on the order dated 04.08.2011, it has to

be implemented. Since, order dated 04.08.2011 has already been revoked/ canceled, therefore, Government is at liberty to act upon in accordance with

Government Order dated 29.05.2014. Petitioner, if so aggrieved by the order dated 29.05.2014, may approach the appropriate forum assailing the

Government Order dated 29.05.2014.”

9. Pursuant to the cancellation order dated 29. 05.2014, State Government issued another order on 27.10.2014 directing the Director, Ayurvedic and

Unani Services to recover the excess amount paid to the petitioners in terms of Government Order dated 4. 08.2011. In the said order the liberty

granted by Division Bench of this Court while disposing of review application filed in WPSB No. 396 of 2012 was referred to.

10. The aforesaid Government Orders dated 29.05.2014 and 27.10.2014 are under challenge in these writ petitions.

11. Heard learned counsel for the parties and perused the record.

12. Learned counsel for the petitioners submits that the Government Order dated 05.02.1998 issued by the Government of Uttar Pradesh held out a

promise to the petitioners that upon regularization of their services, the services rendered by them in ad-hoc capacity, will also be taken into account

for grant of promotional pay scale, which are available to a Government servant upon completion of 8 years and 14 years of continuous satisfactory

service on a post. It is further contended on behalf of the petitioners that the order dated 04.08.2011 was strictly in conformity with the Government

order dated 5. 02.1998 issued by Government of Uttar Pradesh, therefore, the Government Order dated 29.05.2014, whereby earlier order dated

04.08.2011 was cancelled, is unsustainable. It is further contended on behalf of the petitioners that they had neither played any fraud nor had

misrepresented facts, for obtaining the monetary benefits, therefore, the amount

paid to them pursuant to Government Order dated 04.08.2011 cannot be recovered from them.

13. Per contra, Mr. Pradeep Joshi, learned Standing Counsel, appearing on behalf of the State of Uttarakhand, submits that promotion pay scale is

given in lieu of actual promotion to ameliorate the situation of Government employees who are facing stagnation for want of promotion.

He submits that ad-hoc employees are not entitled to promotion, therefore, the benefit of promotion pay scale is not available to them. He further

submits that as per the Government policy applicable in all State Departments, services rendered after regular/substantive appointment alone are taken

into consideration for grant of promotion pay scale. He, therefore, submits that the decision conveyed in the Government Order dated 04.08.2011 was

contrary to the Government policy and was not approved by the State Cabinet. He further submits that grant of promotion pay scale to the petitioners,

even for their ad-hoc services, had set a wrong precedent and similar claims were made by other employees. He further submits that due to the order

dated 04.08.2011, a separate class of employees was created within homogeneous class of Government employees, which would give rise to serious

anomalies in future. Learned Standing Counsel, therefore, submits that the Competent Authority was justified in cancelling the order dated 04.08.2011

and also for ordering for recovery of excess amount paid to the petitioners.

14. The Government Order dated 05.02.1998 only provided that upon their regularization, past services rendered by petitioners in ad-hoc capacity will

be considered for grant of personal pay. Thus anyone who had completed 8 years services before regularization would get one increment in basic pay,

after regularization. Likewise anyone who had completed 14 years service before regularization would be entitled to get promotion pay scale, but only

from the date, after regularization. We have been informed that benefit contemplated under order 05.02.1998 was granted to the petitioners, soon after

their regularization. Pursuant to the order dated 04.08.2011, petitioners were given these benefits from 1996, along with arrears.

15. The policy framed by the State Government for grant of promotion pay scale/assured career progression, as the case may be, is applicable across

the board to all State employees. According to the said policy, service rendered after substantive/regular appointment alone has to be taken into

account for grant of promotion pay scale. Therefore, the order dated 04.08.2011 issued by Principal Secretary, Department of Ayush was contrary to the Government policy and created a class within class.

16. We have gone through the cancellation order dated 29.05.2014, which is a reasoned order. For the reasons indicated in the said order, the State Government was justified in cancelling the order dated 04.08.2011. Accordingly, we find no reason to interfere with the cancellation order dated 29.05.2014 and the said order is upheld.

17. However, another question which falls for consideration is whether the State Government is justified in recovering the excess payment made to the petitioners in terms of the order dated 04.08.2011. Honâ??ble Supreme Court in the case of Syed Abdul Qadir Vs State of Bihar reported in (2009) 3 SCC 475 has held as under:-

â??58. 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 provided 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.â??

18. Similarly in the case of Chandi Prasad Uniyal & others Vs State of Uttarakhand & others reported in (2012) 8 SCC 417, Honâ??ble Supreme Court has held as under:-

â??13. 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 were on the verge of retirement or were occupying lower posts in the administrative hierarchy.

14. We are concerned with the excess payment of public money which is often described as â??taxpayers moneyâ? which belongs neither to the

officers who have effected overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such

situations. The 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 the 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 the 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 and in Col. B.J. Akkara case, the

excess payment made due to wrong/irregular pay fixation can always be recovered.â??

19. In the case of State of Punjab & others Vs Rafiq Masih (White Washer) reported in (2015) 4 SCC 334, the Honâ??ble Supreme Court has

considered and discussed the law on the point and certain guidelines were laid down. Para 18 of the said judgment is extracted below:-

â??18. 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 hereinabove, we may, as a

ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the 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 the inferior post.

(v) In any other case, where the court arrives at a 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.

20. Admittedly in the present case, the Government Order dated 04.08.2011 was not being implemented and the same was implemented under threat

of contempt proceedings, and the benefit of promotion pay scale was given to the petitioners from a date anterior to the date of their regularization,

along with arrears. Thereafter on 22. 05.2014, the State Cabinet met and decided to cancel the Government Order dated 04.08.2011 and formal

Government Order cancelling the earlier order dated 04.08.2011, was issued on 29.05.2014.

21. The petitioners were regularized against Group B posts of Ayurvedic Medical Officer on 27.01.2006 and earlier they were serving in the

same capacity, on ad-hoc basis. Thus they do not belong to the weaker section of society, from whom recovery of the excess payment would be

iniquitous. Moreover, the order for recovery was issued within a year of the excess payment. Petitioners continued to discharge duties of the same

post even after grant of monetary benefits in terms of Government Order dated 04.08.2011, as there was no change in their designation, duties and

responsibilities.

22. In view of the aforesaid discussion, we are of the considered opinion that petitioners are liable to repay the excess amount received by them in

terms of Government Order dated 04.08.2011, except those who retired before 27.10.2015.

23. We accordingly direct the respondents not to make recovery of the excess amount from the petitioners who retired from service before

27.10.2015. However, other petitioners shall be liable for recovery of the excess amount received by them.

24. The writ petitions, therefore, stand allowed to the extent indicated above.

25. Let a copy of this order be placed in all the connected matters.