

(2015) 03 GUJ CK 0100
In the Gujarat High Court
Case No : Special Civil Application No. 8299 of 2008

G.G. Patel

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 24-03-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 14, 142, 15, 16

Citation : (2015) LabIC 2556

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : A.S. Supehia and I.S. Supehia, for the Appellant; D.M. Devnani, Learned Assistant Government Pleader, Advocates for the Respondent

Final Decision : Allowed

Judgement

Abhilasha Kumari, J—The challenge in this petition preferred under Article 226 of the Constitution of India, is to the order dated 28.02.2008, passed by respondent No. 2-Director, Accounts and Treasuries, whereby an amount of Rs. 1,39,428/- has been recovered from the gratuity of the petitioner. The petitioner has prayed for the refund of the said amount with interest at the rate of 10% from the date of deduction, till the date of judgment. The factual matrix of the case is as below:

1.1 The petitioner was appointed as Senior Clerk, which is a Group-III post, on 24.08.1962. On 29.04.1969, he was promoted to the post of Deputy Accountant, a Group-II post. On 07.11.1969, he was further promoted as an Accountant, in a Group-I post. From 14.03.1975, the petitioner came to be reverted, by way of penalty, for two years, from Group-I to Group-II. On his own request, he was reverted to Group-III for a period of two years, with effect from 17.11.1976. On 09.03.1977, the petitioner was reverted, by way of penalty to Group-III post for three years. By way of the order dated 06.11.1979, it was ordered that the petitioner should not be promoted to Group-II post for five years. All the above penalties came to be over on 05.11.1984. The petitioner, therefore, made a

request to reinstate him in the Group-I Post. However, his request was rejected and he was given a posting in the Group-II post with effect from 10.03.1985. Aggrieved, the petitioner preferred a petition, being Special Civil Application No. 7111 of 1985 in this Court, inter alia, praying that he may be placed in the Group-I post from 06.11.1984, that is, after all the penalties were over. The said petition was permitted to be withdrawn by an order dated 19.01.1994, in view of two letters dated 02.12.1993, which were taken on record. After the withdrawal of the above petition, respondent No. 2 passed an order dated 14.10.1994, stating that the petitioner is given the deemed date of promotion in the Group-I post from 06.11.1984 and he would be paid the difference of salary from the date when he actually started working on the said post, that is, 04.02.1994. The pay of the petitioner in the Group-I post would be notionally fixed as on 06.11.1984. The excess amount was ordered to be recovered.

1.2 The above order dated 14.10.1994 was challenged by the petitioner before the Gujarat Civil Services Tribunal by filing Appeal No. 201 of 1996. The appeal came to be disposed of on 04.09.1988, for want of jurisdiction. While the above appeal was pending, respondent No. 2 passed an order dated 26.05.1988, amending the earlier order dated 14.10.1994, to the effect that since the petitioner was actually promoted to the Group-II post by the order dated 28.02.1985 and to the Group-I post by the order dated 04.02.1994, he would be entitled to the difference of salary in the Group-II from 15.03.1985 and in the Group-I from 05.04.1994, when he actually resumed his duties.

1.3 After the disposal of the appeal before the Tribunal, the petitioner made representations to respondent No. 2, for the reconsideration of his case, and for the grant of a deemed date of promotion for the purpose of pay and allowances, instead of notional. By a communication dated 23.10.2001, respondent No. 2 rejected the request of the petitioner, stating that whatever had been done was in accordance with law.

1.4 Thereafter, the petitioner filed another petition, being Special Civil Application No. 1594 of 2003, challenging various orders and praying for directions to pay the salary of the Group-I post from 06.11.1984 and to refund the amount of Rs. 1,39,428/- deducted from the gratuity amount of the petitioner. The said petition was disposed of by judgment dated 26.01.2007. The prayer for arrears of the deemed date of promotion was rejected on the ground of delay. However, the petition was partly-allowed qua the recovery of the amount from the gratuity of the petitioner, on the ground that the petitioner was not heard before the recovery was made. The order deducting the amount of Rs. 1,39,428/- from the gratuity of the petitioner was quashed and set aside and the respondents were directed to pass a fresh order after hearing the petitioner. The Letters Patent Appeal No. 1526 of 2007 filed by the petitioner against the aforesaid judgment was dismissed by the order dated 07.03.2008.

1.5 Pursuant thereto, the petitioner made a representation dated 27.07.2007 to respondent No. 2. He was granted a personal hearing by the said respondent on

03.10.2007, when he handed over an additional representation. After hearing the petitioner and considering the representations, respondent No. 2 passed the impugned order dated 28.02.2008, maintaining the recovery of Rs. 1,39,428/- from the gratuity amount of the petitioner. Aggrieved thereby, the petitioner has approached this Court by way of the present petition.

2. It may be made clear that in this petition, the petitioner has confined himself only to the amount of recovery of Rs. 1,39,428/- deducted from his gratuity amount.

3. Mr. A.S. Supehia, learned advocate for Ms. I.S. Supehia, learned advocate for the petitioner has submitted that, the reason given by respondent No. 2 in the impugned order for maintaining recovery made from the petitioner is that, as per Rule 57A of the Bombay Civil Services Rules, 1959 ("the BCSR Rules" for short), in a case where a benefit is given on the basis of false information furnished by the concerned Government employee, departmental action can be taken against him and the resultant amount of overpayment on account of pay and allowances can also be recovered.

3.1 It is submitted that respondent No. 2 has made the recovery on the alleged misrepresentation made by the petitioner which, according to the said respondent, has resulted in their passing a wrong order dated 14.10.1994, whereby the pay-fixation of the petitioner has been done.

3.2 It is submitted that the order dated 14.10.1994 has been passed by respondent No. 2, after taking into consideration the entire service record of the petitioner, including the penalties inflicted upon him. After giving thoughtful consideration to the entire matter, as is clearly stated in the said order, a decision has been taken to grant the petitioner the deemed date of promotion with effect from 06.11.1984, after all the penalties imposed on the petitioner were over. The pay-fixation of the petitioner has been done on the basis of the said deemed date. It is a decision that has been taken by the concerned respondent himself, which is apparent from the said order. Therefore, it cannot be said that the petitioner has made any misrepresentation to the said respondent, which may have led to the passing of the order dated 14.10.1994.

3.3 That the amount of Rs. 1,39,428/- has been granted as pay-fixation pursuant to the order dated 14.10.1994. It is this amount that has been recovered from the gratuity of the petitioner by the impugned order dated 28.02.2008, after the petitioner retired from service on 31.05.1999.

3.4 It is contended that the petitioner is a senior citizen, who is living a retired life since 1999. The order of recovery would cause him great hardship which would outweigh the equitable balance of the respondents right to recover, even if it is assumed, though not admitted, that the pay fixation has been mistakenly granted to the petitioner.

3.5 It is further submitted that the impugned order does not contain any details

of the alleged misrepresentation purported to have been made by the petitioner, which led to the passing of the order dated 14.10.1994. There is, therefore, no valid or justifiable reason to recover the amount from the gratuity of the petitioner.

3.6 In support of the above submissions, reliance is placed by the learned advocate for the petitioner, upon a judgment of the Supreme Court in *State of Punjab Vs. Rafiq Masih*, (2014) 10 SCJ 700 .

4. The petition has been opposed by Mr. D.M. Devnani, learned Assistant Government Pleader, by submitting that it is apparent from the order dated 14.10.1994 and the impugned order, that certain representations were made by the petitioner to respondent No. 2. There is a reference to a representation dated 18-04-1994, which is not on the record of the case. It can be possible that respondent No. 2, relying upon the said representation, has passed the order dated 14-10-1994, granting pay-fixation to the petitioner which, upon later scrutiny, was found to be incorrect.

4.1 The learned Assistant Government Pleader has relied upon a judgment of the Supreme Court in *Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others*, AIR 2012 SC 2951 : (2012) 135 FLR 161 : (2012) 7 JT 460 : (2013) 169 PLR 148 : (2012) 7 SCALE 376 : (2012) 8 SCC 417 : (2012) AIRSCW 4742 : (2012) 5 Supreme 418 , by submitting that in a case of wrong pay fixation where excess salary has been paid to the employee, the recovery made by the respondent authorities is justified as it is public money that is involved.

4.2 The learned Assistant Government Pleader has further referred to another judgment of the Supreme Court in the case of *Union Territory, Chandigarh and others v. Gurcharan Singh* and another reported in (2014) 13 SCC 598, wherein it is held that in a case where higher pay scale has been disbursed by mistake, the mistake must be rectified and an extra amount so paid pursuant to such mistake be recovered.

4.3 On the above grounds, it is prayed that the petition be rejected.

5. This Court has heard learned counsel for the respective parties, perused the averments made in the petition, contents of the impugned order and other documents on record. This Court has also accorded thoughtful consideration to the submissions advanced at the Bar and the judgments cited by the learned counsel for the respective parties.

6. A perusal of the impugned order dated 28.02.2008 makes it clear that respondent. No. 2 has directed the recovery of Rs. 1,39,428/- from the gratuity amount of the petitioner on the ground that such recovery is possible and permissible, in view of the proviso to Rule 57A of the BCSR Rules, in a case where false information and misrepresentation has been made which has led to the passing of an erroneous order. For the sake of clarity, it may be fruitful to refer to Rule 57A of the BSCR Rules, which reads as under:

"57A. (i) Notwithstanding the provisions contained in these rules, the pay of a Government servant whose promotion or appointment to a post is found to be or to have been erroneous on the basis of facts, e.g. incorrect seniority, failure to apply any relevant rules or orders correctly, shall be regulated in accordance with any general or special orders issued by the Government in this behalf.

[(ii) When any rule or order regulating pay is made with retrospective effect, the pay of a Government servant affected by such order or rule, shall be fixed notionally as if the rule order were applicable in his case but the Government servant concerned shall not be called upon to refund the resultant amount of overpayment on account of pay and allowances:

Provided that in case where the erroneous promotion or appointment was given on the basis of false information furnished by the concerned Government employee; departmental action shall be taken against him and the resultant amount of over payment on account of pay and allowances shall also be recovered from him.]"

7. In the impugned order, the entire facts of the case of the petitioner have been enumerated in detail from the record of respondent No. 2. There can be no dispute regarding that the said details are a matter of record, and have not been manufactured by the petitioner. No other document has been relied upon except for the record.

8. This Court may now compare the enumeration of the service details of the petitioner as given in the impugned order, to those contained in the order dated 14.10.1994, which is the pay fixation order and is now sought to be discarded on the ground that it has been passed erroneously. The very same service details of the petitioner, from the very same record, have been enumerated in detail in this order as well. There is no difference between the impugned order and the order dated 14.10.1994 insofar as the service details of the petitioner are concerned, which are a matter of record. The petitioner has not added or justified any other details which would give a different colour to the matter. The only difference between the two orders is in the calculations. After considering and verifying the entire record and, in the words of respondent No. 2, after giving thoughtful consideration, a decision has been taken vide order dated 14.10.1994, to grant the petitioner the deemed date of promotion with effect from 06.11.1984, which is a day after all the penalties of the petitioner got over on 05.11.1984. As a result of the pay-fixation, an amount of Rs. 1,39,428/- has been allowed to the petitioner on account of pay-fixation.

9. As has been stated hereinabove, this amount was ordered to be recovered from the gratuity amount of the petitioner by an order dated 26.05.1998, which was the subject matter of challenge in Special Civil Application No. 1594 of 2003. This Court, vide order dated 21.06.2007, passed in the above petition, set aside the order of recovery on the ground of the violation of the principle of natural justice, as the petitioner was not granted an opportunity of hearing before its

passing. This Court directed the respondents to hear the petitioner and pass a fresh order. The impugned order dated 28.02.2008 in the present petition is a result of the hearing granted to the petitioner pursuant to the above order of the Court.

10. It may be true that the petitioner made certain representations to respondent No. 2, pursuant to the order dated 14.10.1994. However, by that alone, it cannot be presumed that the said order has been passed upon any misrepresentation made by the petitioner, as it is upto the concerned respondent to verify the record, which is in his possession, and to pass an appropriate order. On one hand, respondent No. 2 states, in the impugned order, that the recovery from the gratuity amount of the petitioner is liable to be made due to a misrepresentation made by the petitioner; however, in the same breath, he states that the order dated 14.10.1994 was passed erroneously. This Court finds no material on record to justify the allegation of the respondents that the petitioner played fraud or made a misrepresentation, leading to the passing of the pay fixation order dated 14.10.1994. The ground taken by the respondents in the impugned order, relying upon Rule 57A of the BSCR Rules is, therefore, unjustified and unsustainable in law as, apart from a mere allegation, no material in respect of the alleged misrepresentation has been produced by them.

11. Even assuming that the impugned order has been passed for the sake of rectifying a mistake in granting a wrong pay-fixation, it remains to be seen whether such an action of the respondents is justified in law, or not.

12. Insofar as this aspect is concerned, it would be illustrative to refer to the relevant judgments of the Apex Court relied upon by the respective parties.

13. In *Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others*, AIR 2012 SC 2951 : (2012) 135 FLR 161 : (2012) 7 JT 460 : (2013) 169 PLR 148 : (2012) 7 SCALE 376 : (2012) 8 SCC 417 : (2012) AIRSCW 4742 : (2012) 5 Supreme 418 , the Supreme Court has held thus:

"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 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 "tax payers money" which belongs neither to the officers who have effected overpayment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. 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 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 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."

14. In a later judgment in the case of Union Territory, Chandigarh and others v. Gurcharan Singh and another (supra), the Supreme Court has held as below:

"13. "Increment" has a definite concept in service law jurisprudence. It is an increase or addition on a fixed scale; it is a regular increase in salary on such a scale. As noted by this Court in SBI v. Central Govt. Labour Court, under the labour and industrial laws, an increment is when in a timescale of pay an employee advances from the lower point of scale to the higher by periodic additions. In other words, it is addition in the same scale and not to a higher scale. An increment is an incidence of employment and an employee gets an increment by working the full year and drawing full salary. During the period of suspension, the contract of service remains suspended. The order of suspension by the departmental enquiry has the effect of temporarily suspending the relations between the master and servant with the consequence that the servant is not bound to render service and, therefore, the petitioner as an employee is not entitled to increments during this period which is taken as period not spent on duty."

15. In the above two judgments, the Supreme Court has rightly shown its concern regarding the disbursement of excess money from the public exchequer due to a bona fide mistake, devoid of the concept of fraud or misrepresentation. It is stated that after the employer has paid some amount to the petitioner as a result of a mistake, such mistake can a ways be rectified so as not to burden the public exchequer.

16. However, the law in this regard was evolved further in the latest judgment of the Supreme Court in State of Punjab Vs. Rafiq Masih, (2014) 10 SCJ 700 , the Supreme Court has laid down certain principles of law regarding recovery of excess dues paid mistakenly to an employee and has categorised certain class of employees, who would suffer great hardship due to the recovery. The Apex Court has held, after examining a catena of judgments, that the orders seeking recovery of monetary benefits wrongly extended to employees, can be interfered with where the recovery would result in a hardship by another which would far outweigh the equitable balance of the employer's right to recover. The exposition of law by the Supreme Court in this regard is as below:

"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 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 concerned employee. If the effect of the recovery from the concerned employee 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.

9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality, can be found in Articles 14 to 18, contained in Part III of the Constitution of India, dealing with "Fundamental Rights". These Articles of the Constitution, besides assuring equality before the law and equal protection of the laws; also disallow, discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracized section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "Directive Principles of State Policy". These Articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice social, economic and political, by inter alia minimizing monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.

10. In view of the aforesaid constitutional mandate, equity and good conscience, in the matter of livelihood of the people of this country, has to be the

basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order-so long as it is not rendered iniquitous to the extent, that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India.

11.Premised on the legal proposition considered above, namely, whether on the touchstone of equity and arbitrariness, the extract of the judgment reproduced above, culls out yet another consideration, which would make the process of recovery iniquitous and arbitrary. It is apparent from the conclusions drawn in Syed Abdul Oadir's case (2009 AIR SCW 1871) (supra) that recovery of excess payments, made from employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement"). Keeping the aforesaid circumstances in mind, we are satisfied that recovery 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, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, 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....

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."

(Emphasis supplied)

17. In the above judgment, the Supreme Court has gone a step further and has stated that even though the excess amount may have been paid to the employee by mistake, the recovery of that amount can be struck down if it entails undue hardship to an employee who falls under the classifications made in paragraph 12 of the judgment as reproduced hereinabove.

18. Examining the case of the petitioner in light of the above judgment of the Apex Court, it is apparent that the petitioner, who has retired from service on 31.05.1999, would be well into his seventies as of today. The petitioner is surviving on a pension which would barely be sufficient to make two ends meet. Being a senior citizen, the petitioner may have to make provisions for medical treatment, as and when required. Besides this, it is a fact of life that the cost of living is rising day by day. The impugned recovery from the gratuity of the petitioner would, in the considered view of this Court, inflict a much greater hardship and heartburning upon the petitioner, apart from it being unjustified and arbitrary in nature. The hardship faced by the petitioner would far outweigh the right of the State Government to recover the amount, even if it has been assumed that it is paid mistakenly.

19. As already stated hereinabove, the impugned order states that a misrepresentation was made by the petitioner which led to a wrong pay fixation order. However, there is not a shred of material on record to indicate the nature of the alleged misrepresentation or that the order of pay fixation dated 14.10.1994 was a result of such misrepresentation. On the contrary, the said order has clearly been passed after considering each and every aspect of the service details of the petitioner from the record of the respondents. There is no element of subjectivity to it.

20. Even if it is assumed that the said order has been passed by mistake, the respondents are not entitled to recover the amount from the petitioner as he falls under categories (i), (ii) and (iii) enumerated in paragraph 12 of the judgment of the Supreme Court in *State of Punjab Vs. Rafiq Masih*, (2014) 10 SCJ 700 . In view of the judgment of the Supreme Court, no recovery could have been made

against the petitioner at all. The impugned order dated 28.02.2008 is, therefore, arbitrary, illegal and unsustainable-in-law and deserves to be quashed and set aside.

21. Viewed from every angle, the case of the petitioner must succeed.

22. For the aforestated reasons, the impugned order dated 28.02.2008, passed by respondent No. 2, is hereby quashed and set aside. Respondent No. 2 is directed to refund the amount of Rs. 1,39,428/- recovered from the gratuity of the petitioner with interest at the rate of 8% per annum from the date of such recovery, within a period of four weeks from the date of the receipt of a copy of this judgment. The petition is allowed in the above terms. Rule is made absolute, accordingly. There shall be no orders as to costs.