(2010) 10 SHI CK 0271

In the High Court Of Himachal Pradesh

Case No : C.W.P. (T) No. 5303 of 2008

Hari Lal and Another APPELLANT

Vs

Himachal Road Transport Corporation and Another RESPONDENT

Date of Decision : 06-10-2010

Acts Referred:

Citation : (2010) 10 SHI CK 0271

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Petitioners were granted senior scale of Rs. 510-800 with effect from 1.1.1978 vide office order dated 2.12.1986. Vide office order dated 28.1.1998. Respondent-corporation has withdrawn the senior scale granted to the petitioners on the ground that they had not completed three years service. Thereafter recovery of Rs. 500/- was directed to be effected from the salary of the petitioners.

2. Mr. D.K. Khanna has strenuously argued that the petitioners have not been heard before the issuance of Annexures A-2 and A-3 dated 28.1.1998 and 25.8.1998, respectively. He then contended that his clients have neither misled nor mis-represented nor played any fraud at the time of release of senior scale to them. According to him, the decision to grant senior scale was a conscious decision and the same could not be withdrawn unilaterally.

3. Mr. Adarsh Sharma has vehemently argued that there is no illegality in Annexures A-2 and A-3.

4. I have heard the learned Counsel for the parties and have perused pleadings carefully.

5. Their Lordships of the Hon''ble Supreme Court in Syed Abdul Qadir and Others Vs. State of Bihar and Others, have culled out the following principles governing

the circumstances in which the excess amount cannot be recovered by the employer:

55. That apart, it also appears from the record produced before us that while the Finance Department of the Government of Bihar was in favour of making the amended provisions of FR. 22-C applicable to the appellants-teachers after having come to know that the said rule did not exist and had been substituted, the Department of Human Resource Development, Government of Bihar, wanted to apply the unamended provision to the appellants-teachers so as to make available the benefit of additional increment provided for under FR.22-C to its teachers, unaware of the fact that even under FR.22-C they were not entitled to the additional increment as they were not discharging duties and responsibilities of greater importance on the promoted post.

56. This further goes on to show that the authorities in the State of Bihar were not even aware of the basic requirement for grant of additional increment and the decision appears to have been taken without proper application of mind. Otherwise, there was no reason for the Finance Department to state in the counter affidavit filed before the High Court that any affidavit filed on behalf of the Education Department may be ignored as Finance Department was the competent authority. In this very affidavit, the Finance Department while admitting that the pay fixation by the Education Department was wrong, stated as under:

...the fixation of pay under Fundamental Rule 22-C has wrongly been made as it was not in existence. Pay fixation on the basis of a nonexistent rule is a bona fide mistake.

57. 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.

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 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 and Others, , Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, ; Union of India (UOI) and Another Vs. M. Bhaskar and Others, ; V. Gangaram Vs. Regional Joint Director and others, ; Col. (Retd.) B.J. Akkara Vs. The Govt. of India and Others, ;

Purshottam Lal Das and Others Vs. The State of Bihar and Others, ; Punjab National Bank and Others Vs. Manjeet Singh and Another, ; and Bihar State Electricity Board and Anr. v. Bijay Bahadur and Anr. .

59. 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.

60. Learned Counsel also submitted that prior to the interim order passed by this Court on 7.4.2003 in the special leave petitions, whereby the order of recovery passed by the Division Bench of the High Court was stayed, some installments/ amount had already been recovered from some of the teachers. Since we have directed that no recovery of the excess amount be made from the appellant teachers and in order to maintain parity, it would be in the fitness of things that the amount that has been recovered from the teachers should be refunded to them.

6. Their Lordships of the Hon''ble Supreme Court in Union of India v. Natarajan 2010 (5) SLR 13 have held that retiral benefits payable to the employees cannot be revised without giving them notice and opportunity of hearing. Their Lordships have further held that rule of audi alteram partem has been treated as fundamental to the system established by rule of law and any action taken or order passed without complying with that rule is liable to be declared void. Their Lordships have held as under:

11. We have considered the respective submissions and carefully scrutinized the records. Although, neither the learned Single Judge nor the Division Bench considered the issue of violation of the rules of natural justice, having given serious thought to the entire matter, we are convinced that the retiral benefits payable to the respondents could not be revised to their disadvantage without giving them action oriented notice and opportunity of hearing. By virtue of the option exercised by them u/s 12A(4)(b) and consequential action taken by the competent authority to fix their pension etc., the private respondents acquired a valuable right to accordingly receive the financial benefits and the same could not have been reduced without complying with one of the basic rules of natural

justice that no one shall be condemned unearned. The rule of audi alteram partem has been treated as fundamental to the system established by rule of law and any action taken or order passed without complying with that rule is liable to be declared void State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, and Sayeedur Rehman Vs. The State of Bihar and Others, .

12. It is not in dispute that before directing revision of the pension etc., payable to the private respondents, the Central Government did not give them action oriented notice and opportunity of showing cause against the proposed action. Therefore, it must be held that the direction given by the Central Government to revise the retiral benefits including the pension payable to the respondents was nullity.

13. Dehors the above conclusion, we are convinced that the action taken by the appellants to revise and reduce the retiral benefits payable to the respondents was ex facie arbitrary, unreasonable and unjustified and the learned Single Judge did not commit any error by declaring that the Central Government did not have the jurisdiction to unilaterally alter/change the option exercised by the writ petitioners u/s 12A(4)(b) read with Section 12A(4C).

8. Their Lordships of the Hon''ble Supreme Court in Union of India and Ors. v. Jagdish Pandey and Ors. 2010 (6) Scale 651 have held that pay scale is a legitimate right of an employee and except for valid and proper reasons it cannot be varied. Their Lordships have held as under:

8. The respondents in the present appeal had challenged the validity of the above order before the Tribunal on various grounds including that they have always been placed at parity with the goods driver, they have been given similar scales and there was no reason, whatsoever, for altering the pay scale to the prejudice of the respondents, which was in force for a considerable time. It will be useful for us to notice the findings recorded by the Tribunal. In paragraph 8 of its judgment the Tribunal noticed that both the parties have not placed on record any material to indicate as to what was the pay scale provided for the TWDs pursuant to the various Pay Commission Reports. The Tribunal specifically noticed and recorded the finding that for the last 40 years, i.e. right from 1959 the respondents were being paid the same pay scale as goods drivers. There was no disparity of pay scales between TWDs and goods drivers after Union of India and Railways had accepted recommendations of the IInd, IIIrd, IVth and even of Vth Pay Commissions. The Tribunal also specifically noticed vague denials of the Union of India and that such denials were hardly substantiated by any cogent material. Reliance was placed upon the judgment of the Calcutta High Court in relation to the grant of running allowance. In that Writ Petition, the only dispute raised by the parties related to the grant of running allowance and the Union of India did not raise the issue of disparity in pay scale. This order of the High Court had attained finality. We have already referred to the findings recorded by the Tribunal where it is specifically noticed that after acceptance of Vth Pay Commission Report by the Government, TWDs were given the salary in the pay

scale of Rs. 5000-8000 w.e.f. 1.1.1996 and in the letter dated 15.4.1993 the concerned authorities noticed the disparity created even between the TWDs i.e. in Sealdah division out of 32 TWDs, 24 were getting pay scale of Rs. 1350-2200 (unrevised) and remaining 8 were getting the pay scale of Rs. 1320-2040 and it directed a uniform pay scale of Rs. 1350-2200 should be given to all the TWDs. Another reason that weighed with the Tribunal was that no material has been produced to show as to what were the reasons or material on the basis of which the authorities had decided to discontinue the pay scale of Rs. 1350-2200 to these respondents. The above reasoning and discussion in the order of the Tribunal clearly shows that the action on the face of it was arbitrary. This order of the Tribunal was confirmed by the High Court and the respondents made no effort to place anything on record to show that they were different and distinct classes and were entitled to receive different pay scales. Even in the order dated 9th August, 2002 the Tribunal specifically noticed that it was not even averted that eligibility criteria for the post of TWDs was different than that for the goods driver and their duties were substantially different. In other words, either before the Tribunal or before the High Court the Union of India never pleaded the essential basis for justifying payment of different pay scales to two categories of drivers i.e. TWDs on the one hand and goods train drivers on the other. There has to be a substantial difference in method of recruitment, eligibility, duties and responsibilities before substantial disparity in scale can be justified. As far as recording of finding of facts is concerned, factual disputes can hardly be raised before this Court and in any case for the first time. Despite this the Union of India has failed to place any material to substantiate its decision before the Forum/Courts. The judgment of the Calcutta High Court, in relation to running allowances, has attained finality. At that time no other issue was raised by Union of India that they are different and distinct posts with different pay scales and as such identical running allowances could not be paid. In fact, the judgment of the Calcutta High Court has duly been implemented now for years together without objection. Not only this, same pay scale as that of the goods train driver has been paid to these respondents for years and there appears to be no justification on record for unilateral withdrawal of such a scale. Pay scale is a legitimate right of an employee and except for valid and proper reasons it cannot be varied, that only in accordance with law. None of these justifiable reasons exist in the present case. The impugned order itself does not give any reason. The expression `erroneously'' used in the order can hardly justify withdrawal of such an existing right.

9. Accordingly, the petition is allowed. Annexures A-2 and A-3 dated 28.1.1998 and 25.8.1998 are quashed and set aside. No costs.

