(2018) 08 CAT CK 0049

In the Central Administrative Tribunal

Case No : Original Application No. 711 Of 2014

Ishwar Singh APPELLANT

Vs

MTNL And Ors RESPONDENT

Date of Decision : 20-08-2018

Acts Referred:

Citation : (2018) 08 CAT CK 0049

Hon'ble Judges : V. Ajay Kumar, J;Nita Chowdhury, Member (A)

Bench : Division Bench

Advocate : U. Srivastava, Rachna Joshi, Vandana Mishra

Final Decision : Dismissed

Judgement

Nita Chowdhury, Member (A)

1. The applicant has filed this Original Application (OA) seeking the following reliefs:-

"(a) To allow the original application

(b) To quash and set aside the impugned order dated 05.03.2013 directing the respondents to refund the amount of recovery of Rs.5,18,037/-recovered from leave encashment of the applicant alongwith 12% interest and order be passed accordingly in the interest of justice.

(c) To direct the respondents to absolute the order dated 26.05.2012 which was passed by the respondents regarding pay fixation of the applicant whereby the basic pay of the applicant had been fixed Rs.48610/- and this may be made absolute without prejudice to legal right of the applicant in the case anomaly of pay fixation amounts to his juniors, as it came to know that there has been anomaly in fixation of pay of the applicant vis a vis his juniors.

(d) Any other relief which this Hon"ble Tribunal deem fit and proper may also be passed in the facts and circumstances of the case in favour of the applicant."

2. The brief facts as stated by the applicant in this OA is that an impugned order dated 05.03.2013 was issued to him whereby he was directed to deposit Rs.5,18,037/- as over payment made on wrong fixation of pay, at the earliest otherwise the same will be recovered from the leave encashment/gratuity payable to him. It is submitted that the aforesaid overpayment dues which was occurred due to fixation by the respondents has been recovered from the dues of leave encashment. On 23.02.2013, the applicant preferred representation requesting his pending grievance mentioned in his representation dated 08.01.2013 be settled but nothing has been done. On 02.03.2013, another representation was preferred requesting that delay in submission of option be condoned and his basic pay fixed at Rs.44970/- may be corrected by way of bringing Rs.55,040/- at par with juniors. Another representation dated 13.03.2013 was addressed to the General Manager Telephone Limited requesting that the recovery of Rs.5,18,037/- which comes wrong interpretation be cancelled and amount of leave encashment be paid as his pay was rightly fixed by the respondents. The applicant has thus challenged the validity of the impugned order dated 05.03.2013 on the basis of the judgment of Hon"ble Apex Court in the case of Syed Abdul Kadir v. State of Bihar & Ors., 2009 II AD SC 576 wherein it was held that the excess payment made as a result of wrong interpretation of the rule cannot be recovered. The applicant has further placed reliance in the matter of Babu Lal Jain Vs. State of MP & Ors., (2007) SCC 180. In this matter, it was observed that recovery of excess payment, which was made on misconception of law and not due to any mistake or misrepresentation on the part of the applicant, was not justified without issuing any show cause notice. The applicant has further placed reliance on the judgments of the Hon"ble Supreme Court in the case of Shyam Babu Verma v. Union of India, (1994)2 SCC 521 and B.L. Akkara v. Government of India, (2006)11 SCC 709 in support of his contentions.

3. It is also averred that no show cause notice was issued in proper manner, while deciding to recover the amount and as such, applicant was not given reasonable opportunity to defend his case. Hence, the respondents have violated the principles of natural justice.

4. It is also contended that with regard to the pay fixation made in the month of May, 2012, there was no such stipulation that in case of irregularity and illegality, the excess amount is refundable and shall be recovered at any time. It is submitted that the case of the applicant was reviewed and the pay fixation made w.e.f. 1. 01.1996 without giving reasonable opportunity to him to defend his case. As such the order dated 05.03.2013 is liable to be set aside.

5. Opposing the OA, the respondents have filed their reply. In reply, they have stated that while working as Senior Accounts Officer, the applicant was charge-sheeted vide memo dated 26.08.2004 and a penalty of reduction of his basic pay of Rs.17300 (in the scale of Rs.14500-350-18700) by two stages with cumulative effect was imposed by the disciplinary authority. It is further directed that

applicant, Sr. AO will not earn increments of his pay during the period of such reduction and on expiry of this period, the reduction will have the effect of postponing his future increments of pay. The applicant, on rejection of his appeal vide order dated 28.07.2006, preferred a review petition before the reviewing authority. The reviewing authority, vide its order dated 24.09.2008, ordered, inter alia as under:-

"i. Reduction of applicant"s pay by one stage for a period of three years and one month w.e.f. 01.04.06 AND

ii. It was further directed that the applicant Shri I.S. Malik will not earn increments during the period of reduction and that on the expiry of this period, the reduction will have effect of postponing his future increments of pay."

6. It is further pleaded that the applicant against the aforesaid order dated 31.03.2006 of disciplinary authority, order dated 28.07.2006 of the appellate authority and order dated 24.09.2008, filed an OA No. 1756/2009 which was also dismissed by this Tribunal vide its order dated 05.05.2010. As such, the order of reviewing authority had attained finality and the pay scales of the applicant were accordingly fixed.

7. It is pleaded by the respondents that while working as Chief Accounts Officer, the applicant, taking advantage of his position, made two frivolous representations dated 28.05.2012 and 04.06.2012. On the aforesaid misrepresentations by the applicant, the respondent wrongly entertained his claims. As a result, DGM (BCP) had allowed applicant"s option of pay while switching over of pay from CDA to IDA pay scale (i.e. w.e.f. 01.10.2000) on the date of regular promotion to the post of Senior Accounts Officer w.e.f. 03.04.2001 after a lapse of 6 years which is beyond the power of DGM (BCP) and in clear contravention of FR 22I(a)(1) and further the pay of the applicant was reviewed by the Accounts Officer (Pay & Allowances) at Bhikaji Cama Place Office of MTNL and his pay was erroneously fixed as on 01.04.2006 at the stage of Rs.18,000/-. Further the Accounts Officer wrongly interpreted the penalty imposed by the reviewing authority vide order dated 24.09.2008 treating it as without cumulative effect and released all the increments during the penalty period notionally on 01.05.2009 and upgraded in E-5 scale on 01.05.2009 and his pay was fixed at Rs.44,470/- instead of Rs.39,910/-. Accordingly, the final fixation memo dated 06.07.2012 of the applicant, thus, erroneously fixed his pay.

8. It is further pleaded that when the applicant retired from the post of Deputy General Manager on 28. 02.2013, his service book was sent to Accounts Officer (Pension), who while computing the applicant"s retiral benefits, noticed that the pay fixation of the applicant was erroneous due to the aforesaid misrepresentations on the part of the applicant and undue influence by him. Accordingly, the respondent issued a notice for reduction of pay dated 22.03.2013 read with corrigendum dated 23.02.2013 whereby the applicant was informed that his pay had been reviewed as it was wrongly fixed from time to

time and time. Consequently, vide impugned notice dated 05.03.2013, the applicant was requested to deposit an amount of Rs.5,18,037/- which was overpaid to the applicant otherwise the said amount would be recovered from the leave encashment/gratuity payable to the applicant.

9. In the reply, it is further stated that in reply to the aforesaid notice dated 05.03.2013, the applicant preferred a representation dated 12.03.2013. Accordingly, in order to examine the grievances of the applicant, a Committee was set up which unanimously opined that the revised pay fixation done by the Accounts Officer (Pay & Allowances) Head Quarters was correct. Hence, the respondents have prayed for dismissal of the OA.

10. We have carefully considered the rival submission made by the learned counsel for the parties and perused the pleadings available on record and judgments cited by both the parties.

11. The short issue involved in this OA is whether the recovery made by the respondents is permissible in law or not.

12. It is evident from the record that when the fixation of pay scale of the applicant was made, the applicant had furnished an undertaking dated 05.07.2012 which reads as under:-

"I will be liable to deposit/refund any over payment regarding my fixation case."

13. When the applicant retired from service, the Accounts Officer (Pension) who while computing his retiral benefits, noticed that the fixation of the applicant was erroneous and thus, the excess payment was sought to be recovered.

14. Further, we find that the respondents, in their reply, have clearly pointed out that the applicant was given a notice dated 05.03.2013 for recovery of overpayment and in reply thereto, the applicant preferred a representation dated 12.03.2013. Accordingly, respondents set up a Committee with a view to examine the grievances of the applicant. The said Committed has unanimously opined as under:-

"On the perusal of FRSR, it has come to notice that as per FR-29 and Govt. of India"s order Scope of Rule-29(2)(b)(i)&(ii), it is stated that after treating the period for which the increments were to be postponed as not counting for increments.

After seeing the rulings in FRSR, all the members checked the pay fixation done by AO(P&A)HQ and are of the view that the AO(P&A) HQ has interpreted the penalty order of CMD rightly and fixed the pay of Sh. Ishwar Singh correctly.

Sh. Ishwar Singh stated in his representation that Sh. J.S. Dahiya, DGM(F) HQ being junior to him is getting more pay from him. On this point, it is stated that the Pension section has checked the Service Book of Sh. J.S. Dahiya and found that the officer is getting correct pay. The committee observed that there is no comparison between a penalized employee and a general employee."

Thus, it is clear from the above that the respondents have successfully controverted the averment of the applicant that he was not given an ample opportunity to defend his case with regard to recovery of overpayment.

15. We have also gone through the judgment of the Hon"ble Supreme Court in the case of State of Punjab & Ors. etc. vs. Rafiq Masih (White Washer), (2015)4 SCC 334 in which it was held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer 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, 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."

16. The situation no. (ii) above cannot apply to facts of the present OA, the applicant, before wrong fixation of pay, had also furnished an undertaking on 05.07.2012 that he will be liable to deposit/refund any over payment regarding his pay fixation case. As such, the applicant who was a Class-I Officer, is bound by the aforesaid undertaking.

17. In an identical case of High Court of Punjab & Haryana & Ors. v. Jagdev Singh (Civil Appeal No.3500/2006), the Hon"ble Supreme Court, while examining the case of Rafiq Masih (supra), has observed as under:-

"8. The order of the High Court has been challenged in these proceedings. From the record of the proceedings, it is evident that when the Respondent opted for the revised pay scale, he furnished an undertaking to the effect that he would be liable to refund any excess payment made to him. In the counter affidavit which has been filed by the Respondent in these proceedings, this position has been specifically [1]admitted. Subsequently, when the rules were revised and notified on 7 May 2003 it was found that a payment in excess had been made to the Respondent. On 18 February 2004, the excess payment was sought to be recovered in terms of the undertaking.

9. The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an

employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.

10. In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc1. this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer 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."

11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking."

It is clear from the aforesaid order that principles enunciated in the case of Rafiq Masih (supra) cannot apply to a situation where an undertaking has already been furnished by the applicant.

18. It is also evident from the record of the proceedings that the applicant had filed two misrepresentations dated 28.05.2012 and 05.07.2012. On the basis of the said misrepresentations, the DGM(BCP) had allowed applicant"s option of pay while switching over of pay from CDA to IDA pay scale (i.e. w.e.f. 01.10.2000) on the date of regular promotion to the post of Senior Accounts Officer w.e.f. 03.04.2011 after a lapse of 6 years which is beyond the power of DGM (BCP) and is in clear violation of FR22.I(a)(1) and the penalty imposed by the reviewing

authority vide order dated 24.09.2008 had been wrongly interpreted by treating it as without cumulative effect and so the release of all the increments during the penalty period which eventually led to wrong fixation of pay. Hence, it is a case of misrepresentations on the part of the applicant, which led to erroneous fixation of pay.

19. It is also noted that the applicant has been drawing Rs.44,000/- approx. as pension (along with DA) and as such, he does not even fall under the exceptions of extreme hardships. The amount of Rs.5,18,037/-received by the applicant without authority of law has been rightly recovered by the respondents to obviate unjust enrichment of the applicant at the cost of public exchequer. In the case of Chandi Prasad Uniyal & Ors. Vs. State of Uttarakhand & Ors., (2012)8 SCC 417 as relied by the respondents, the Hon"ble Supreme Court has held as under:-

"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 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."

20. The judgments relied upon by the applicant in the cases of Rafiq Masih (supra), Syed Abdul Kadir, Shyam Babu Verma (supra) and B.J. Akkara (supra) are not applicable to the facts of the present case as the applicant herein has already furnished an undertaking dated 05.07.2012 to the effect that he will be liable to deposit/refund any over payment regarding his pay fixation case. Rather the present case is covered by the aforesaid decision of the Hon"ble Supreme Court in the case of Chandi Prasad Uniyal (supra).

21. For the aforesaid reasons, we do not find any merit in this OA and the same is dismissed accordingly. No order as to costs.

