

(2006) 01 CAL CK 0030
In the Calcutta High Court
Case No : Writ Petition No. 18974 (W) of 2005

Kalyan Kumar Chattopadhyay		APPELLANT
	Vs	
The State of West Bengal and Others		RESPONDENT

Date of Decision : 27-01-2006

Acts Referred:

Constitution of India, 1950 — Article 265
Contract Act, 1872 — Section 72
Limitation Act, 1963 — Section 17(1)
Sales of Goods Act, 1930 — Section 64A

Citation : (2006) 2 CALLT 600 : (2006) 111 FLR 214

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : Milan Chandra Bhattacharya, Ashim Halder, Anirban Saha and Shyamal Sarkar, for the Appellant; Saikat Banerjee, for the Respondent

Final Decision : Allowed

Judgement

Jyotirmay Bhattacharya, J.—The petitioner who was appointed as an Assistant Teacher of Madarat Popular Academy on 13th June, 1966 retired from service on superannuation with effect from 31st January, 2003.

2. The pay scale of the petitioner was revised from time to time on several occasions during the period of his service.

3. The petitioner exercised his option under the Ropa 1981 on 2nd April, 1981. The said option was accepted by the concerned respondent and the pay scale of the petitioner was revised accordingly under the said Ropa Rules of 1981 with effect from 2nd April, 1981. Such pay revision was not only recorded in the Service Book of the petitioner but was also authenticated by the concerned District Inspector of Schools.

4. Even thereafter the petitioner's pay scale was revised subsequently under Ropa Rules of 1990 as well as under the Ropa Rules of 1998.

5. The petitioner was paid his salary according to such pay fixation by the concerned authority upto the date of his retirement. Last pay certificate certifying that the basic pay of the petitioner was Rs. 11450/- as on the date of his retirement, was also issued by the school authority.

6. In spite of compliance of all the necessary formalities by the petitioner, the entire retiral dues of the petitioner has not been paid by the concerned authority till date. The grievance of the petitioner in this writ petition is primarily against the State respondents for withholding the payment of a sum of Rs. 1,17,439/- on account of the overdrawal in pay of the petitioner. The Pension Payment Order being annexure "P-2" to this writ petition at page 48 indicates that the said sum of Rs. 1,17,439/- was deducted from the gratuity amount payable to the petitioner on the ground that the said amount was overdrawn by the petitioner due to wrong fixation of his pay scale.

7. The reasons for which such deduction was made, are indicated in annexure "P-3" to this writ petition at page 49. It is mentioned therein that "since the option date of the petitioner under Ropa 1981 is 01.04.1981 instead of 02.04.1981 (vide DDA'S Notings No. DD/Pen-12-H/147 dated 17th June 2003), his pay fixation is to be changed under Ropa "81 and under subsequent Ropas...."

8. The contents of the said document indicate that the concerned authority refused to give the benefits under the Ropa Rules of 1981 to the petitioner as the petitioner exercised his option one day beyond the schedule date. Consequently the benefits of the subsequent Ropas were also denied to the petitioner.

9. Thus, it appears that the said amount was overdrawn by the petitioner on account of erroneous pay fixation by the concerned authority.

10. Mr. Milan Bhattacharya, learned advocate, appearing for the petitioner, submitted that since the petitioner was never responsible for erroneous pay fixation, the concerned authority cannot recover any amount which was allegedly overdrawn by the petitioner on account of such erroneous pay fixation by the concerned authority.

11. In support of such submission, Mr. Bhattacharya relied upon the following decisions of the Hon"ble Supreme Court:

- (i) Shyam Babu Verma and Others Vs. Union of India (UOI) and Others,
- (ii) Union of India Vs. IRSS Association, (1995) Suppl. (3) SCC 600 .

12. Mr. Bhattacharya has also relied upon another decision of this Court in the case of Kamalakanta Jha v. State of West Bengal and Ors. reported in 2001(1) CHN 54 in support of his above contention.

13. Mr. Bhattacharya further pointed out that adjustment of any amount on account of overdrawal against the gratuity amount is not permissible under the extant Rule.

14. Mr. Bhattacharya thus submitted that the petitioner is not only entitled to recover the said amount which was unauthorisedly deducted from his gratuity amount as aforesaid, but also is entitled to get interest thereon at a penal rate.

15. Mr. Saikat Banerjee, learned advocate, appearing for the State respondents, submitted that the decisions which were cited by Mr. Bhattacharya, cannot be accepted as declaration of law as the said decisions were given by the Hon''ble Supreme Court in ignorance of the decision of the larger Bench of the Hon''ble Supreme Court in the case of Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, wherein the effect of Section 72 of the Indian Contract Act was dealt with meticulously.

16. By relying upon the said decision, Mr. Banerjee submitted that if any amount is paid either by mistake of law or by mistake of fact, such amount can be recovered by the person who paid such amount by mistake from the person who received such payment u/s 72 of the Indian Contract Act which provides that a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

17. Mr. Banerjee further contended that in view of the aforesaid decision of the Hon''ble Supreme Court in the case of Sales Tax Officer v. Kanhaiyalal (supra), even the equitable consideration cannot come into play because of the statutory provision as contained in Section 72 of the said Act.

18. Mr. Banerjee further pointed out from annexure "R-1" to the affidavit-in-opposition filed by the respondent No. 4, that while submitting formal application for pension, the petitioner declared that if any amount of excess payment and overdrawal in pay and allowances, loans, advances etc., is found out during scrutiny of any pension paper, such excess payment would be adjusted from the gratuity and the pension relief. The petitioner further declared that he will not raise any objection to such adjustment. According to Mr. Banerjee, once the petitioner gives such an undertaking in the formal application for pension, the petitioner subsequently cannot object to such adjustment.

19. Mr. Banerjee further submitted that the petitioner ought not to have suppressed the fact of giving such undertaking before this Court. According to Mr. Banerjee, the writ petition is liable to be dismissed for non-disclosure of such undertaking. In support of such submission, Mr. Banerjee also relied upon a decision of the Hon''ble Supreme Court in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, , wherein it was held that a litigant who approaches the Court, is bound to produce all the documents executed by him which are relevant, to the litigation and if he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party. It was held therein that under such circumstances such a litigant who is guilty of committing fraud can be thrown out at any stage of the litigation.

20. Mr. Banerjee further contended that since undisputedly the petitioner

submitted the above declaration, the petitioner has no legally enforceable right which can be enforced by way of issuance a writ of mandamus.

21. Mr. Banerjee also relied upon another decision of the Hon''ble Supreme Court in the case of V. Gangaram Vs. Regional Joint Director and others, , wherein it was held that excess amount paid by mistake can be recovered from the pension amount of a pensioner.

22. Mr. Banerjee thus supported the action of the concerned respondents and prayed for dismissal of this writ petition.

23. Heard the learned advocates of the parties. Considered the materials on record.

24. Undisputedly a sum of Rs. 1, 17,439/- was deducted from the admissible gratuity amount of the petitioner by the concerned respondent on the ground that such amount was overdrawn by the petitioner on account of erroneous fixation of the pay scale of the petitioner during the tenure of his service.

25. The respondents claim that such pay fixation was made by the concerned authority by mistake. Such mistake was discovered by the respondents at the time of settlement of the retiral dues of the petitioner. As such, the concerned respondent deducted such overdrawn amount from the admissible retiral dues of the petitioner.

26. Now the question is as to whether any amount paid in excess, even by mistake, can be recovered from a retired person out of his retiral dues or not?

27. The decisions which were cited by Mr. Bhattacharya as referred to above uniformly laid down that any amount paid in excess to the petitioner due to the fault of the respondents cannot be recovered from the retired person out of his retiral dues, provided however the retired person is in no way responsible for the default on the part of the respondents.

28. Mr. Banerjee, however, submitted that those lines of decisions of the Hon''ble Supreme Court cannot be held to be a good law in view of the decision of the larger Bench of the Hon''ble Supreme Court in the case of Sales Tax Officer v. Kanhaiyalal (supra) wherein it was held by the Hon''ble Supreme Court that any amount paid in excess by mistake can be recovered by the person who paid such excess amount by mistake from the person to whom such payment was made u/s 72 of the Indian Contract Act.

29. Mr. Banerjee strongly relied upon the said decision of the Hon''ble Supreme Court to support the action of the concerned respondent.

30. Unfortunately Mr. Banerjee lost sight of the subsequent larger Bench decision of the Hon''ble Supreme Court of greater strength in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , by which the earlier decision of the Hon''ble Supreme Court in the case of Sales Tax Officer v. Kanhaiyalal (supra) was overruled by a very long Judgment, the relevant portion

of which are set out hereunder:

35. Now, what are the propositions emerging from this decision? They are: (1) Section 72 of the Contract Act does not make any distinction between a mistake of law and the mistake of fact; it takes both kinds of mistakes. (2) the rule then obtaining in England and certain other countries that taxes paid under a mistake of law are not recoverable has no relevance to this country. Here, the matter is governed by Section 72 of the Contract Act. (3) Where the taxes are paid under a mistake of law, the person paying is entitled to recover the same from the State on establishing the mistake. This consequence flows from Section 72 of the Contract Act. On such mistake being established, the State is bound to repay or return the amounts irrespective of any other consideration. (4) The right to recover or the obligation to refund mentioned in (3) above is subject, however, to "questions of estoppel, waiver, limitation or the like". (5) There is no question of estoppel where both parties were labouring under a mistake of law. (6) Equitable considerations cannot be imported when there is a clear and unambiguous provision of law which entitles the plaintiff to the relief claimed by him. (7) The fact that the State has spent away the taxes for the purposes of State is no defence to a claim for refund of taxes paid under a mistake of law, in view of the plain terms of Section 72 .

Subsequent decisions of this Court on the question of refund.

76. The first question that has to be answered herein is whether *Kanhaiya Lal*, 1959 SCR 1350 : AIR 1959 SC 135 : (1958)9 STC 747 has been rightly decided insofar as it says (1) that where the taxes are paid under a mistake of law. the person paying it is entitled to recover the same from the State on establishing a mistake and that this consequence flows Section 72 of the Contract Act; (2) that it is open to an assessee to claim refund of tax paid by him under orders which have become final - or to reopen the orders which have become final in his own case - on the basis of discovery of a mistake of law based upon the decision of a Court in the case of another assessee, regardless of the time-lapse involved and regardless of the fact that the relevant enactment does not provide for such refund or reopening; (3) whether equitable considerations have no place in situations where Section 72 of the Contract Act is applicable, and (4) whether the spending away of the taxes collected by the State is not a good defence to a claim for refund of taxes collected contrary to law.

Re (III)

80. For the purpose of this discussion, we take the situation arising from the declaration in invalidity of a provision of the Act under which duty has been paid or collected, as the basis, inasmuch as that is the only situation surviving in view of our holding on (I) and (II). In such cases, the claim for refund is maintainable by virtue by virtue of the declaration contained in Article 265 as also u/s 72 of the Contract Act as explained hereinbefore, subject to one exception : Where a person approaches the High Court or the Supreme Court challenging the

constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision become final and cannot be reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ in *Tilokchand Motichand* (1969)1 SCC 110 : (1969)2 SCR 824 : AIR 1970 SC 898 and we respectfully agree with it. In such cases, the plaintiff may also invoke Section 17(1)(c) of the Limitation Act for the purpose of determining the period of limitation for filing a suit. It may also be permissible to adopt a similar rule of limitation in the case of writ petitions seeking refund in such cases. But whether the right to refund or restitution, as it is called, is treated as a constitutional right flowing from Article 265 or a statutory right arising from Section 72 of the Contract Act. it is neither automatic nor unconditional. The position arising under Article 265 is dealt with later in paras 84 to 86. Here we shall deal with the position u/s 72 . Section 72 is a rule of equity. This is not disputed by Shri F.S. Nariman or any of the other counsel appearing for the appellants-petitioners. Once it is a rule of equity, it is understandable how can it be said that equitable considerations have no place where a claim is made under the said provision. What those equitable considerations should be is not a matter of law. That depends upon the facts of each case. But to say that equitable considerations have no place where a claim is founded upon Section 72 is in our respectful opinion, a contradiction in terms. Indeed, in *Kanhaiya Lal*, 1959 SCR 1350 : AIR 1959 SC 135 : (1958)9 STC 747, the Court accepts that the right to recover the taxes - or the obligation of the State to refund such taxes - u/s 72 of the Contract Act is subject to "questions of estoppel, waiver, limitation or the like" but at the same time, the decision holds that equitable considerations cannot be imported because, of the clear and unambiguous language of Section 72 . With great respect, we think that a certain amount of inconsistency is involved in the aforesaid two propositions. "Estoppel, waiver ...or the like", though rules of evidence, are yet based upon rules of equity and good conscience. So is Section 72 . We are, therefore, of the opinion that equitable considerations cannot be held to be irrelevant where a claim for refund is made u/s 72 . Now, one of the equitable considerations may be the fact that the person claiming the refund has passed on the burden of duty to another. In other words, the person claiming the refund has not really suffered any prejudice or loss. If so, there is no question of reimbursing him. He cannot be recompensated for what he has not lost. The loser, if any, is the person who has really borne the burden of duty: the manufacturer who is the claimant has certainly not borne the duty notwithstanding the fact that it is he who has paid the duty. Where such a claim is made, it would be wholly permissible for the Court to call upon the petitioner/plaintiff to establish that he has not passed on the burden of duty to a third party and to deny the relief of refund if he is not able to establish the same, as has been done by this Court in *ITC*, 1993 supp(4) SCC 326, In this connection, it is necessary to remember that whether the burden of the duty has been passed on to a third party is a matter within the exclusive knowledge of the manufacturer. He has the relevant evidence - best

evidence - in his possession. Nobody else can be reasonably called upon to prove that fact. Since the manufacturer is claiming the refund and also because the fact of passing on the burden of duty is within his special and exclusive knowledge, it is for him to allege and establish that he has not passed on the duty to a third party. This is the requirement which flows from the fact that Section 72 is an equitable provision and that it incorporates a rule of equity. This requirement flows not only because Section 72 incorporates a rule of equity but also because both the Central excises duties and the customs duties are indirect taxes which are supposed to be and are permitted to be passed on to the buyer. That these duties are indirect taxes, meant to be passed on, is statutorily recognised by Section 64-A of the Sale of Goods Act, 1930 [which was introduced by the Indian Sale of Goods (Amendment) Act, 1940 and substituted later by Act 33 of 1963]. As originally introduced, Section 64-A read:

64-A. In the event of any duty of customs or excise on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time -

(a) if such an imposition or increase so takes effect that the duty or increased duty, as the case may be or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition: and

(b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty, and he shall not be liable to pay or be sued for or in respect of, such deduction.

31. The principle which was laid down in the aforesaid decision of the Hon'ble Supreme Court in the case of *Mafatlal Industries Ltd. and Ors. v. Union Of India and Ors.* (supra) makes it clear that equitable considerations cannot be held to be irrelevant where a claim for refund is made u/s 72 of the Indian Contract Act.

32. On careful perusal of the decisions of the Hon'ble Supreme Court cited by Mr. Bhattacharya, as aforesaid, it appears to this Court that in all those decisions, the Hon'ble Supreme Court by taking note of the equitable consideration, directed that the amount paid in excess cannot be recovered from the retired person out of the retiral dues provided however the retired person is not responsible in any way for payment of such overdrawal amount.

33. The subsequent decision of the Hon'ble Supreme Court in the case of *V. Gangaram v. Regional Joint Director and Ors.* (supra), cannot be held to be a good law inasmuch as the principle as laid down in the earlier decision of the larger Bench of the Hon'ble Supreme Court in the case of *Shyam Babu Verma v. Union of India* (supra), as aforesaid, was not considered.

34. Here in the instant case, the respondent has not come out with a case that the petitioner is in any way responsible for erroneous fixation of his pay scale. The pay scale of the petitioner was revised from time to time. Such revision was not only noted in the sex-vice book but also authenticated by the appropriate authority.

35. Standard of living of every person rises with the increase of his income. Thus, whatever additional benefits a person received by way of increment in his salary during his service period, are all normally spent with the rise of his standard of living. The retired person cannot subsequently recover the said amount from the person to whom such payment was made in lieu of the benefits which he received therefrom.

36. Thus, if this equitable consideration is taken into account, then it should be held that the respondents who are at fault, should not be allowed to recover the said amount from the retiral benefits of a retired person. That apart, the question of limitation, estoppel etc. are also relevant consideration which all stand in the way of such recovery.

37. Under such circumstances, by following the decisions of the Hon'ble Supreme Court which were cited by Mr. Bhattacharya as aforesaid, this Court holds that when such excess payment was made to the petitioner due to admitted fault on the part of the respondents, the respondents cannot recover the said excess amount by way of adjustment from the retiral dues of the petitioner.

38. Let me now consider the effect of giving the declaration by the petitioner at the time of submission of his application for grant of pension.

39. On examination of the extant Scheme, it appears to this Court that no such application is contemplated under the said Scheme for grant of pension to the retired person. Even the grant of such declaration is not provided under the said Scheme.

40. The retired persons always show their eagerness to get their retiral dues settled at an early date. With the usual anxieties and worries, the retired persons often give such undertaking and/or declaration in expectation of early settlement of their retiral dues.

41. The State should not however take advantage of such undertaking and/or declaration given by such retired persons when the respondent's right to recover such overdrawal amount which was paid to the petitioner on account of mistake on the part of the respondent, has not been recognised by the Hon'ble Supreme Court in the aforesaid decisions cited by Mr. Bhattacharya.

42. This Court also holds that when the petitioner was allowed to draw such excess amount due to no fault on the part of the petitioner, equity demands that such excess amount should not be allowed to be adjusted against the retiral dues of the petitioner.

43. This Court further holds that since the declaration was taken from the petitioner by the concerned respondent in excess of the statutory requirement, even such declaration cannot improve the defence of the respondents. As such, non-disclosure of such a declaration also cannot be fatal to the interest of the writ petitioner.

44. That apart, when the right to recover of the excess amount from the retired persons out of the retiral dues has not been recognised by the Hon'ble Supreme Court in the aforesaid citations, even the grant of such declaration cannot improve the defence of the respondents.

45. It is not out of place to mention here that even no opportunity of hearing was given to the petitioner before taking the decision for deduction of the said overdrawal amount from the retiral dues of the petitioner. This Court also cannot support the decision of the concerned respondent for readjustment of the excess payment against the retiral dues of the petitioner inasmuch as such decision was taken in violation of the principles of natural justice.

46. Even the decision for re-fixation of pay of the petitioner for delayed exercise of option cannot be supported. In fact, the delay is of only one day. When the respondent granted the benefits of Ropa Rules of 1981 in spite of delayed exercise of option, it should be presumed that such benefits were granted upon condonation of delay. In any event, the clock cannot be set right anticlockwise after 22 years.

47. Under such circumstances, this Court holds that the petitioner has a legally enforceable right which can be enforced by issuance of a writ of mandamus.

48. Accordingly, this Court directs the concerned respondents to pay the said sum of Rs. 1,17,439/- to the petitioner positively within a period of four weeks from the date of communication of this order. Since such payment has been withheld by the concerned respondents for such a long time, the concerned respondents are also directed to pay interest @ 10% per annum on the aforesaid amount to the petitioner for the entire period of such delay, i.e., from the date of retirement of the petitioner upto the actual date of payment thereof. Such payment should be made along with the payment of the aforesaid sum of Rs. 1,17,439/- to the petitioner.

The writ petition thus stands allowed.

Urgent xerox certified copy of this Judgment, if applied for, be given to the parties, as expeditiously as possible.