
(2008) 12 GAU CK 0003
In the Gauhati High Court

Mahananda Deb Barma

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 22-12-2008

Acts Referred:

Border Security Force Rules, 1969 — Rule 19
Constitution of India, 1950 — Article 14, 309

Citation : (2009) 4 GLR 598 : (2009) 3 GLT 52

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

U.B. Saha, J.—The petitioner, who was promoted to the post of Assistant Engineer (electrical), has challenged the order of the Chief Engineer (electrical) dated 14.5.1998 (Annexure-E) and the Office Order No. 61 dated 12.8.1998 (Annexure-I to the writ petition) of the Executive Engineer, Transmission Division, whereby and whereunder, the pay fixed earlier was reduced to Rs. 2,330 from 3,000 and the excess payment amounting to Rs. 40,348 paid to the petitioner due to wrong fixation of pay in the scale of Rs. 3,000-5,000 was asked to be recovered in forty installments, i.e., 39 installments @ Rs. 1,000 and the last installment @ Rs. 1,348 from the salary bill of the petitioner with effect from August 1998 onwards.

2. Heard Mr. D.K. Biswas, Learned Counsel for the petitioner and Mr. T.D. Majumder, learned Additional Govt. Advocate for the State respondents.

3. The back ground facts sans of unnecessary details are Discussed as follows:

The petitioner was appointed as Junior Engineer (Elect), Grade-I in the year 1994 and on completion of one year, he was promoted as Assistant Engineer on 25.11.1995 and provided the senior level scale of Assistant Engineer, i.e., the pay scale of Rs. 3,000-5,000, which was applied to the Assistant Engineer completing four years of service. Accordingly, the petitioner received the benefits

of the aforesaid scale of Rs. 3,000-5,000 vide office order No. 146 dated 6.1.96 (Annexure-C to the writ petition) and his pay was fixed at Rs. 3,000 on 27.11.1995. Accordingly, in the subsequent years also, he got the benefits of the said scale along with increments. But thereafter vide order dated 14.5.1998 (Annexure-E to the writ petition), his pay was shown to have been fixed in the pay scale of Rs. 2,100-5,000 on the ground that since the petitioner did not complete four years of service including the service in the feeder post, he was not entitled to the aforesaid pay scale of Rs. 3,000-5,000 as the same was allowed to him due to wrong interpretation of the relevant Revision of Pay Rules, 1988 (for short ROP Rules, 1988) read with its clarificatory Memo issued under the authority of Article 309 of the Constitution of India, which provided the said senior level scale of Rs. 3,000-5,000 to the direct recruit as well as promotee in the post of Assistant Engineer on completion of four years in their service, including the service in the feeder post of the promotee.

4. The impugned order dated 14.5.1998 admittedly does not speak for recovery of the excess amount, but only a copy of the said order was communicated to the Executive Engineer with a direction to recover the amount paid in excess and in view of the said order dated 14.5.1998 of the Chief Engineer (electrical), the Executive Engineer, Transmission Division, Agartala issued office order No. 61 dated 12.8.1998 superceding the earlier office order No. 146 dated 6.1.1996. Vide order dated 19.6.1998 (Annexure-G to the writ petition), the petitioner was allowed pay scale of Rs. 2,100-5,000 and pay has been refixed under F.R. 22(C) with effect from 27.11.1995 at Rs. 2,330.

5. Dissatisfied with the aforesaid order dated 14.5.1998 (Annexure-E) of re-fixation of pay at Rs. 2,330 from Rs. 3,000, the petitioner submitted a representation to the Chief Engineer, Electrical, respondent No. 3 herein, but the said representation was surprisingly denied by the letter dated 19.6.1998 (Annexure-G). It is therein stated that the senior level pay scale of Rs. 3,000-5,000 can be allowed only after completion of four years of service including the service rendered in the feeder post and the date will be 6.4.1998 instead of 27.11.1995.

6. On 20.6.1998, dissatisfied with the order of the authority dated 14.5.1998 (Annexure-E to the writ petition), petitioner served a demand notice to the respondent Nos. 2 and 3 for cancellation of the said order dated 14.5.1998 (Annexure-E). While the petitioner was expecting for cancellation of the aforesaid order, the respondent No. 4, the Executive Engineer, Transmission Division, Agartala issued the order dated 12.8.1998 (Annexure-I to the writ petition) re-fixing the pay of the petitioner at Rs. 2,330 with effect from 27.11.1995 with further direction for recovery of the amount of Rs. 40,348, the excess amount paid in pursuance of the earlier fixation in the pay scale of Rs. 3,000-5,000 in forty installments from his salary with effect from August, 1998. Being aggrieved, the petitioner impugned the orders dated 14.5.1998 and 12.8.1998 in this writ petition on the grounds that those orders are contrary to the notification

dated 12.6.1990 and issued without providing any opportunity to the petitioner.

7. To resist the prayer of the petitioner, the respondents filed a detail counter-affidavit wherein it is, inter alia, stated that the post of Junior Engineer (electrical), Grade-I is the feeder post for promotion to the post of Assistant Engineer (electrical) as per Tripura Power Engineering Service (2nd Amendment) Rules, 1987 and as per said Rules, a degree holder Junior Engineer is eligible for promotion to the grade of Assistant Engineer on completion of minimum service of one year and the petitioner being completed requisite length of service was promoted to the post of Assistant Engineer on 25.11.1995, but according to ROP Rules, 1988, the post of Assistant Engineer, (electrical), carries two pay scales, viz., (1) Rs. 2,100-5,000 and (2) Rs. 3,000-5,000. Second scale of pay is a senior level pay scale and is only available to the Assistant Engineer who completed four years of service as the ROP Rules, 1988 were liberalized vide office Memorandum dated 16.6.1990 issued by the Finance Department and according to the said office Memorandum, four years of service will include the service in the feeder post. But the petitioner was promoted to the post of Assistant Engineer on 25.11.1995 and allowed the senior level pay scale of Rs. 3,000-5,000 before completion of four years of service, including the period of his service in the feeder post as Junior Engineer (electrical).

8. Fact remains that the petitioner joined the post of Junior Engineer, electrical on 6.4.1994 and he was promoted, as Assistant Engineer on 25.11.1995, just after completion of one year instead of four years which was to be completed on 6.4.1998. It has been contended in the counter-affidavit that eligibility for promotion considered with reference to the provisions to Tripura Power Engineering Service Rules, 1987 as amended from time to time and the fixation of pay is to be made in accordance with the provisions of ROP Rules, 1988 and the fundamental Rules. Being the petitioner's pay was erroneously fixed at Rs. 3,000 on his promotion to the post of Assistant Engineer in the higher scale of pay instead of fixation of pay along with increment at Rs. 2,330, the impugned orders were issued. As the petitioner was not entitled to get the benefit of senior level pay scale available to the Assistant Engineer on completion of four years on the basis of which his pay was fixed at Rs. 3,000, he has no right to claim over the excess payment made to him on the basis of the senior level pay scale of Rs. 3,000-5,000, and, as such, the recovery of excess amount for the period from 27.11.1995 to 6.4.1998 was ordered to be recovered in accordance with law vide impugned order dated 12.8.1998 which is just and proper and no interference is called for by this Court.

9. The dispute centers around the question as to whether re-fixation of pay of an employee due to wrong interpretation of Rule/mistake is permissible or not and if so whether the recovery of excess amount paid to the said employee on erroneous fixation is permissible or not.

10. Mr. Biswas, Learned Counsel for the petitioner in support of the writ petition submits that it is a settled position of law that money is a property and if any

recovery is required to be effected, a show cause proceeding has to be made which has admittedly not been taken by the respondents in the instant case. Arid on that ground alone, the impugned order dated 14.5.1998 (Annexure-E) is required to be quashed. He also contends that the respondents in their counter-affidavit have admitted that the benefit of higher scale of Rs. 3,000-5,000 was given to the petitioner by way of mistake and such mistake continued for four years. According to him, the excess payment made to the petitioner is not for his own fault. Therefore, the respondents cannot ask for recovery of the said excess amount. He also attacks the aforesaid impugned order on two counts, inter alia, the substantive part of the aforesaid impugned order does not contain anything that the higher pay scale was awarded to the petitioner illegally and no order of the recovery was contained therein. Therefore, without the strength of any executive/office order, no direction can be given for recovery in the endorsement part of the order. In alternative, he urges that even if the court holds that till 1998, the petitioner was not entitled to the benefit of higher pay scale of Rs. 3,000-5,000 which is meant for the Assistant Engineer who completed four years of service including the service rendered in the feeder post; then also the recovery of the amount cannot be ordered in view of the judgment of the Supreme Court in P.M. Reddy and Ors. v. N.T.R.D. and Ors. 2002 (2) SLR 694. He also referred to a common judgment dated 17.6.05 of this Court rendered in Civil Rule No. 440 of 1993 (Shri Ashotosh Saha and Ors. v. Tripura Khadi and Village Industries Board and Ors.) and other cases, wherein the order of recovery as issued by the authority adverse to the petitioners of those cases was set aside.

11. Mr. T. D. Majumder, learned Additional Govt. Advocate while placing the case of the respondents tried to efface the contention of Mr. Biswas on the ground that the bona fide mistake can be rectified at any stage. In the instant case, it is the admitted position that the petitioner though not completed four years of service including the service in the feeder post of the Junior Engineer, he was allowed a higher pay scale, i.e., senior level scale, which he is not entitled to either in accordance with ROP Rules, 1988 or in view of the office order dated 16.6.1990 (Anexure R-1 to the counter-affidavit) by which the earlier office memorandum dated 8.5.1990 was partially modified so far para-3(ii) is concerned. Therefore, the petitioner cannot claim over the excess money paid to him as that was made to him due to wrong interpretation of the ROP Rules, 1988 and orders applicable to his service condition. He has also contended that when there is a conflict regarding pay of an employee between service Rules and the ROP Rules, 1988 framed under Article 309 of the Constitution, then the ROP Rules will prevail and in the instant case, the respondents fixed the pay of the petitioner in view of the provisions of ROP Rules, 1988 read with Memo dated 16.6.1990 (Annexure R-I to the counter-affidavit) which is not under challenge before this Court. In support of his aforesaid contention, he placed reliance in the case of Union of India Vs. IRSS Association, (1995) Suppl. (3) SCC 600 wherein the Apex Court permitted the recovery of the excess payment due to erroneous identification of the date of commencement of the revised pay scale from the existing employees and not to

recover from the employees who have already retired from service, in the instant case, the petitioner is in service. He also relied the decision of the Apex Court in V. Gangaram Vs. Regional Joint Director and others, particularly para-7 of the said report, which is reproduced hereunder:

7. On the basis thereof, the appellant is entitled to only two additional increments, namely, one increment for M.A. and thereafter one for M.Ed. Under these circumstances, the authorities have wrongly applied the GOMs No. 928 and GOMs No. 266 Finance and Planning dated 17.11.1986. While issuing the notice, it was confined to the question of recovery of the arrears paid to him from the year 1985, the year in which he is eligible to acquire additional qualifications for holding the post of lecturer. Thus, it could be seen that he is entitled to the revised scale of pay giving the additional increments on two qualifications, namely, MA and M.Ed. and, therefore, he is entitled to the computation of the scale of pay then applicable to him prior to the date of immediate month in which examination was conducted of the scale of pay plus two additional increments. He is not entitled to the four increments, as successively claimed. We hold that he is entitled to only two increments as indicated above. Since the Department itself has adopted the above approach, we direct that arrears paid prior to 1985 are not to be recovered and excess amount from 1985 is liable to be recovered from the pension payable to the appellant. The installment should be proportionately distributed so as not to cause any undue hardship.

12. Finally, he has placed reliance in the case of U.P.S.R.T.C. Vs. Mahendra Nath Tiwari and Another, particularly para-9 of the said report, which is quoted below:

9. We, therefore, allow the appeal in part and set aside the award of back wages. The respondent would be entitled to wages or salary only from the date of his being reinstated pursuant to the direction of the Labour Court. If anything has been paid to him in excess, U.P. SRTC would be entitled to adjust the same from his future salary in monthly instalments and/or recover it from his retrial benefits, if he is not still in service or by proceeding otherwise.

13. This Court has given thoughtful consideration to the facts as they emerged from the impugned orders of the respondents and the rival contention of the Learned Counsel for the parties as well as the documents and citation Relied On.

14. In the case of P.H. Reddy and Ors. (supra), considering the facts and circumstances of that case, the Apex Court affirmed the order of re-fixation done by the appropriate authority and set aside the order of repayment of the excess payment drawn by the employee, the appellant therein. In the case of Ashotosh Saha and Ors. (Civil Rule No. 440 of 1993) (supra) also, this Court considering the facts and circumstances of that case noted that "an incumbent in a post is not entitled to pay in excess of what is due to him in law, but if the same follows an erroneous fixation by the authorities concerned, a process in which has complicity is not established, it would be open for a court of law more particularly a court exercising an equitable jurisdiction to mould the reliefs having regard to

the attending facts and circumstances" and considering the facts and circumstances of that case upheld the impugned action of stepping down the pay scales of the petitioners and struck down the order of proposed recovery. In the aforesaid case, the court while struck down the order of recovery also noted that justice in a given situation requires at times to be tempered with mercy, meaning thereby, the court in that case did not lay down law regarding recovery of the excess amount on which an employee had/has no lawful right. Therefore, this Court is unable to accept the submissions of Mr. Biswas, Learned Counsel for the petitioner that the money is a property but for retaining such money, a person is to establish his lawful right for such money. In the instant case, it has to be examined by this Court whether the petitioner has the lawful right over the excess amount paid to him by the authority either due to mistake or due to wrong interpretation of the provisions to ROP Rules, 1988 and the order of the Government.

15. In the case of V. Gangaram (supra), question came up whether excess amount paid to the petitioner employee due to mistake or wrong interpretation of Govt. order can be recovered. The Apex Court after considering the facts of that case noted that an employee was not entitled to four increments as successively claimed and held that he is entitled to only two increments and since the Department was confined to the question of recovery of the arrears paid to him from the year 1985, the year in which he is eligible to acquire additional qualification for holding the post of lecturer, the court directed that the arrears paid prior to 1985 are not to be recovered and excess amount from 1985 is liable to be recovered from the pension payable to the appellant. The installment should be proportionately distributed so as not to cause, any undue hardship, meaning thereby the ratio of V. Gangaram (supra) is the excess amount paid due to mistake is recoverable.

16. In Sitesh Bhattacharjee v. State of Tripura (2000) 3 GLR 74, this Court, considering the facts of that case, inter alia, held that the writ petitioner was appointed as a science teacher being a bachelor of science and he was allowed higher pay scale for acquiring master degree in Bengali instead of master degree in science as required under the Govt. memorandum due to misapprehension held that excess amount paid under misapprehension can be recovered from the petitioner.

17. Following the case of V. Gangaram (supra) and the case of Radha Kishan v. Union of India and Ors. (1997) (2) SLR 418, this Court in Samir Bhattacharjee v. State of Tripura and Ors. (2001) 3 GLR 174 held that the recovery of the excess amount paid to an employee by mistake of the authority, refund is to be made to the State exchequer and the ratio available in the above decision should be the rule. An exception can be carved out to the above rule where it is found that the authorities concerned are grossly negligent in their actions which resulted into excess payment as in that case, since the date of initial appointment, the authorities concerned were negligent, the court thought it fit to recover the

excess amount from the writ petitioner-employee as well as from the officer at default by proportionately distributing the amount and ultimately directed to the State respondents to recover only 40% of the excess amount from the pay and allowances of the petitioner by way of installment and remaining 60% from the officer guilty from the negligence and latches.

18. In Indian Railway SAS Staff Association (supra), the Apex Court while Considering the case held that the respondent employee of that case are not entitled to any difference on the basis of notional fixation of pay w.e.f 1.1.1986. The arrears, if any, paid to the respondent-employees on account of the notional fixation of their pay w.e.f 1.1.1986 may be recovered from their future salaries. It is, however, made clear that the said arrear shall not be recovered from those of the employees who have already retired from service, meaning thereby, according to the Apex Court, if any amount is paid to the employee due to the mistake, the said amount can be recovered subject to the condition that the employee is in service.

19. It appears from U.P. SRTC (supra) that the Apex Court while setting aside the award of back wages in that case, held that if anything has been paid to him in excess, the appellant, U.P. SRTC would be entitled to adjust the same from his future salary in monthly installments and/ or recover it from his retrial benefits, if he is not still in service or by proceeding otherwise, meaning thereby the authority was given power to recover the excess amount paid to an employee as the concerned employee is not lawfully entitled the said amount.

20. In the case of Union of India and Others Vs. Rakesh Kumar etc., the Apex Court while considering the question whether the members of B.S.F. resigning under Rule 19 of the B.S.F. Rules, 1969 after serving for ten or more years but less than 20 years were entitled to pension/pensionary benefits, observed that if by erroneous interpretation of statutory rules pensionary benefits are granted to someone, it would not mean that the said mistake should be perpetuated by direction of the court. It would be unjustifiable that by appropriate writ, the Court should direct something which is contrary to the statutory rules. The Apex Court also held that in such cases, there is no question of application of Article 14 of the Constitution. No person can claim any right on the basis of decision which is de hors the statutory rules nor can there be any estoppel. In such cases, there cannot be any consideration on the ground of hardship.

21. In a catena of decisions, the Apex Court noted that an evident mistake cannot constitute a valid basis for compelling the administration to keep on repeating that mistake. One of those cases is Chandigarh Administration and Ors. v. Naurang Singh and Ors. 1997 (2) SLR 230. In U.P. Sugar Corporation Ltd. v. Sant Raj Singh Civil Appeal No. 6588 of 2003, the Apex Court allowed the authority to recover the excess payment from the salary. At best an employee can ask for recovery of excess payment made to him by easy installments as the money paid in excess being not his own, rather public money. Following the aforesaid cases along with the case of V. Gangaram (supra), a Division Bench of

this Court in Director General Indian Council of Agricultural Research (ICAR) and Anr. v. Victor Dihkar and Ors. (2007) 1 GLR 106 held that the Government and the Council like ICAR is an impersonal body having no personal reference, it cannot act by itself, it has to act/work through its officers and employees, who represent it, to fulfill its policy decision. If any employee or officer allowed some benefits to other ineligible employees/officers or workers to get such benefits due to wrong interpretation of the policy/office memorandum and/or order due to bona fide mistake, then the government or the council has the right to rectify the said bona fide mistake of its employee/officer as and when such wrong/mistake came to its knowledge". It has also been held that "as a court of equity we cannot deprive a citizen and/or an employee from his legal entitlement provided by any law/statute or any order issued by the competent authority, but at the same time we cannot also allow a person/an employee to retain public money paid to him in excess to his lawful entitlement wrongly by another public officer, giving wrong interpretation of Govt. policy/order". In that case, being it was an admitted position, the respondents applicants were not entitled to special duty allowance (SDA) as per the decision of the Apex Court and the memorandum of the Finance Department of the Govt. of India as well as orders of the ICAR, and they were paid the said SDA due to wrong interpretation of the order of the authority. It was also held that "the amount paid to the applicants by way of SDA in excess due to wrong interpretation/clarification/mistake committed by another officer of the ICAR are recoverable, as the said amount was paid due to wrong interpretation of the office memorandum issued by the Ministry of Finance, Govt. of India and the Authority of the ICAR". The Division Bench also took note of the case of State of Tamil Nadu and Others Vs. St. Joseph Teachers Training Institute and Another, wherein it is held that hardship cannot be a ground for providing certain benefits to the ineligible persons/ employees contrary to the rights provided by law or policy.

22. In the instant case, it is the admitted position that though the petitioner did not fulfil the service condition as prescribed under the ROP Rules, 1988 and the Govt. order dated 16.6.1990 (Annexure-R1. to the counter-affidavit) for getting higher pay scale, i.e., the senior level pay scale meant for the Assistant Engineer as he did not complete four years of service as Assistant Engineer (Electrical), the same was allowed to him just after completion of one year service as Junior Engineer due to erroneous interpretation of the provisions to ROP Rules and the office order as stated supra. Therefore, the petitioner is not entitled to retain the excess amount made to him due to such mistake or wrong interpretation of Rules and order, as over the said amount, he has no lawful rights. More so, when the ROP Rules, 1988 and the Govt. order do not provide such senior level pay scale, the court cannot ask to give him senior level pay scale, but the same was allowed to him due to wrong interpretation or mistake of the authority. The court cannot compel the administrative authority for allowing the benefit of senior level pay scale to the petitioner as well as not to recover the excess payment made to him due to wrong interpretation of the Rules and orders being the petitioner has

no lawful rights to the said excess amount. Therefore, it can safely be held by this Court that before completion of four years service, the petitioner was not entitled to the senior level pay scale which was allowed to him by the respondents authority due to wrong interpretation of Rule as well as order and on the basis of the aforesaid pay scale, the fixation of pay of the petitioner at Rs. 3,000 in the higher level pay scale is also wrong. His fixation of pay at the relevant time should be at Rs. 2,330 in the pay scale of Rs. 2,100-3,000 due to his non-completion of four years service either as Junior Engineer or as Assistant Engineer.

23. In view of the aforesaid position, the order of recovery of the excess amount vide memo dated 12.8.1998 (Annexure-I to the writ petition) is valid being the petitioner is in service and the excess amount made to him being not his own rather public money. A bona fide mistake can be rectified. In the instant case, the excess payment made to the petitioner is a bona fide mistake giving wrong interpretation to the ROP Rules, 1988 and the Govt. orders by the respondent authority who has the power to rectify the same. By the impugned orders, the respondent authorities had rectified the same. Hence, the impugned orders are not required to be interfered with.

24. For the foregoing reasons and discussions, the writ petition is devoid of merit and accordingly, the same is dismissed. Consequent thereto, the stay order passed earlier shall stand vacated.

No order as to costs.