

(2011) 04 CAL CK 0101
In the Calcutta High Court
Case No : W.P.C.T. No. 169 of 2008

Mehboob Rahaman

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-04-2011

Acts Referred:

Citation : (2012) 3 CHN 657

Hon'ble Judges : Mrinal Kanti Chaudhuri, J;Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Suhendu Mukherjee and Sanat Kumar Chowdhury, for the Appellant; Murari Mohan Das and Mrinal Kanti Sardar and Mansi Bhattacharya for Respondent Nos. 1, 2, 3, 4, 7 and 8, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—The petitioner was initially non-IPS cadre. He was promoted to IPS cadre with effect from March 23, 2005. The subject dispute relates to the period when the petitioner was working as Vice-Principal in Central Detective Training School, Calcutta on deputation. Pertinent to mention, the concerned school was under the Bureau of Police Research and Development, Ministry of Home Affairs, Union of India. As per the service conditions so published in notification dated June 28, 2001 the post was to be filled up by transfer on deputation from amongst the in house candidates being IPS officers working in the senior scale or State Police Service Officers holding post in the scale equivalent to senior scale of IPS or included in the select list for the promotion to IPS or different categories mentioned in the notification working in Central Police cadre. The petitioner was in State Police Service as observed earlier. He was initially a non-IPS cadre. He opted for the post of Vice-Principal in the academy and was selected as such. He joined the post on deputation on July 1, 2003 on a term of three years. At that time, he was working as Deputy Superintendent of Police, West Bengal, enjoying a basic pay of rupees twelve thousand seven hundred and fifty in the scale of Rs. 1200 - 375 - 18000. He was engaged as Vice-Principal and fitted in the scale of Rs. 10000 - 325 - 15200 and basic pay was fixed at Rs. 12,925/-. From July 2003 to June 2005 he continued to enjoy

the said scale. On March 23, 2005 he was promoted to IPS rank and became entitled to the scale of Rs. 10000 - 325 - 15200, the scale which he enjoyed earlier. The dispute arose with regard to fixation of his pay after his promotion as IPS. The authority observed that his pay should be fixed at Rs. 12750/- retrospectively with effect from July 1, 2003 in the scale of Rs. 12000 - 375 - 18000. The authority asked him to refund a sum of Rs. 73,743/- stated to have been overdrawn by him till that date. The authority granted instalment of rupees five thousand for such reduction. The authority subsequently corrected the amount and asked for refund of rupees sixty-five thousand five hundred thirty which the petitioner disputed. Repeated representations were made. Ultimately, the petitioner approached the Tribunal. The Tribunal dismissed his application vide judgment and order dated January 28, 2008 which gave rise to the present application before us.

2. On perusal of the judgment and order impugned herein, we find that the petitioner contended before the Tribunal that his pay was correctly fixed at rupees twelve thousand nine hundred and twenty-five as he was persuaded to accept the lower scale as by that time he was already enjoying the scale of Rs. 12000-325-18000. On the persuasion of the authority he agreed to accept the lower scale being Rs. 10000 - 325 - 15300 on the assurance of pay protection. The authority, accordingly, fixed his pay at rupees twelve thousand nine hundred and twenty five. Hence, the subsequent recall of the earlier pay fixation was invalid. The petitioner also contended that for last two years he enjoyed the said benefit without having any audit objection. Moreover an audit account considered the issue and contemporaneously accepted such fitment as would appear from page 25 of the paper book. Pertinent to note, the Audit Accounts Officer, Government of India vide memo dated May 26, 2005 observed that the fixation of pay was correctly done as per the logic so advanced by the concerned officer appearing in the said report. The Tribunal rejected his contentions on the ground that the earlier pay fixation did not have the approval of the competent authority. The Tribunal also observed that the DA pattern in the State Service was not the same as the Central Government. Moreover, as there was delay in fixing of the pay, provisional pay was offered to him which was fixed at a lower scale than what he was enjoying in his original post. However, such fixation was a temporary fixation and should not be of any consequence. On the issue of persuasion to opt a lower pay scale, the Tribunal observed that deputationist could not opt for a particular pay scale in view of training allowance which he was otherwise entitled to as a service condition. The Tribunal lastly rejected the contention of the petitioner that recovery was not valid in view of the decision of the Apex Court in the case of Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, .

3. Mr. Subhendu Mukherjee, learned counsel being assisted by Mr. Sanat Kumar Chowdhury, learned advocate appearing for the petitioner reiterated what he had contended before the Tribunal. Learned Counsel, in addition, contended that the Tribunal did not consider the audit observation appearing at page 25 and

erroneously termed the earlier fixation as a provisional pay. He contended that according to the Service Rules pay scale was fixed and such benefit once extended could not be recalled after a lapse of two years. In any event such belated recovery was not permissible in view of the decision in the case of Shyam Babu Verma (Supra). He also contended that the very fact that he was persuaded to accept the lower pay scale was apparent from the records. The petitioner agreed to the same in view of his fixation at a higher rate. Such fixation could not be recalled at a belated stage that too, retrospectively.

4. Mr. Murari Mohan Das, learned senior counsel appearing for the State contended that the petitioner did not challenge the fixation in absence of any challenge being thrown to the fixation. The prayer for recall of the order of recovery of the excess amount was not maintainable.

5. He contended that unless and until the petitioner challenged the fixation appearing at page 36 the recovery could not be stalled.

6. We have considered the rival contentions. From the order of the Tribunal we find that the Tribunal accepted the fact that the petitioner was fitted in a lower pay scale at the initial stage. If such fitment was wrong the benefit flown from such fitment, if any, in our view, could not be recalled. It is well-settled principle of law that a service benefit once given to an employee could not be recalled unless it was done by mistake. Even if such mistake was committed by the administration, retrospective recall was not permissible. Mr. Das relied on the decision in the case of Union of India and Others Vs. Smt. Sujatha Vedachalam and Another, .

7. In the case of Union of India vs. Smt. Sujatha Vedachalam (Supra), pay was erroneously fixed which the authority sought to correct. The Apex Court, considering the factual aspect, allowed the appeal of the Union of India permitting them to recover the overdrawn amount for a period spread over for fifteen years.

8. In the case of Shyam Babu Verma (Supra), the nature of work was, more or less same but the scale of pay varied on academic qualification and experience. The Apex Court observed that the principle of equal pay of equal work could not apply. However, the Apex Court, after upholding such pay fixation by the authority correcting their mistake, did not permit them to recover the overdrawn amount observing that such amount was paid to the employees having no fault of them Paragraph 11 of the said decision is quoted below--

Although we have held that the petitioners were entitled only to the pay scale of Rs. 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs. 330-560 but as they have received the scale of Rs. 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly,

we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same.

9. In the instant case, we find that the authority fixed the pay by fitting the petitioner in a lower scale than what he had been enjoying in his regular post. Hence, he could not be blamed for the same. Mr. Das sought to contend that he, being the self-drawing authority was responsible for such fitment. We do not find any positive support of such statement either from the pleadings or from the judgment and order impugned. We are in view that fitment in a particular scale is within the domain of the executives. Such fitment could not be questioned before the Court of law unless it could be termed as arbitrary. From the facts discussed above, we do not find any arbitrariness on that score. Hence the challenge to such fitment was rightly rejected by the Tribunal. We do not find any scope of interference. We join issue on the question of recovery. We feel that the instant case is squarely covered by the decision in the case of Shyam Babu Verma (Supra). The Tribunal did not apply the said ratio as decided in the case of Shyam Babu Verma (Supra). In fact the issue was side-tracked as we find from the judgment and Order impugned. The principal basis of the decision of the Tribunal was that it was a provisional pay subject to the final approval of the higher authority. Hence, the subsequent fitment by the higher authority could not be questioned. The Tribunal observed that payment made in excess was not due to an error committed by the respondent. The logic is, however, not intelligible to us. The Tribunal observed that the applicant did the exercise of his own for his benefit. We do not find any support of such statement. In any event assuming it was done by the applicant himself, for two years despite audit verifications he enjoyed the said benefit. In any event it was not done deliberately. Even if the petitioner did it, such exercise was on a mis-conception that he would be entitled to such pay in view of pay protection, despite fixing him in a lower scale. The situation is not such where unhesitatingly we could come to a conclusion that petitioner did it of his own deliberately. In our considered view, the decision in the case of Shyam Babu Verma (Supra) squarely applies.

10. The application succeeds in part. The order of the Tribunal rejecting the prayer for cancellation of the fitment is affirmed. However, recovery proceeding, so attempted by the authority for Rs. 67,530/- said to have been overdrawn by the petitioner is quashed and set aside. To the said extent, the order of the Tribunal is modified.

11. WPCT No. 169 of 2008 is disposed of. Urgent xerox photostat copy will be given to the parties, if applied for.

Dr. Mrinal Kanti Chaudhuri, J.

I agree.