

**(2008) 12 AHC CK 0011**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 33760 of 2002

Mohammad Musa

APPELLANT

Vs

State of U.P. and others

RESPONDENT

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**Date of Decision :** 08-12-2008

**Acts Referred:**

**Citation :** (2009) 120 FLR 698

**Hon'ble Judges :** V.K. Shukla, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## **Judgement**

V.K. Shukla, J.—Present writ petition has been filed by the petitioner, questioning the validity of order dated 1.8.2002, mentioning therein that similar pay scale cannot be accorded and the excess amount in question, which has been paid, is liable to be recovered.

2. Brief background of the case is that Petitioner was initially appointed as Laboratory Technician in Medical Health Department of the State of U.P. petitioner has stated that on 10.6.1985 decision was taken to create a separate cadre of the employees who were working in the Medical & Health Department and the Employees State Insurance Department, who had been transferred to the Labour Department of the State of U.P. petitioner has stated that all the employees like the petitioner who were appointed in the Health, Department, but were actually posted in the State Employees Insurance Hospitals and Dispensaries, were asked to exercise their option for being merged in the cadre to be constituted in respect of State Employees Insurance Hospital in the Labour Department. In this regard reference has been given of clause 5 of Government order dated 10.6.1985, which provided that the employees opting for State Employees Insurance Department would be entitled to same salary and other service benefits as are admissible to the Medical Staff and Paramedical Staff under the Medical and Health Department. Petitioner claims that in view of the said provision, he exercised his option in the prescribed format and the said

option was duly accepted. Petitioner claims that thereafter he became the member of the cadre of the employees of the E.S.I. Department, and he was accorded selection grade after completing 16 years of service and benefit of revised pay scale was also accorded. Petitioner has contended that thereafter for no rhyme or reason, some audit objection was raised under the signature of Senior Audit Officer by mentioning that wrong fixation has been made, as similar pay scale was not admissible vis-a-vis the staff and the State Employees Insurance Department and the Health Department, and excess amount paid on account of wrong fixation is liable to be recovered. At this juncture, present writ petition has been filed.

3. On presentation of writ petition this Court on 20.8.2002 passed following order, which is being quoted below:

"It is contended that petitioner had opted for Employees State Insurance Department, in the year 1985 and that by Government order dated 10.6.1985, the pay and allowances of all the employees, working as medical and paramedical, were protected providing that they will be paid same salary and allowances which were applicable to the medical staff and paramedical staff of the Medical & Health Department and as such the petitioner's salary cannot be reduced.

Notice on behalf of all the respondents has been accepted by the learned Standing Counsel. He prays for and is granted four weeks" time to file counter affidavit. List in the 1st week of October, 2002.

Until further orders, the effect and operation of impugned order dated 1.8.2002, passed by respondent No. 3, Medical Superintendent, Employees State Insurance Hospital, Naini, Allahabad, shall remain stayed. The petitioner shall continue to draw the same salary, as was drawn by him before issuance of the impugned order."

4. In spite of repeated opportunity being accorded till date no counter affidavit has been filed on behalf of the respondents, and as such the statement of facts mentioned in the writ petition remains un-rebutted.

5. Sri S. Asraf Ali, learned Counsel for petitioner, contended with vehemence that in the present case benefit was extended strictly in consonance with clause 5 of the Government order dated 10.6.1985, and in the matter of pay taxation, the petitioner had no role to play, as such amount in question, by no stretch of imagination, could have been recovered, as has been sought to be done in the present case, as such writ petition deserves to be allowed.

Learned Standing Counsel, on the other hand, contended that rightful view has been taken, as such no interference be made.

6. After respective arguments have been advanced, factual position which emerges is to the effect that by Government order dated 10.5.1985 pay and allowances of all the employees, working as medical and paramedical, were

protected providing that they will be paid same salary and allowances which were applicable to the medical staff and paramedical staff of the Medical Health Department. Petitioner's initial appointment was with the State Government as lab Technician and Petitioner had exercised his option to be merged in the cadre to be constituted in respect of State Employees Insurance hospital and Dispensaries. With the exercise of option, the petitioner became member of the State Employees Insurance Department and thereafter, in terms of clause 5 of Government order dated 10.6.1985 all benefits have been extended. As far as Petitioner is concerned, he has given his option on the asking for from the respondents and said option has become final, and thereafter being member of the cadre of the employees of the State Employees Insurance, all benefits had been extended to the petitioner. Thereafter, on 1.8.2002 order impugned has been passed. No reason, whatsoever, has been given in the aforementioned order as to why same pay scale was not being made admissible to the employees of the State Employees Insurance Department qua the employees of Medical and Health Department. Without disclosing any reason directives have been issued for recovery of the excess amount.

7. The law is well settled that in the matter of fixation of salary and allowance in case, there is no fraud or misrepresentation, then the amount paid in excess on account of wrong fixation, cannot be recovered. Hon'ble Apex Court in the case of Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, has taken the view that higher pay scale erroneously given to an incumbent and incumbent having received higher scale due to no fault of his, it shall be just and proper not to recover any excess amount already paid to them. Division Bench of this Court in the case of Bindeshzvari Sahai Srivastava v. Chief Engineer, irrigation Department, Lucknow and others 1996 (74) FLR 2127 (All.) has taken similar view that it is well settled principle that wages paid to an employee by employer voluntarily in bona fide manner without there being any fraud or misrepresentation, cannot be recovered from the employee subsequently merely on the ground that some mistake committed by employer for which employee cannot be held responsible.

8. This Court in identical matter decided on 23.11.2004 Awadh Nath Tripathi Vs. Chief Development Officer and Others, has taken the same view and has concluded that in view of aforesaid legal position, it is not open to the respondents to recover any amount from the petitioner on the fact mentioned in the impugned order that salary of petitioner was wrongly fixed in the selection grade.

9. On the parameters as discussed above. The directives contained in the impugned order dated 1.8.2002 directing recovery of the amount cannot be sustained. As far as second part of the order that same pay scale is not admissible. As no reasons have been disclosed and opportunity has not been provided for, as such order is unsustainable. Recovery of amount already paid cannot be made, but in respect of fixation of salary, decision can be taken, after

providing opportunity of hearing to petitioner and that too by reasoned order.

Consequently, writ petition succeeds and is allowed. The impugned order dated 1.8.2002 is hereby quashed and set aside.