

(2009) 05 AHC CK 0640

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 38354 of 2007

Om Prakash

APPELLANT

Vs

State of U.P.and others

RESPONDENT

Date of Decision : 28-05-2009

Acts Referred:

Citation : (2009) 05 AHC CK 0640

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

Final Decision : Partly Allowed

Judgement

V.K. Shukla, J.

Present writ petition has been filed questioning the validity of order dated 19.05.2007 passed by Chief Development Officer, Rampur, directing cancellation of order dated 14.03.2007 by means of which the petitioner was accorded pay scale of Rs.45007000 of the post of Assistant Accountant, with effect from 01.04.2001 and further order directing recovery of the excess amount paid.

Brief background of the case is that the petitioner had been performing and discharging duties as junior clerk in the office of the District Development Officer, initially on temporary basis, and subsequently, he was confirmed as junior accounts clerk with effect from 01.01.1999 in the pay scale of Rs.30504590/. The petitioner continued to hold the post of junior accounts clerk and was confirmed. Thereafter, petitioner was promoted to the post of Accounts Clerk in the pay scale of Rs.40006000/ vide order dated 07.12.1999, and the petitioner continued to function on the said post. The State Government in the year 2003 issued Government Order and in pursuance of the recommendations made by the Pay Commission of 199799, Chef Secretary of the State constituted a committee in respect of the posts of Rural Development Department of the State, and as per the same nomenclature of the ""Accounts Clerk" was changed to ""Assistant Accountant". One of the decisions so taken was that the post of accounts clerk (pay scale of Rs.40006000/) shall be merged in the post of Assistant Accountant (pay scale of Rs.40006000/). Petitioner's contention is that in accordance with

the provisions of the aforesaid Government Order dated 30.09.1993, the petitioner, who was working on the post of accounts clerk in the scale of Rs.40006000/ became Assistant Accountant in the office of the Chief Development Officer, Rampur. Subsequent to the same by another Government Order dated 26.04.2006 pay scale of the Assistant Accountants, who were working in the pay scale of Rs.40006000/ was increased to Rs.45007000/ with effect from 01.10.2001. Petitioner submits that thereafter in compliance of the aforementioned Government Orders dated 30.09.2003 and 26.04.2006 with effect from 01.10.2001, he was accorded the pay scale of Rs.45007000/. However, subsequently, the order impugned has been passed, which is subject matter of challenge before this Court in present writ petition.

Counter affidavit has been filed on behalf of the State respondents, and therein, it has been stated as follows:

"That the petitioner is working as Accounts Clerk in the Department concerned since 08.12.1999 in the pay scale of Rs. 40001006000. Later on the State Government vide its government order dated 30.09.2003 has merged the post of Accounts Clerk in the cadre of Assistant Accountant and they have been redesignated as Assistant Accountant. It is further relevant to mention here that later on the State Government again issued a government order dated 26.04.2006 by which the pay scale of the Assistant Accountant has been upgraded as Rs. 45001257000 w.e.f. 2001 and in pursuance thereof, the pay scale of the petitioner being Assistant Accountant has been fixed in upgraded pay scale of Rs. 45001257000 vide office order dated 17.10.2006 w.e.f. 30.09.2003. It appears that the petitioner fraudulently obtained arrears of his salary in the said upgraded pay scale of Rs. 45001257000 w.e.f. 2001 whereas the petitioner was designated as Assistant Accountant by virtue of government order dated 30.09.2003 and as such he was/is entitled to get pay scale of Rs. 45001257000 from 30.09.2003 and not from 2001 as the petitioner was not working as Assistant Accountant in 2001 rather he has been designated in the said post on 30.09.2003 and as such excess payment of made to the petitioner was directed to be recovered from his salary in equal six instalments by means of impugned order, which is perfectly just and legal and the same has been passed in public interest."

In this background, it has been stated that the order impugned warrants no interference by this Court.

Rejoinder affidavit has been filed disputing the averments made in the counter affidavit, and it has been reiterated that the amount in question has been rightly paid to the petitioner and recovery is not permissible.

After pleadings inter se parties have been exchanged, present writ petition has been taken up for final hearing and disposal with the consent of the parties.

Sri Pradeep Kumar, learned counsel for the petitioner, contended with vehemence that in the present case benefit extended to the petitioner with effect from

01.04.2001 has been rightly extended and as his claim is covered under the aforesaid Government Orders, coupled with the fact that, as there is no fraud or misrepresentation on the part of the petitioner in fixation of salary in the pay scale of Rs.45007000/, as such excess amount which had been paid, could not have been asked to be recovered in the way and manner, in which it has been sought to be done in the present case, as such writ petition deserves to be allowed.

Countering the said submission, Sri Amit Kumar, learned Standing Counsel, contended that in the present case on the face of it, the petitioner was not entitled to get the pay scale of Rs.45007000/ with effect from 01.04.2001, and once on the face of it incorrect amount has been fixed and paid, the petitioner is duty bound to refund the same, and as such this Court should refuse to interfere with the impugned order passed.

The first question to be adverted to, is as to whether fixation of salary in the pay scale of Rs.45007000/ has rightly been done in favour of the petitioner with effect from 01.04.2001 or not. In the present case undisputed position, and qua which there is no dispute, is that the petitioner had been performing and discharging duties as junior clerk in the office of the District Development Officer initially on temporary basis and subsequently, he was confirmed as junior accounts clerk with effect from 01.01.1999 in the pay scale of Rs.30504590/. The petitioner continued to hold the post of junior accounts clerk and was confirmed. Thereafter, petitioner was promoted to the post of Accounts Clerk in the pay scale of Rs.40006000/ vide order dated 07.12.1999, and the petitioner continued to function on the said post. The State Government in the year 2003 issued Government Order and in pursuance of the recommendations made by the Pay Commission of 199799, Chief Secretary of the State constituted a committee in respect of the posts of Rural Development Department of the State, and as per the same nomenclature of the ""Accounts Clerk" was changed to ""Assistant Accountant". One of the decisions so taken was that the post of accounts clerk (pay scale of Rs.40006000/) would be merged in the post of Assistant Accountant (pay scale of Rs.40006000/). Petitioner's contention is that in accordance with the provisions of the aforesaid Government Order dated 30.09.1993, the petitioner who was working on the post of accounts clerk in the scale of Rs.40006000/ became Assistant Accountant in the office of the Chief Development Officer, Rampur. Subsequent to the same by another Government Order dated 26.04.2006 pay scale of the Assistant Accountants, who were working in the pay scale of Rs.40006000/ was increased to Rs.45007000/ with effect from 01.10.2001. Pursuant to the aforesaid Government Order, petitioner was accorded revised pay scale with effect from 01.04.2001, and thereafter impugned order has been passed, clearly mentioning therein that the petitioner was not entitled to the said benefit with effect from 01.04.2001. Factual position is that the petitioner had been functioning as accounts clerk in the pay scale of Rs.40006000/ and as per the Government Order dated 30.09.2003 pursuant to recommendation made by the Pay Commission of the year 199799 with effect

from 30.09.2003, decision had been taken to merge the post of accounts clerk with the post of Assistant Accountant in the same pay scale of Rs.40006000/ and with the name and designation of accounts clerk no further appointments/promotions were to be made. Merger was made with effect from 30.09.2003, and prior to it petitioner's status was that of accounts clerk in the pay scale of Rs.40006000/. The Government Order dated 26.04.2006 provided benefit to the Assistant Accountants, Accountants and Senior Accountants. The Assistant Accountants who were in the pay scale of Rs.40006000 with effect from 01.01.1996, with effect from 01.04.2001 they were accorded the pay scale of Rs.45007000/. As far as petitioner is concerned. on 01.04.2001, he was holding the post of Accounts Clerk. Once petitioner was not holding the post of Assistant Accountant on 01.04.2001, then by no stretch of imagination, he could have been extended the aforesaid benefit and said benefit was extendable to him only from the date when merger had taken place and not prior to the same. The authorities in the present case realised their mistake and proceeded to correct the same. Consequently, in the facts and circumstances of the case, once petitioner became Assistant Accountant with effect from 30.09.2003 and prior to it his status was that of accounts clerk, though in the pay scale of Rs.40006000/, but same ipso facto will not confer on the petitioner the status of Assistant Accountant with effect from 01.04.2001, merely because there was parity in the pay scale of the two cadres, which have been merged into one on subsequent occasion. In this background, the view taken by the authority concerned that the petitioner was entitled to pay scale of Rs.45007000/ with effect 30.09.2003 cannot be faulted. Totally correct and legal view has been taken.

The next question to be adverted to is as to whether the amount in question which has been paid to the petitioner on account of wrong fixation, when there is no fraud or misrepresentation on the part of the petitioner, can even then the same may be directed to be recovered from the petitioner.

To consider this aspect of the matter, view point of Hon''ble Apex Court is being looked into. Hon''ble Apex Court in the case of Shyam Babu Verma and others vs. Union of India and others, (1994) 2 SCC 521 has taken the view that once higher pay scale has been awarded due to no fraud or misrepresentation on the part of the incumbent and the excess amount which has been paid, the same cannot be recovered. Paragraph 11 of the aforesaid judgment being relevant is being quoted below:

"11. Although we have held that the petitioners were entitled only to the pay scale of Rs.330480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, received the scale of Rs.330560 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."

Full Bench of this Court in the case of Shyam Deo Mishra vs. State of U.P. and others, (2006) 1 (All) 467 (FB) has taken the view that in case of excess payment unless the said payment is result of employee's mistake or on his own showing, same cannot be recovered. Paragraph 18 of the aforesaid judgment being relevant is being quoted below:

"18. Thus, broadly speaking, the principle which can be culled out from these decisions is that in commercial matters, the successful party is not only entitled to the amount withheld on the basis of the interim order, but it is also entitled to interest thereon. However, in service matters, if the incumbent has worked and has been paid, unless his claim was fraudulent, based upon frivolous grounds or upon acute factual dispute, the amount so paid ought not to be recovered. Even in cases of excess payment, it cannot be recovered unless said payment is result of the employee's mistake or on his showing. But, if the employee has been paid without working or has not been paid though has worked, he would not be entitled to it if the petition is dismissed as infructuous. We hasten to add, that the court cannot draw an exhaustive list of such situation, as each case is to be decided on its facts."

Again Division Bench of this Court in the case of Rajendra Prasad Nigam vs. State of U.P. and others, (2007) 10 ADJ 413 (DB) while considering the question of excess payment has taken the view that in case there is no fraud or misrepresentation on the part of the incumbent, then order of recovery cannot be asked. Paragraphs 5 and 6 of the aforesaid judgment being relevant is being quoted below:

"5. We are of the view that the contention of learned counsel for the petitionerappellant has substance in view of the law laid down by the Apex Court as well as this Court in the judgments relied upon by learned counsel for the petitionerappellant which have been followed by this Bench also in Special Appeal No. 1317 of 2003 M.D./Chief Engineer U.P. Jal Nigam & others Vs. Sri Nath Singh and other connected matters in which this Bench has held as under :

"In the matter of recovery, we may remind to the authorities that now it is well settled if certain payment has been made to the employee on account of any fault of the employer, and for which the employee is not responsible, namely, not guilty of fraud or misrepresentation, in such a case, the amount which has already been received by the employee and he has spent, should not be recovered."

6. We, therefore, are of the view that the Hon'ble Single Judge fell in error by dismissing the writ petition merely on the ground that in the case of Shyam Babu Verma & others Vs. Union of India & others 1994, 1 UPLBEC (52) the recovery was being made after lapse of 11 years and, thus, that judgment has no application in the present case since in the present case, recovery is being sought within a period of 10 months. Moreover this finding is also contrary to

record because the payment was admittedly made in the year 1994, i.e., immediately after the issuance of the G.O. dated 25.3.1994 whereas the order of recovery was passed on 19.1.1998, i.e., after a lapse of about four years. It is not disputed that the appellant has retired after attaining the age of superannuation in the meantime, i.e., before issuance of the order dated 19.1.1998. Thus, the order of Hon'ble Single Judge cannot sustain."

On the parameters as set out, the principle culled out is that in service matters if amount in excess has been paid and in fixation of such amount, the incumbent has no role to play and there is no fraud or misrepresentation on his part, then the excess amount which has been paid, the same is not at all liable to be recovered.

On the said parameters, the facts of the case in hand is being adverted to. In the present case, it has been sought to be contended in the counter affidavit that there was misrepresentation on the part of the petitioner, but there is nothing on record to show and suggest that any fraud or misrepresentation was there on the part of the petitioner at the point of time when fixation was made in the scale of Rs.45007000/ and the benefit was extended with effect from 01.04.2001. Record in question clearly shows that under some misconception, respondents themselves proceeded to make fixation of salary of petitioner with effect from 01.04.2001 in the pay scale of Rs.45007000/ extending the benefit to the petitioner and the petitioner had no role to play in the same. Once this is the factual position that the petitioner had no role to play in the matter of fixation of salary and there was no fraud or misrepresentation on his part, then in this background the impugned order passed by the respondents directing recovery of amount in six instalments cannot be sustained.

Consequently, writ petition is allowed partly. The impugned order dated 19.05.2007 to the extent it directs recovery of the excess amount paid to the petitioner with effect from 01.04.2001 to 29.09.2003 is hereby quashed and set aside.

No order as to costs.