
(2010) 07 AHC CK 0291
In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 58855 of 2007

Ram Manohar Kapoor

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 12-07-2010

Acts Referred:

Citation : (2010) 07 AHC CK 0291

Hon'ble Judges : Anil Kumar, J

Final Decision : Allowed

Judgement

Anil Kumar,J.

By means of the present writ petition, the petitioner has challenged the order dated 8.10.2007 passed by Finance Controller, Public Works Department (Pension Cell) Lucknow, opposite party no.3.

Heard Yogish Kumar Saxena, learned counsel for the petitioner and the learned Standing Counsel appearing on behalf of the respondents.

In brief, the facts as submitted by the learned counsel for the petitioner, are that the petitioner was working as Junior Engineer in the Public Works Department. During the tenure of his service, respondent no.1 has issued a Government Order dated 20.11.1979 by which additional dearness allowance was given to the employees of different category.

In pursuance of the said Government Order, by means of order dated 6.2.1992 the petitioner has been given dearness allowance of Rs. 219 with effect from 1.8.1979. However, the petitioner was not satisfied with the fixation of additional dearness allowance at the rate of Rs. 219/. As per his version he was entitled for dearness allowance at the rate of Rs. 224/ so he submitted a representation in this regard to respondent no.2 but nothing has been done in the matter in question.

In the meantime, the petitioner retired from service on 30.4.1995 after attaining

the age of superannuation. Further, when the post retiral benefits pension etc. were not given to him, he filed a Civil Misc. Writ Petition no. 26285 of 1995 for payment of his post retiral benefits, disposed of by order dated 26th September, 1995 with the direction that the EngineerinChief Public Works Department, U.P. Lucknow shall pass appropriate orders and direct the subordinates that the petitioner's post retirement benefit and claims be cleared within two weeks from the date of filing of a certified copy of the said order. Despite the said directions given by this Court, the EngineerinChief, Public Works Department, U.P. Lucknow, opposite party no.2 did not pay any heed in the matter in question as such the petitioner was compelled to file a contempt petition.

Thereafter on 16.12.1995, the opposite party no.2 has passed an order thereby fixing additional dearness allowance payable to the petitioner as Rs. 208.10 paise instead of Rs. 219/ fixed and paid to the petitioner by order dated 16.2.1992. The petitioner has challenged the same before this Court by way of Writ Petition No. 5530 of 1996 dismissed by order dated 20.5.2003. The said order was challenged by filing Special Appeal No. 656 of 2003, Sri Ram Manohar Kapoor Vs. State of U.P. and others and on 4.4.2007, disposed of with the following directions:

"We, therefore, modify the judgement of the learned Single Judge and dispose of the appeal without expressing any opinion on merit, with the direction to the respondent no.4, Financial Controller, who is expert in finance matters to reexamine the matter and pass a detail reasoned order with regard to the rate of payment of additional dearness allowance and also whether the order dated 6.2.1992 fixing the petitioner appellant's payscale was rightly passed or not. Because of the fact that the appellant has retired from service long back, it is further directed that the aforesaid decision shall be taken by respondent no.4 expeditiously preferably within a period of six weeks from the date of production of a certified copy of this order after affording opportunity of hearing to the appellant to explain the factual aspects. The order of the Executive Engineer dated 15.12.1995 will be subject to the subsequent order passed by the respondent no.4."

In pursuance to the same, the respondent no.3 Finance Controller, Public Works Department (Pension Cell) Lucknow has passed the impugned order 8.10.2007.

Sri Y.K.Saxena, learned counsel for the petitioner submits that impugned order dated 8.10.2007 is in violation of order dated 4.4.2007 passed by this Court in Special Appeal no.656 of 2003 where it has been held that there is no material to demonstrate that the order dated 6.2.1992 of the Executive Engineer fixing the salary of the petitioner appellant was passed either on account of any fraud or misrepresentation attributable to the appellant or through connivance of lower staff so the same is without jurisdiction.

Learned counsel for the petitioner further submits that the impugned order is also in contravention to the Government Order dated 20.11.1979 by which the

additional dearness allowances was fixed at the rate of 219/ with effect from 1.8.1979, hence the action on the part of the respondents thereby recovering the amount of Rs. 30,000/ paid to him as excess amount towards additional dearness allowance after retirement of the petitioner, is an action arbitrary, illegal and against the principles of natural justice. In support of his contention, learned counsel for the petitioner has placed reliance in the case of Sahib Ram Vs. State of Haryana and others, 1995 Supp (1) SCC18 and Ram Murti Singh Vs. State of U.P. and others 2006 (4) ESC 2379 (All) (DB).

Learned Standing Counsel submits that in pursuance to the order passed in Special Appeal, after hearing the petitioner and going through the record, the Finance Controller has passed the order dated 8.10.2007 holding therein that the petitioner is not entitled for additional dearness allowance at the rate of Rs.219/ with effect from 1.8.1979 as in view of the Government order dated 12.8.1983 the petitioner is entitled for additional dearness allowance amounting to Rs. 208.10 paisa hence the present writ petition filed by the petitioner is misconceived and liable to be dismissed.

I have heard the learned counsel for the petitioner and gone through the record.

In the present case, the petitioner retired employee of Public Works Department had initially been granted additional dearness allowance in view of the Government Order dated 20.11.1979 of Rs. 219/ (122+97.20 paisa) with effect from 1.8.1979 by means of order dated 6.2.1992. However thereafter the same was reduced by order dated 16.12.1995 to Rs. 208.10 paisa(122+86.10 paisa). In view of the said fact a sum of Rs. 30,000/ was deducted from the post retiral benefits.

Thus, the core question which is to be decided in the present case is whether by means of order dated 6.2.1992, in pursuance to the Government Order dated 20.11.1979, petitioner was rightly granted additional dearness allowance of Rs. 219/ with effect from 1.8.1979 or not?

An average employee is considered to have no saving capacity except through forced savings, such as, contribution to provident Fund or premium towards Life Insurance etc. He is expected to consume his pay packet in meeting the daily needs for him and his family. If by mistake the employer makes over payments and such mistake is not induced by any representation from the employee and the employee has received higher scale due to default it is only to just and proper not to recover and excess amount already paid to him .

In Shaib Ram Vs. State of Haryana, 1995 Supp (1) SCC 18 there was a mistake in the fixation of payscale of the appellant. He received his pay on higher payscale than due resulting in over payment, which the State Subsequently sought to recover, the Hon"ble Supreme Court observed:

"....it is not on account of any misrepresentation made by the appellant that the benefit of higher pay scale was given to him but wrong construction made by the

Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant."

In *Nand Kishore Sharma Vs. State of Bihar* 1995 Supp (3) SCC 722 the employees of Agriculture Department were granted revised payscale on the recommendation of Anomaly Committee consent to which was given by the Finance Department. The employees were given benefits of revised pay with arrears of pay. However, the State Government never officially accepted the revised payscale and sought to recover the difference of salary from the employees was interfered by the Supreme Court stating that payment having been made as a result of Anomaly Committee's recommendation and concurrence of the Finance Department, the State could not have reversed the same, more so, without affording prior opportunity to the employees the recovery was impermissible. However, the withdrawal of the revised pay scale was allowed.

In the case of *State of Jammu and Kashmir V. Pirzada Gulam Nabi*, 1998 SCC (L&S) 462 it is held by the Apex Court that when salary was already paid under any misapprehension and by the time correct position emerged the employee already retired from service, the Courts may be reluctant to order recovery from such retired employee, as recovery would put a retired employee to hardship.

In *Union of India Vs. Ram Gopal Agarwal* (1998) 2 SCC 589 noticing that recovery order caused hardship, the Supreme Court held that such recovery cannot be effected. The same view was taken in *Bihar State Electricity Board V. Bijay Bahadur*, 2000 SCC (L&S) 394.

In *K. Vasudevan V Mohan N. Mali*, 2003 SCC (L&S) 90 payments were effected on account of wrong promotion; the Supreme Court held that promotion could be annulled but no recovery was permissible.

In the case of *Duryodhan Lal Jatav V State of U.P. And others* 2005 (2) ESC 1067 (All) this Court has held that if additional payment has been made to the employees for no fault of their, they should not be penalized for this.

In the case of *Ram Murti Singh Vs. State of U.P. and others*, 2006 (4) ESC 2379 (All) (DB) this Court has held that "Having given our anxious consideration to the various pleas raised by the learned counsel for the parties, we find that now it is well settled by the decision of the Apex Court that if employees have received higher scale due to no fault of theirs, it would only be just and proper not to recover any excess amount already paid to them".

In view of the above stated proposition of law in the instant case the order dated 8.10.2007 passed by opposite party no.3 is not sustainable and arbitrary in nature.

Further this Court while deciding the Special Appeal filed by the petitioner (Special Appeal No. 656 of 2003, *Sri Ram Manohar Kapoor Vs. State of U.P. And*

others) by order dated 4.4.2007 has held as under:

"we have considered the submissions. From a perusal of averments made in the counter affidavit, we do not find any material to demonstrate that the order dated 6.2.1992 of the Executive Engineer fixing the salary of the petitionerappellant was passed either on account of any fraud or misrepresentation attributable to the appellant or through connivance of lower staff and thus the finding recorded by the learned Single Judge cannot be sustained."

Moreover from the perusal of the orders under challenge in the present case it is crystal clear that respondent no.3 while passing the impugned order dated 8.10.2007 has not given any findings that whether there was any fault or fraud played on the part of the petitioner by virtue of which the additional dearness allowances was granted to him at the rate of Rs. 219/ with effect from 1.8.1979 by means of order dated 6.2.1992, so the same is in contravention to the order dated 4.4.2007 passed in Special Appeal no. 656 of 2003 as well as against the principles of natural justice.

For the foregoing reasons, the writ petition is allowed. The order dated 8.10.2007 passed by opposite party no.3 is set aside.

No order as to costs.