(2006) 03 AHC CK 0033

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 16908 of 1984

Sri Mohd Abid Bano and Others APPELLANT

Vs

State of U.P. and Another RESPONDENT

Date of Decision : 02-03-2006

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2006) 6 AWC 6330

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : R.P. Goyal and P.K. Singhal, for the Appellant; Haider Zaidi and C.S.C., for the Respondent

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—Heard learned Counsel for the petitioner and Sri Haider Zaidi, learned standing counsel for the respondents.

2. The writ petition is directed against the order dated 9.10.1984 (Annexure-7) whereby the representation of the petitioner for deputation allowance from 1.9.1978 and onwards has been rejected by the government vide order dated 14.8.1984 as communicated by the Collector vide impugned order. The said order also direct that deputation allowance already drawn by the petitioner from 1.9.1978 to 30.6.1984 shall be recovered.

3. In brief the relevant facts are that the petitioner was appointed as stamp clerk in December, 1944 in the Collectorate of District Rampur and was subsequently absorbed and confirmed on the said post. There was a banking company M/s Rampur Bankers Private Limited, which got involved in certain fraudulent activities of public funds and criminal proceeding were initiated. The Collector, Rampur was appointed as Administrator by the High Court for the purpose of distribution of the assets. He launched a scheme namely "Rampur Bankers Refund of Money Scheme" and directed the petitioner to work as clerk on

deputation in the aforesaid scheme pursuant whereto the petitioner worked on deputation from 25.5.1967. The aforesaid deputation was duly sanctioned by the Commissioner, Bareilly. It appears that initially the deputation was for a period of five years whereafter an attempt was made to replace the petitioner by some other employee. This matter attracted attention of this Court and on 28.8.1973 this Court passed the following order:

Sri Mohd. Abid, an employee of the Collctorate, has been on deputation with Rampur Bankers for five years. It was brought to the notice of the Court that under the Government Rules no official can remain on deputation for more than five years and for this reasons it was under contemplation to revert him to the Collectorate and to post another official on deputation in his place. Such a step will create many problems and the District Magistrate will find it very difficult to make payments in pursuance of the orders of this Court. A new official will take many months to be acquainted with the record and even then cannot easily trace out a particular entry or paper. The District Magistrate will be well advised to move the State Government to exempt Sri Mohd, Abid from the operation of this Rule and he may be allowed to remain on deputation till such time as the District magistrates considers necessary for making payment to the depositors in pursuance of the orders of this Court.

4. In pursuance to the order dated 28.8.1973 passed by this Court, it appears that the Collector Rampur referred the matter to the State Government for sanction of the deputation of the petitioner as a special case and since no communication was received, in the mean time the petitioner continued on deputation in the aforesaid refund scheme. The State Government vide order dated 20.6.1984 sanctioned and approved deputation of the petitioner for the period 24.5.1972 to 28.2.1983. The said order also sanction deputation allowance for a period up to 31.8.1978 only at the rate of 20% and denying deputation allowance for the substantive period. However, for the purpose of deputation allowance the salary admissible to the petitioner including 20% deputation allowance was to be taken into account. The aforesaid order claim to have been issued with the concurrence of the Finance department as stated in para-2 of the said order. It is not disputed that the petitioner attained the age of superannuation on 30.6.1984 while working continuously on deputation and the aforesaid order was issued just ten days earlier to his date of retirement. Immediately thereafter by Government Order dated 29.9.1984 the period of deputation of the petitioner from 1.3.1983 till 30.6.1984 was also approved on the same terms and conditions as contained in the earlier Government Order dated 20 6.1984. It appears that when the matter was pending before the respondents, the deputation allowance actually continued to be paid to the petitioner but pursuant to the orders dated 20.6.1984 and 29.9.1984 the petitioner apprehending recovery of deputation allowance, represented the matter to the government which has been rejected by the Government Order dated 9.10.1984 communicate to the petitioner by the Collector, Rampur vide letter dated 16.10.1984 (Annexure-7 to the writ petition) wherein it has further

been directed that in case the deputation allowance has been withdrawn by the petitioner between the period of 1.3.1983 to 30.6.1984 the same may be recovered. Challenging the aforesaid order dated 9.10.1984 passed by respondent No. 1 the petitioner has approached this Court by means of this writ petition.

5. A counter affidavit has been filed and the State Government states that the Government Order dated 13.8.1978 was issued which provides that the maximum period for deputation would be five years and the employee sent on deputation to public undertaking and companies under the control of the Government shall be entitled for deputation allowance. The amount of deputation allowance was also prescribed as 20% of the pay of the incumbent. Another Government Order appears to have been issued on 16.3.1983 directing to ensure repatriation of a government servant from deputation on the expiry of five years by 31.3.1983 and in case any employee flout such order, action be taken against him and not to pay any deputation allowance or other benefit in the company or undertaking in which he is working on deputation.

6. Learned Counsel for the petitioner submits that his continuance on deputation was not on his volition or request but in the exigency of the circumstances under the orders of this Court as well as the authorities of the State Government. He never requested the respondents to continue him on deputation In the circumstance, neither it can be said that the continuance of the petitioner on deputation beyond five years or after 1.9.1978 was due to his own fault or on account of disobedience of any Government Order and in these circumstances being the special case, the petitioner was entitled for payment of deputation allowance, which was, a fortiori, rightly paid by the respondent No. 2 and the respondent No. 1 have acted illegally in passing the impugned order directing for recovery of such deputation allowance.

7. Learned standing counsel however, submitted that since deputation allowance beyond five years pursuant to the aforesaid Government Order dated 13.8.1978 and 16.3.1983 was not permissible and therefore, the impugned order passed by the respondent No. 1 is perfectly right and in accordance with law. He further submitted that since the deputation allowance could not have been allowed beyond five years under the aforesaid Government order, therefore, for recovery of such amount impugned order has been issued.

8. Heard learned Counsel for the parties.

9. It is not disputed that the deputation of the petitioner was approved by the State Government vide order dated 20.6.1984 for the period of 24.5.1972 to 28.2.1983 with the direction that he shall be entitled for 20% deputation allowance up to 31.8.1978. The relevant extract of the said order reproduced as under-

la[;k 2068 ?1&4?84 499 ch&4 @ 77

izs"kd]

Jh lqjs''k pUnz feJk] vuqlfpo mRrj izns''k ljdkjA

lsok esa]

lfpo jktLo ifj"kn] mRrj izns''k] foHkkx&12 y[ku?A

jktLo vuqHkkx&4 fnukad y[ku? twu 20] 1984 fo"k; %& Jh eksgEen vkfcn eq[; fyfid jkeiqj cSadlZ ds in ij izfrfu;qfDr dh Lohd`frA

egksn;] mi;qDr fo"k;d ifj"kn ds i= la[;k 7003 @ 12&196,@ 67] fnukad 2 twu] 1983 ds laca/k esa eq>s ;g dgus dk funsZ''k gqvk gS fd jkT;iky egksn; foRrh; fu;ekoyh [k.M&2 Hkkx 2 ls 4 ds ewy fu;e 110 rFkk ''kklukns''k la[;k th& 2&638 @ l? 530 ?46? 76] fnukad 17 ebZ] 1976 esa fn;s x;s funsZ''kksa ds vUrxZr jkeiqj dysDVs~V ds deZpkjh Jh eksgEen vkfcn dks fnukad 24 ebZ] 1972 ls 28 Qjojh] 1983 rd jkeiqj cSadlZ esa eq[; fyfid ds in ij ckg~; lsok ij izfrfu;qfDr dh vof/k fuEufyf[kr ''krksZa ds vUrZxr c<+k;s tkus dh Lohd`fr iznku djrs gS%

1- osru %& ckg~; lsok mDrkuqlkj c<+k;h xbZ vof/k esa Jh vkfcn dks muds iSr`d foHkkx ds osru eku esa vuqeU; osru rFkk ml ij 20 izfr''kr izfrfu;qfDr HkRrk fnukad 31-8-78 rd ns; gksxk rFkk mlds ckn fdlh izdkj dk izfrfu;qfDr HkRrk ns; u gksxkA

2- eWagxkbZ HkRrk%& Jh vkfcn dks eWagxkbZ HkRrk jkT; ljdkj dh njksa ij vuqeU; gksxk vkSj bldh x.kuk muds ckg~; lsok osru vFkkZr iSr`d foHkkx dk ewy osru rFkk ml ij 20 izfr''kr o`f) feykdj dh tk;sxhA

10. Subsequently for the period of 1.3.1983 to 30.6.1984 another Government Order issued on 29.9.1984 approving the deputation to the incumbent . This order is also reproduced as under:

izfrfyfi Jh lqjs''k pUnz feJk] in lfpo mRrj izns''k ''kklu la[;k 52 ?4?@1&4@ 84 &899 ch&4177 jktLo vuqHkkx&4] y[ku? fnukad 29 flrEcj 1984 A

fo"k;%& Jh eksgEen vkfcn] eq[; fyfid] jkeiqj cSadlZ ds in ij ckg~; lsok dh Lohd`frA

''kklu dh lacaf/kr rFkk ifj"kn dh i`"Bkafdr ftykf/kdkjh jkeiqj ds mi;qZDr fo"k;d i= la[;k 1224 @ 66&67 @ fnukad 14 vxLr] 1984 ds lanHkZ esa eq>s ;g dgus dk funsZ''k gqvk gS fd jkT;iky egksn; ''kklukns''k la[;k 2068 ds lanHkZ esa eq>s ;g dgus dk funsZ''k gqvk gS fd jkT;iky egksn; ''kklukns''k la[;k 2084 @ 1@4@84&899 ch&4 @77 fnukad 20 twu] 1984 esa fu/kkZfjr ''krksZa ds v/khu Jh eksgEen vkfcn dh ckg~; lsok dh vof/k foRrh; fu;ekoyh [k.M 2] Hkkx 2&4] ds ewy fu;e 110 ds v/khu fnukad 1-3-83 ls 30-6-84 rd vkSj c<+k;s tkus dh lg"kZ Lohd`fr iznku djrs gSaA

2- ;svkns''k foRr foHkkx ds v''kkldh; la[;k &th ?1? @ 484@ nl&1984 fnukad 22 flrEcj] 1984 esa izkIr mudh lgefr ls tkjh fd;s tk jgs gSaA

dk;kZy; ftykf/kdkjh] jkeiqjA

la? 250 ?11? th?lh? fnukad 16-1984 izfrfyfi fuEufyf[kr dks lwpukFkZ ,oa vko';d dk;Zokgh gsrq izsf"krA

1- jktLo lgk;d

2- th- lh?

3- jkeiqj cSadlZ fjQ.M LdheA

g? vLi"V ?uhjt? d`rs ftykf/kdkjh] jkeiqjA

11. It is interesting to notice that although the petitioner was employed on deputation in the year 1967 and pursuant to this Courts order dated 28.8.1973, continued on deputation beyond the period of five years as a special case which was also approved and sanctioned by the State Government. However, it took more than a decade for the Government to approve and sanction deputation of the petitioner commencing from 24.5.1972 and onwards and for the said purpose it has referred to and taken into the consideration the Government Order dated 17.5.1976 as apparent from the order dated 20.6.1984. In the counter affidavit however, the respondents have relied upon the Government Order dated 13.8.1978 which provides in para-2 that the period of five years of deputation can be extended considering the expediency of the particular case. The said order however, nowhere provides that no deputation allowance shall be payable after five years, even if it is approved and extended beyond five years. Though reliance has also been placed upon the Government Order dated 16.3.1983, but it also does not provide that no deputation allowance shall be paid after five years. On the other hand it provides that the employees who have completed their period on deputation, they be repatriated to their parent department positively by 31.3.1983 and no amount except their substantive pay in the parent department shall be paid after 31.3.1983. Therefore, in order to deny deputation allowance beyond five years even the Government order dated 16.3.1983 is of no help.

12. Fundamental Rule 114 provides that a government servant in foreign service will draw pay from the foreign employer from the date on which he relinquished charge of his post in Government service but subject to any restriction which the Governor may by general order may impose. The amount of pay, the amount of joining time admissible to him and his pay during such joining time will be fixed by the authority sanctioning the transfer in consultation with the foreign employer. The order issued under Fundamental Rule 114 as published in Financial Hand Book Vol. 2 (Part II to IV) contained in paras 7, 8 and 9 are reproduced as under:

7. The pay of a Government servant transferred to a post the duties of which are similar to those of the post which he held when transferred, should be fixed at a sum which does not exceed by more than 25 percent, of his last substantive pay in the service of the Government, or if he is officiating in a grade or post from which he is unlikely to revert, 25 per cent of his last pay. The special pay,

personal pay or other emoluments classes as "pay" under Fundamental Rule 9 (21) (iii) should not be taken into account in regulating foreign service pay without the sanction of the Governor.

8. A Government servant transferred to an unusually responsible or difficult post or to one the duties of which differ from those of his post under the Government, should receive pay specially fixed with reference to his status and pay in the service of the Government and the nature of the work for which he is transferred, The special pay, personal pay or other emoluments classed as ''pay'' under Fundamental Rule 9(21) (iii) should not be taken into account in regulating foreign service pay without the sanction of the Governor.

9. Increase of pay will be regulated as follows:

(a) A Government servant whose pay is fixed under paragraph 7 above and who belongs to a graded service or to a service in which pay is regulated by a time scale, may, on the occasion of each substantive promotion on his departmental list or accrual of periodical increment, be granted an increase to that which such promotion or increment would have given in Government service plus a sum not exceeding 20 per cent thereon. If such a Government servant would have obtained, had he remained in the service of the Government, officiating promotion from which he would not have been likely to revert, his foreign service pay may be raised, with the consent of the foreign employer, to the amount of enhanced pay which he would have received in the service of the Government plus a sum not exceeding 20 per cent of such pay.

(b) In all other cases in which pay is fixed under paragraph 7 and in all cases in which it is fixed under paragraph 8, a revision of pay involving an increase will be allowed only in the following circumstances.

(1) If the pay is not on a time scale basis, a revision of pay involving an increase shall not be allowed until a Government servant has been in foreign service for three years. After that period and subsequently at interval of not less than three years, an increase of not more than 20 per cent of the pay existing at the time may be allowed, if the foreign employer proposes it and if the authority who sanctioned the transfer, having regard to the nature of the Government servant''s duties, considers that such an increase is justified.

(2) If the pay is on an incremental or time scale basis, no revision of the time scale shall be allowed unless-

(i) There is a change in the nature of the duties or responsibilities of the post in foreign service, or

(ii) The maximum pay of the time scale has been drawn for not less than three years.

13. It is not disputed that exercising the power under Clause 9 aforesaid, the deputation allowance payable to the petitioner was fixed at the rate of 20 per

cent of the substantive pay admissible in parent department. The aforesaid provisions no where restrict payment of deputation allowance for five years only. The State Government did not inform the petitioner well in time that his continuance on deputation will be without any deputation allowance on and after 31.8.1978. In fact for approval of the period of deputation i.e. 29.5.1972 to 30.6.1984, the Government took more than a decade in passing the orders i.e. 20.6.1984 and 20.9.1984 and approved part of the period of deputation even after the retirement of the petitioner on 30.6.1984. The petitioner at no point of time was allowed any opportunity to repatriate to his foreign department in case he was not entitled for deputation allowance. On the contrary actual payment of deputation allowance to the petitioner has confirmed meaning thereby it was represented by the respondents that his continuous deputation entails deputation allowance and the sanction or approval of the State Government for deputation beyond five years was only a formality which was under consideration pursuant to this Courts order. Under Fundamental Rule 110 a person may continue on deputation only with consent. If no deputation allowance was payable, the petitioner was entitled to be told in advance so that he could have decided to repatriate or to continue without deputation allowance.

14. In the present case before denying the deputation allowance, the petitioner had no opportunity, well in time, but at the fag end of his service career, the orders were issued sanctioning deputation beyond five years but without any deputation allowance for some part of the deputation i.e. beyond five years The foreign employer however as a matter of fact has paid the deputation allowance leaving no occasion for the petitioner to approach this Court, but since the impugned order seeks to recover of deputation allowance already paid the petitioner has invoked equitable jurisdiction of court under Article 226 of the Constitution. In my considered view the executive order issued by the respondents cannot be allowed to have retrospective effect to prejudice the interest of the petitioner particularly in the absence of any opportunity to the petitioner to change his position otherwise. Even the various Government Orders and provisions as referred and reproduced hereinabove nowhere supports the case of the respondents that no deputation allowance is payable after a particular period even though the incumbent continue to work on deputation. The orders passed by the respondents therefore, are not consistent with the provisions as discussed above and applicable in this regard. Denial of deputation allowance to the petitioner and recovery of the amount already paid for the period from 1.9.1978 to 30.6.1984 therefore cannot be sustained.

15. In the result the writ petition is allowed and the impugned order (Annexure-7 to the writ petition) is quashed. The respondents are restrained from recovering any amount paid to the petitioner towards the deputation allowance from 1.9.1978 to 30.6.1984. In the facts and circumstances of the case there shall be no order as to costs.