
(2013) 09 CAL CK 0001
In the Calcutta High Court
Case No : W.P.S.T. No. 216 of 2013

State of West Bengal and Others

APPELLANT

Vs

Asis Das Gupta

RESPONDENT

Date of Decision : 09-09-2013

Acts Referred:

West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971 — Rule 140

Citation : (2013) 09 CAL CK 0001

Hon'ble Judges : Pranab Kumar Chattopadhyay, J; Murari Prasad Srivastava, J

Bench : Division Bench

Advocate : Bimal Kr. Chatterjee, A.G., Mr. Joyotosh Mazumdar and Mr. Arindam Mandal, for the Appellant;

Final Decision : Dismissed

Judgement

Pranab Kumar Chattopadhyay, J.—This writ petition has been filed by the State of West Bengal and the senior officers of the State Government challenging the judgment and order dated 22nd February, 2012 whereby the West Bengal Administrative Tribunal finally disposed of application filed by the respondent herein by directing the authorities concerned namely, the petitioners herein to make arrangement for refund of Rs. 41,244/- to the respondent herein since the said amount was recovered from the retiral benefit on the ground of excess payment. Despite service of notice none appears on behalf of the respondent. The learned Tribunal following the decision of the Supreme Court in the case of Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, held that the aforesaid amount of Rs. 41,244/- cannot be recovered from the retiral benefit of the employee concerned namely, the respondent herein and therefore, directed the petitioners herein to refund the said amount of Rs. 41,244/- to the employee concerned.

2. The learned Advocate General appearing on behalf of the petitioners submitted that the learned Tribunal committed an error by not considering Rule 140 of the West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971

which, according to the learned Advocate General, specifically provides for recovery of government dues from retiring government servant. The learned Advocate General also relied upon the following decisions in support of his arguments:-

1. Comptroller and Auditor General of India and Others Vs. Farid Sattar,
2. Union of India and Others Vs. Smt. Sujatha Vedachalam and Another,
3. Col. (Retd.) B.J. Akkara Vs. The Govt. of India and Others,
4. Videsh Sanchar Nigam Ltd. and Another Vs. Ajit Kumar Kar and Others,
- 5 Union of India (UOI) Vs. S.R. Dhingra and Others,
- 6 Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others,
7. State of Haryana and Others Vs. Vijay Singh and Others,
8. Calcutta Municipal Corporation and Others Vs. Rukhsana Anjum
9. Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd., reported in [1942] 2 All E.R. 122.

3. Let us now consider whether the Rule 140 of the West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971 is at all applicable in the facts of the present case. The said Rule 140 is set out hereunder:-

Recovery of Government dues.-- (1) It shall be the duty of every retiring Government servant to clear all Government dues before the date of his retirement.

Compiler's Note: *Power of Audit Officer under this sub-rule has been restricted consequent on issue of F.D. Memo, No. 10000 dated 13.9.82 under which concurrence of Finance Deptt, is required in case of continuance of Provisional pension be 12 months. Compare with Compiler's Note at page 88.

(2) where a retiring Government servant does not clear Government dues and these are ascertainable an equivalent cash deposit may be taken from him, or, out of the gratuity payable to him an amount equal to that recoverable on account of ascertainable Government dues, such as, balance of House Building or Conveyance Advance, arrears of rent and other charges pertaining to occupation of Government accommodation, overpayment of pay and allowance and arrears of income tax deductible at source under the Income Tax Act, 1961 (43 of 1961) shall be deducted there from.

4. In terms of Rule 140(1) it shall be the duty of every retiring government servant to clear all government dues before the date of his retirement.

5. In the present case, the employee concerned retired from service on attaining the age of superannuation on 31/01/2007. The petitioner No. 4 issued a letter on 22nd March, 2007 to the Principal Accountant General (A & E) West Bengal

revising and refixing the pay of the respondent at Rs. 7200/- with effect from 01/04/02 instead of 7600/-. By the said written communication petitioner No. 4 also informed the Principal Accountant General (A & E) that a sum of Rs. 41,244/- is to be recovered from the pensionary benefit of the respondent herein for overdrawal of pay and allowances with effect from 01/04/02 to 31/01/07. The petitioner No. 4 herein revised and refixed the pay scale of the employee concerned long after his retirement on 22nd March, 2007. Therefore, it cannot be said that the respondent herein being a retiring government servant failed to clear government dues before the date of his retirement since on the date of retirement authorities concerned did not revise the pay scale of the respondent employee and determine the overdrawal amount. From the government records it does not appear that on the date of retirement of the respondent herein any amount was due and payable to the State Government by the respondent herein.

6. In the aforesaid circumstances, the respondent herein had no occasion to clear any government dues since on the date of retirement nothing was due to the State Government from the respondent herein. Therefore, Rule 140(1) has no manner of application in the facts of the present case. The Sub-Rule 2 of Rule 140 also cannot be made applicable in the facts of the present case for the identical reasons since it cannot be said that the respondent herein being a retiring government servant did not clear government dues on the day of retirement.

7. For the aforementioned reasons, we hold that Rule 140 of the West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971 has no manner of application in respect of the respondent employee herein.

8. The decisions of the Supreme Court cited by the learned Advocate General in the case of Comptroller & Auditor General of India & Ors. v. Farid Sattar (supra), Union of India & Ors. v. Sujatha Vedachalam (Smt) & Anr. (supra) and State of Haryana & Ors. v. Vijay Singh & Ors. (supra) have no manner of application in the facts of the present case since in the aforesaid decisions, Hon'ble Supreme Court had no occasion to consider the recovery of any amount from a retired government employee.

9. In the case of Col. B.J. Akkara (Retd.) v. Government of India & Ors. (supra), Hon'ble Supreme Court relied on the earlier decision of the three Judge Bench of the said Supreme Court in the case of Shyam Babu Verma & Ors. v. Union of India & Ors. (supra) and specifically observed that the pensioners can seek a direction that wrong payments should not be recovered. The Hon'ble Supreme Court however, permitted the Union of India to recover the excess amount from the pensioners from a particular date when clarificatory circular was issued and pensioners were put on notice in regard to the wrong calculations. Paragraph 29 of the aforesaid decision is set out hereunder:-

On the same principle, pensioners can also seek a direction that wrong payments should not be recovered, as pensioners are in a more disadvantageous position

when compared to in-service employees. Any attempt to recover excess wrong payment would cause undue hardship to them. The petitioners are not guilty of any misrepresentation or fraud in regard to the excess payment. NPA was added to minimum pay, for purposes of stepping up, due to a wrong understanding by the implementing departments. We are therefore of the view that the respondents shall not recover any excess payments made towards pension in pursuance of the circular dated 7-6-1999 till the issue of the clarificatory circular dated 11-9-2001. Insofar as any excess payment made after the circular dated 11-9-2001, obviously the Union of India will be entitled to recover the excess as the validity of the said circular has been upheld and as pensioners have been put on notice in regard to the wrong calculations earlier made.

10. The learned Advocate General relied upon the decision of Union of India v. S R. Dhingra & Ors. (supra) which in our opinion cannot be of any help to the petitioners herein since the Hon'ble Supreme Court in the aforesaid judgment specifically held:-

However, any amount already paid to the respondents and other similarly situated persons shall not be recovered from them.

11. The learned Advocate General heavily relied on the decision of the Supreme Court in the case of Chandi Prasad Uniyal & Ors. v. State of Uttarakhand & Ors. (supra). In the aforesaid decision, Hon'ble Supreme Court specifically accepted the earlier view of the three Judge Bench of the Supreme Court in the case of Syed Abdul Qadir and Others Vs. State of Bihar and Others, and also in the case of Col. B.J. Akkara (Retd.) v. Government of India & Ors. (supra). In the case of Syed Abdul Quadir v. State of Bihar (supra), three Judge Bench of the Supreme Court affirmed the earlier three Judge Bench decision of the Supreme Court in the case of Shyam Babu Verma & Ors. v. Union of India & Ors. (supra) and Col. B.J. Akkara (Retd.) v. Government of India & Ors. (supra).

12. The decisions of the Supreme Court in the case of Chandi Prasad Uniyal & Ors. v. State of Uttarakhand & Ors. (supra) will also not support the arguments advanced by the learned Advocate General specially in view of Paragraphs 12 and 15 of the said judgment. The paragraphs 12 and 15 are set out hereunder:-

Para-12. Later, a three-Judge Bench in Syed Abdul Qadir Case, after referring to Shyam Babu Verma, Col. B.J. Akkara, etc. restrained the department from recovery of excess amount paid, but held as follows: (Syed Abdul Qadir case, SCC pp. 491-92, para. 59) "59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held responsible. Rather,

the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made.

(emphasis added)

Para-15. We are, therefore, of the considered view that except few instances pointed out in Syed Abdul Qadir case and in Col. B.J. Akkara case, the excess payment made due to wrong/irregular pay fixation can always be recovered.

13. The learned Advocate General also referred to a passage from *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* (supra). The said passage has been quoted at page 138 of the aforesaid decision which is reproduced hereunder:-

This, I think, was the view of VISCOUNT HALDANE, L.C., speaking for the Judicial Committee in *Royal Bank of Canada Vs. R.* (36), at p.296. He said:

It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that has failed. It applies, as was pointed out by Brett, L.J., in *Wilson v. Church* (24) [at p. 49] when money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequently to the payment and which has become abortive. The lender has in this case a right to claim the return of the money in the hands of the borrowers as being held to his use.

14. The aforesaid principle of English Common Law has no manner of application in the facts of the present case since we are only concerned whether any excess payment can be recovered from a retired government servant.

15. The learned Advocate General desperately raised another objection with regard to the maintainability of the application before the learned Tribunal referring to section 21 of the West Bengal Administrative Tribunal Act, 1985. The respondent employee in the application filed before the learned Tribunal specifically declared that the said application was within the period of limitation as prescribed u/s 21 of the West Bengal Administrative Tribunal Act, 1985.

16. The learned Advocate for the State did not raise any objection before the learned Tribunal with regard to the maintainability of the application. Therefore at this belated stage, we are not inclined to decide the aforesaid objection raised on behalf of the State Government since the issue with regard to the

maintainability should have been raised before the learned Tribunal at the first instance and not before this court after disposal of the application by the learned Tribunal on merits in presence of the learned advocate of the State Government.

17. We are, therefore, not inclined to decide the issue with regard to the maintainability of the application before the learned Tribunal at this stage after final disposal of the said application on merits by the learned Tribunal.

18. The learned Tribunal passed the impugned order upon placing reliance on a three-Judge Bench judgment of the Supreme Court in the case of Shyam Babu Verma & Ors. v. Union of India & Ors. (supra) which has been consistently followed by the Supreme Court in the subsequent decisions including the decisions cited on behalf of the petitioners herein. The aforesaid three Judge Bench judgment in the case of Shyam Babu Verma & Ors. v. Union of India & Ors. (supra) is operative and binding till today since the said decision has not yet been overruled by the Supreme Court in any subsequent decision. The learned Tribunal, therefore, committed no error by allowing the prayer of the applicant namely, the respondent herein, upon placing reliance on the aforesaid decision of the Supreme Court in the case of Shyam Babu Verma & Ors. v. Union of India & Ors. (supra).

19. For the reasons discussed hereinabove, we do not find any merit in the present writ petition. Therefore, we affirm the decision of the learned Tribunal and dismiss this writ petition without awarding any costs. The respondent authorities are directed to comply with the order passed by the learned Tribunal within four weeks from date positively.

Let urgent xerox certified copy of this judgment and order, if applied for, be given to the learned Advocates of the parties on usual undertaking.

Murari Prasad Shrivastava, J.

I agree.