

(2005) 12 AHC CK 0179

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 3308 of 1994, 34927 of 1996 and 12776 of 1999

Surya Deo Mishra

APPELLANT

Vs

The State of U.P. and The Chief Engineer

RESPONDENT

Date of Decision : 23-12-2005

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 7
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Constitution of India, 1950 — Article 226

Citation : (2006) 5 AWC 5306 : (2006) 2 LLJ 583 : (2006) 1 UPLBEC 399

Hon'ble Judges : Yatindra Singh, J;Sunil Ambwani, J;Devendra Pratap Singh, J

Bench : Full Bench

Advocate : A.B. Singh, M.D. Mishra and R.C. Tripathi, for the Appellant; Sudhir Agrawal, Addl. A.G. and S.P. Kesarwani and S.C., for the Respondent

Judgement

Devendra Pratap Singh, J.—An important issue, which is often confronting courts, falls for determination by this Full Bench. An employee, continues in service beyond the superannuation age of 58 years on the strength of an interim order, is fastened with deduction of the amounts paid as salary from his retiral benefits on the dismissal of the writ petition as infructuous.

2. A learned Single Judge of this Court was confronted with the decisions of the Apex Court in the case of State of U.P. v. Harendra Kunwar 1995 A.L.J. 1603 and State of J&K v. Pirzada Ghulam Nabi (1998) 8 SCC 102 where it was held that an incumbent who has continued in service beyond the age of superannuation on the strength of an interim order, may not be entitled to retain or receive salary in case the writ petition is ultimately dismissed either on merits or as infructuous. And the contrary view also of the Apex Court in the case of Collector of Madras and Another Vs. K. Rajamanickam, and Burn Standard Co. Ltd. and Others Vs. Dinabandhu Majumdar and Another, both followed by a learned Single Judge of our Court in Ram Khelwan Pathak Vs. State of U.P. and others, where it was held that an employee who actually worked on the strength of an interim order would

be entitled to his salary even though the writ petition may have been dismissed subsequently. Thus, he referred the issue to a Larger Bench.

3. Minimal facts, necessary for deciding the issue in this petition are:

4. Petitioner, a driver in the Irrigation Department of State of Uttar Pradesh challenged a notice dated 8.12.1993 retiring him on 31.1.1994 on attaining the age of 58 years, through writ petition No. 3308 of 1994 claiming that retirement age was 60 years. A Learned Single Judge of this Court stayed the operation of the said notice but clarified that the petitioner would be allowed to continue only upto the age of 60 years. This petition was dismissed as infructuous on 7.8.1996. But as no retiral benefits were released, he preferred writ petition No. 34927 of 1996 which remains pending. A third writ petition No. 5649 of 1998 for release of retiral benefits was again filed but was finally disposed off on 19.12.1998 directing the respondent to decide the representation with regard to the claim of retiral benefits treating the retirement age as 58 years. In pursuance thereof, by an order dated 25.9.1998, claim was decided holding that the retiral benefits could be released after adjustment of Rs. 81,836/-, the amount received by the petitioner as salary for two years on the strength of the aforesaid interim order in the first writ petition. This order was subjected to challenge in the fourth writ petition No. 12776 of 1999 when the Learned Single Judge referred it to a Larger Bench.

5. When these petitions were taken up on 20.10.2004, we framed the following two questions:

i) Whether the petitioner is entitled to get salary for the period that he has worked under the interim orders of the Court even if the writ petition (in which the interim order is granted) is dismissed, as infructuous or after holding that he was not so entitled to work?

ii) In case the writ petition in which interim order was granted is dismissed without any reference to the salary for the period that the petitioner had worked under the interim orders of the Court then, whether a second writ petition is maintainable for the salary of that period?

6. We have heard learned counsel for the parties.

7. Before we proceed to answer the two questions framed by us, it would be appropriate to examine the law with regard to interim orders.

8. The interim orders cannot but merge with the final orders passed in the proceedings as has been held by the Apex Court in the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, The three Judge Bench was considering whether the rent decree against a company wound up can be enforced where winding up order of the Appellate Authority under Sick Industrial Companies (Special provision) Act has been stayed. The Court, finding that interim order staying operation of an order under challenge, and, quashing of an order are two different things, held;

quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from the existence.

9. In the case of *State of U.P. v. Harendra Kunwar (Supra)*, the Apex Court sounded a note of caution considering that a large number of unscrupulous employees go scot free by availing the benefits under the interim order even after the dismissal of the petition as infructuous. It throws considerable light on the first question. In this case, on the strength of an interim order, the incumbent had continued in service upto 60 years though the actual retirement age was 58 years, but he got the writ petition dismissed as infructuous with an observation for payment of retiral benefits after continuing till 60 years on the strength of the interim order. The Apex Court held that the High Court should have considered whether the incumbent deserved benefits under the Rules and the issue whether the retirement age was 60 years or 58 years ought to have been decided because that will directly relate to the settlement of retiral benefits, and thus, it allowed the appeal and remanded the matter to the High Court to consider deduction of the salary already paid for those two years to deter people from questioning their date of birth at belated stages.

10. More than three and a half decades ago a Division Bench of our Court in the case of *Shyam Lal Vs. State of Uttar Pradesh, Lucknow and Others*, was considering whether an incumbent who had been compulsorily retired but was being paid his salary on the strength of an interim order without actually working, could retain the amount so paid even after dismissal of the writ petition. The Bench held that the interim order merges in the final order and it does not exist by itself and once the writ petition is dismissed the order of compulsory retirement would take effect from the date it was passed and therefore the incumbent could not retain the amount. This view was consistently reiterated by our Court in the case of *Sri Ram Charan Das Vs. Pyare Lal, , Shyam Manohar Shukla v. State of U.P. 1986 (4) LCD 196* and *M/s. Kanoria Chemicals and Industries Ltd. Vs. U.P. State Electricity Board and other*,

11. In *Grindlays Bank Limited Vs. Income Tax Officer, Calcutta and Others, ,* the Supreme Court affirmed the principle that any undeserved and unfair advantage obtained by a party invoking the jurisdiction of the Court must be neutralized. In *South Eastern Coalfields Ltd. Vs. State of M.P. and Others*, it has reiterated the principle that none should suffer by an act of court and explained the concept of restitution. In this case it was confronted with a situation where royalty of coal was increased which was subjected to challenge and interim orders were passed but finally the enhancement in royalty was upheld by it and when interest for the period of non-payment of the enhanced royalty was sought to be recovered, another set of litigation started and the Supreme Court came down heavily,

observing that litigation may turn into a fruitful industry, in the following words:-

Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.

12. In the case of *State of J&K v. Pirzada Ghulam Nabi*, (Supra), the Apex Court was considering the claim of salary by an incumbent who continued to render service on the strength of an interim order but was not paid after the dismissal of the petition even on the basis of two earlier judgments of that court in *Collector of Madras* and *Burn Standard Company* (Supra). It refuted the claim, after distinguishing the two decisions, and held:

In the present case, however, no amount has been paid by the appellant to the respondent for the service rendered by the respondent after the date of superannuation. The department was throughout contesting the claim of the respondent. It agreed to hold a fresh inquiry regarding his date of birth, but did not agree to payment of any salary after the respondent's superannuation as per their records. We fail to see how we can direct any payment for any service rendered during the period this inquiry after the date of superannuation, When salary is already paid under any misapprehension the court may be reluctant to order recovery from a retired employee who may be put to hardship if he has to repay the amount. But these considerations do not operate in present situation. Hence the appeal is allowed and the impugned order is set aside. The writ petition is dismissed.

13. In *Kerala State Electricity Board through its special officer (revenue) and Another Vs. M.R.F. Limited and Others*, the Apex Court while upholding a notification enhancing the electricity tariff, while considering whether the consumer was liable to pay penal charges for the period the interim order operated in their favour, though it found that they were liable but it held that such action by way of restitution was not an inflexible rule and the relief would depend on facts of each case, it went on to hold;

But in giving such relief, the Court should not be oblivious of any unmerited hardship to be suffered by the party against whom action by way of restitution is taken. In deciding appropriate action by way of restitution, the court should take pragmatic view and frame relief in such a manner as may be reasonable, fair and practicable and does not bring about unmerited hardship to either of the parties.

14. But in the case of Collector, Madras and Anr. v. K. Raja Mallikkam (Supra) while considering the case of an employee who remained in office on the strength of an interim order even after his superannuation on the basis of the recorded date of birth in the service record, the apex Court directed that the salary already paid for the said period when he had worked would not be recovered but the retiral benefits should be computed from the date on which he stood superannuated on the strength of the service record. This case was noted and considered subsequently in Pirzada's case (Supra), but distinguished on the ground that no salary had been paid in Pirzada's case.

15. Again, a three Judge Bench of the Apex Court in the case of Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, was confronted with a situation where several incumbents had been drawing higher pay scale without their fault, but subsequently the scale was reduced, it refused adjustment in the following words:-

Accordingly, we direct 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.

16. Yet again in Gabriel Saver Fernandes and Others Vs. State of Karnataka and Others, while considering whether the higher scale illegally granted to the incumbent should be recovered after their retirement, it directed that since they had been paid the higher scale and had retired since then, the difference should not be recovered from the salary even though they were not eligible to receive it.

17. In Mahmood Hasan and others, etc. etc. Vs. State of U.P. and others, a three Judge Bench of the Apex Court was confronted with interim and final orders of the High Court which formed the basis of promotion of juniors who had been paid higher pay scale, but while passing final orders it held;

However, those who will have to step down on account of this correctional process need not to refund the pecuniary and other benefits enjoyed by them for they had actually worked as Supply Inspector during that period.

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.

19. Let us apply the aforesaid principle to the facts of this case.

20. From the record it is evident that the claim of the petitioner that the retirement age of the drivers in the department was 60 years is solely based on a Division Bench judgment of this Court rendered in the case of Subh Nath Dubey v. State of U.P. (Writ Petition No. 18104 of 1988) decided on 18.1.1989 and subsequent Single Judge decision following the aforesaid Division Bench in the case of Srikant Shukla v. Executive Engineer (Writ Petition No. 19223 of 1990) decided on 7.2.1991. While entertaining the petition and granting interim order, this Court had granted six weeks time to the Standing Counsel to file counter affidavit, in vain. Till the pendency of the writ petition, no counter affidavit was filed and it was dismissed on 7.8.1996 as infructuous since during the pendency of the petition the petitioner had already attained the age of 60 years on 31.1.1996. It is settled law that the right of the parties are to be determined on the date of initiation of the proceedings and its judgment is retrospective "inter se" parties but prospective for the rest of the world. The Apex Court in Atma Ram Mittal v. Ishwar Singh Punia 1998 (4) SCC 284 has held:-

It is well settled that the right of the parties will have to be determined on the basis of the right available to them on the date of the suit....

Thus, as the law propounded by this Court in the aforesaid two judgments was that the retirement age of drivers in the department was 60 years, the petition was rightly dismissed as infructuous.

21. However, Sri Sudhir Aggrawal, learned Additional Advocate General for the State respondent has urged that the two cases of Shubh Nath Dubey and Srikant Shukla (Supra) were not correctly decided. He has urged that the age of superannuation for Government servants is provided under Rule 56(3) of the Fundamental Rules Chapter II part 2 to 4. The age of superannuation of all the Government servants of inferior category was 60 years. Clause (1) of the amended Government Order dated 28.7.1987 provides that the age of retirement of all Government servants is 58 years but those employees who were appointed in Group "D" prior to 5.11.1985, would retire at the age of 60 years. Nevertheless, Government vide an order dated 14.6.1984 declared drivers to be members of technical service and in 1986 they were given higher pay scale, therefore, he has rightly urged, that the drivers were no longer member of Group "D" service and they became group "C" employees therefore the proviso to Rule 56(3) was not applicable to them. A perusal of the decisions in Shubh Nath Dubey and Srikant Shukla (Supra) shows that the provision relating to higher pay scale and treating drivers as "technical employees" were neither brought to the notice of the Court nor were considered. No doubt, the petitioner was appointed prior to 5.11.1985 and earlier he was drawing a salary of less than Rs. 354/- and belonged to group "D", but after reclassification of the post of Driver and increase in salary he ceased to be a member of Group "D" service and thus was not entitled to the benefit of the proviso to Rule 56(3). In Our opinion, the aforesaid two decisions have not been correctly decided and as such they are

hereby over-ruled.

22. Sri M.D. Mishra, learned counsel for the petitioner has filed an application in writ petition No. 3308 of 1994 to modify the order dated 7.6.1996 claiming that he should be paid the retiral benefits treating his date of retirement as 31.1.1996. We have already held that the ratio in Subh Nath Dubey and Srikant Shukla (Supra) was incorrectly decided, therefore, there is no question of treating the retirement age of the petitioner as 31.1.1996. Nevertheless, the interim order in writ petition No. 3308 of 1994 was neither obtained by misrepresentation nor on fraud but having been based on a Division Bench decision of this Court, the benefit accrued to the petitioner on the strength of the interim order should not be denied. In view of this, we allow the modification application partly and the order dated 7.8.1996 in the first writ petition is modified to the effect that the petitioner would only be entitled to his retiral benefits treating his age of superannuation to be 58 years but salaries paid to him during the pendency of the first petition for the work performed may not be deducted from his post retirement benefits.

23. The second question need not detain us any longer. In the first writ petition relief of mandamus was sought not to retire the petitioner on 31.1.1994 instead of 31.1.1996 and salary was also claimed. The writ petition was dismissed as infructuous. He therefore, cannot be permitted to take up the same issue by means of any subsequent writ petition. The rules of this Court clearly prohibit such course of action. Rule 7 of Chapter XXII of the Allahabad High Court Rules 1952 provides that, where an application has been rejected, it shall not be competent for the applicant to move a second application on the same fact. Even if the petitioner has withdrawn the earlier writ petition without a prayer to file a fresh writ petition, a second writ petition for the same cause of action is not maintainable. This cardinal rule of public policy to discourage multiplicity of proceedings, also incorporated in Order 2 Rule 2 of the Code of Civil Procedure, the principles whereof are also applicable to writ proceedings, is too well settled to merit any elaboration. For this, it will be sufficient to refer to the judgments in B.N. Singh v. State of U.P. 1979 ALJ 1184 Dr. Ramji Dwivedi Vs. State of Uttar Pradesh and Others, equivalent to 1983 UPLBEC 426; Niranjana Rai v. District Inspector of Schools (1991) 2 UPLBEC 1416 ; Sahib Ram Vs. State of Haryana and Others, ; Harish Chandra Srivastava v. State of U.P. and Ors. (1967) 3 UPLBEC 1840 ; Keshav Tripathi v. State of U.N.P. and Ors. 1997 ALJ 28 and S.L. Bathla v. State Bank of India (1999) 1 UPLBEC 233 . This rule was succinctly explained in State of U.P. and another Vs. Labh Chand, by the Apex Court in paragraph 20 as follows:-

20. When a Judge of Single Judge Bench of a High Court is required to entertain a second writ petition of a person on a matter, he cannot, as a matter of course, entertain such petition, if an earlier writ petition of the same person on the same matter had been dismissed already by another Single Judge Bench or a Division Bench of the same High Court, even if such dismissal was on the ground of

laches or on the ground of non availing of alternative remedy. Second writ petition cannot be so entertained not because the learned Single Judge has no jurisdiction to entertain the same, but because entertaining of such a second writ petition would render the order of the same court dismissing the earlier writ petition redundant and nugatory, although not reviewed by it in exercise of the recognized power. Besides, if a learned Single Judge could entertain a second writ petition of a person respecting a matter on which his first writ petition was dismissed in limine by another learned Single Judge or a Division Bench of the same court, it would encourage an unsuccessful writ petition to go on filing writ petition after writ petition in the same matter in the same High Court, and have it brought up for consideration before one Judge and another. Such a thing, if is allowed to happen, it could result in giving full scope and encouragement to an unscrupulous litigant to abuse the process of the High Court exercising its writ jurisdiction under Article 226 of the Constitution in that any order of any bench of such court refusing to entertain a writ petition could be ignored by him with impunity and relief sought in the same matter by filing a fresh writ petition. This would only lead to introduction of disorder, confusion and chaos relating to exercise of writ jurisdiction by Judges of the High Court for there could be no finality for an order of the court refusing to entertain a writ petition. It is why, the rule of judicial practice and procedure that a second writ petition shall not be entertained by the High Court on the subject matter respecting which the first writ petition of the same person was dismissed by the same court even if the order of such dismissal was in limine, be it on the ground of laches or on the ground of non-exhaustion of alternative remedy, has come to the accepted and followed as salutary rule in exercise of writ jurisdiction of courts.

24. In the result the answers to the questions formulated for decisions by us are as follows;

1. The petitioner is entitled to the salary for the period that he has worked under the interim order of the Court in view of the law laid down in Shubh Nath's case which has now been overruled. We have therefore, modified the order passed in the first petition.

2. Where a writ petition in which interim orders were granted is dismissed without any reference to the salary for the period that the petitioner had worked under the interim orders of the Court, a second writ petition for claiming the salary of the same period is not maintainable. However, it may be maintainable to quash any subsequent illegal order regarding payment of post retirement benefit, as it would be a fresh cause of action.

25. In view of our discussions;

(i) Writ petition No. 34927 of 1996 is dismissed.

(ii) The application to modify the order dated 7.8.1996 in writ petition No. 3308 of 1994 is partly allowed. The order dated 7.8.1996 is modified to the extent that the respondent shall not recover/adjust the salary paid to the petitioner in

pursuance of interim order however his post retirement benefit may be calculated treating his age of retirement to be 58 years.

(iii) Writ petition No. 12776 of 1999 is partly allowed and order dated 25.9.1999 is quashed. Respondents shall pass fresh order regarding post retirement benefits in accordance with the order dated 7.8.1996 as modified by us today and pay it to the petitioner at an early date if possible within three months of date of receipt of certified copy of this order, failing which the petitioner would be entitled to simple interest @ 6% per annum after expiry of three months from the date of receipt of the order.