
(2013) 02 PAT CK 0084
In the Patna High Court
Case No : CWJC No. 3817 of 2013

Surya Kumar Das and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 28-02-2013

Acts Referred:

Citation : (2013) 3 PLJR 408

Hon'ble Judges : Mihir Kr. Jha, J

Bench : Single Bench

Advocate : Rajeev Ranjan, for the Appellant; Jawahar Pd. Karn, for the Respondent

Judgement

Mihir Kr. Jha, J.—Having heard counsel for the parties as with regard to the following reliefs:--

I. To issue a writ in the nature of certiorari for quashing of the office order dated 14.2.2011 bearing letter No. 261 (Annexure-11) issued by the respondent No. 7 and the office order dated 26.2.2011 bearing letter No. 414 (Annexure-12) issued by the respondent No. 6, as the same have been issued in complete defiance of the order passed in C.W.J.C. No. 10660 of 1996 (Annexure-3) order passed in L.P.A. No. 274 of 1996 & others analogous appeals (Annexure-1) and the order passed in C.W.J.C. No. 11338 of 2009 (Annexure-7).

II. To issue a writ in the nature of certiorari for quashing of the office order dated 14.2.2011 bearing letter No. 261 (Annexure-11) issued by the respondent No. 7 and the office order dated 26.2.2011 bearing letter No. 414 (Annexure-10) issued by the respondent No. 6, as the same are per se illegal, mala fide, arbitrary and erroneous, hence fit to be quashed.

III. To issue a writ in the nature of certiorari for quashing of the office order dated 10.1.2011 bearing letter No. 44 (Annexure-10), as the same is illegal, malafide, erroneous and a glaring example of non-application of mind.

IV. To issue a writ in the nature of certiorari for quashing of the order dated 18.3.2011 bearing memo No. 398 issued by the respondent No. 3 (Annexure-15), as the same is neither reasoned nor based on any substantive material, rather the same has been passed in complete defiance of the order passed in L.P.A. No. 274 of 1996 (Annexure-1), C.W.J.C. No. 16046 of 2004 (Annexure-5), order passed in C.W.J.C. No. 10660 of 1996 (Annexure-3), M.J.C. No. 2843 of 2000 (Annexure-4), C.W.J.C. No. 11338 of 2009 (Annexure-7) and also against the office order dated 24.4.199 bearing memo No. 1261 (Annexure-6).

V. To stay the operational effect of the order dated 14.2.2011 bearing letter No. 261 (Annexure-11) issued by the respondent No. 7 and the office order dated 26.2.2011 bearing letter No. 414 (Annexure-12) issued by the respondent No. 6 and the office order dated 10.1.2011 bearing No. 44 (Annexure-10), as the same have been passed against the mandate of the order passed in C.W.J.C. No. 10660 of 1996 (Annexure-2) order passed in L.P.A. No. 274 of 1996 & other analogous appeals (Annexure-1) and the order passed in C.W.J.C. No. 11338 of 2009 (Annexure-7).

and having regard to the settled position in law that in none of the judgment the Apex Court or this Court has approved the concept of grant of increment to a daily wager, being paid salary in the minimum of pay scale, this Court would find no flaw in the impugned order dated 10.1.2011 passed by the Chief Engineer which reads as follows:--

In fact the said concept came for the first time in view of the judgment of the Apex Court in the case of Randhir Singh Vs. Union of India (UOI) and Others, and Dharendra Chamoli and Another Vs. State of U.P., , laying down the law that the daily wages employees should not be exploited by continuing them for indefinite period on daily wages and at least they should be paid for minimum of pay scale on the post on which they are working. As a matter of fact the Apex Court later on in the case of State of Punjab and Others Vs. Devinder Singh and Others, had clarified that the application of principle of equal pay for equal work does not mean that daily wager will straightaway be paid the running time scale of regularly appointed employee and in fact they would be entitled only for payment of their salary in the minimum of time scale.

2. The submission of the learned counsel for the petitioners that such increment was given to them under the orders of this Court is patently incorrect. From the order of this Court dated 18.9.1996 in L.P.A. No. 274/1996 (Annexure-1) it would be clear that the Division Bench in a batch of appeals including that of the petitioners had directed for payment of salary in the lowest stage of time scale of pay admissible to respective post on which they are working and to that extent it would be also necessary to quote the last paragraph of the aforesaid judgment which reads as follows:--

We, accordingly, dispose of these appeals with a direction that the appellants and

all other similarly situated employees should be paid their salary in the lowest stage of the time scale of pay admissible to the respective posts on which they are working. The appellants will receive their salary in the time scale of pay from the date of filing of the writ petitions.

3. Thus the aforesaid order being confined to payment of salary in the lowest stage of time scale of pay the petitioners could not have also claimed payment of increment in the time scale of pay.

4. The reliance placed by learned Counsel for the petitioner on the orders of the learned Single Judge dated 28.9.2010 in C.W.J.C. No. 10660/1996 is also wholly misplaced, inasmuch as in the last paragraph the learned Single Judge had only observed that the benefit of time scale of pay granted to the petitioners with effect from 7.12.1998 should not be taken away till the exercise of consideration of their case for regularization is completed. It is not in doubt that the regularization of the service of the petitioners pursuant to the direction given by the learned Single Judge has already been made on 18.3.2011 as has been noted in the order dated 23.3.2011 while disposing of the contempt application filed by the petitioners, M.J.C. No. 4087/2009, the relevant portion whereof reads as follows:--

In compliance of the orders of this Court dated 26.8.2009 and 4.9.2009 State respondents have passed order dated 18.3.2011 on the basis of which the Executive Engineer has passed order dated 18.3.2011, which is contained in Annexures-F, G to the supplementary show cause, wherefrom it appears that petitioners have been regularized on the post of Chaukidar/Peon with effect from 12.9.2009 and they have been allowed increment from that date.

The two contempt petition(s) are, accordingly, disposed of granting liberty to the petitioners to challenge the aforesaid two orders, whereunder request of the petitioners for grant of increment for the period until their regularization on the post of Chaukidar/Peon has been refused.

5. A question would, therefore, arise as to whether the petitioners were ever legally entitled to get increment prior to their regularization with effect from 12.9.2009. Such answer has to be given in negative. The petitioners had made an attempt to mix up their cases with the cases of some of the work charge employees. The petitioners in fact had never become work charge employees as has been found by the Chief Engineer in his impugned order. It is true that a work charge employee is entitled to grant of increment because he gets his salary in a prescribed pay scale with increments thereon. The petitioners however were never brought in the work charge establishment and for them the direction of this Court as quoted above was confined to payment of their salary in the lowest stage of their time scale of pay. The reference to some interim order or orders passed in the cases of other work charge employees therefore will be also of no avail to the petitioners and in fact that is the reason that the authorities have rightly come to a conclusion that so far cases of these two

petitioners, prior to regularization of service are concerned, they were out and out daily wages employee and were only given the benefit of payment of their salary at the lowest stage of their pay scale. In the considered opinion of this Court that would make all the material difference in the case of the petitioners vis-a-vis the other work charge employees who have been subsequently regularized.

6. In fact the petitioners will also not get any benefit of the order dated 4.9.2009 in C.W.J.C. No. 11338/2009 because the case of the petitioners was quite distinguishable from the case of others who were the petitioners in C.W.J.C. No. 16046/2004 and for whom an order was passed on 8.9.2006. It is this aspect of the matter which has been completely clarified by the respondent Chief Engineer by holding that whereas those persons, the petitioners in C.W.J.C. No. 16046/2004, were at least for sometime getting the benefit of regular pay scale in capacity of work charge employee. The petitioners however had never been given such benefit as a daily wages employee beyond getting their salary in the lowest stage of their pay scale. It was on account of this that the learned Single Judge who had earlier passed an order dated 4.9.2009 had himself while disposing of the contempt petition vide his common order dated 23.3.2011 in M.J.C. Nos. 4086 of 2009 and 4087 of 2009 relegated the petitioners by only giving leave to them for filing a fresh writ petition and therefore, the petitioners cannot be allowed to make any premium on account of the confusion being created by them on the basis of one judicial order or the other. The fact of the matter is that the petitioners were never entitled to get increments in the lowest stage of pay scale in capacity of daily wage employees and it is only from the date of their regularization of their service that they can claim payment of salary in the prescribed pay scale with annual increments. It is this aspect of the matter which has been further clarified by the State Government in the reasoned order dated 10.3.2011 (Annexure-15) which for sake of clarity and convenience is also quoted hereinbelow:--

7. As with regard to the consequential recovery from the petitioners, it has to be held that since the petitioners were not entitled for payment of increment in the time scale pay, the order passed on 10.3.2011 granting increments to the petitioners was itself without jurisdiction and illegal and was correctly cancelled by the impugned order dated 10.1.2011. Since the petitioners were/are still continuing in service they can also not claim to retain the excess amount paid to them on the head of increments specially when payment of such increments to them was never contemplated in the order dated 4.3.2006.

8. Once this aspect becomes clear there would be no difficulty in holding that the petitioners having received excess amount of salary on account of an illegal order cannot retain the excess amount to which they were never entitled in law. The Apex Court in the case of Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others, after analyzing the law on the subject had held as follows:--

8. We are of the considered view, after going through various judgments cited at the bar, that this court has not laid down any principle of law that only if there is misrepresentation or fraud on the part of the recipients of the money in getting the excess pay, the amount paid due to irregular/wrong fixation of pay be recovered.

9. Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, was a three-Judge Bench judgment, in that case the higher pay scale was erroneously paid in the year 1973, the same was sought to be recovered in the year 1984 after a period of eleven years. The court felt that the sudden deduction of the pay scale from Rs. 330-560 to Rs. 330-480 after several years of implementation of said pay scale had not only affected financially but even the seniority of the petitioners. Under such circumstance, this Court had taken the view that it would not be just and proper to recover any excess amount paid.

10. In Sahib Ram Vs. State of Haryana and Others, a two-Judge Bench of this Court noticed that the appellants therein did not possess the required educational qualification and consequently would not be entitled to the relaxation but having granted the relaxation and having paid the salary on the revised scales, it was ordered that the excess payment should not be recovered applying the principle of equal pay for equal work. In our view, this judgment is inapplicable to the facts of this case. In Yogeshwar Prasad and Others Vs. National Inst., Edu. Planning and Admn. and Others, a two-Judge Bench of this Court after referring to the above mentioned judgments took the view that the grant of higher pay could be recovered unless it was a case of misrepresentation or fraud. On facts, neither misrepresentation nor fraud could be attributed to appellants therein and hence, restrained the recovery of excess amount paid.

11. We may in this respect refer to the judgment of two-Judge Bench of this Court in Col. (Retd.) B.J. Akkara Vs. The Govt. of India and Others, where this Court after referring to Shyam Babu Verma case, Sahib Ram case and a few other decisions held as follows Col. (Retd.) B.J. Akkara Vs. The Govt. of India and Others,

Such relief, restraining recovery back of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion, to relieve the employees, from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief

against recovery.

12. Syed Abdul Qadir and Others Vs. State of Bihar and Others, case reported in (2009)3 SCC 475 after referring to Shyam Babu Verma, Col. B.J. Akkara (retd.) etc. restrained the department from recovery of excess amount paid, but held as follows Syed Abdul Qadir and Others Vs. State of Bihar and Others, -

Undoubtedly, the excess amount that has been paid to the appellants-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 appellants-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 appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made.

(emphasis added)

We may point out that in Syed Abdul Qadir case such a direction was given keeping in view of the peculiar facts and circumstances of that case since the beneficiaries had either retired or were on the verge of retirement and so as to avoid any hardship to them.

13. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy.

14. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at

fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

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

16. Appellants in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However, we order the excess payment made be recovered from the appellant's salary in twelve equal monthly installments starting from October 2012.

9. Admittedly the petitioners were/are still continuing in service and therefore, they would also be not covered by the exception carved out in the case of Syed Abdul Qadir and Others Vs. State of Bihar and Others, and Chandi Prasad Uniyal (supra).

10. From the impugned order it would be also clear that the excess amount of Rs. 86,833/- from petitioner No. 1 and Rs. 87,449/- from petitioner No. 2 has been sought to be recovered from them in 44 and 50 instalments respectively out of which recovery in part has already been made in the last two years as these two orders were not stayed by any court.

11. Thus, having considered all aspects of the matter, this Court does not find any error in the impugned orders refusing the petitioners' benefit of payment of increment in capacity of daily wages employee and the consequential action for recovery of the excess amount from them. This writ application being thus devoid of any merit is, accordingly dismissed.