(2004) 08 PAT CK 0106

In the Patna High Court

Case No : C.W.J.C. No. 6549 of 2004

Surya Nath Mishra APPELLANT

Vs

The Chairman, Bihar State Electricity Board and Others RESPONDENT

Date of Decision : 19-08-2004

Acts Referred:

Citation : (2004) 4 PLJR 173

Hon'ble Judges : Radha Mohan Prasad, J

Bench : Single Bench

Advocate : Nand Kishore Pd. Sinha, for the Appellant; Mihir Kumar Jha for the Board, for the Respondent

Final Decision : Allowed

Judgement

Radha Mohan Prasad, J.—In this writ petition, petitioner is aggrieved by the order, contained in Memo No. 1055 dated 26.5.2003 issued by the Financial Controller, Bihar State Electricity Board (Respondent no. 3), hereinafter referred to as ''the Board'', as contained in Annexure-3, whereby a sum of Rs. 75,000/- has been sought to be recovered on account of excess pay drawn by him as alleged from the gratuity payable to him. According to the case of the Respondent-Board in the counter affidavit, petitioner admittedly retired from the post of Senior Selection Grade Meter Reader on 30.11.2002. It is stated that a sum of Rs. 1,97,720/- has been sanctioned as DCR Gratuity to the petitioner out of which an appropriate sum of Rs. 75,000/- was recoverable on account of excess pay and the remaining amount of Rs.1,22,720/- was paid vide cheque no. 702297 dated 18.7.2004 to the petitioner. However, it is further stated that calculation for excess pay drawn by the petitioner was made by the Finance Department and it was found that excess drawn amount was Rs. 53,041/-, and, thus, a sum of Rs. 21,959/- is to be paid to the petitioner. In the supplementary counter affidavit it is stated that the petitioner was provisionally appointed as Meter Reader in leave vacancy of Ram Dayal Das and his service was terminated on 7.10.1964. Later he was again appointed vide letter no. 6308 dated

9.10.1964 at Rs. 50/- in the time scale of Rs. 50-2-70-EB-2-90 and on that basis in view of various standing orders with respect to upgradation, it is stated that in the case of the petitioner selection grade pay scale would be effective from 10.10.1978 instead of 22.7.1977 and senior selection grade would be effective from 1.8.1988 and, thus, corresponding correction were made by the Auditor. A copy of the said Audit Report dated 9.4.2003 has been annexed as Annexure-E. Thus, according to the Respondent-Board a calculation was made and it was found that the amount of Rs. 53,041/- has been drawn in excess by the petitioner and the same has been sought to be recovered obviously on the basis of the said Audit Report dated 9.4.2003 from the gratuity amount much after his retirement. It is not the case of the Respondents that the alleged excess payment was made on the basis of any representation, misrepresentation or fraud committed by him.

2. In reply affidavit filed on behalf of the petitioner, petitioner has denied about the claim of the Respondents that he was appointed in leave vacancy of Ram Dayal Deo. However, the petitioner has admitted about termination vide office order no. 289 dated 6.10.1964, but, has stated that it was communicated at Chakardharpur, where he was posted by the Assistant Electrical Engineer, Chaibassa vide order no. 2016 dated 9.10.1964 in the afternoon at 4.30 P.M. mentioning therein that as Ram Dayal Deo has joined his duty on the forenoon of 7.10.1964 his service was terminated with effect from 7.10.1964 and he was again appointed as Meter Reader vide order no. 303 dated 9.10.1964 in the time scale. He has further stated that pursuant to the earlier order of termination Assistant Electrical Engineer, Chaibassa by letter no. 500EA dated 10.10.1964 relieved him from his Section with effect from the forenoon of 10.10.1964 and thereafter he joined at Jamshedpur in the afternoon of 10.10.1964 itself. Thus, according to him, he has rightly been given all the benefits treating his continuous service with effect from 22.7.1963 by the Respondents till the date of his retirement, and, according to him, recovery after his retirement by treating his service since 10.10.1964 is not justified. It is contended that the petitioner was never given notice with regard to recovery and only after retirement the said amount is sought to be recovered on wrong fact of break in service. The petitioner has also raised certain dispute regarding less payment of interest and amount of leave encashment etc.

3. Learned counsel for the petitioner has contended that the recovery is bad, as the petitioner was never given any notice or opportunity in that regard either before retirement or even after retirement. Thus, according to him, the recovery is in violation of the principles of natural justice. On merit he contended that, in fact, no excess amount was drawn by the petitioner as alleged. Apart from this, he contended that in any view of the matter such recovery is not permissible in view of the law settled in numerous decision by the Apex Court. In support of this he placed reliance on the decisions of the Apex Court in the case of Sahib Ram Vs. State of Haryana and Others, and in the case of Bihar State Electricity Board and Anr. v. Bijay Bahadur and Anr. .

4. Learned counsel for the Board has failed to show that the petitioner was given any notice or opportunity before making recovery. Thus, obviously the petitioner has been denied of reasonable opportunity to defend himself and show to the authority that he had not drawn any excess payment as alleged. He, however, contended that recovery of excess payment made due to wrong fixation/ calculation of the admissible pay of the petitioner on the basis of audit report, which is permissible as has been held by the Division Bench comprising of Hon''ble Nagendra Rai, J. and Hon''ble P.N. Yadav, J. in the case of Bihar State Electricity Board and Others Vs. Man Bahadur and Others , which arose from two separate orders passed in separate writ petition with respect to two employees of the Board.

5. I am unable to appreciate the submission of the learned counsel for the Board. In the case of Bihar State Electricity Board vs. Man Bhadur (supra), which arose from two separate orders passed in separate writ petitions filed by two employees of the Board, the Division Bench has not held that recovery can be made even without notice and complying with the requirement of rules of natural justice. The Division Bench comprising of Hon''ble Nagendra Rai, J. and Hon''ble S.N. Hussain, J. in the case of Bihar State Electricity Board & Ors. vs. Mauji Lal Sinha (L.P.A. No. 939 of 2003 disposed of on 23.4.2004) held that "The appellant-Board can recover the amount only when the amount due to be recovered is determined according to law. Admittedly, in this case the Board has not given any opportunity of hearing to the writ petitioner-Respondent before coming to the conclusion that the aforesaid amount is recoverable and, thus, the Board should first decide as to whether the aforesaid amount is recoverable or not after giving an opportunity of hearing to the writ petitioner-Respondent and thereafter to take step for recovery." And, thus, after quashing the order of recovery remitted the matter back to the Board for complying with the rules of natural justice. Moreover, in the case of Bihar State Electricity Board vs. Man Bhadur (supra) it was contended on behalf of the Board that the writ petitioner''s pay was wrongly fixed and later on it was correctly fixed, which they did not challenge, and, as such, the Court held that they cannot be allowed to challenge the consequential steps taken for recovery of the same specially when they did not challenge the stand of the Board that they were wrongly paid excess amount due to wrong fixation of pay. The said fact has been noticed by the Division Bench in paragraph 12 as well as in paragraph 26 in which the Division Bench relying upon the decision of the Apex Court in the case of V. Gangaram Vs. Regional Joint Director and others, , State of Punjab and Others Vs. Devinder Singh and Others, and Union of India and Others Vs. Smt. Sujatha Vedachalam and Another, found that the case of the petitioner''s of the said case was also covered by the said decisions of the Apex Court for the simple reason that the pay was wrongly paid due to miscalculation by the office and when the said mistake was detected pay was refixed and it was even communicated to the writ petitioners as was mentioned in the counter affidavit and they did not challenge the same and only when steps were taken to recover the amount they made

grievance before this Court. Thus, the Division Bench held that the action taken by the Board cannot be said to be in breach of equity, good conscience or justice.

6. In the present case, there is no such contention even raised on behalf of the Respondent-Board. It is only after so-called audit objection that too much after the retirement that the impugned order for recovery (Annexure-2) from retiral dues of the petitioner was passed without giving any notice/affording any opportunity. Moreover, I find that the facts before the Apex Court in the case of V. Gangaram (supra), Devinder Singh (supra) or Sujatha Vedachalam (Smt.) (supra) were completely different and the recovery was upheld in the facts of those cases. In the present case the facts are completely different and more or less similar to the case of Bihar State Electricity Board & Anr. vs. Bijay Bhadur & Anr. (supra) in which the Apex Court has held recovery not permissible.

7. In the case of V. Gangaram vs. Regional Joint Director (supra) the Apex Court was dealing with the impugned proceedings initiated to recover the amount paid to the appellant on the premise that he was not entitled to the advance increments more than two. The Apex Court found that the appellant was entitled to only two additional increments, namely, one increment for M.A. and thereafter one for M.Ed. and under the said circumstances the Apex Court held that the authorities have wrongly applied the G.O. Ms. No. 928 and G.O. Ms. 266 Finance and Planning dated November 17, 1986. Further, the Apex Court considering the approach of the Respondents that while issuing notice, it was confined to the question of recovery of the arrears paid to him from the year 1985, the year in which he is eligible to acquire additional qualifications for holding the post of Lecturer directed that arrears paid prior to year 1985 was not to be recovered and excess amount from 1985 was liable to be recovered from the pension payable to the appellant. Thus, it was not a case where the recovery was sought to be made on the basis of audit report after retirement and that too without any notice.

8. In the case of State of Punjab vs. Devinder Singh (supra) also the Apex Court was not dealing with a case relating to recovery of alleged excess payment after retirement, In the said case the High Court directed the appellant-State to pay the Respondent-petitioners before the High Court the salary and allowances as are being paid to the regular employees holding similar post and also to pay the difference of pay scales for the period of last three years from the date of filing of the writ petition. The Apex Court considering the principle of equal pay for equal work directed that they should have paid the minimum of the pay scale of Ledger Keeper, which was available to regularly appointed Ledger Keepers/Ledger Clerks, and, thus, allowed the appeal to the limited extent that though the Respondents are held entitled on the principle of "Equal Pay for Equal Work" to get the salary of Ledger Keepers/Ledger Clerks, who are regularly recruited, they would be entitled to minimum of the pay scale of Ledger Keepers, which may be available to the regularly appointed Ledger-keepers and they cannot be straightaway paid the running time scale as they were not regularly appointed as

Ledger-Keepers/Ledger Clerks. To that extent the Apex Court set aside the direction given by the High Court and further directed that difference of emoluments already paid to each of the respondents and those payable to them pursuant to the present order will be payable to the respondents for a period of three years prior to the filing of the writ petition and thereafter minimum salary in the time scale of Ledger-Keepers/Ledger Clerks with appropriate allowances thereon shall be available to the respondents so long they work as daily wage Ledger-Keepers/Ledger Clerks. In view of the said order the Apex Court observed that if in case any amount is found to have been paid to the Respondents in excess, it would be adjusted in a phased and reasonable manner so that the respondents may not be out of pocket to a large extent.

9. In the case of Union of India & Ors. vs. Sujatha Vedachalam (Smt.) & another (supra) it was found that pay of the respondent on reversion ought to be fixed at Rs. 1090/- and consequently, orders for refixation of pay and recovery of excess amount were issued. The respondent challenged the said orders by means of original application before the Central Administrative Tribunal. The Tribunal allowed the application of the respondent and the writ petition filed by the appellants was dismissed. For the reasons stated in Comptroller & Auditor General of India vs. Farid Sattar and the decision of the Apex Court in SLP No. 9324 of 1996 titled Chandan Saha vs. Union of India decided on 25.4.1996 the impugned orders and judgments under appeal were set aside by the Apex Court. In that view of the matter, the Apex Court in the facts and circumstances directed that the appellants may recover the excess pay paid to the respondents in easy instalments, which may be spread over for fifteen years or till the date of retirement, whichever is earlier.

10. Thus, it is evident that in the aforementioned cases also the Apex Court while permitting recovery directed for doing so in easy instalments in a phased and reasonable manner so that the Respondents may not be out of pocket to a large extent obviously considering the agony one is faced with in his life after reduction. However, in none of those cases the Apex Court was dealing with the case relating to recovery after retirement from the retiral dues payable to an employee suddenly upsetting the entire future plan of such retired employee for no fault of his.

11. The Apex Court in the case of D.S. Nakara and Others Vs. Union of India (UOI), while considering the validity of classification in the revised pension formula between the pensioners on the date of retirement in paragraph 19 also dealt with as to ''What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date? and considered the need to answer them and incidental questions so as to render just justice between the parties. The Apex Court noted that the antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and,

therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deokinandan Prasad Vs. The State of Bihar and Others, , wherein the Apex Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. While answering the enquiry involved in the said case being limited to non-contributory superannuation or retirement pension paid by Government to its erstwhile employee and the purpose and object underlying it and considering the questions referred to above held as follows:

Initially this class of pension appears to have been introduced as a reward for loyal service. Probably the alien rulers who recruited employees in lower echelons of service from the colony and exported higher level employees from the seat of Empire, wanted to ensure in the case of former continued loyalty till death to the alien rules and in the case of latter, an assured decent living standard in old age ensuring economic security at the cost of the colony.

22. In the course of transformation of society from feudal to welfare and as socialistic thinking acquired respectability, State obligation to provide security in old age, an escape from undeserved want was recognised and as a first step pension was treated not only as a reward for past service but with a view to helping the employee to avoid destitution in old age. The quid pro quo was that when the employee was physically and mentally alert, he rendered unto the master the best, expecting him to look after him in the fall of life. A retirement system therefore exists solely for the purpose of providing benefits. In most of the plans of retirement benefits, everyone who qualifies for normal retirement receives the same amount. (See Retirement Systems for Public Employees by Bleekney, page 33).

29. Summing-up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on sayings. One such saving in kind is when you gave your best in the heyday of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowances or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a Government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation for service rendered. In one sentence one can say that the most practical raison d''etre for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon.

33....The principal aim of a socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income.....

12. Thus, in my opinion, the State or its agencies will be failing in their constitutional obligation in ensuring security in old age and a reasonable discent standard of life, medical aid, freedom from want, freedom from fear and enjoyable leisure, relieving the burden and humility of dependence in old age of the employee by making recovery of the alleged excess payment in the fall of life, inasmuch as the entire future plan of a retired employee after his retirement would stand frustrated for no fault of his, if recovery is allowed to be made of alleged excess payment made to him without his fault, such as, representation, misrepresentation or fraud committed by him. Moreover, such act or acts for recovery cannot under any circumstances be said to be in consonance with equity, good conscience and justice and cannot be sustained under any circumstances.

13. Learned counsel for the Board then referred to paragraph 27 of the decision in the case of Man Bhadur (supra) and submitted that the Division Bench of this Court in the case of Bihar State Electricity Board & another vs. Ram Gati Singh & Ors. (L.P.A. No. 86 of 2002 disposed of on 9.7.2002) held that recovery is permissible and the SLP against that was dismissed by the Apex Court. This aspect has been considered by me in the order dated 20th May, 2003 passed in the case of Mauji Lal Sinha vs. Bihar State Electricity Board & Ors. (C.W.J.C. No. 12304 of 2001). In the said case, in paragraph 7 this Court has noticed that on filing of review application the Apex Court had issued notice to the Board in the case of Ram Gati Singh as was brought to the notice of this Court in the case of Md. Siddique vs. The Bihar State Electricity Board & Ors. (C.W.J.C. No. 10360 of 2000). Earlier in course of hearing of another matter it was brought to the notice of this Court that said Review Petition which was registered as Review Petition (Civil) No. 1494 of 2002 has been allowed on 14th July, 2004 and the connected SLP has been restored for disposal on merit and notice has been issued in that regard. Moreover, it is well settled by the Apex Court in the case of Hemalatha Gargya Vs. Commissioner of Income Tax, A.P. and Another, that a SLP dismissed in limine would not operate as confirmation of the reasoning in the decisions sought to be appealed against. Further, the order of the Division Bench in the case of Ram Gati Singh is of later date than the order of another Division Bench in the case of Bihar State Electricity Board and Others Vs. Jagdeo Singh and Others, . The latter Division Bench in the case of Ram Gati Singh has not taken notice of the order passed by the earlier Division Bench in the case of Jagdeo Singh in which while declining to interfere with the order of the learned Single Judge that recovery under such circumstances is not permissible, it has been held that "High Court should not come to the rescue of the Board to make deductions and let the official who was a ready party in the irregularities walk off

without being questioned." The Division Bench further directed that "If the Board argues that this is a matter of accountability then it must question and put its own house in order. If at the fag end this employee is being asked to return the money received as an irregular gain, granted in 1976 then let the Officer be identified who granted the sanction to pay these three increments to the appellant, Jagdeo Singh. The Board cannot look on the other side on those who have arranged for these presents to be delivered to the employees, who enjoyed them for almost 25 years. The High Court cannot be involved in such matters when the Board is not absolved in such irregularities being permitted unchecked." About the undertaking relied upon by the Board, the Division Bench directed that "This sort of undertaking is for bona fide mistakes and errors which permit marginal adjustments." According to the settled law of precedents if latter decision of the Division Bench has not taken notice of the earlier decision of the Division Bench then the principle decided by the earlier Division Bench is binding. It appears that learned counsel for the Board has not brought the decision in the case of Jagdeo Singh (supra) to the notice of the Division Bench, which was also a case against the Board. Apart from this the Division Bench comprising of Hon''ble Nagendra Rai, J. and Hon''ble S.K. Katriar, J. in the case of Bihar State Electricity Board and Others Vs. Madan Mohan Prasad and Others, in which Bihar State Electricity Board was appellant held as follows:

8.....Law is well settled that money benefit paid to an employee in excess of his entitlement should not normally be recovered from him after a long lapse of time, particularly after his superannuation from service. It is, however, subject to two exceptions, namely, if the order granting the money benefit itself stipulates that the same is liable to be recovered if found erroneous at a later stage or is subject to approval by authorities. The second exception is that such a money benefit can be recovered if it is found at any later stage on that the same had flowed to the employee on account of fraud, misrepresentation or the like attributable to him. Law is equally well settled that even if the money benefit already paid is not recoverable because of applicability of the dominant principle of law De Hors the exceptions, the pensionary benefits payable in future can be refixed on the basis of the admissible pay.....

In fact, in all fairness learned counsel for the Board should have placed the earlier decisions of the earlier Division Bench in the case of Jagdeo Singh (supra) and in the case of Madan Mohan Prasad (supra) before the latter Division Bench so that if Their Lordships could have occasion to consider and if wanted to differ from it then referred the matter to the larger bench in the light of the principle decided by the Apex Court in the case of Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel, . Thus, the decision given by the Division Bench in the case of Man Bahadur (supra) in ignorance of the earlier decision of the Division Bench in the case of Jagdeo Singh (supra), and Madan Mohan Prasad (supra) in my opinion, is per incuriam and not settler on the question aforementioned.

14. In the present case, recovery has been sought to be made on account of

excess pay drawn due to wrong fixation of pay from the gratuity amount payable after his retirement. It is not the case of the Board that fixation of pay was with any such condition as mentioned by the Division Bench in the case of Madan Mohan Prasad (supra). It is neither their case that said fixation was done on representation misrepresentation or fraud committed by the petitioner. As such the recovery is not permissible even in view of the decision of Division Bench in the case of Madan Mohan Prasad (supra) also.

15. Further, in the absence of any order passed by the Board refixing the salary of the petitioner and reducing it which attained its finality, in my opinion, the decision of the Division Bench in the case of Man Bhadur (supra) has got no relevance. I am in full agreement with the Division Bench that it has not been laid down as an abstract proposition of law if there being no fraud or misrepresentation. no recovery can be made in case of excess payment made to the employees on account of wrong fixation of pay, increments or similar other grounds as is also evident from the case referred to above in which recovery has been ordered to be made by the Apex Court.

16. The present case is squarely covered by the decision of the Apex Court in the case of Bihar State Electricity Board and Anr. v. Bijay Bahadur and Anr. . In the case of Bihar State Electricity Board vs. Bijay Bhadur (supra) the Apex Court dismissed the appeal preferred by the Board against the Division Bench judgment of this Court where recovery was held not permissible on account of erroneous grant of increment without passing Hindi Noting and Drafting examination even when Respondent-Bijay Bhadur was in service and the Apex Court recorded its concurrence with the observations made in the case of Sahib Ram vs. State of Haryana (supra) and came to the conclusion that since payment has been made without any representation or misrepresentation, the appellant-Board could not possibly be granted any liberty to deduct or recover the excess amount paid by way of increments at an earlier point of time. The Apex Court further directed that act or acts on the part of the appellant-Board cannot under any circumstances be said to be in consonance with equity, good conscience and justice, and, that the concept of fairness has been given a go-by, and, as such, it has been held that the actions initiated for recovery cannot be sustained under any circumstances. It is true that the Apex Court in paragraph 10 directed that "This order however be restricted to the facts of the present writ petitioners", but that was followed by clarification that "Regulation 8 will operate on its own and the Board will be at liberty to take appropriate steps in accordance with law except however in the case or cases which has/have attained finality," by which obviously the Apex Court meant that where arrears of the stopped increments is claimed despite the bar under Regulation 8 in which case it cannot be said that it has attained finality, the appropriate steps can be taken in accordance with law, and nobody can assail such action of the Board relying upon the principle enunciated therein, that "since payments have been made without any representation or misrepresentation, the appellant-Board could not possibly be granted any liberty to deduct or recover the excess amount paid by way of

increments at an earlier point of time" and that "The act or acts on the part of the appellant Board cannot under any circumstances be said to be in consonance with equity, good conscience and justice." The Apex Court has also considered that by not following the said principle the concept of fairness has been given a go-by and, as such, held that the actions initiated for recovery cannot be sustained under any circumstances. In my opinion, it would be showing disrespect to the principle decided by the Apex Court in the case of Bihar State Electricity Board & Anr. vs. Bijay Bhadur & Anr. (supra), in which the Respondent-Board itself was appellant, if not followed in the present case. The judicial discipline demands to respect the verdict of the highest Court of the land following the law of precedence and not to ignore it or comment upon it. It is really unfortunate that despite the law being settled by the highest court of the land, the Respondent-Board has been dragging its employees to litigation and unnecessarily burdening this Court by flow of such litigations. As such, in my opinion it is a fit case for awarding cost of Rs. 10,000/- (Rupees ten thousand) to be paid to the petitioner by the concerned authority from his pocket. In the result, this writ application is allowed with cost of Rs. 10,000/-. The order contained in Annexure-3 is hereby quashed. The Respondent-Board is directed to pay the remaining amount of gratuity accordingly and cost within one week, failing which the petitioner will be at liberty to file two pages affidavit for initiating appropriate action. The Board shall realise the amount of cost from the erring authority who is responsible for dragging the petitioner into litigation.

