

(2009) 03 AHC CK 0098

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 44705 of 2008

Sushila Kanojia

APPELLANT

Vs

State of U.P.and Others

RESPONDENT

Date of Decision : 20-03-2009

Acts Referred:

Contract Act, 1872 — Section 72

Citation : (2009) 03 AHC CK 0098

Hon'ble Judges : Sunil Ambwani, J

Final Decision : Partly Allowed

Judgement

Sunil Ambwani, J.—Heard Shri Rahul Asthana, learned counsel for the petitioner. Shri Ashok Bhatnagar appears for the respondent bank.

2. The petitioner's husband Shri Moti Lal died in harness while serving on the post of REFG, MECH in the office of the Garrison Engineer, Air Force, Bamrauli on 15.1.1999: He was receiving Rs. 5,800/ as basic pay at the time of his death" The petitioner as his widow was made entitled to family pension w.e.f. 16.1.1999 at the rate of Rs. 2,900/. The Pension Payment Order provided in Column4 "class and amount of pension" that the enhanced rate of Rs. 2,900/ will be payable from 16.1.1999 to 15.1.2006 and thereafter from 16.1.2007 the family pension shall be paid at the normal rate of Rs. 1,740/ per month. The petitioner was also made entitled to dearness relief at the rate of 32% on the amount of family pension.

2. The petitioner was receiving family pension through Bank of India, Branch Sulem Sarai, Allahabad from her Saving Account No. 6022 at the rate of Rs. 2,900/ per month with dearness allowance. It is alleged that w.e.f. 31.1.2008 an amount of Rs. 1,610/ only was debited to her account as family pension by the bank and from February onwards upto July, 2008 she received only Rs. 2,337/ per month in her account. In para 12 of the writ petition it is stated by the petitioner that when she visited the bank, she was told that she was to be paid pension at the normal rate only upto 15.1.2006 and that by inadvertent mistake

the family pension was paid to her at normal rates till December, 2007. She had received Rs. 54,180/ in excess, which was sought to be recovered from her at Rs. 1,500/per month and consequently her family pension including dearness allowance was reduced from Rs. 3,837/ to Rs. 2,337/. The petitioner has challenged the recovery on the ground that excess payment was due to the fault of the Manager. The petitioner did not commit any default or misrepresentation and therefore the recovery of alleged excess payment was illegal and is violative of Art. 19 of the Constitution of India. She has further pleaded that her pension could not be reduced without the approval of the Hon"ble President of India and that the entire recovered amount be paid back to her and her pension be restored at the rate on which it was being paid to her.

4. Shri Ashok Bhatnagar, the counsel for the bank would submit that the pension payment order clearly stipulated.that the petitioner is entitled to family pension at special rate of Rs. 2,900/ for seven years from 16.1.1999 to 15.1.2006, and thereafter it will be reduced to normal rates at Rs. 1,740/w.e.f. 16.1.2006. Due to inadvertent mistake of the disbursing clerk of the bank the pension at the rate of Rs. 2,900/ per month and dearness allowance continued to be deposited even after 16.1.2006 and the petitioner continued to draw excess amount. When the mistake was discovered, the amount of Rs. 54,180/was sought to be recovered, which the petitioner was not entitled to retain. The petitioner submitted a letter to PCDA (Pension) Allahabad on 20.2.2008, which was sent to the bank stating that the bank has stopped payment on account of some recovery. The petitioner was withdrawing the family pension at special rates even after 15.1.2006, on account of a mistake. The petitioner gave in writing on 20.2.2008 signed by her to the PCDA (Pension), Allahabad with reference to PPO No. C/ENG/614/1999 as follows:

"From : Smt. Susheela Kanojia W/o Late Moti lal

Jayantipur, Allahabad

To: PCDA (Pension)

Allahabad

PPO No. C/ENG/614/1999

Respected Sir,

1. It is submitted for your kind information that the applicant reported to Bank of India, Sulem Sarai, Alld for getting my family pension on 13 Feb 2008 but the same could not receive and the rep of Bank told that the pension could not pay due to some recovery is due.

2. It is therefore, requested that above facts may please be intimated at the earliest if any recovery is due against the applicant which may please be recovered in the monthly installment as per Govt. rule and balance amount may please be released for monthly pension, so that the applicant put on the monthly

expenditure smoothly.

Thanking you,

Yours faithfully,

(Smt. Susheela Kanojia)

W/o Late Moti Lal"

5. Shri Ashok Bhatnagar would submit that the mistake of the bank on account of shifting of the branch did not entitle the petitioner to keep the excess amount of family pension, which was paid to her inadvertently.

6. It is contended that the principle of unjust enrichment will be attracted in the case. In *Mahabir Kishore and others v. State of Madhya Pradesh*, MR 1990 SC 313 Hon'ble Mr. Justice K.N. Saikia with Hon'ble Mr. Justice G.L. Oza held that principle of unjust enrichment require firstly that the defendant has been "enriched" by the receipt of a "benefit", secondly, that the enrichment was "at the expense of the plaintiff" and thirdly that the retention of the enrichment was unjust. The unjust enrichment justifies restitution. Enrichment may take the form of direct advantage to the recipient's wealth such as by the receipt of money or indirect unjust enrichment, where inevitable expense has been saved. In this judgment the Supreme Court held in para 8 to 12 as follows:

"The question is what was the law applicable to the case. *Nul ne doit senrichir aux depens des autres* No one ought to enrich himself at the expense of others. This doctrine at one stage of English common law was remedied by "indebitatus assumpsit" which action lay for money "had and received to the use of the plaintiff". It lay to recover money paid under a mistake, or extorted from the plaintiff by duress of his goods, or paid to the defendant on a consideration which totally failed. On abolition of "indebitatus assumpsit", Courts used to imply a promise to pay which, however, in course of time was held to be purely fictitious. Lord Mansfield in *Moses v. Macferian*, (1760) 2 Burr 1005 at p. 1012 explained the juridical basis of the action for money "had and received" thus:

"This kind of equitable action, to recover back money, which ought not injustice to be kept is very beneficial, and therefore much encouraged. It lies only for money which, "ex aequo et bono", the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in, point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or, for money fairly lost at play; because in all these cases, the defendant may" retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiffs situation, contrary to laws made for the protection of persons

under those circumstances. In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

9. In that case Moses received from Jacob four promissory notes of 30sh. each. He endorsed these to Macferlan who, by a written agreement, contracted that he would not hold Moses liable on the endorsement. Subsequently, however, Macferlan sued Moses on the notes in a Court of Conscience. The Court refused to recognise the agreement and Moses was forced to pay. Moses then brought an action against Macferlan in the King's Bench for money "had and received" to his use. Lord Mansfield allowed him to recover observing as above.

10. Courts in England have since been trying to formulate a juridical basis of this obligation. Idealistic formulations as "aequum et fenum" and "natural justice" were considered to be inadequate and the more legalistic basis of unjust enrichment is formulated. The doctrine of "unjust enrichment" is that in certain situation it would be "unjust" to allow the defendant to retain a benefit at the plaintiffs expense. The relatively modern principle of restitution is of the nature of quasicontract. But the English law has not yet recognised any generalised right to restitution in every case of unjust enrichment. As Lord Diplock has said, "there is no general doctrine of "unjust enrichment" recognised in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system i.e. based upon the civil law." In *Sinclair V. Brougham*, (1914) AC 398 Lord Haldane said that law could not "de jure" impute promises to repay whether for money "had and received" otherwise, which may, if made de facto, it would inexorably avoid.

11. The principle of unjust enrichment requires: first, that the defendant has been "enriched" by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiff"; and thirdly; that the retention of the enrichment be unjust. This justifies restitution. Enrichment may take the form of direct advantage to the recipient's wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved.

12. Another analysis of the obligation is of quasi contract. It was said : "if the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt, and gives this action founded in the equity of the plaintiffs case, as it were, upon a contract (quasi ex contractu) as the Roman law expresses it." As Lord Wright in *Fibrosa Spolka v. Fairbairn Lawson*, (1943) AC 32: (1942) 2 All ER 122 pointed out, "the obligation is as efficacious as if it were upon a contract. Such remedies are quasi contract or restitution and theory of unjust enrichment has not been closed in English law."

7. It is contended that under Section 72 of the Indian Contract Act a person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it. The principle of unjust enrichment and restitution of debt is thus codified in Section 72 of the Contract Act.

8. In *Thomas Abraham and others v. National Tyre and Rubber Co. of India Ltd.*, MR 1974 SC 602 the Supreme Court held in para 12, that where accounts are drawn up and assented to by parties under a common mistake, as to their rights and obligations, the accounts may be directed to be opened. It is an established principle of common law that an action for money had and received, is a practical and useful instrument to prevent unjust enrichment. The law implies an obligation to repay the money which is an unjust benefit.

9. In the present case it is not denied that the petitioner was not entitled and had in fact given in writing to the bank that she was erroneously paid excess amount as against the clear stipulation in the pension payment order. If the bank committed a mistake, it was liable to be reimbursed. The petitioner as a bonafide pensioner was obliged to inform the bank for payment of the correct amount. The bank was only an agency through which the pension was paid. There are no pleadings nor it is contended that the petitioner's pension was increased or that she had not received the additional benefit from the employer. The statement of account does not show that the petitioner had claimed any higher amount. It was apparently a mistake, which was sought to be rectified by the bank. The principle that any amount paid in excess for no fault, fraud or representation by the recipients, cannot be recovered is not applicable to the case. The petitioner is a pensioner. She had consented to the recovery to be made from her salary. Shri Ashok Bhatnagar states that a part of excess payment has already been recovered.

10. In the end learned counsel for the petitioner pleads that taking into account rising cost of living and the fact that the petitioner's son is still unemployed, the deductions be reduced from the rate of Rs. 1500/ to a reasonable amount.

11. In the facts and circumstances, the writ petition is partly allowed with directions that the bank will consider to recover the balance amount at a reasonable rate, say at the rate of Rs. 500/ per month to be adjusted from the pension payable to petitioner every month. The costs are made easy.