(2013) 09 DEL CK 0169

In the Delhi High Court

Case No : Writ Petition (C) 5555 of 2013

Union of India and Another APPELLANT

Vs

J.S. Sharma and Others RESPONDENT

Date of Decision : 04-09-2013

Acts Referred:
Contract Act, 1872 — Section 72

Citation : (2013) 203 DLT 514

Hon'ble Judges : S. Ravindra Bhat, J;Najmi Waziri, J

Bench : Division Bench

Advocate : Ruchir Mishra and Mr. Sanjiv Kumar Saxena, for the Appellant;

Final Decision : Dismissed

Judgement

Najmi Waziri, J.

CM 12345/2013 (exemption)

Allowed, subject to all just exceptions.

The application stands disposed off.

W.P.(C) 5555/2013 & CM 12344/2013 (stay)

1. This writ petition is directed against the order dated 5th February, 2013 of the Central Administrative Tribunal, Principal Bench, New Delhi, ("Tribunal"). The endeavour of the petitioner to recover from the respondents herein such monies as were paid to them as transport allowance was directed to be not recovered. The issue before the Tribunal was:

Whether Group "A" officers who had been granted Grade Pay of Rs. 10,000/- under Non-Functional Upgradation Scheme, were entitled for drawing the Transport Allowance at the enhanced rate of Rs. 7,000/- + DA on par with Joint Secretary level officers in the Government of India, who are also in the Grade Pay of Rs. 10,000/-.

The facts in which the present issue arose are that for commuting between office and residence. Officers of the level of Joint Secretary and above are provided with the facility of staff car on prescribed payment basis (under Office Memorandum No. 20(5)-E.II(A)/93 dated 28th January, 1994). They have the option to switch over to payment of transport allowance, at applicable rates subject to the facility of staff car being withdrawn. The respondents who were Group A Officers, were drawing pay at par with an officer of the post of Joint Secretary. However, the respondents reached that level of pay scale on the grant of non-functional upgrade (under Officer Order No. 30/26/2010-EC-EW-1 dated 3rd February, 2011). This upgrade was in pursuance of Office Memorandum (OM) No. AB. 14017/64/ 2008-Estt.(RR) dated 24th April, 2009 of the DoPT, which recommended/directed such non-functional upgrade. Since the pay grade of the respondents was at par with that of officers of the level of Joint Secretary - as a consequence of the grant of the non functional upgrade - they were being allowed transport allowances at the rate of Rs. 7,000/- + D.A. from the dates from which they were conferred the upgrade.

2. The said allowances were sought to be withdrawn by the petitioners (by OM dated 23rd September, 2011) on the ground that it was not payable to officers who were granted grade pay of Rs. 10,000/- under Non-Functional Upgradation Scheme and that the facility of official car was available only to those who were covered by OM dated 28th January, 1994. The over-payment of the transport allowance was sought to be recovered from the said officers/respondents herein by way of individual notices dated 5th October, 2011.

3. After hearing the parties in the proceedings before it, the Tribunal found that according to the OM No. 21(1)/97/E.II(B) dated 3rd October, 1997 as amended by OM dated 22nd February, 2002, only, those officers (at the level of Joint Secretary) who had been provided with the facility of staff car and who had the option to either avail of the facility or to switch over the payment of transport allowance were entitled to the allowance of rate of Rs. 7,000/- per month + DA thereon. It observed that merely because the respondent officers were in the grade pay of Rs. 10,000/- - by virtue of the non functional upgrade - they could not claim all the benefits or allowances entitled to Joint Secretary and above and that the said benefit of transport allowance was available only to those officers who are promoted to Joint Secretary grade on regular basis. It further observed that a perusal of the OM dated 24th April, 2009 would reveal that the upgrade and consequential grade pay of Rs. 10,000/- would not bestow any right to the officers to claim promotion or deputation benefit and that the same is personal to the officer. Accordingly, it held that the Grade Pay Officers would not be entitled to the transport allowances.

4. Nevertheless, relying upon the ratio of Syed Abdul Qadir and Others Vs. State of Bihar and Others, the Tribunal directed that the recovery of the money may not be made since the travel allowance was being paid by the Government on its own and is not because of any misrepresentation or fraud played by the

applicants.

5. Learned counsel for the petitioners contended that the recovery was sought since the officers had benefited by payments being made to them under a bona fide mistake and they ought to return the same in fairness. He submitted that the monies so paid to them were not their legal entitlement and that the government was justified in seeking its return. Learned counsel also submitted that the Grade Pay Officers were permitted allowance of Rs. 3,200/- and hence the recovery from those who were paid excess was sought only after deducting Rs. 3200/-. He relied upon the judgment in Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others, , to submit that that reliance ought to not be placed on the judgment of Syed Abdul Qadir case.

6. Chandi Prasad Uniyal was a case of restitution u/s 72 of the Contract Act, 1872, whereby recovery of amount paid in excess without any authority of law and payments so received by the recipient party was allowed to be recovered lest it amount to unjust enrichment. It was held that:

14. 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.

15. 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.

7. This court notices that the case, however, was with relation to wrong/irregular pay fixation whereas in the present case the pay had already been fixed and the monies were paid to the Grade Pay Officers without any misrepresentation on fraud played by them. This court further notices that the case further involved a specific service condition that read "In the condition of irregular/wrong pay fixation, the institution shall be responsible for recovery of the amount received in excess from the salary/pension". The Supreme Court had held that the said condition bound the parties therein. However, no such condition has been pleaded or relied on in the present case.

8. Furthermore, this court is of the opinion that the case of the grade pay officers falls in the exceptional category - which exception even the Chandi Prasad Uniyal case recognized the existence of - that would have the benefit of the ratio of Syed Abdul Qadir (supra):

57. This Court, in a catena of decisions, has granted relief against recovery of

excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee, and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See Sahib Ram Vs. State of Haryana and Others, , Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, , Union of India (UOI) and Another Vs. M. Bhaskar and Others, , V. Gangaram Vs. Regional Joint Director and others, , Col. (Retd.) B.J. Akkara Vs. The Govt. of India and Others, , Purshottam Lal Das and Others Vs. The State of Bihar and Others, , Punjab National Bank and Others Vs. Manjeet Singh and Another, and Bihar State Electricity Board and Anr. v. Bijay Bahadur and Anr. .

Having considered the arguments and the facts of the case and the ratio of Syed Abdul Kadir case, this Court finds no reason to interfere with the impugned order. The petition is without merit and is accordingly dismissed.