

(2004) 04 PAT CK 0107

Patna High Court

Case No: LPA No. 935 of 2003

Bihar State Electricity Board and
Others

APPELLANT

Vs

Man Bahadur and Others

RESPONDENT

Date of Decision: April 16, 2004

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

1. Both the appeals are barred by limitation.
2. After having heard learned Counsel for the parties and taking into consideration the averments made in the limitation petitions, we are satisfied that sufficient ground has been made out to condone the delay in filing these appeals, Accordingly, the delay in filing these appeals are condoned.
3. The point involved in both the appeals are the same and as such they have been heard together and are being disposed of by this common order.
4. LPA No. 935 of 2003 has been filed by the Bihar State Electricity Board (hereafter referred to as the Board) and its officers against the part of the order dated 27.6.2003 whereby the learned Single Judge while allowing the writ application being CWJC No. 3310 of 2003 filed by the writ Petitioner-Respondent No. 1 Man Bahadur for payment of retiral dues has also directed the Appellant-Board to refund Rs. 14,289/- which has been recovered from the retiral dues of the writ S-Respondent No. 1 on account of excess payment due to wrong fixation of pay.
5. LPA No. 955 of 2003 has been filed by the Appellant-Board against the part of the order dated 25.6.2003 passed in CWJC No. 3282 of 2003 reported in 2003(3) PLJR 509 whereby the learned Single Judge while directing the Appellant-Board to pay the retiral dues to the writ Petitioner-Respondent No. 1 Kedar Nath Verma has also directed it for payment of Rs. 26,147/- which was recovered from his retiral dues as

excess payment due to wrong fixation of pay.

6. Both the writ Petitioners-Respondents were the employees of the Appellant-Board. The writ Petitioner-Respondent No. 1 of LPA No. 935 of 2003 retired on 29.2.2000 as Head Lineman, (Urban) Division Nalanda at Biharsharif and writ Petitioner-Respondent No. 1 of LPA No. 955 of 2003 retired on 30.4.1999 as Head Clerk. Nalanda Electric Supply Anchal, Biharsharif.

7. Both the writ Petitioners-Respondents filed the aforesaid writ applications for direction to pay the retiral dues. The writ Petitioner-Respondent No. 1 of LPA No. 935 of 2003 stated that some amount has been deducted from the sanctioned D.C.R. gratuity due to excess payment made previously which is not to be recovered after retirement. The writ Petitioner-Respondent No. 1 of LPA No. 955 of 2003 specifically challenged the recovery made of Rs. 26,147.10 P from the amount of gratuity on account of excess payment as the same is not permissible in law specially after retirement.

8. The Appellant-Board filed counter affidavits in both the cases. So far payment of other retiral dues is concerned, as the Board is not aggrieved by the direction issued by the learned Single Judge, the assertion of the Board with regard to same is not being stated for the reason that they are not relevant for disposal of the present case. So far recovery aspect with regard to writ Petitioner-Respondent No. 1 of LPA No. 935 of 2003 is concerned, it was stated in paragraph 6 of the counter affidavit filed in CWJC No. 3310 of 2003 that a sum of Rs. 14,289/- has been recovered from the amount of gratuity on account of excess payment drawn by the writ Petitioner-Respondent No. 1 and extract of the excess amount drawn by him is detailed in Annexure-B to the counter affidavit. The order for recovery of excess amount was passed on 16.1.2001. It was clearly mentioned in the Gratuity Payment Order No. 3094 dated 3.5.2001 contained in Annexure-A to the counter affidavit that the aforesaid amount has been recovered from the amount of gratuity. It was further stated that the writ Petitioner-Respondent No. 1 has not challenged the recovery in the writ application.

9. With regard to writ Petitioner-Respondent No. 1 of LPA No. 955 of 2003 it was stated in paragraph 6 of the counter affidavit filed in CWJC No. 3282 of 2003 about the details as to how the excess payment has been made and it was further stated that the writ Petitioner-Respondent No. 1 was informed about the said discrepancies in the pay fixation by letter dated 4.10.2001 vide Annexure-C to the counter affidavit, but he did not challenge the same and when the consequential action of recovery has been sought to be taken, he cannot be allowed to challenge the same.

10. The learned Single Judge directed for payment of amount recovered from the gratuity of the writ Petitioners-Respondents on the sole ground that as there being no misrepresentation or fraud on their part, the Appellant-Board was not justified in making the recovery of the aforesaid amount. Before the learned Single Judge, the

Board relied upon a Division Bench judgment of this Court in LPA No. 86 of 2002 disposed of on 9.7.2002 Bihar State Electricity Board and Anr. v. Ram Gati Singh and Ors. wherein in similar circumstances in the case of employee of the Appellant-Board, this Court did not interfere with the order, and the order of the Apex Court dismissing the SLP against the said order, but the learned Single Judge observed that the Board cannot take the help of the said judgment in view of the settled law by the Supreme 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. reported in (2000) 10 Supreme Court Cases 99 and accordingly allowed the claim of the writ Petitioners-Respondents as stated above.

11. The learned Single Judge has also relied upon a circular of the Board dated 25.7.2001 which has been annexed as Annexure-1 to the Letters Patent Appeals for coming to the conclusion that according to own decision of the Board any amount sought to be recovered on account of anomalies in the pay fixation or on any ground cannot be made after retirement.

12. The learned Counsel appearing for the Appellant-Board submitted that the writ Petitioners-Respondents' pay was wrongly fixed and later on it was correctly fixed. They did not challenge the order of re-fixation and as such 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. As the writ Petitioners-Respondents were not entitled to amount in law and the same being public money they cannot retain the same on the ground of equity as the equity does not permit the public servant to retain the amount, which he is not entitled, only on the ground that there being no fraud or misrepresentation on his part.

13. Learned Counsel appearing for the writ Petitioners-Respondents submitted that fixation of pay was made by the Board and there was no misrepresentation or fraud on their part and as such after retirement the Board cannot take steps to recover the same. In support of the said contention they have relied upon two judgments of the Supreme Court in the cases of Sahib Ram and the Bihar State Electricity Board (supra).

14. There is no dispute about the fact that pay fixation was wrongly made and the writ Petitioners-Respondents were paid excess amount which they were not entitled. It is also admitted position that re-fixation of pay was made and mistake was corrected prior to taking steps for recovery of the excess amount but the writ Petitioners-Respondents had not challenged the order re-fixing the correct pay scale.

15. Thus, the only question for consideration in this case is as to whether the-, excess amount paid to the writ Petitioners-Respondents due to wrong fixation of pay can be recovered when there is no fraud or misrepresentation on their part.

16. So far circular of the Board dated 25.7.2000. which has been annexed as Annexure-1 to the Letters Patent Appeals, which has been relied upon by the learned Single Judge for holding that the Board cannot recover the excess amount paid to the employees on account of wrong fixation etc. is concerned, the same does not support the view taken by the learned-Single Judge. That is the circular issued by the Board to take steps for payment of retiral dues as well as to take decision with regard to anomalies regarding pay fixation during service tenure of the employees otherwise if subsequently the order of recovery is found invalid by the court then the amount will be recovered from the concerned officer. The said circular does not say that the recovery should not be made from the employee after retirement. The purpose of the circular is that there should not be delay in payment of retiral dues and any controversy regarding pay fixation should be solved while the Government servant is in employment to avoid litigation and undue hardship to the employees but by no stretch of imagination the said circular can be read to mean that it prevented from making any recovery if the Board finds that the amount has been paid wrongly.

17. The question as to whether the excess amount paid to the employees due to wrong fixation of pay, increments or analogous reasons can be recovered or not has been the subject matter of the decision by the Apex Court in several cases. In Sahib Ram's case (supra) the upgraded pay scale was granted to the Librarians who did not possess the requisite qualification. It was found that the Principal of the College had erred in granting him relaxation in the educational qualification. Dealing with the said matter the Apex Court in paragraph 5 of the judgment observed as follows:

Since the date of relaxation the Appellant had been paid his salary on the revised scale, However, it is not on account of any misrepresentation made by the Appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the Appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the Appellant.

18. In that case it was held that there was no misrepresentation by the Appellant and the Principal wrongly constructed the relevant provision.

19. In the case of [V. Gangaram Vs. Regional Joint Director and others](#), the Appellant before the Apex Court was entitled to only two additional increments, but were granted four increments and the Apex Court held that the excess payment made is to be recovered from the pension payable to the Appellant.

20. In the case of [State of Punjab and Others Vs. Devinder Singh and Others](#), the daily wages employees were paid the regular pay scale which the Apex Court found to have wrongly given to him and accordingly ordered that any amount found to have been paid to the employees in excess it will be adjusted in phased and reasonable manner.

21. In the case of [Union of India and Others Vs. Smt. Sujatha Vedachalam and Another](#), it was found that pay fixation was wrongly made and accordingly, order was passed for recovery of the amount in easy instalment.

22. In the case of the Appellant Bihar State Electricity Board (supra), the question of recovery of excess payment was considered by the Apex Court. In the said case, the Board sought to recover the increments granted to the Respondents on the ground that they did not pass the Hindi Reading-Writing Examination and Hindi Noting and Drafting Examination at the relevant time which was a relevant condition for giving increment. It was found that the writ Petitioner-Respondents of that case were granted increments as well as promotion. The promotions were not withdrawn whereas increments were withdrawn. It was also found that the resolution of Board adopting Bihar Govt. Service (Hindi Examination) Regulation, 1968 which made mandatory for passing the concerned examination for grant of increment was not intimated to the staff prior to 1996 and the writ Petitioners-Respondents had subsequently assed the aforesaid relevant examination. Taking into consideration the aforesaid aspect, the Apex Court relying upon the judgment in Sahib Ram's case (supra) in paragraph 10 observed as follows. However while observing it was held that the order will be restricted only to the facts of the present writ Petitioners.

The High Court also relied on the unreported decision of the learned Single Judge in the case of Saheed Kumar Banerjee v. Bihar SEB. We do record our concurrence with the observations of this Court in Sahib Ram case and come to a conclusion that since payments have been made without any representation or a 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 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 concept of fairness has been given a go-by. As such the actions initiated for recovery cannot be sustained under any circumstances. This order however be restricted to the facts of the present writ Petitioners. It is clarified 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.

23. The Apex Court taking into consideration the facts and circumstances of the case has in some cases allowed the recovery of the amount due to wrong fixation of pay, increments and in some cases disallowed the same on the ground of there being no fraud or misrepresentation. 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.

24. Salary paid to an employee of the Government or the Corporation is a public money and the employee is entitled to only that salary which is permissible

governing the service. If an employee has been paid excess amount due to wrong calculation which he is not entitled, then he cannot claim on the ground that as there being no fraud and misrepresentation he will not return the same. Even if there is no fraud or misrepresentation but due to bonafide mistake or wrong committed by the office, excess payment has been made, the employer can take steps for recovery of the same and the Court taking into consideration the facts of the case may or may not interfere with the order.

25. In Sahib Ram's case (supra), as stated above, as the higher authority wrongly constructed the provision and granted the scale, the Apex Court did not permit the recovery and in the case of the Appellant (Bihar State Electricity Board) (supra) which had gone up to the Supreme court as the resolution of the Board putting (sic) condition for passing the Hindi Reading-Writing Examination and Hindi Noting and Drafting Examination was not intimated (sic) the employees and the order of promotion was not withdrawn whereas only increment was withdrawn, the Apex Court in those circumstances did not approve the order passed by the employer for recovery of the amount, but in other cases as noted above, the Apex Court having found that the person has wrongly been given the increments or pay fixation has wrongly been made, ordered for recovery of the same even from the retiral benefits.

26. The present case in my view is covered by the law laid down by the Apex Court in the case of V. Gangaram (supra), Devinder Singh (supra), Sujatha Vedachalam (Smt.) (supra) 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 re-fixed and it was even communicated to the writ Petitioners-Respondents as 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.

27. Thus, the action taken by the Board cannot be said to be in breach of equity, good conscience or justice. In a similar situation, this Court in the case of Ram Gati Singh {supra} has upheld the order of the Board and the SLP against the same has been dismissed. Once the Division Bench of this Court in a similar matter has upheld the order of the Board and the learned Single Judge was of the view that the view taken by this Court in the aforesaid Ram Gati Singh was contrary to the judgment of the Supreme Court rendered in Sahib Ram's case (supra) and Bihar State Electricity Board (supra) in that case, he should have referred the matter to the larger Bench. In this connection, reference may be made to the judgment of the Constitution Bench of the Supreme Court in the case of [State of U.P. and another Vs. C.L. Agrawal and another, etc.](#). In that case it appears that the Division Bench instead of following the decision of the Full Bench of their own High Court proceeded to decide the matter on the ground that the view taken by the Full Bench was contrary to judgment of the Supreme Court as the decisions of the Supreme Court were not noticed by the Full Bench. Dealing with the said matter, the Apex Court said that the

Division Bench cannot do and the proper course was to refer the matter to the Full Bench. In this connection, it is relevant to quote paragraph 19 of the judgment:

We are dismayed that the Division Bench hearing the said writ, petition should have proposed to examine the issue "notwithstanding the aforesaid pronouncement of the Full Bench judgment..." If the judgments in the cases of Supreme Court Employees' Welfare Assn. and H.C. Puttaswamy were cited and the Respondents to the said writ petition submitted that the Full Bench judgment was erroneous by reason thereof, the proper course for the Division Bench to follow, if it found any merit in the submission, was to refer the said writ petition to a Full Bench, Judicial discipline requires that a Division Bench should not examine de novo an issue that is concluded by the decision of a Full Bench of that High Court.

28. In the result, both the appeals are allowed and the order passed by the learned Single Judge directing the Board-Appellant for payment of the amount recovered from the writ Petitioners-Respondents which was wrongly paid to them on account of wrong fixation of pay is set aside.

P.N. Yadav, J.

29. I agree.