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Court : Mumbai Aurangabad

Decided On : Oct-01-2014

Judge : Ravindra V. Ghuge

Appeal No. : Writ Petition No. 1677 of 2014

Appellant : Executive Engineer, MSEDCL and Another

Respondent : Anjali Anil Tare

Judgement :

1. Rule. Rule made returnable forthwith by the consent of the parties and heard finally.
2. This Court has considered the submissions of the rival parties at length. The petitioners have challenged the judgment and order dated 19.11.2013, delivered by the Industrial Court, Jalgaon in Complaint (ULP) No.38 of 2009, filed by the respondent.
3. A short issue has been raised for the consideration of this Court. In two other Writ Petition Nos. 741 and 745 both of 2013, this Court has decided a similar challenge on 24.9.2014,
4. The respondent was appointed as a Lower Division Clerk (LDC) in 1977. She passed her lower division grade examination on 30.3.1980 and later on she became eligible for promotion as Upper Division Clerk (UDC). On promotion, she

was working as UDC till 1997, when she was transferred from Jalgaon to Parbhani. In order to continue at Jalgaon, due to personal reasons, she opted for a reversion from the post of UDC to LDC. She joined the office of the petitioners at Jalgaon in 1997 on the reverted post of LDC.

5. On 5.11.2008, the respondent gave an application for fixation of her pay. It was in June 2009 that the petitioners realised that the respondent was paid an excess salary of Rs.1,94,637/- from October 1997 till May 2009. An order dated 29.5.2009 was issued for carrying out recovery of the said amount from her.

6. The respondent preferred Complaint (ULP) No. 38 of 2009 before the Industrial Court at Jalgaon on 10.7.2009 and challenged the recovery under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (the said Act). By an interim order dated 17.8.2009, the recovery was stayed. The respondent stood retired on attaining the age of superannuation on 31.3.2012. By the impugned judgment dated 19.11.2013, the complaint was allowed by the Industrial Court, Jalgaon.

7. The petitioners submit that due to inadvertance and oversight, the petitioners failed to record that the respondent had opted to be reverted from UDC to LDC. She continued to draw her salary on the basis of UDC and therefore, an excess payment of Rs.1,94,637/- was made to her. No loss or harm would be caused to the respondent if the said recovery is effected as she was not legally entitled to earn the same and there cannot be a legitimate expectation. The petitioners have also canvassed the principles of unjust enrichment against the respondent.

8. The learned Advocate for the respondent, while supporting the impugned judgment, submits that the respondent is a Senior Citizen and has already retired on 31.3.2012. She had been constantly sending reminders and representations to the petitioners for fixation of her salary. Despite the same, the petitioners issued a letter dated 3.8.2004 holding her to be eligible to the salary of the higher post. This letter is not retracted.

9. She has not indulged in any fraud or mis-representation. The negligence and laxity on the part of the petitioners cannot be countenanced and she cannot be

compelled to face the brunt of the wrongful actions of the petitioners. Being an aged person and surviving on pension, recovery of the amount of Rs.1,94,637/- would cause severe hardships and irreparable harm to the respondent, are her contentions.

10. I have considered the rival contentions. The Apex Court in the case of Syed Abdul Qadir and others Vs. State of Bihar and others [(2009) 3 SCC 475] (Three Judges' Bench) has concluded that equitable principles would prohibit allowing of a recovery against the employee, where there is no misrepresentation or fraud on the part of the employee. For the wrong or mistake committed by the employer, an employee cannot be held responsible. The Court can permit recovery only when the over-payment is detected within a short time.

11. The Apex Court, in the case of Syed Abdul Qadir (supra), has held as under:-

" 27. 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. 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, 1995 Supp. (1) SCC 18, Shyam Babu Verma vs. Union of India [1994] 2 SCC 521; Union of India vs. M. Bhaskar, [1996] 4 SCC 416; V. Ganga Ram vs. Regional Jt. Director, [1997] 6 SCC 139; Col. B.J. Akkara [Retd.] vs. Government of India and Ors. [2006] 11 SCC 709; Purshottam Lal Das and Ors., vs. State of Bihar, [2006] 11 SCC 492; Punjab National Bank and Ors. Vs. Manjeet Singh and

Anr., [2006] 8 SCC 647; and Bihar State Electricity Board and Anr. Vs. Bijay Bahadur and Anr., [2000] 10 SCC 99.

28. 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.

29. Learned counsel also submitted that prior to the interim order passed by this Court on 7.4.2003 in the special leave petitions, whereby the order of recovery passed by the Division Bench of the High Court was stayed, some installments/amount had already been recovered from some of the teachers. Since we have directed that no recovery of the excess amount be made from the appellantteachers and in order to maintain parity, it would be in the fitness of things that the amount that has been recovered from the teachers should be refunded to them.

30. In the result, the appeals are allowed in part, the impugned judgment so far as it relates to the direction given for recovery of the amount that has been paid in excess to the appellants teachers is set aside and that part of the impugned judgment whereby it has been held by the Division Bench that the amended provisions of FR.22-C would apply to the appellants-teachers is upheld. We direct that no recovery of the excess amount, that has been paid to the teachers of

Secondary Schools, be made, irrespective of the fact whether they have moved this Court or not. We also direct that the amount that has been recovered from some of the teachers, after the impugned judgment was passed by the High Court, irrespective of the fact whether they have moved this Court or not, be refunded to them within three months from the date of receipt of copy of this judgment. "

12. In the case of Chandi Prasad Uniya and others Vs. State of Uttarakhand and others [(2012) 8 SCC 417], the Apex Court has permitted the recovery of money since it was public money that was wrongfully paid to an employee. However, the Apex Court has concluded, in paragraph Nos.7 to 16 that if the case of an employee falls in the exceptional categories, the recovery cannot be effected. It would be of assistance to reproduce paragraph Nos.7 to 16 of the said judgment as follows:-

7. We may also indicate that when the revised pay scale/pay fixation was fixed on the basis of the 5th Central Pay Scale, a condition was superimposed which reads as follows:

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 appellants are further bound by that condition as well. The facts, mentioned hereinabove, would clearly demonstrate that the excess salary was paid due to irregular/wrong pay fixation by the concerned District Education Officer. The question is whether the appellants can retain the amount received on the basis of irregular/wrong pay fixation in the absence of any misrepresentation or fraud on their part, as contended.

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 case (supra) 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 case (supra), 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 case (supra), 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. B.J. Akkara (retd.) case (supra) where this Court after referring to Shyam Babu Verma case, Sahib Ram case (supra) and few other decisions held as follows:

28. 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. Later, a three-Judge Bench in Syed Abdul Qadir case (supra) 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:

59. 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 appellantteachers, 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 herein before 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 herein before 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.

13. In my view, the case of the respondent falls within the exception, as observed by the Apex Court. For about twelve years, the petitioners did not notice their mistake. It was on the applications of the respondent seeking fixation of salary, that the petitioners woke up from their deep slumber. All these aspects and

hardships were considered by the Industrial Court while delivering the impugned judgment. I do not find that the impugned judgment could be termed as perverse or erroneous. The observations of the Apex Court in paragraph Nos.9, 10 and 11 of the Chandi Prasad Case (supra) and paragraph No.28 of the Syed Abdul Qadir case (supra), assist the respondent in this case.

14. Having considered the narration of facts as recorded in brief hereinabove, in my view, this petition rests on a law issue in relation to the jurisdiction of this Court. So far as the limitations on the supervisory / writ jurisdiction of this Court are concerned, the view taken by the 5 Judges Bench of the Supreme Court in the case of Syed Yakoob Vs. K.S. Radhakrishnan and others, [AIR 1964 SC 447] becomes applicable. The Apex Court has laid down the law under paragraph Nos. 7 and 8 of the said judgment, which read thus:-

7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or Tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has

influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Art. 226 to issue a writ of certiorari can be legitimately exercised (vide *Hari Vishnu Kamath v. Syed Ahmed Ishaque*), *Nagendra Nath Bbora v. The Commissioner of Hills Division and Appeals, Assam* ([1958] S.C.R. 1240.) and *Kaushalya Devi v. Bachittar Singh*.

8. It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious misinterpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on the face of the record as such and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our

opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of a the legal provision which is alleged to have been misconstrued or contravened.

15. In the case of Surya Dev Rai Vs. Ram Chander Rai [2003(6) SCC 682], the Apex Court has once again defined the scope and jurisdiction of the supervisory powers of this Court in paragraph Nos.38(1) to (9) and 39, which read thus :-

38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-

(1) Amendment by Act No.46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the

subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of

evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.

39. Though we have tried to lay down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Articles 226 or 227 of the Constitution cannot be tied down in a straitjacket formula or rigid rules. Not less than often the High Court would be faced with dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where 'a stitch in time would save nine'. At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge.

16. In the light of the above, by taking a circumspect view of this case, I do not find that the petitioners can justify their action of recovery. I, therefore, conclude that

the impugned judgment is neither perverse nor erroneous. No interference is called for.

17. The Writ Petition being devoid of merits is, therefore, dismissed. Rule stands discharged. No order as to costs.

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