

Ram Binod Singh, Vs. the Bihar State Electricity Board and ors.

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SooperKanoon Citation : sooperkanoon.com/135274

Court : Patna

Decided On : Jul-04-2007

Judge : Shiva Kirti Singh, Mridula Mishra and Dharnidhar Jha, JJ.

Appellant : Ram Binod Singh, Shabbir Alam, Sri Dineshwar Prasad Singh and Mostt. Indu Devishree Nandan Prasad, B

Respondent : The Bihar State Electricity Board and ors. The State of Bihar and ors. Ram Kumar Bharti @ R.K. Bharti

Disposition : Appeal allowed

Judgement :

Shiva Kirti Singh, J.

1. Specific orders referring the relevant issues for decision by a larger Bench have been passed in CWJC No. 12181 of 2003 Ram Binod Singh v. the Bihar State Electricity Board and Ors. and in CWJC No. 8677 of 2003 Shabbir Alam v. Bihar State Electricity Board. The other matters have been listed because they are also dependent upon the outcome of answer to the issues under reference.

2. The orders making reference disclose that the learned Single Judges hearing the writ petitions noticed that the view taken by a Division Bench of this Court in case of Bihar State Electricity Board and Ors. v. Man Bahadur and Ors. reported in 2004 (3) PLJR 3 appears to be contrary to earlier Division Bench judgments of this

Court, particularly in the case of Bihar State Electricity Board and Ors. v. Madan Mohan Prasad and Ors. 2001 (2) PLJR 58.

3. In eight out of nine matters before us the petitioners are class III or Class IV employees (or their widows/dependents) retired from service under the State of Bihar or Bihar State Electricity Board (hereinafter referred to as 'the Board'). In the only Letters Patent Appeal before us, the sole respondent is a retired class 111 employee of the Board, whose writ petition has been allowed by the judgment under appeal passed by learned Single Judge holding that no recovery can be made of the excess payment made on account of wrong fixation of his pay while he was in service.

4. On behalf of the employees, who are the writ petitioners or respondent in the only LPA, a categorical stand has been taken that the Division Bench of this Court in the case of Bihar State Electricity Board v. Madan Mohan Prasad (supra) has taken a correct view of law in holding that 'Law is well settled that money benefit paid to an employee in excess of his entitlement should not normally be recovered from Mm 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 that the same had flowed to the employee on account of fraud, misrepresentation or the like attributable to him'.

5. On the other hand on behalf of the Board and on behalf of the State of Bihar a stand has been taken that although the later Division Bench judgment in the case of BSEB and Ors. v. Man Bahadur and Ors. (supra) has missed to notice the earlier Division Bench judgment in the case of Madan Mohan Prasad but nonetheless it lays down the law correctly by holding that excess payment due to mistake in pay fixation grant of increment or the like leading to wrong calculation of salary of the employees can be recovered from the retiral or other dues and the recovery cannot be resisted on the ground that there was no fraud or misrepresentation on the part of the concerned employee.

6. The view taken in the aforesaid two Division Bench judgments were in the context of retired employees of the Board from whom recovery was sought to be made on the premise that while in service they had received monetary benefits to which they were legally not entitled. In the case of Madan Mohan Prasad, the employee had received monetary benefits under a conditional order affording him pay protection. Later, in terms of the condition, the Board withdrew the pay protection and excess payment was recovered. Challenge to such recovery failed before the Division Bench in view of clear applicability of one of the two exceptions, namely, if the order granting benefit itself stipulates recovery after the order is found erroneous at a later stage. On the other hand, in the case of Man Bahadur recovery was allowed because excess amount was paid due to wrong pay fixation and the employees were not entitled to the same. The Board was found entitled to correct the mistake. In this case, the law declared by the Division Bench is clearly to the effect that where public money is involved and an employee has been paid excess amount due to mistake or wrong calculation or wrong fixation of pay, wrong award of increments or for analogous reasons then recovery cannot be denied on the ground that there is no fraud or misrepresentation on the part of the concerned employee. Clearly, this judgment enlarges the scope of recovery from retired employees beyond the situations covered by the two exceptions clearly enunciated and spelt out by the earlier Division bench in the case of Madan Mohan Prasad. To that extent, there is apparent conflict between the two judgments which has necessitated a reference to this larger Bench.

7. In view of brief discussion made above of the two Division Bench judgments, the issue to be decided and the question to be answered is whether the later Division Bench judgments including that in the case of Man Bahadur lay down the law relating to recovery from the pensionary benefits of retired employees correctly or not.

8. Before taking up the main issue and considering the arguments of the parties it is deemed necessary to remove certain cobwebs and misgivings in respect of the issue for determination by this Bench. The conflict between the two Division Bench judgments noticed above does not relate to recovery of monetary benefits already paid to an employee the entitlement whereof remains to be decided. The issue of

entitlement is a separate issue depending upon facts of each case which may show that either the employee has accepted that excess payment was made to which he was not entitled or where the authorities or the courts have already come to a final decision to that effect. In most of the writ petitions a stand was taken in course of arguments that issue of entitlement itself has not been finally decided, at least by this Court. Hence, the writ petitions will have to be remitted back to the concerned Benches for considering the issue of entitlement and for final disposal in the light of decision on the issue under reference. However, in the only Letters Patent Appeal the issue of entitlement is no longer open and the fate of the respondent will be governed by this judgment. Secondly, although some arguments were advanced as to whether recovery of unauthorized/wrong payments should be permitted in the case of serving employees, that issue also does not fall for consideration by this Bench because it has already been noticed that the conflict between the two Division Bench judgments relates solely to the issue of recovery of unauthorized monetary benefits from retired employees out of their retiral and other dues including pension and gratuity.

9. Having cleared the deck for consideration of the main issue as a pure question of law, it is made clear that factual details relating to individual petitioners/employees are not required to be noticed any further, particularly in view of submissions on behalf of the petitioners that the writ petitions require to be remitted back to the concerned Benches for disposal in accordance with law and also in the light of this judgment.

10. Coming to the main issue, on behalf of the petitioners it was strongly contended that mistakes or errors in fixation of pay or grant of increments and promotions may entitle the State or the Board to make recovery if the employee is in service but no recovery should be permitted from those who have already superannuated because in their case relationship of master and servant has come to an end and a limited relationship, statutory in nature continues for the limited purpose of payment of retiral benefits. The next submission was to the effect that if on reinterpretation of some rule, circular or standing order past payments become irregular/ illegal, in that event, no recovery of the payments already made is permissible because an administrative decision involving reinterpretation cannot

be allowed to operate retrospectively to affect the past benefits already received; such decision can only be prospective.

11. Elaborating the second submission, Mr. Hivajee Pandey, learned Counsel for the petitioners in some of the cases, took a cautious but fair stand that a prospective correction which shall not involve recovery on account of reinterpretation of applicable rule, circular or standing order pre-supposes that two views are possible in the matter and one view has existed for some time leading to excess payments over a long period of time. According to him, if no reasonable person could have come to initial interpretation leading to payment then the decision may be labeled as malafide in law and, therefore, void ab initio and in a case of such nature only Wednesbury Principle as discussed by the Supreme Court in the case of *Tata Cellular v. Union of India* (1994) 6 SCC 651 may apply leading to justified recovery. In other words, it was submitted that all kinds of unauthorized or wrong payments cannot be recovered from the employees unless it is found that the decision leading to unauthorized or excess payment was void as against being illegal/ irregular. According to learned Counsel for the petitioners, if the orders authorizing excess payment or leading to excess payment are based upon reasonably possible view, passed by competent authorities and it is not a case of fraud, misrepresentation or malafide which may render the order void, the excess payments cannot be recovered. He cited a recent judgment of the Supreme Court in the case of *Purshottam Lal Das v. State of Bihar* : (2006) 11 SCC 492 and pointed out that in the said judgment the Apex Court has observed that if the promotion/ appointment is void ab initio then the excess amount paid, as a normal course, is recoverable and a mere fact that the employee had worked in the post concerned for long, cannot be a ground for not directing recovery. On that principle, it was submitted that only if the decision leading to excess payment is void ab initio recovery may be permitted. In that case, on facts, the Apex Court found that the promotion had been found only to be irregular and, therefore, without interfering with the order of reversion no recovery was permitted of the amount already paid in respect of the promotional posts.

12. On behalf of the petitioners, the judgment of the Division Bench in the case of *Man Bahadur* (supra) dated 16.4.2004 was criticized on the ground that it was per

incurium of earlier Division Bench judgments in the case of (i) Madan Mohan Prasad (supra), (ii) BSEB v. Jagdeo Singh 2002 (3) PLJR 67 and (iii) Mostt. Kanti Devi v. State of Bihar 2003 (1) PLJR 9. It was further submitted that judgments of the Supreme Court in the case of Sahib Ram v. State of Haryana (1995) suppl. (1) SCC 18 and in BSEB v. Bijay Bahadur : (2000)10SCC99 were also not properly considered and were incorrectly distinguished by the Division Bench in the case of Man Bahadur (supra).

13. Learned Counsel for the petitioner in CWJC No. 8677 of 2003 has raised a question whether the Board can be permitted to recover the excess payment from a retired employee from the amount of gratuity payable to him when Section 13 of the Payment of Gratuity Act, 1972 provides a protection that no gratuity payable under this Act shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court. He has cited some judgments of the Supreme Court which have accepted and approved the protection in Section 13 as enacted by the legislature. However, he could not show from the record that the Board had proceeded to get the gratuity of the petitioner attached in execution of any decree or order of any court. Further, it was pointed out by learned Counsel for the Board that according to the Division Bench judgment in the case of Janak Prasad Singh v. BSEB 2004 (1) PLJR 635, the Gratuity Act is not applicable to the Bihar State Electricity Board and its employees are governed by Pension rules read with service regulations. On the other hand, learned Counsel for the petitioner stated that a Special Leave Petition against the said judgment is still pending Be that as it may, the said submission is not relevant for answering the questions to be decided by this Bench under orders of reference and hence, this issue is left open for decision by the concerned Benches in accordance with law.

14. On behalf of the Board, Mr. Mihir Kumar Jha, learned Senior Advocate submitted that apparent error or mistake in the matter of pay fixation, grant of increment or the like which leads to unauthorized payment from public money has rightly been held recoverable by the Division Bench judgment in the case of Man Bahadur (supra). He pointed out that the Senior Judge who presided over the Bench which decided the case of Madan Mohan Prasad, was also a member of the Division Bench which passed the later judgments in the case of (i) BSEB v.

Umesh Prasad 2003 (3) PLJR 437, (ii) BSEB v. Ram Gati Singh LPA No. 86/2002 decided on 9.7.2002 against which Special Leave to Appeal No. 17929/2002 was dismissed by the Supreme Court on 23.9.2002) and (iii) BSEB v. Man Bahadur (supra) and in these cases the consistent view is that unauthorized payments on account of mistake in pay fixation or grant of increment etc. can be recovered from retiral benefits. It was further submitted that Sahib Ram's case and Vijay Bahadur's case were properly considered and distinguished by the Division Bench in the case of Man Bahadur and rightly reliance was placed upon following three judgments of the Apex Court (i) V. Gangaram v. Regional Joint Director : [1997]3SCR1043 , (ii) State of Punjab v. Devinder Singh : (1998)9SCC595 and (iii) Union of India v. Sujatha Vedachalam (Smt.) : AIR 2000 SC2709 for holding the view that on detection of mistake, error or miscalculation leading to excess payment, recovery was permissible.

15. It was further submitted on behalf of the Board that erroneous refixation of pay due to mistake or wrong grant of additional increments or time bound promotions without fulfillment of conditions precedent prescribed by law or against policy decision are ministerial acts without any authority of law. Such acts must be treated as void and incapable of creating any right or entitlement in favour of the concerned employee to retain unauthorized excess payment only on the ground that detection of mistake was made after a number of years. In other words, such ministerial acts must always be treated as void and the excess payment on account of such acts can be recovered on the principles of law enacted in Sections 65, 70 and 72 of the Indian Contract Act. It was highlighted that according to authoritative judicial pronouncements the word 'mistake' occurring in Section 72 of the Contract Act covers mistake of fact as well as law. For this, reliance was placed upon judgment of the Privy Council in the case of Sri Shiba Prasad Singh v. Shrish Chandra AIR 1949 PC 297 and judgment of the Supreme Court in the case of The Sales Tax Officer v. Kanhaiya Lal : [1959]1SCR1350 . Lastly, it was submitted that equity also has been used by the Indian courts to prevent unjust enrichment. According to learned Counsel for the Board, allowing an employee to retain excess payment out of public money which was paid as a result of mistake and void action, would cause unjust enrichment and hence, in such cases, the court must permit recovery by public authorities as this course would be in

consonance with the principle of restitution which has been approved in cases of unjust enrichment. In support of the principle of restitution in a case of unjust enrichment reliance was placed upon judgments of the Supreme Court in the case of Mahavir Kishore v. State of M.P. : [1990]184ITR548(SC) and in the case of K.S. Satya Narayana v. V.R. Narayana Rao : [1999]3SCR1213 .

16. Learned Additional Advocate General, Mr Lalit Kishore appeared on behalf of the State. While concurring with the submissions advanced on behalf of the Board, he made some further submissions. According to him, excess or unauthorized payment to an employee may take place in two situations, firstly when money is paid automatically on the basis of calculations on account of revision of pay scales or grant of increments for which no reasoned orders are required and secondly, where administrative orders are passed as in case of order of promotion and then money payments follow. According to him, in the first category of cases a mistake in ministerial acts leading to excess payment is wholly unauthorized, beyond jurisdiction, void and therefore, recoverable whereas in the second situation, a scrutiny will be required for judging the nature of defect in the order which has led to excess or unauthorized payments. According to him, if the reasons invalidating the order are such which render the order ultra vires on account of being in conflict with mandatory provisions of law, policy decisions or the like then the recovery should be permissible but if the order is found to be suffering from some illegality or irregularity which is curable, in that event recovery of the money paid for working on higher post may not be permissible as clearly held by the Supreme Court in a recent judgment in the case of Purshottam Lal Das (supra).

17. He also elaborated the submission of learned Counsel for the Board made on the basis of Sections 65, 70 and 72 of the Indian Contract Act by pointing out that in paragraph 31 of the judgment in the case of the Sales Tax Officer v. Kanhaiya Lal (supra), the Apex Court has held that equitable considerations cannot be imported when the terms of Section 72 of the Indian Contract Act are clear and unambiguous. He also cited a case law in support of well established principle that there can be no estoppel against statute. On the vexed issue as to what actions can be treated as void, Mr. Lalit Kishore placed reliance upon Constitution Bench judgment in the case of Secretary, State of Karnataka v. Uma Devi (2006) 4 SCC

1. According to him, the principles discussed in that judgment for finding out the various defects in appointment which render the appointment void and incapable of regularization can safely be used for deciding the issue in the present cases as to the nature of the defects which shall render excess or wrong payment void. According to him, if the grant is made to a person not qualified and eligible to receive the monetary grant in view of settled law and policy decisions then the excess or wrong payment must be recoverable. Only in cases where non-fundamental elements of the process for making the grant is not followed then the defect is curable and must be treated as a mere irregularity and in such transactions recovery may not be permissible.

18. According to learned Counsel for the State, there is no real clash between the Division Bench judgments in the case of Madan Mohan Prasad and in the case of Man Bahadur. According to him, the judgment in the case of Madan Mohan Prasad needs only to be read down by holding that the two exceptions wherein recovery is permitted are only illustrative and there may be other exceptional cases to warrant recovery from retired employees even after long number of years such as in a case of excess or wrong payment on account of void action or orders. According to him, this would be inconsonance with the general law enunciated in paragraph 7 of the judgment of the Supreme Court in the case of Purshottam Lal Das (supra). According to learned Counsel for the State, orders or actions resulting into excess or unauthorized monetary payments may be either void or only irregular, hence such determination has to be done in each case on the basis of relevant facts and established principles of law. According to him, it is neither possible nor desirable to lay down an exhaustive list of various situations in which excess or unauthorized monetary benefit may be recoverable from a retired employee. Hence, even after adding to the two exceptions pointed out in the case of Madan Mohan Prasad a third exception i.e. where excess or unauthorized payments have been made on account of void orders or actions, the list of exceptions must be treated only as illustrative and not exhaustive.

19. By way of reply to the submissions advanced on behalf of the Board and the State, on behalf of the petitioners/employees it was submitted that if the law laid down in the case of Man Bahadur is left unexplained and unqualified, the general

rule of no recovery from the pensionary benefits of retired employees laid down in the case of Madan Mohan Prasad will stand reversed and substituted by a general rule favouring recovery on the spacious plea of bonafide mistake, after any number of years from retirement. It was submitted that as laid down by the Apex Court in the case of Purshottam Lal Das (supra), only where the payment for working on a higher post is on account of promotion/appointment which was void ab initio, the normal course may be to permit recovery, regardless of long period of working in the post concerned. A stand was taken on behalf of the petitioners that generally there must be a presumption of official acts being regular and correct, particularly in respect of payment of monetary benefits to employees of State or State owned Corporations hence the general rule must be of no recovery from retired employees if the payment was under orders of or approval of prescribed authority and suffered from no apparent mistake which could be detected within a reasonable period of time or during service period. It was submitted that the two exceptions provided in the case of Madan Mohan Prasad justifying recovery, may not be treated as exhaustive and the list of exceptions may include those cases also where the monetary benefits have flown on account of orders or decisions which were void ab initio, as indicated in the case of Purshottam Lal Das (supra). However, it was further submitted that there would be rare cases of orders being void ab initio and this category cannot include wrong fixation of pay or mistaken grant of increment or wrong grant of time bound promotion which are generally the reasons leading to excess payment in the present matters. According to learned Counsel for the petitioners, such mistakes or errors are capable of being corrected but correction must be only prospective and should not be applied retrospectively so as to effect recovery from retired employees.

20 On behalf of the petitioners as well as the State and the Board some authorities were cited to suggest what should be the proper meaning of void and voidable orders. Views of eminent authors like H.W.R. Wade on this issue were also cited. However, if found necessary then only the authorities on this issue will be considered later. It is sufficient to notice here that according to petitioners, actions or orders resulting into wrong pay fixation, and wrong grant of increments or wrong promotions are not void but only irregular and voidable. It was also submitted that at least in two judgments by learned single Judges of this Court. Section 72 of the

Contract Act was held to be not applicable to issues relating to recovery from retired employees of the Board.

21. In view of petitioners' case that the judgment in the case of Madan Mohan Prasad be preferred to the judgment in the case of Man Bahadur, it will be useful to first notice that in the case of Madan Mohan Prasad, the Division Bench did not refer to any earlier judgment of the High Court or of the Supreme Court except the judgment of a learned single Judge in the case of Bedamo Devi v. MD, Bihar State Road Transport Corporation, reported in 2001 (2) PLJR 56, for coming to the view which has already been noticed, that law is well settled that money benefit already 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 except in two exceptional circumstances. In support of this view, the relevant judgments cited before us are two later Division Bench judgments of this Court in the case of BSEB v. Jagdeo Singh (supra) and Mostt. Kanti Devi v. State of Bihar (supra). In the case of Jagdeo Singh, the excess amount paid in the form of wrongful increment was enjoyed by the retired employee for almost 25 years. In that view of the matter, the High Court held that the Board cannot be absolved of such irregularity and it is entirely up to the Board how to adjust the amount, may be even from those who permitted the sanction of three irregular increments to the employee. In the case of Mostt. Kanti Devi, the employee was allowed to work and was paid salary beyond the period of his retirement. The court did not permit recovery from heirs of the deceased employee and they were held entitled to arrears of pension and family pension. From the judgment in the case of Jagdeo Singh, it is clear that on facts the court felt satisfied that a wrong decision/ interpretation by the authorities was in existence for a long number of years leading to excess payment, hence recovery could be made from the authorities committing error but not from the concerned employee who had received benefits. The case of Mostt. Kanti Devi which related to wrong payment of salary for period beyond the date of retirement is distinguishable on facts. Moreover, the Supreme Court in the case of Radhe Kishun v. Union of India : (1997)ILLJ 1165 SC has already laid down the law that allowing the employee to retain payments received for the period when he could not be in service due to crossing the age for superannuation will amount to giving premium to 'manipulation with impunity'.

Recovery from a retired employee was approved in this case with emphasis along with directions for action against concerned authorities.

22. The relevant Supreme Court judgments on the main issue cited on behalf of the petitioners include that in the case of Sahib Ram (supra). In this case upgraded pay scale was permitted to the Librarians in a college on account of wrong interpretation by the Principal of the college, of a subsequent order relaxing the requirement of a 1st or 2nd class in the degree, diploma or other prescribed educational qualification. The relaxation was only in respect of requirement of 1st or 2nd class and not in respect of educational qualification itself but the Principal had wrongly interpreted it otherwise. In such a situation, the court did not permit recovery of payments already made. In the other case i.e. Bijay Bahadur (supra), the requirement to pass Hindi reading and writing examination and Hindi noting and drafting examination, was introduced by the Board by adopting relevant regulations of the Bihar government and as a result, those not passing the examinations were not to be given increments or any promotion nor to be allowed to cross Efficiency Bar till such time the employees passed such examination. The Board sought to implement this resolution dated 16.7.1979 and to deduct increments already granted on or since 1994 but promotions already given were not withdrawn. The court found that the resolution of 1979 could not be shown to have been intimated to the concerned staff and increments had been given during 14-15 years of service not on account of any representation or misrepresentation of the employee who had passed the examinations in 1993. In view of these facts and noticing the dual stand of the Board in respect of increments and in respect of promotions, the court held that the deduction or recovery by the Board was not in consonance with equity, good conscience, justice and fairness and hence, cannot be sustained. On a careful understanding of the said judgment it can be inferred that in that case the court found that the Board had actually not implemented its resolution dated 16.7.1979 for a number of years and it was seeking to implement the said resolution retrospectively and that also by adopting dual standards in respect of increments and in respect of promotions. Thus, on facts of the case, the Apex Court found retrospective implementation of the resolution impermissible and, therefore, the employees were clearly found entitled to the increments already granted to them. This judgment, therefore, cannot be read to cover such

cases where the increments were found to be wrongly given. Hence, the said judgment cannot be treated as an authority for the proposition that unauthorized or wrong payments cannot be permitted to be recovered from retiral benefits of the concerned employees due to lapse of time. It was clearly observed in this judgment that the order will be restricted to the facts of the said case only.

23. The judgments cited on behalf of the Board and the State in this context include Division Bench judgment of this Court in the case of BSEB v. Umesh Prasad (supra). In this case three advance increments given to a Bill Clerk of the Board on account of passing departmental examination were wrongly taken into consideration in fixation of pay on promotion to the next higher grade in violation of Clause 3 of the relevant standing order. This judgment shows that the case of Madan Mohan Prasad was not cited and considered but the judgments of the Apex Court in the case of Sahib Ram and in the case of Bijay Bahaur were considered and distinguished and reliance was also placed upon judgments of the Apex Court in the case of V. Gangaram v. Regional Joint Director (supra) and in the case of Union of India v. Sujatha Vedachalam (Smt.)(supra) for holding that recovery can be made of the amount paid to the employees on account of wrong fixation of pay. In an unreported judgment in the case of BSEB v. Ram Gati Singh, noticed earlier, the pay fixation of the concerned employee of the Board suffered from admitted mistake and was in violation of circular of the Board. The Division Bench held that there was no justification to allow the concerned employee to keep the public money wrongly paid due to mistake in refixation of his pay and did not interfere with the Board's order for recovery. The Special Leave to Appeal against the said judgment and order, as noticed earlier, was dismissed by the Supreme Court. In the case of BSEB v. Man Bahadur (supra) same reasonings and discussions were adopted as in the case of BSEB v. Umesh Prasad (supra) and further reliance was placed upon another judgment of the Supreme Court in the case of State of Punjab v. Devinder Singh (supra) for coming to the conclusion that recovery was proper where the employee had wrongly been given increments or when pay fixation had been wrongly made. Recovery from retiral benefits in such circumstances was approved.

24. The relevant judgments of the Supreme Court on the aforesaid issue on which reliance has been placed by learned Counsel for the Board may now be noticed conveniently. In the case of *v. Gangaram v. Regional Joint Director* (supra), the concerned employee was found entitled to only two additional increments but had been wrongly granted four increments. The notice issued by the Apex Court was confined to the question of recovery of the arrears paid from the year 1985. The Court held that excess amount from 1985 is liable to be recovered from the pension payable to the employee. In order to avoid undue hardship recovery was permitted to be made in instalments. In the case of *State of Punjab v. Devinder Singh* (supra), it was found that daily wage employees were wrongly paid in regular pay scale and accordingly, the Apex Court permitted excess payment to be adjusted in a phased and reasonable manner. It was not a case of recovery from retired employees. In the case of *Union of India v. Sujatha Vedachalam (smt)* (supra), the pay fixation of the concerned employee was found to suffer from mistake. While upholding re-fixation of pay by correcting the mistake the recovery of the excess pay was permitted to be made in easy instalments spread over 15 years period or till the date of retirement. This was also not a case of recovery from a retired employee.

25. In view of aforesaid discussion of relevant judgments cited on behalf of the parties, it is noticed that in the case of *Sahib Ram* (supra) decided by a Bench of two Hon'ble Judges on 19.9.1994, no recovery was permitted even from a serving employee on the ground that higher pay scale was wrongly given to the concerned employee by wrong construction made by the Principal for which employee cannot be held to be at fault whereas in the case of *V. Gangaram v. Regional Joint Director* (supra) another Bench of two Hon'ble Judges of the Supreme Court presided by the same senior Judge, on 25.4.1997, permitted recovery of excess payment even from pension where certain increments were found to be wrongly given. The two later judgments also by a Bench of two Hon'ble Judges i.e. in the case of *State of Punjab v. Devinder Singh* (supra) decided on 21.7.1997 and in the case of *Union of India v. Sujatha Vedachalam* (supra) decided on 7.4.2000, excess payment on account of wrong grant of pay scale and in case of wrong fixation of pay was permitted to be recovered in a phased manner or in instalments.

26. The relevant provisions of the Indian Contract Act, particularly Section 72 cover cases of mistake of fact as well as law and provide for recovery. The principle of restitution in case of unjust enrichment is also an accepted principle for ensuring justice in appropriate case. Hence, in law, the position appears to be clear that there is no legal bar in ordering for recovery from retired employees where they have received money benefits on account of mistake at the ministerial level in the matter of fixation of pay, grant of increments or time bound promotion when the conditions precedent for such promotions were clearly non est. However, it has been correctly submitted on behalf of the petitioners that the theory of simple mistake or error to justify recovery will not hold good where the grant did not suffer from patent illegality or perversity so as to attract the Wednesbury Principle or the vice of malafide in law. For example, where two interpretations of a provision were possible and one was consciously approved and adopted by the competent authority meant to be applied generally to all concerned, any error in such decision of the competent authority if corrected at a later stage may be ordered to apply only prospectively. Moreover, if the decision has been followed for many years. In other words, if on reinterpretation or adjudication the earlier view permitting the grant of monetary benefits is found to be by a competent authority and bonafide but wrong, mistaken or erroneous, then ordinarily no recovery should be made unless the excess payment already made is covered by the two exceptions pointed out in the case of Madan Mohan Prasad (supra). But if the grant was by way of undue favour, arbitrary, malafide, ultra vires and or void ab initio, recovery of public money should be the normal course. In such cases of clear disobedience of policy or rules by ministerial action or clear dishonest decision causing undue loss to public money, action against the concerned authority may also be justified to prevent and discourage plunder of public money by sheer disregard of clear law. The constitutional schemes of rule of law and fairness in public action support recovery in such cases unless law of limitation or waiver etc. are successfully invoked to show that they prevent such a course in the facts of any particular case.

27. Although judgments have been cited at the Bar from both the sides to highlight when an order or decision is void or voidable and relevant passage on this topic from the book Administrative Law by H.W.R. Wade and C.G. Forsyth (Seventh Edition.) has also been brought to notice of this Court, which runs as hereunder:

'Void or voidable' was a distinction which could formerly be applied without difficulty to the basic distinction between action which was ultra vires and action which was liable to be quashed for error of law on the face of the record. That distinction no longer survives since the House of Lords declared all error of law to be ultra vires. But formerly an order vitiated merely by error of law on its face was intra vires and within jurisdiction, but liable to be quashed because of the exceptional powers of control which the courts established three centuries ago. Such an order was voidable, being intra vires and valid and effective, unless and until the court quashed it. Although judges have suggested that these terms were borrowed from the law of contract and unsuited to administrative law, in fact, in their proper application, they are natural and apt.

It is not desirable to enter into this controversy in the present matters. In Administrative Law what defects will render the decision wholly incapable of implementation since inception must be left to be decided in the facts and circumstances of each case in accordance with established principles of law. The principle that action which was ultra vires is void and action which was liable to be quashed for other errors is voidable can only serve as a guiding factor in deciding such a vexed issue in the facts of each case.

28. In the result, it is found that the two exceptions pointed out by the Division Bench in the case of Madan Mohan Prasad (supra) are only illustrative in nature and not exhaustive. It is also found that in appropriate facts and situation of a case mistake, clear, plain and simple, leading to wrong grant of increment, time bound promotion or wrong fixation of pay can justify recovery from an employee who has already superannuated. Such recovery is not by virtue of any condition of service so as to warrant that the contract of service must subsist at the time of recovery. Submission to the contrary on behalf of petitioners is meritless. The harsh effect of recovery, in appropriate cases, should be mellowed by providing for reasonable instalments. It is also found that the principle of law laid down in the case of Man Bahadur (supra) was without noticing the earlier Division Bench judgment in the case of Madan Mohan Prasad but nonetheless it suffers from no error and it can be applied in appropriate cases but keeping in view the principles discussed in the preceding paragraphs as to when an error of interpretation by a competent

authority may not amount to mistake or error of a malafide nature and, therefore, ipso facto, may not justify recovery of monetary benefits already paid to the concerned employees. Both the aforesaid judgments and other judgments of this Court following them shall stand explained to that extent.

29. In the order of reference passed in CWJC No. 8677 of 2003 an issue was raised that on account of disposal of most of the matters at the stage of admission by short orders there has arisen practical difficulties in eliciting and appreciating the worth of such orders as binding precedents. On this issue we can do no better than to refer to principle of law as to what is a good precedent as enunciated by the Supreme Court in the case of Union of India v. Dhanwanti Devi (1996) 6 SCC 44 and in particular, paragraphs 9 and 10 thereof. Besides describing the three basic postulates of every decision and what would constitute ratio decidendi, it has been clearly concluded that the enunciation of the ratio or principle on which a question before a court has been decided is alone binding as a precedent.

30. The reference is answered accordingly.

31. As already indicated earlier; the writ petitions are remitted back to the concerned Benches for decision in accordance with law and keeping in view this judgment. So far as the Letters Patent Appeal No. 726 of 2004 is concerned it is found that by the order under appeal dated 23.3.2004 passed in CWJC No. 1689 of 2004 the order for recovery of the excess payment has been nullified without considering the relevant facts which require consideration in the light of this judgment. Hence, the order under appeal dated 23.3.2004 is set aside and the writ petition is remitted back for reconsideration by the learned single Judge in accordance with law and this judgment. The LPA is thus allowed to that extent only. There shall be no order as to costs.

Mridula Mishra, J.

32. I agree.

Dharnidhar Jha, J.

33. I agree.

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