

In the Central Administrative Tribunal  
Calcutta Bench

OA 977/97

Present : Hon'ble Mr. Justice G.L.Gupta, Vice Chairman  
Hon'ble Mr.S. Biswas, Member(A)

Biswanath Baksi, Son of Late Indra Narayan Baksi,  
residing at Radhanagar Para, P.O. & P.S. & Dist.Burdwan-  
713 101 Ex Income Tax Inspector in the Office of ITO,  
Burdwan.

... Applicant

-Vs-

1) Union of India, service through the Secretary,  
Ministry of Finance, Deptt. of Revenue, Bitta Bhawan, New  
Delhi - 110 001

2) Central Board of Direct Taxes, Service through the  
Chairman, Lok Nayak Bhawan, 9th Floor, Khan Market, New  
Delhi - 110 003

3) Chief Commissioner of Income Tax (West Bengal), P-7,  
Chowringhee Square, Calcutta-700 069

4) Asstt. Commissioner of Income Tax, Circle Burdwan,  
P.O. & Dist.Burdwan

...Respondents

For the applicant : Mr.C.R. Bag  
Ms S. Banerjee

For the respondent : Ms U.Sanyal

Date of Order : 31.7.02

ORDER

Per Mr.Justice G.L. Gupta :

The reliefs claimed in this OA are :

a) to direct the respondents to cancel, withdraw and/or  
rescind the impugned order dated 23-7-96/5-8-96;  
b) to direct the respondents to regularise the period of  
service rendered by the applicant from 1-1-87 to 31-10-87

c) to direct the respondents to make the payment of  
gratuity and the balance amount of commutation of  
pension.

2. The background of this case may be stated as follows :

Applicant was working as Income Tax Inspector in Burdwan  
in the office of the ITO. At that time an order was issued by the  
respondents on 15-1-85 stating that the applicant would stand retired  
with immediate effect i.e. 15-1-85. The applicant feeling aggrieved  
with the order preferred Writ Petition No.C.O. 1223(W) of 1985 before



the Hon'ble High Court on 1-2-85 and succeeded in obtaining an injunction order restraining the respondents (employer) not to give effect the order of superannuation. The case for the applicant was that his real date of birth was 27-12-28 and therefore he would not retire in 1985 and the retirement would be on 31-12-86. The interim order issued by the learned single Judge was challenged before the Division Bench by way of F.M.A.T. No.452 of 1985. Vide order dated 4-4-85 it was directed as follows at para 1 :

" After hearing the learned Advocates of the parties and after considering the facts and circumstances of the case we direct that pending the disposal of the Rule Nisi the respondent writ petitioner shall not join his duties but the appellants have agreed to pay him his monthly emoluments".

After this part of the order it was observed as follows :

" This order virtually disposes of the appeal. The appeal is treated as on day's list and both the appeal and the application are disposed of as above. There will be no order for costs".

Persuant to the order of the High Court, the respondent employer continued to pay the salary to the applicant till October 31, 1987. Deductions towards GPF Contribution, Professional Tax, Premium under Central Government Employees Insurance Scheme were also made from the salary.

It is averred that the applicant retired from service on 31-12-86, but to his surprise he received an order dated 23-7-96/5-8-96 from the Respondent No.4 intimating that a sum of Rs35,577.80 was outstanding against him and after adjusting the amount of Gratuity of Rs18,202/- the net balance of Rs17375.80 was payable by him. The effect of the order was that no Gratuity amount in cash was paid to the applicant.

3. The case for the applicant in this OA is that the purported order dated 23-7-96/15-8-96 (Annexure A-7) is wholly bad in law, because the respondents on their own had paid the salary for the months of January to October, 1987 in terms of the Order of the



Hon'ble High Court dated 4-4-85. It is stated that the services of the applicant should be deemed to have been extended upto 31-10-87, as he has been paid salary of their own accord and with full knowledge and in terms of the Order of the High Court. It is further stated that the order of recovery against the amount of Gratuity after a lapse of nine years is wholly bad in law and without jurisdiction and it is also against the decision of the Hon'ble Supreme Court dated 17-10-94. It is then stated that the payment of Rs5116/- & Rs4348/- was made to the applicant by the Department voluntarily on its own and it cannot be considered as a case of excess payment as the payment was not made to the applicant by mistake.

4. In the reply, the respondents' stand is that the case for the applicant for the change of date of birth was not accepted by the High Court and therefore he stood retired on 15-1-85. It is stated that excess emoluments were <sup>paid</sup> to the applicant in terms of the order of the Hon'ble High Court dated 4-4-85 to which the applicant was not entitled and the respondents are entitled to recover the same.

5. In the rejoinder, the applicant has reiterated the facts of his writ petition filed for the change of the date of birth. According to him his date of birth is 27-12-1928 & not 1-11-25.

6. We have heard the learned counsel for the parties and perused the documents placed on record.

7. Mr. Bag, learned counsel for the applicant contended that once the respondents had paid the salary for the period from 1-1-87 to 31-10-87 of their own accord they are not entitled to recover the same. His further contention was that in view of the judgement of the Supreme Court dated 17-10-94, the matter cannot be reopened and whatever amount has been paid to the applicant should be treated as



ex-gratia payment to him. His contention was the objection taken in the reply is barred by the principle of res judicata. He placed reliance on the case of Forward Construction Co. V. Prabhat Mandal (Regd) Andheri (1986 SC 391).

8 On the other hand, Ms Sanyal, learned counsel for the respondent contended that the excess amount was paid under the mistaken belief that the applicant was entitled to the same under the Order of the High Court dated 4-4-85 to which he is not entitled and hence the applicant cannot be allowed to keep the excess amount paid to him. She contended that the Supreme Court's Order dated 17-10-94 in no way helps the applicant for the payment made from 1-1-87 to 31-10-87.

9. We have given the matter our thoughtful consideration.

10. The narration of the facts made above makes it clear that even as per the case of the applicant in the writ petition, his date of birth was 27-12-28, and hence he could not be in service after 31-12-86 as he had attained 58 years <sup>age</sup> on 26-12-86. It is also the admitted case for the applicant that he did not work after 31-12-86.

It is significant to point out that when the respondents asked the applicant to collect his salary for the months of January and February, 1987, he raised objection vide letter dated 11/12-3-87 (Annexure A4) as to on what basis the salary was being paid to him. In reply to the letter dated 11/12-3-87 of the applicant, he was informed vide letter dated 21-4-87 (Annexure A5) that the payment was being made in view of the decision of the High Court dated 4-4-85, (though the Hon'ble High Court had not given such directions).

11. The Hon'ble High Court in its order dated 4-4-85 nowhere directed the payment of salary to the applicant beyond 31-12-86. As a



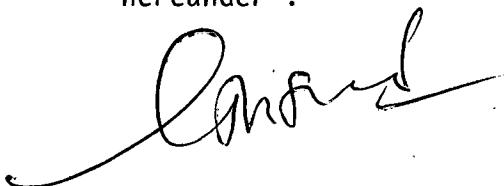
matter of fact, such an order could not be passed because it was not the case for the applicant that he was entitled to serve even after 31-12-86. It is obvious, the officers of the respondents without considering the spirit of the order of the High Court dated 4-4-85 went on paying the salary to the applicant till October, 1987. The mistake seems to have occurred because in the order it was observed that petitioner (applicant) shall not join his duties but the appellants had agreed to pay him his monthly emoluments.

The order could not mean that the applicant shall be paid emoluments throughout his life. The order had to be understood with reference to the Writ Petition filed by the applicant which means that the applicant was entitled to emoluments at the most till the date of superannuation claimed by him which was in December, 1986.

12. Be that as it may, it is evident that the officers of the respondents showed lack of proper understanding of the order when they went on paying the salary to the applicant upto 31-10-87.

13. In our view, the payment has been made to the applicant due to the mistake committed by the officers of the respondents. If the applicant is allowed to keep that amount which he has received without work it will be unjust enrichment to him which is not permissible. The respondent authorities cannot be said to have faulted when they detected the mistake and recovered the amount from the Gratuity payable to the applicant.

14. The next question to be considered is whether in view of the order of Hon'ble Supreme Court dated 17-10-94 passed in Special Leave to Appeal (Civil No.2287/88, the respondents cannot recover the amount. The order of the Hon'ble Supreme Court is reproduced hereunder :

A handwritten signature in dark ink, appearing to be 'Anand', written in a cursive style.

" It cannot be disputed that the petitioner in fact worked upto December, 1986. In that view of the matter, the salary paid to him till December 1986 cannot be withdrawn. The respondents may treat the amount of salary paid to the petitioner ex-gratia payment to him. With these observations the Special Leave Petition is disposed of".

It is evident from the order that the appeal had been taken to the Supreme Court by the applicant who had lost in the High Court. It is further obvious from the Order that the Hon'ble Supreme Court was informed that the applicant had in fact worked upto December, 1986, whereas the fact might not be correct as the High Court had clearly directed in the order dated 4-4-85 that the applicant shall not join his duties. In any case, it is because of the fact stated before the Hon'ble Supreme Court that the applicant had worked upto December 1986, their Lordships directed that the salary paid to the applicant should not be withdrawn and that payment of salary to him may be treated as ex-gratia payment.

15. It is not clear as to how this order can operate as res judicata for the claim of the respondents from January to October 1987, in which period, admittedly, the applicant had not worked in the office of the respondents. In our opinion, the order of the Hon'ble Supreme Court does not help the applicant in avoiding the refund of the salary he had received from the respondents for the period from January to October, 1987. It may be that the salary for that period was paid to the applicant without his asking but the payment which was made of him in the mistaken belief that he was also to be paid salary after 31-12-86 under the orders of the High Court, is liable to be refunded by the applicant.

16. Vide communication dated 23-7-96/5-8-96, the applicant had been asked to deposit the sum of Rs17,375.80 which fell short after the adjustment of the Gratuity amount. The amount of Rs35577.80 payable by the applicant is said to be on three counts :



- a) Salary for the period from Jan'87 to Oct'87 . Rs26113.80
- b) Arrear salary from 15-1-85 to 31-12-86 after Rs 5116.00  
giving effect of recommendation of 4 CPC
- c) Enhancement leave encashment treating 31-12-86 as Rs4348.00  
date of retirement following judgement of Hon'ble  
Supreme Court dated 17-10-94.

17. We have already discussed the subject matter of (a) above.

As to the subject matter of (b) it may be stated that the arrears of salary were paid to the applicant from 15-1-85 to 31-12-86 pursuant to the recommendation of the Fourth Pay Commission.

In our opinion, the respondents cannot recover this amount from the applicant in view of the order of the Hon'ble Supreme Court dated 17-10-94. As already stated, it has been observed by their Lordships that the applicant worked upto 31-12-86. Thus the salary upto Dec'86 was to be paid as per the Extant Pay Rules. The entire salary from 15-1-85 to 31-12-86 will have to be considered as the ex-gratia payment in terms of the order of the Supreme Court. Therefore, the amount cannot be recovered from the applicant.

As to the subject matter of (c) it may be stated, that the applicant's date of superannuation 31-12-86 was not accepted by the High Court. The writ petition, filed in that regard had been dismissed. Thus the service rendered by the applicant after 15-1-85 cannot be counted as the regular service of the applicant. The writ petition having been dismissed, the date of retirement of the applicant shall be treated as 15-1-85, and therefore if some leave was credited to the applicant from 16-1-85 to 31-12-86 that could not be considered for the purpose of encashment of leave. The Judgement




of the Hon'ble Supreme Court had not extended the period of superannuation of the applicant. In the order only the salary paid to him upto December 1986 was protected and it was clearly stated that the salary paid upto December 1986 would be treated as ex-gratia payment.

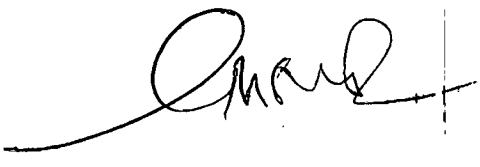
Therefore, in our opinion if encashment of leave earned on the basis of service from 16-1-85 to 31-12-86 has been made to the applicant, the same cannot be retained by him. Obviously it is unjust enrichment to the applicant. This payment was not covered by the order of the Hon'ble Supreme Court.

18. Consequently it is held that if the respondents have adjusted the amount of Gratuity of Rs18202.00 towards the outstanding sum of Rs26113.80 + Rs4348.00 = Rs30461.80, the respondents cannot be said to have faulted.

19. One of the contentions of the learned counsel for the applicant was that the applicant was not issued show cause notice and therefore the recovery is illegal. We are unable to accept this contention. In such matters, the principles of natural justice cannot be invoked when the applicant knew before hand that he had received undue amount from his employer. As such, the respondents were justified in recovering the amount from the amount of Gratuity payable to the applicant.

20. Consequently, the OA is allowed in part. This part of Annexure A-7 is set aside that a sum of Rs5116.00 was payable by the applicant. In other respects the OA fails and is hereby dismissed. There is no order as to costs.

  
(S. Biswas)  
Member(A)

  
(G.L. Gupta)  
Vice Chairman