

Court No. - 39

Case :- WRIT - A No. - 27391 of 2012

Petitioner :- Udai Naraian Ojha

Respondent :- State Of U.P.Thru.It S Secy. And Others

Counsel for Petitioner :- Ashok Kumar Tiwari,G.D.Misra

Counsel for Respondent :- C.S.C.

Hon'ble Ashwani Kumar Mishra,J.

1. Petitioner superannuated on 31.12.2011 from the post of Assistant Sub Inspector (Ministerial) in U.P. Police and is aggrieved by an order dated 28.1.2012, whereby, the amount payable to him towards gratuity has been withheld. This order records that the gratuity is not payable to petitioner. In the counter affidavit filed it is disclosed by the State authorities that a criminal Case No. 1838 of 2007 under Section 409 I.P.C. is pending investigation wherein petitioner is alleged to have embezzled a sum of Rs. 21,596/- and, therefore, the gratuity is rightly withheld. A subsequent counter affidavit is filed wherein it is disclosed that a charge-sheet has been filed against the petitioner on 20.4.2013. The first information report was lodged on 19.9.2007. Criminal trial is, however, pending. According to the respondents, withholding of gratuity in the above noted facts, is as per law. The short question that requires consideration in the present case is as to whether the amount of gratuity payable to retired employee of State could be withheld merely on account of pendency of criminal investigation against him at the time of retirement. The connected issue is whether the charge-sheet filed against the petitioner, subsequently, would justify withholding of gratuity even if the charge relates to a period which dates back to more than 4 years from the date of superannuation?.

2. Payment of gratuity to a government employee is regulated by the provisions of Civil Service Regulations and the U.P. Retirement Benefit Rules,1961. The provisions in that regard have

been noticed recently by a Full Bench of this Court in Special Appeal No. 40 of 2017 (Shivagopal Vs. State of U.P. and 4 others). Para Nos. 15 to 22 and 28 of the Full Bench judgment are relevant for the purposes of deciding the present case and are reproduced:-

"15. A civil servant's claim to pension and gratuity, therefore, is regulated by the Regulations/Rules in force at the time when the officer demits office on attaining the age of superannuation or otherwise from the service of the government.

16. Chapter XVIII of Civil Service Regulations provides for 'Conditions of Grant of Pension'; Section-I to the Chapter provides the classification of pensions. Article 424 reads thus: "424. Pensions for "Superior and Inferior services" are divided into four classes, the Rules for which are prescribed in the following section of this Chapter :

(a) compensation pensions (See Section II),

(b) invalid pensions (See Section III),

(c) superannuation pensions (See Section IV),

(d) retiring pensions (See Section V)."

17. The 'superannuation pension' contained in Section IV of the aforementioned Chapter reads thus:

"458. A superannuation pension is granted to an officer in superior and inferior service entitled or compelled, by Rule to retire at a particular age.

18. Article 41 defines pension which reads thus: "41. Pension-- Except when the term "Pension" is used in contradistinction to Gratuity, "Pension" includes Gratuity."

19. Article 23-A12 defines Death-cum-Retirement Gratuity.

"23-A. "Death-cum-retirement gratuity" means death-cum-retirement gratuity admissible, as the case may be, under Rule 3 of the U. P. Liberalized Pension Rules, 1961 or under rule 5 of the U. P. Retirement Benefits Rules, 1961."

20. Whether the term 'pension' includes 'gratuity' came to be settled by a Three Judge Bench of the Supreme Court in Jarnail Singh vs. The Secretary, Ministry of Home Affairs and others¹³. Rule 3 of CCS (Pension) Rules, 1972, defines pension in similar terms as defined in Article 41. Rule 3(1)(o) of the C.C.S. (Pension) Rules, 1972 reads thus: "Clause (o) in Sub-rule (1) of Rule 3 is as under:-

"pension' includes gratuity except when the term pension is used in contradistinction to gratuity"

21. Rule 9 of the CCS (Pension) Rules, 1972, confers power upon the President to withhold or withdraw pension. The provision is similarly worded as Article 351-A. Rule 9 for our convenience reads thus:

9. Right of President to withhold or withdraw pension. - (1) The President reserves to himself the right of withholding or withdrawing a pension or part thereof, whether permanently or for a specified period, and of ordering recovery from a pension of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement:

Provided that the Union Public Service Commission shall be consulted before any final orders are passed"

22. Supreme Court in Jarnail Singh upon considering the provisions held as follows:

"xxx xxx xxx Bearing in mind the definition of the term 'pension' in Rule 3(1)(o), the term 'pension' used in Rule 9(1) must be construed to include gratuity since the term 'pension', in the context, is not used in contradistinction to gratuity. Learned counsel for the appellant, however, referred to the amendment made in Rule 9(1) by the Central Civil Services (Pension) Third Amendment Rules, 1991, whereby the term 'pension' has been substituted by the expression 'pension or gratuity, or both' and consequential amendments made in that sub-rule. The question is : Whether this amendment made in 1991 indicates, as contended by learned Counsel for the appellant, that 'pension' alone could be withheld under Rule 9(1) and not also the gratuity prior to the amendment of Rule 9(1) in 1991. In our opinion, the definition of 'pension' in Rule 3(1)(o) quoted above negatives the appellant's contention and clearly indicates that the 1991 Amendment is merely clarificatory and makes explicit that which was clearly implicit prior to that Amendment by virtue of the definition of term 'pension' in Rule 3(1)(o). This clarification appears to have been made only to remove the doubt created by the decisions relied on by counsel for the appellant which are considered hereafter....."

"28. From the definition of 'pension', it is clear that ordinarily the word 'pension' wherever used in the Civil Service Regulations includes 'gratuity' except when the term 'pension' is used in contradistinction to 'gratuity'. We accordingly hold that the term 'pension' would include 'gratuity' particularly in Article 351, 351-A of the Civil Service Regulations."

3. The Full Bench in Shivagopal also considered the import of Article 351/ 351-A of the Civil Service Regulation. Para Nos. 40 to 43 of the judgment takes note of relevant provisions and are reproduced hereinafter:-

"40. Article 351-A empowers the Governor to withhold or withdraw pension or a part of it permanently or for specified

period and order recovery from pension for pecuniary loss caused to the Government if the pensioner in departmental proceedings or in judicial proceedings, has been found: (i) guilty of grave misconduct or (ii) to have caused pecuniary loss to Government by misconduct or negligence during his service. The proviso to the Article spells out the circumstances/conditions in which the departmental proceedings/judicial proceedings is required to be instituted for the purposes of withholding/withdrawing pension. Article 351-A reads thus:

*"351-A21. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement:
Provided that-*

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during reemployment-

(i) shall not be instituted save with the sanction of the Governor.

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceeding; and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) Judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) the Public Service Commission, U.P. shall be consulted before final orders are passed.

[Provided further that of the order passed by the Governor relates to a cash dealt with under the Uttar Pradesh Disciplinary Proceedings, (Administrative Tribunal) Rules, 1947, it shall not be necessary to consult Public Service Commission].

Explanation-For the purposes of this article-

(a) Departmental proceeding shall be deemed to have been instituted when the charges framed against the pensioner are issued to him or, if the officer has been placed under suspension from an earlier date, on such date ; and

(b) judicial proceedings shall be deemed to have been instituted:

(i) in the case of criminal proceedings, on the date on which complaint is made, or a charge-sheet is submitted, to a criminal

court ; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made to Civil court

Note- As soon as proceedings of the nature referred to in this article are instituted the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned."

41. Explanation to Article 351-A clarifies that departmental proceedings shall be deemed to have been instituted: (i) when charges are framed against the pensioner; or (ii) the officer has been placed under suspension from such date. Further, judicial proceedings is deemed to have been instituted against the pensioner: (i) in the case of criminal proceedings, on date on which complaint is made or charge-sheet is submitted to a criminal court; (ii) in case of civil proceedings on the date on which plaint is presented or as the case may be, an application is made to Civil Court.

42. Now we will refer to the proviso to Article 351-A. The proviso speaks about initiation of disciplinary proceedings or judicial proceedings against the government servant after retirement. For initiating proceedings the conditions specified therein must be satisfied, that is, departmental proceedings as indicated in proviso (a) if not instituted while the officer was on duty then it shall not be instituted except:

(i). with the sanction of the Governor;

(ii). it shall be initiated on an event which took place not more than 4 years before the institution of the proceedings;

(iii). such proceedings would be conducted by such authority and in such place as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

43. On perusal of Proviso and its Explanation, referred to above, deals only with the conditions for initiation for disciplinary proceedings/judicial proceedings and the limitation within which such initiation of the proceedings can be done has been made explicit."

4. The right of State to withhold or withdraw a part of pension, whether permanently or for a specified period, is available only if pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct or to have caused pecuniary loss to the Government by misconduct or negligence during service, including service rendered on re-employment after retirement. The proviso, however, makes it explicit that where judicial proceedings

were not instituted while the officer was on duty either before retirement or during re-employment, it shall be instituted in accordance with sub clause (ii) of Clause (a) and (c), the Public Service Commission U.P. shall also be consulted before final orders are passed. The explanation appended to Article 351-A further provides that judicial proceedings shall be deemed to have been instituted in the case of criminal proceedings on the date when charge-sheet is submitted to a criminal court. The scheme contained in the regulations, as noticed above, explicitly provides that where charge-sheet is not already submitted before retirement or during re-employment, it **shall** be instituted in accordance with sub-Clause(ii) of Clause (a). Sub Clause (ii) of Clause (a) provides that the charges shall be in respect of an event which took place not more than 4 years before the institution of such proceedings.

5. The charges levelled against the petitioner relates to a prior prior to lodging of the first information report on 19.9.2007. The period of 4 years taken from the date of lodging of first information report would expire some time in September, 2011. The petitioner retired on 31.12.2011. The judicial proceedings against him have been initiated with submission of charge-sheet dated 20.4.2013. The facts of the present case when are analysed with reference to the above noted provisions of Civil Service Regulations, it becomes apparent that the charges in respect of which judicial proceedings have been instituted against the petitioner are in respect of an event which took place more than 4 years before the date of retirement. The withholding of gratuity, therefore, is clearly in teeth of Regulation 351-A and would thus be impermissible in law.

6. The arguments advanced by Sri Vishal Tandon, learned State Counsel that a first information report had already been lodged in the matter and for any delay in conclusion of investigation cannot

come to the aid of petitioner, cannot be accepted. The right of a retired employee to receive pension and gratuity is recognised as a **property** which cannot be deprived except by having recourse to law in view of Article 300-A of the Constitution of India. The issue, in that regard, has been dealt with by the Supreme Court in Deokinandan Prasad Vs. State of Bihar; (1971) 2 SCC 330. Par Nos. 29 and 35 of the aforesaid judgment is reproduced:-

“29. The last question to be considered, is, whether the right to receive pension by a government servant is property, so as to attract Articles 19(1)(f) and 31(1) of the Constitution. This question falls to be decided in order to consider whether the writ petition is maintainable under Article 32. To this aspect, we have already adverted to earlier and we now proceed to consider the same.”

“35. Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by clause (5) of Article 19. Therefore, it follows that the order dated 12-6-1968, denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Article 32 is maintainable. It may be that under the Pension Act (23 of 1871) there is a bar against a civil court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of writ of mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law.”

7. In State of Jharkhand Vs. Jitendra Kumar Srivastava, 2013 (12) SCC 210, their Lordships of the Supreme Court referred to subsequent judgments of the Apex Court post 44th Constitutional amendment, and observed as under in Para Nos. 9 & 10:-

“9. In State of W.B. v. Haresh C. Banerjee [(2006) 7 SCC 651 : 2006 SCC (L&S) 1719] this Court recognised that even when, after the repeal of Article 19(1)(f) and Article 31(1) of the Constitution vide Constitution (Forty-fourth Amendment) Act, 1978 w.e.f. 20-6-1979, the right to property no longer remained a fundamental right, it was still a constitutional right, as provided in Article 300-A of the Constitution. Right to receive pension was treated as right to property. Otherwise, challenge in that case was to the vires of Rule 10(1) of the West Bengal Services (Death-

cum-Retirement Benefit) Rules, 1971 which conferred the right upon the Governor to withhold or withdraw a pension or any part thereof under certain circumstances and the said challenge was repelled by this Court. The fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognised as a right in “property”.

10. *Article 300-A of the Constitution of India reads as under:*

“300-A. Persons not to be deprived of property save by authority of law.—No person shall be deprived of his property save by authority of law.”

Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the constitutional mandate enshrined in Article 300-A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.

It hardly needs to be emphasised that the executive instructions are not having statutory character and, therefore, cannot be termed as “law” within the meaning of the aforesaid Article 300-A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold even a part of pension or gratuity. As we noticed above, so far as statutory Rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these Rules, the position would have been different. “

8. The power of State to withhold pension and gratuity, therefore, must be exercised strictly as per the applicable law and if the State action is not found to be in consonance with it, the withholding of gratuity would violate Article 300-A of the Constitution of India. The denial of such constitutional right, therefore, would be liable to be interfered with by this Court under Article 226 of the Constitution of India.

9. Even otherwise, the period of 4 years is a reasonable period from the date of the event, leading to submission of charge-sheet and the employee cannot be made to suffer for any un-explained or undue delay on the part of the State or the investigating agency. It is, otherwise, not shown by the respondents that such delay was attributed to any act or omission on part of the petitioner. The right

of State to proceed in accordance with law, is otherwise available by virtue of Article 351 of Civil Services Regulations if the charges are found proved in judicial proceedings and the public interest also would not be adversely affected, if the gratuity due is paid to the government servant. In view of the above discussions, this Court has no hesitation in holding that action of respondents in withholding payment of gratuity to petitioner is wholly illegal, arbitrary and cannot be sustained.

10. Writ petition succeeds and is allowed. The order dated 28.1.2012 passed by the respondent no. 3, so far as it relates withholding of gratuity payable to petitioner is concerned, is set aside. A writ of mandamus is issued to the respondents to forthwith release the withheld amount of gratuity together with 6% interest. In case the amount is not paid within four months from today, the petitioner shall be entitled to enhanced rate of interest at the rate of 8% per annum, and it shall be open for the authorities of the State to realise the additional interest from the salary of the officer found responsible for not ensuring release of gratuity to petitioner in terms of this order.

11. No order is passed as to costs.

Order Date :- 21.1.2020

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