

(2011) 07 DEL CK 0355

In the Delhi High Court

Case No : Writ Petition (C) No. 469 of 2011

Anil Kumar Sharma

APPELLANT

Vs

Chairman and Managing Director National Fertilizers Ltd.

RESPONDENT

Date of Decision : 11-07-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Fertilizer Corporation of India Employees (Conduct, Discipline and Appeal) Rules, 1972
— Rule 35A

Citation : (2011) 10 AD 139

Hon'ble Judges : Kailash Gambhir, J

Bench : Single Bench

Advocate : Anju Bhattacharya, for the Appellant; G. Joshi, for the Respondent

Final Decision : Disposed Off

Judgement

Kailash Gambhir, J.

1 By this petition filed under Article 226/227 of the Constitution of India, the Petitioner seeks to direct the Respondent to release the amount of his leave encashment alongwith interest @ 12% per annum.

2. Brief facts of the case relevant for deciding the present petition are that the Respondent No. 1 is a Government of India Undertaking under the administrative control of Ministry of Chemical and Fertilizer, Department of Fertilizers and that the Petitioner joined the Respondent as Assistant Agronomist on 5.07.1975 and rose to the level of General Manager (Marketing) which post he held till the date of his retirement on 31.03.2010. That on his retirement, the Petitioner was entitled to receive his retiral dues on account of gratuity and leave encashment which was not released by the Respondent as certain departmental proceedings were held against the Petitioner on account of irregularities in the import of Urea deal with M/s Karsan Ltd., Ankara, Turkey. However, on the basis of oral and documentary evidence adduced and on examination of the findings of the Inquiry Officer, the Disciplinary Authority ordered the dropping of all charges alleged

against him and the Petitioner was fully exonerated vide order dated 18.2.2005. That the Enforcement Directorate filed a complaint against N.F.L. and some of its officials including the Petitioner alleging FERA violations in respect of the aforesaid contract of import of Urea entered between NFL and a Turkish company which are still pending. That the Petitioner has approached the Controlling Authority under the Payment of Gratuity Act for release of his gratuity amount, which is still pending. With respect to the leave encashment payable to the Petitioner, the stand that judicial proceedings are pending against the Respondent company and some of its officials, has been taken by the Respondent due to which it claims that it has withheld the said payment. The grievance raised by the Petitioner is that he is made party only by the legal fiction under Clause 68 of FERA merely because at the time the contract was executed he was one of the Principal Officers of the Company, namely Company Secretary and not due to any misconduct committed by him individually. However, the Respondent claims that it has withheld the leave encashment amount of the Petitioner, as the culmination of these proceedings may lead to imposition of penalty and fine and further in view of the fact that a Company being an artificial juristic person, has a right to recover the said penalty and fine from its accused employees.

3. Ms. Anju Bhattacharya, learned Counsel for the Petitioner submits that the Petitioner has already retired from his service on 31.3.2010 and on his retirement the Petitioner was entitled to the payment of gratuity as well as his leave encashment. Counsel also submits that the Petitioner was placed under suspension by the Respondent w.e.f. 20.5.96 on account of alleged irregularities in the import of urea deal with M/s. Karsan Ltd. Ankara, Turkey after the preliminary enquiry was held by the Vigilance Department. Counsel further submits that the said suspension order was withdrawn by the Respondent w.e.f. 10.4.99, but simultaneously the charge sheet was issued against the Petitioner under Clause 32 of NFL Employees (CDA) Rules for having committed irregularities and misconducts in relation to the vetting of the contract dated 30.10.1995 for import of Urea from M/s. Karsan Ltd. Ankara, Turkey. The contention of the counsel for the Petitioner is that the Petitioner was completely exonerated from the said charges and even the suspension period was also directed to be treated as suspension due. In support of her arguments, counsel for the Petitioner has placed reliance on the order dated 18.2.2005 passed by the Chairman & Managing director of the Respondent No. 1 by virtue of which the Petitioner stood completely exonerated. Counsel for the Petitioner further submits that the Respondent has wrongly placed reliance on Rule 35A of NFL employees (CDA) Rules so as to withhold gratuity and leave encashment as the said Rules only deal with withholding of the gratuity amount during the pendency of the disciplinary proceedings. Counsel further submits that the said rule of CDA is not applicable in the case of leave encashment and even otherwise the said rule can be invoked when the disciplinary proceedings are pending against the delinquent employee and not when the employee stands exonerated. Counsel

thus submits that as the Respondent has completely exonerated the Petitioner, therefore the Respondent has No. legal right to withhold the payment towards leave encashment due to the Petitioner. Counsel also submits that so far the alleged violation of FERA proceedings are concerned, the concerned criminal court will be competent enough to direct prosecution against the guilty officials but the pendency of the said criminal proceedings cannot come in the way of the Respondent not to grant release of the amount of the Petitioner towards the leave encashment.

4. Opposing the present petition, Mr. Joshi learned Counsel for the Respondent submits that so far the allegations of FERA violations against the Petitioner are concerned, the same shall be gone into only by the criminal court and not by the Respondent and therefore the Respondent is well within its right to withhold the said amount. In support of his arguments, counsel for the Respondent has placed reliance on the office memo dated 10.9.96 and also the decision of the Board of Directors of the Respondent in their 214th meeting held on 16.8.96.

5. I have heard learned Counsel for the parties and gone through the records.

6. The Petitioner joined the Respondent as Assistant Agronomist on 5.07.1975 and rose to the level of General Manager (Marketing) which post he held till the date of his retirement on 31.03.2010. It is not in dispute between the parties that the Petitioner on his retirement was not paid his dues i.e. gratuity and leave encashment. To claim payment of the gratuity amount, the Petitioner has approached the Controlling Authority under the Payment of Gratuity Act. It is also not in dispute that departmental proceedings were conducted by the Respondent against the Petitioner after an FIR was registered by the CBI questioning the said contract for the import of urea for which hundred percent payment i.e. an amount of Rs. U.S.\$ 38 million was paid by the Respondent to M/s. Karsan Ltd. Ankara, Turkey. It is also not in dispute that separate proceedings were initiated by the Enforcement Directorate against the Petitioner for contravention of FERA provisions and the said criminal proceedings are still pending disposal before the concerned court of ACMM, Delhi. It is also not in dispute that vide order dated 18.2.2005 the Petitioner was exonerated on account of his alleged role in the irregularities of import of the said urea with the Turkish company. In the said order, the Disciplinary Authority clearly observed that on the basis of documentary and oral evidence and analysis of the enquiry officer, stood partially proved only to the extent of succumbing to the pressure of the then Executive Director (Mktg)/MD in putting up the proposal at their behest for which for which he was advised to be careful in future. Otherwise the disciplinary authority in the said order has held that there was No. substance to hold the Petitioner responsible for the charges leveled against him and the and therefore dropped the charges against him.

7. It is manifest that all charges against the Petitioner have been dropped in the said departmental proceedings, hence now the question that arises for consideration before this Court is that how the Respondent can claim that

irregularities were committed by him in the contract for the import of urea with the Turkish Company. The Resolution dated 16.8.96 authorizes the Respondent to withhold the leave salary/ leave encashment only when the disciplinary proceedings are pending against the employee on the charge of having caused loss/damage to the company. The said resolution passed by the Respondent in their meeting held on 16.8.96 is reproduced as under:

RESOLVED THAT the proposal for withholding the payment on account of leave salary/leave encashment due to an employee against whom disciplinary proceedings for imposing major penalty are contemplated and/or pending on the charge of having caused loss/damage to the Company and from whom some amount will become recoverable if charges are proved, be and is hereby approved for incorporation in rules of the Company.

As per the said resolution also the payment of leave salary and leave encashment could be validly and legally withheld by the Respondent during the pendency of the disciplinary proceedings for imposing of major penalty and such proceedings being under contemplation and not otherwise.

8. It is a settled legal position that the departmental enquiry and criminal proceedings are two distinct and separate proceedings. It has been further held that the approach and the objective in the criminal proceedings and the disciplinary proceedings is altogether distinct and different. In the disciplinary proceedings the question is whether the Respondent is guilty of such conduct as would merit his removal from service or a lesser punishment, as the case may be, whereas in the criminal proceedings the question is whether the offences registered against him are established and, if established, what sentence should be imposed upon him. It would be relevant here to the three bench judgment of the Apex Court in the case of Depot Manager, Andhra Pradesh State Road Transport Corporation Vs. Mohd. Yousuf Miya, etc., wherein the Court distinguished the two proceedings in detail as under:

The purposes of departmental enquiry and of prosecution are two different and distinct aspects. Criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So, crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be No. bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of a grave nature involving complicated questions of fact and law. Offence generally implies infringement of public duty, as distinguished from mere

private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Indian Evidence Act, 1872 (in short "the Evidence Act"). Converse is the case of departmental enquiry. The enquiry in departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. Under these circumstances, what is required to be seen is whether the departmental enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances.

Hence, when the two proceedings aim at different things, the outcome of one cannot be dependent on the outcome of the other.

9. The Courts are time and again faced with the cases where they have to judge that whether the departmental enquiry should be stayed while the criminal proceedings on the same charges are in progress and the settled position is that the two can go on simultaneously and there can be No. straitjacket formula for determining as to in which cases the departmental enquiry should be stayed and hence depends on facts and circumstances of each case. It is also a settled legal position that the result of the criminal trial is not binding on the departmental enquiry and the decision in the two have to be according to its own procedure. There are cases where the Apex Court has held that acquittal in a criminal trial would not lead to immediate reinstatement and it is the departmental proceedings on which the decision regarding to the reinstatement, etc would depend. (The State rep. by CBI, Hyderabad Vs. G. Prem Raj, . Hence it is quite manifest that the outcome of the departmental enquiry would govern the conditions of employment. The conditions of service and retrial benefits are dependant upon the findings of the enquiry conducted by the department and not by the criminal proceedings. It has also been held time and again that the retrial benefits like pension, gratuity or leave encashment are not bounty or grace but are earned by the employee through the years of service of a company. They are an employee's security after retirement and is something he can fall back on after his permanent source of income has ceased to exist and they cannot be withheld if he has come clean in any enquiry conducted against him. Hence, in the facts of the present case, the exoneration in departmental proceedings is reason enough for the Respondent to release the dues of the employee. As far as the criminal proceedings are concerned, it is not only that the Petitioner is facing the same but the proceedings are against the Respondent corporation and a lot of other employees of the corporation and the fate of the case on merits would be decided by the concerned criminal court and the Respondent cannot be heard to say that till the time of pendency of the criminal case, the retrial benefits cannot be released.

10. In the light of the above, the Respondent is directed to release the amount due towards leave encashment of the Petitioner within one month from the date of this order alongwith interest at @8% p.a from the date of the retirement till actual payment.

11. With the above directions, the present petition stands disposed off.