

(2012) 05 CAL CK 0016
In the Calcutta High Court
Case No : W. P. No. 19427 (W) of 2010

Bindeshwari Prasad Singh

APPELLANT

Vs

The Eastern Coal Fields Ltd. and Others

RESPONDENT

Date of Decision : 11-05-2012

Acts Referred:

Payment of Gratuity Act, 1972 — Section 4, 4(6A), 7(3), 7(3A)

Citation : (2012) 3 CALLT 513 : (2012) 5 CHN 21

Hon'ble Judges : Joymalya Bagchi, J

Bench : Single Bench

Advocate : Partha Ghosh, for the Appellant; Alok Banerjee, Susanta Pal, Partha Basu and Mr. Nikhil Kumar Roy, for the Respondent

Judgement

Joymalya Bagchi, J.—The petitioner has taken out the instant writ petition, inter alia, praying for release of his gratuity, other terminal benefits, arrear wages and leave encashment which have been wrongfully withheld by the respondent company and also for quashing the disciplinary proceeding initiated vide memorandum of charges dated 27.01.2010 which is being continued even after his superannuation. The respondent company has opposed the instant writ petition by filing affidavit-in-opposition in the matter. The stance of the respondent company in the affidavit-in opposition is to the effect that the delinquent conduct of the petitioner amounted to grave misconduct which called for awarding of major penalty under the extant service rules and therefore, the respondent company was entitled to continue the disciplinary proceedings against the petitioner notwithstanding superannuation. At the interim stage, this Court by order dated 4.10.2010 directed the Assistant Commissioner to consider and dispose of the representation of the petitioner with regard to release of gratuity. Pursuant to such direction, it appears that the gratuity payable to the petitioner has been released by the respondent company. In course of the hearing. Mr. Banerjee, learned counsel appearing for the respondent company further informed this Court that the arrear of wages payable to the petitioner have also been released.

2. In view of the aforesaid facts, what remains to be decided at the final hearing of this writ petition is whether the disciplinary proceedings initiated against the petitioner ought to be continued even after his retirement.

3. Mr. Ghosh, learned counsel appearing for the writ submits that the continuation of the disciplinary proceeding post superannuation would be an empty formality in view of the law declared by the Supreme Court in the case of *Jaswant Singh Gill v. Bharat Coking Coal Ltd. & Ors.*, reported in (2007) 1 SCC 663. In the said decision, the Apex Court held that Regulation 34.3 of the Coal India Executives' Conduct, Discipline and Appeal Rules, 1978 was ultra vires the provisions of the Payment of Gratuity Act, 1972 and would not permit the respondent company to withhold payment of gratuity resorting to the said rule in violation of the provisions of the said Act. In view of such ratio as laid down by the Supreme Court, he submits that the disciplinary proceeding for the purpose of withholding the payment of gratuity is not permissible in law. Mr. Ghosh further submits that a bare reading of memorandum of charges would show that no pecuniary loss had been suffered by the respondent company on account of the alleged delinquent act of the petitioner. Relying on the decisions rendered by this Court in the cases reported in (2009) 1 CLJ (Cal) 221 and (2010) 3 CHN 871, and the Apex Court in *Bhagirathi Jena Vs. Board of Directors, O.S.F.C. and Others*, and *Kanbi Nanji Virji and Others Vs. The State of Gujarat*, he submits that in the absence of pecuniary loss suffered by the respondent company, the latter does not have jurisdiction to continue such disciplinary proceeding post superannuation. He, therefore, prays that the disciplinary proceeding be quashed and other dues like leave encashment be forthwith released by the respondent authorities to the petitioner.

4. Mr. Banerjee, learned counsel for the respondent company in rebuttal submits that no pecuniary loss is required to be caused in continuing with a disciplinary proceeding against a retired employee if the service rules so permit. He submits that Rule 34.2 of the service rules do not lay down such a condition precedent and the same cannot be read into it. He relies on a case reported in (2001) 3 CHN 740 wherein an Hon'ble Division Bench of this Court has held that Rule 10 of the West Bengal Services (Death-cum-Retirement Benefits) Rules, 1971 permit continuation of a proceeding against a superannuated employee irrespective of any pecuniary loss suffered by the government. He also relies upon a decision reported in *Ramesh Chandra Sharma Vs. Punjab National Bank and Another*, wherein a major penalty of dismissed was awarded to a retired employee for the purposes of withholding pension made the relevant Pension Regulations. He further submits that during the hearing of this matter, the respondent company has concluded the proceeding and awarded a minor penalty to "censure" under Rule 27 of the Service Rules. He submits a copy of memo No. ECL/C-5 (D)/113/2627/82 dated 08.05.2012 imposing the minor penalty of "censure" in the instant case.

5. I have considered the submissions of the parties. The first issue raised by Mr.

Ghosh is whether the disciplinary proceedings can be continued if no pecuniary loss is not suffered by the respondent company. The articles of charges as levelled against the petitioner are required to be appreciated in order to come to a finding whether any pecuniary loss can be said to have been suffered by the respondent company on account of alleged misconduct of the petitioner during his service tenure. The articles of charge are set out hereinbelow :

Article - I

That Sri Bindeswari Prasad Singh, Chief Personnel Manager while he was posted and functioning as CPM(Ee) till 03.12.09, committed gross irregularity/misconduct in the matter of issuance of an unauthorized office order No. ECL/C-5(D)/order/EE/2922 dated 1.12.09 giving unauthorised/unwarranted instruction with a intension to extend undue favour to Sri TK Roy and giving some unauthorised responsibility to Sri T. K. Roy which was contrary to transfer order of even No. 2889 dated 26.11.09 issued with competent approval.

The referred letter dated 1.12.09 of Sri. B.P. Singh was clear violation of transfer order No. 2889 dated 26.11.09 issued with competent approval. The instructions/actions contained in the said office order dated 1.12.09 were also not under authority of Sri Singh keeping in view that transfer order dated 26.11.09 was issued with competent approval of D(P).

By above action on the part of Sri. B.P. Singh, the company's image has been affected adversely and by issuing unauthorised orders. Sri. B. P. Singh has crossed all limits of his authority.

Article - II

That, during the tenure as CPM(Ee) and while functioning in aforesaid office, said Sri. B. P. Singh, committed yet another irregularity/misconduct in as much as instead of accepting authorised office order of Dy. CPM(Ee) bearing No. 2941 dated 3/12/09 issued by Dy. CPM(Ee) with the competent approval of D(P), ECL had issued another unauthorised office order bearing No. ECL/C-5(D)/113A/12868 dated 3.12.09 i.e. on the last day of his working as CPM(Ee), declaring valid order No. 2941 of Dy. CPM(Ee) as irregular.

That said unauthorised order of Sri. B.P. Singh bearing No. 2922 dated 1.12.09 was superceded vide order No. ECL/C-5(D)/order/P&A/EE/2941 dated 3.12.09 issued by Dy. CPM(Ee) with competent approval. But without verifying the facts from Dy. CPM(Ee) and in order to extend undue favour to Sri. T.K. Roy, said Sri. B.P. Singh had issued another unauthorised order No. 12868 using unwarranted legal language and giving unacceptable reasons.

Said Sri. B.P. Singh was required to verify the facts from Dy. CPM(Ee) but this was not done for some bad intention and/or with ulterior motive and an unauthorised office order was issued by Sri. B.P. Singh and thereby he has crossed all limits of his authority. By issuing above said unauthorised order. Sri. B.P. Singh tried to run parallel administration which can not be acceptable in the

organisation in the interest of maintaining discipline and decorum in the company.

The above acts of omission and commission on the part of Sri. B.P. Singh besides being tantamount to non-fulfillment of duties and obligations as contained under Rule 4.1(ii) to 4.1(iv), 4.3 and 4.6 of CDA Rules, 1978 of CIL (Amended upto April, 2000), also amounts to misconduct in terms of rules 5.0(5), 5.0(6), 5.0(20) and 5.0(26) of the said CDA Rules, 1978 of CIL.

6. A perusal of the said articles of charge makes it evident that the respondent company did not suffer any pecuniary loss on account of such alleged misconduct of the petitioner. The gist of the accusation against the petitioner in the aforesaid memorandum of charges is that by abuse of his authority he unauthorisedly issued an office order in favour of a subordinate officer in order to retain in his post illegally nullifying a valid order of transfer of such officer. No doubt such accusation, if proved, amounts to grave misconduct and insubordination of the part of the petitioner but the same by no stretch of imagination cannot be said to be one which would entail pecuniary loss to the employer.

7. In support of his submission Mr. Ghosh has relied on (2009) 1 CLJ 221. In the said case, a single Judge of this Court held continuation of disciplinary proceeding against a superannuated employee is not permissible under Rule 153 of the Railway Force Rules, 1993 when there is no pecuniary loss. However, in that judgment the Court observed that no steps had been taken against the delinquent under Rule 9 of Railway Service (Pension) Rules, 1993 which permitted such proceeding ever after retirement for withholding pension of the delinquent. In the case reported in (2010) 3 CHN (HC) 871, an Hon"ble Division Bench of this Court held that proceeding under Rule 10 of West Bengal Services (Death-cum-Retirement Benefits) Rules, 1971 cannot be initiated against a superannuated employee without pecuniary loss. In the cases reported in Bhagirathi Jena Vs. Board of Directors, O.S.F.C. and Others, the Supreme Court held that the continuation of the disciplinary proceeding was without jurisdiction after retirement of the employee as there was no provision for conducting such an enquiry after retirement and for making deduction from retiral benefits, if charge is proved. Similarly, in the case reported in State of Punjab Vs. Khemi Ram, the Supreme Court held that a disciplinary proceeding cannot be conducted post-retirement and the employee must be retained in service by suspending him till it is concluded and final order is passed. It is apposite to state that in that case there was no provision in the Service Rules to continue such proceeding post-retirement.

8. On the contrary, in the ease reported in (2001) 3 CHN 740 this Court held that a proceeding against a superannuated employee can be continued irrespective of pecuniary loss. In the case of Union of India and Others Vs. Shri B. Dev, the Supreme Court held as follows :

Rule 9 gives to the President the right of - (1) withholding or withdrawing a pension or part thereof, (2) either permanently or for a specified period, and (3)

ordering recovery from a pension of the whole or part of any pecuniary loss caused to the Government. This power can be exercised if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service. The power, therefore, can be exercised in all cases where the pensioner is found guilty of grave misconduct or negligence during the period of his service. One of the power of the president is to recover from pension, in a case where any pecuniary loss is caused to the Government, that loss. This is an independent power in addition to the power of withdrawing or withholding pension. The contention of the respondent, therefore, that Rule 9 cannot be invoked even in cases of grave misconduct unless pecuniary loss is caused to the Government, is unsustainable.

9. Similarly, in the case of Ramesh Chandra Sharma Vs. Punjab National Bank and Another, the Supreme Court held that bearing in mind the relevant Service Regulation relating to the pensionary benefits of an employee, an employer can even award the punishment of dismissal from service even after superannuation for the purpose of withholding or denying such pensionary benefit under the relevant Pension Rules. The Apex Court held that it was not relevant as to whether pecuniary loss has been suffered by the employer on the ground of alleged misconduct of the employee. In paragraph 13 of the aforesaid decision, the Apex Court held as follows:-

The question as to whether a departmental proceeding can continue despite the delinquent officer's reaching the age of superannuation would depend upon the applicability of the extant rules. It may be true that the question of imposition of dismissal of the delinquent officer from service when he has already reached the age of superannuation would not ordinarily arise. However, as the consequences of such an order are provided for in the service rules, in our opinion, it would not be correct to contend that imposition of such a punishment would be wholly impermissible in law.

In conclusion the Apex Court held as follows:-

The question, thus, as to whether continuation of a disciplinary proceeding would be permissible or the employer will have to take recourse only to the pension rules, in our opinion, would depend upon the terms and conditions of the services of the employee and the power of the disciplinary authority conferred by reason of a statute or statutory rules.

10. In the light of the analysis of the aforesaid decisions I am constrained to hold that irrespective of pecuniary loss the employer may continue a disciplinary proceeding under the relevant Service Rules after superannuation of the employee in the event such rules permit imposition of any penal consequence even after retirement like withholding or reduction of pension etc.

11. In this light let me examine the service rules applicable to the petitioner. Rules 34.2 and 34.3 read as follows:-

Rule 34.2

Disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his re-employment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.

Rule 34.3

During the pendency of the disciplinary proceedings, the Disciplinary Authority may withhold payment of gratuity, for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the company if have been guilty of offences/misconduct as mentioned in sub-section (6) of section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of section 7(3) and 7(3A) of the Payment of Gratuity Act, 1972 should be kept in view in the event of delayed payment, in the ease the employee is fully exonerated.

12. The said rules fell for decision in the ease of *Jaswant Singh Gill v. Bharat Coking Coal Ltd. & Ors.* reported in (2007) 1 SCC 663 wherein the Supreme Court held that Rule 34.3 permitting the employer to withhold the payment of gratuity is ultra vires the provisions of the Payment of Gratuity Act, 1972 and does not entitle the employer to withhold the same except for cases provided in section 4(6A) and (6B) of the Payment of Gratuity Act, 1972.

13. In view of the aforesaid decision the penal consequence which could have been imposed by the employer upon a superannuated employee against whom a proceeding is continued under Rule 34.2 by withholding his gratuity by operation of Rule 34.3 stands whittled down. The employer can no longer do so until and unless such case falls within the category of cases until and unless this ease falls within the ambit of Section 4 (6A) and (6B) of the Payment of Gratuity Act, 1972. It is an admitted situation that the instant case does not fall within the ambit of the aforesaid statutory provisions. As a result, the continuation of the impugned disciplinary proceeding for the purposes of withholding the gratuity in the light of Rule 34.3 is impermissible in view of the law declared by the Apex Court. Moreover, the penalties which have been enumerated in Rule 27 of the Service Rules applicable to the petitioner are also of such nature that the same cannot be implemented against the petitioner after his retirement.

Rule 27 enumerates the following minor and major penalties which may be imposed on a delinquent.

Rule 27 reads as follows:

27.1 The following penalties may, for good and sufficient reasons, be imposed on an employee for misconduct, viz.

(i) Minor Penalties :

(a) Censure;

(b) Withholding increment, with or without cumulative effect:

(c) Withholding promotion: and

(d) Recovering from pay or gratuity of the whole of or part of any pecuniary loss caused to the company by negligence or breach of orders or trust.

(ii) Major Penalties :

(a) Reduction to a lower grade or post or stage in a time scale;

Note

The Authority ordering the reduction shall state the period for which it is effective and whether, on the expiry of that period, it will operate to postpone future increments or, to affect the employee's seniority and if so to what extent.

(b) Compulsory retirement;

(c) Removal from service; and

(d) Dismissal

14. The Apex Court in the case of *Jaswant Singh Gill v. Bharat Coking Coal Ltd. & Ors.* (supra) dealt with Rule 27 in the following manner:

....Rule 27 of the Rules provides for recovery from gratuity only to the extent of loss caused to the Company by negligence or breach of orders or trust. Penalties, however, must be imposed so long an employee remains in service. Even if a disciplinary proceeding was prior to the attaining of the age of superannuation, in the event the employee retires from service the question of imposing a major penalty by removal or dismissal from service would not arise. Rule 34.2 no doubt provides for continuation of a disciplinary proceeding despite retirement of employee if the same was initiated before his retirement but the same would not mean that although he was permitted to retire and his services had not been extended for the said purpose, a major penalty in terms of Rule 27 can be imposed.

15. In view of such discussion, no recovery of any loss from gratuity under Rule 27 is permissible, in the instant case, as admittedly no loss is suffered by the company on account of the petitioner. Furthermore, in view of the aforesaid ratio no penalty as envisaged under Rule 27, including one of "censure" could have been imposed upon the petitioner as the master-servant relation had ended by permitting him to retire.

16. It is, therefore, clear that in view of the service rules applicable to the petitioner as interpreted by the Apex Court in *Jaswant Singh Gill* case there is no scope of awarding any penalty upon the petitioner either in terms of Rule 34.3 or

Rule 27 of the aforesaid rules.

17. Mr. Banerjee, learned advocate appearing for the respondent company admitted that there was no power in the respondent company to withhold pension of the petitioner under the relevant pension scheme. It is therefore clear under the extant service rules the respondent company is devoid of any power to impose any penalty upon the retired employee in the facts of the instant case. It is a settled proposition of law that a Court would not permit the continuation of a futile act. This proposition of law was quoted with approval in the case reported in *The Executive Engineer and Another Vs. Sri Seetaram Rice Mill*, wherein the Apex Court held as follows:

It is settled principle that the courts/tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain. *Lex nil frustra facit* nor to enforce one which would be frivolous - *lex neminem cogit ad vana seu inutilia* - the law will not force anyone to do a thing vain and fruitless.

18. The aforesaid proposition of law applies with all vigour to the facts of the instant case where the continuation of the impugned disciplinary proceeding against the petitioner has become an empty formality and an act in futility since no order of penal consequence can be passed against him under the relevant service rules. As observed by me earlier, in course of the hearing Mr. Banerjee learned advocate for the respondent company had produced an order dated 08.05.2012 whereby the respondent company during the hearing of this writ petition appears to have hurriedly concluded the disciplinary proceeding and awarded a minor penalty of censure upon the petitioner. It is settled law that the Court can take into consideration subsequent events and mould the relief accordingly.

19. I, therefore, take into consideration the subsequent development of passing of the order of censure against the superannuated employee. Once the employee has been permitted to retire and the master-servant relationship has come to an end notwithstanding the deeming provision in Rule 34.2 of the Service Rules, there is no jurisdiction of the employer to pass the penalty of censure" against him. Moreso, when the service rules do not provide for any penal/civil consequence of imposition of such penalty in the form of withholding or reduction of retiral benefits such order of censure is an empty formality and non-est in law: I, therefore, hold that the passing of the impugned order of "censure" which is purportedly dated 08.05.2012 (but signed on 09.05.2012) was wholly beyond the powers of the respondent company as provided in the service rules and was clearly an act of futility and is liable to be quashed.

20. I therefore, mould the relief in the instant writ petition and quash the impugned disciplinary proceeding and also the impugned order of censure/awarded against the petitioner by the impugned memo No. ECL/C 5(D)/113/2627/82 dated 08.05.2012 in conclusion thereof.

21. I further direct in the event the petitioner is entitled to any leave encashment

due and other retiral benefits the same shall be calculated and forthwith released to him within a period of four weeks from the date of communication of this order. With the aforesaid directions, the instant writ petition is disposed of.

Urgent photostat copy of this order, if supplied for be given to the parties upon compliance of necessary formalities.