(2014) 07 AHC CK 0259

In the Allahabad High Court

Case No : C.M.W.P. No. 14572 of 2006

Gulab Singh APPELLANT

Vs

Deputy Inspector General of Police RESPONDENT

Date of Decision : 16-07-2014

Acts Referred:

Constitution of India, 1950 — Article 148, 309
Payment of Gratuity Act, 1972 — Section 14, 4, 4(1), 4(6)
Penal Code, 1860 (IPC) — Section 147, 201, 302

Citation : (2014) 8 ADJ 225 : (2015) 1 ALJ 143 : (2014) 106 ALR 389 : (2014) 6 AWC 5850 : (2014) 4 ESC 2123 : (2014) 143 FLR 793 : (2014) 143 FLR 279

Hon'ble Judges : Mahesh Chandra Tripathi, J

Bench : Single Bench

Advocate : Shailendra Mishra, Manu Sharma and H.K. Sharma, Advocate for the Appellant

Judgement

@DELETEUPPERDATA

Mahesh Chandra Tripathi, J.—Heard learned Counsel for the petitioner and learned Standing Counsel for the State. By means of present writ petition, the petitioner has prayed for quashing the impugned order dated 6.2.2002 (Annexure No. 2 to the writ petition), by which gratuity of the petitioner was not paid and only interim pension was issued.

2. Learned Counsel for the petitioner states that petitioner was working as constable in civil police. During the tenure of service career a criminal case No. 107/90 under sections 147, 302, 201, I.P.C., Police Station, Bairiya, District Ballia, was registered and the said case is reported to be pending against the petitioner and meanwhile petitioner was retired on 29.2.2000 and as per the record, there was no departmental proceeding against the petitioner. When the petitioner has not been paid gratuity and other retiral dues had filed Civil Misc. Writ Petition No. 39938 of 2001. The said writ petition was disposed of by this Court vide order dated 3.12.2001 directing the answering respondent to decide

the claim of the petitioner strictly in accordance to the law.

3. In pursuance to the said direction the respondent had refused to release the gratuity vide order dated 6.2.2002 (Annexure No. 2 to the writ petition), on the ground that criminal trial is pending against the petitioner, therefore, in view of the Government Order dated 28.10.1980, the gratuity of the petitioner cannot be released. The said order dated 6.2.2002 was the subject-matter to challenge before this Court.

Learned Counsel for the petitioner states that petitioner is liable to receive the complete pensionery benefits including full gratuity, pension etc. and the answering respondent in the garb of Government Order dated 28.10.1980, cannot stop payment of gratuity and full pension of the petitioner, specially in the background where the petitioner had not faced any department inquiry.

Where as stand taken by the respondent that petitioner was subjected to criminal proceeding, which is reported to be pending. Therefore, in view of the Government Order dated 28.10.1980, petitioner is not entitled for payment of gratuity as well as full retiral dues. The relevant portion of the Government Order dated 28.10.1980 is quoted below:

Heard learned Counsel for the parties and perused the record.

The provision of Payment of Gratuity has been provided under section 4 of the Payment of Gratuity Act, 1972. Section 4(1) says that Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years-(a) on his superannuation; (b) on his retirement or resignation; or (c) on his death or disablement due to accident or disease; wherein sub-clause (6) spells out the conditions under which gratuity of an employee can be stopped or withheld. Section 4(6) of Payment of Gratuity Act, 1972 is quoted below:

"(6) Notwithstanding anything contained in sub-section (1), ----------

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited.

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

4. While examining the import of the aforesaid section, it contemplates the following conditions on which Gratuity can be withheld (a) if the order of

termination is based upon any act, wilful omission or negligence causing any damage or loss to the property belonging to the employer; (b) if the services of an employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part; (c) if the employee is found guilty of moral turpitude provided that said offence has been committed during tenure of his service career. These are the only conditions which empowers the respondents to withhold the Gratuity of the petitioner.

5. In the present case what has been alleged that the petitioner was implicated in criminal case and trial is said to be pending, as such his gratuity cannot be released in his favour, while none of the conditions as aforesaid do exist as the petitioner''s services were not terminated nor he falls under any of the conditions otherwise given in sub-section (6) and its sub-clauses. Termination of services for any of the causes enumerated in sub-section (6) of section 4 of the Act, therefore, is imperative.

6. Perusal of the impugned order reveals that reliance has been placed on G.O. dated 20.10.1980 which contemplates the following things:

(a) the provisional pension shall be authorized for the period commencing from the date of retirement up to including the date on which judicial proceedings of the departmental or administrative Tribunal, as the case may be, final orders are passed by the competent authority.

(b) No death cum retirement gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings or the enquiry by the Administrative Tribunal.

7. These rules are contrary to the section 4(6) of the Act which does not prescribed any such conditions. Even though the expression judicial proceedings have been used for the purpose of any administrative action or which may have given rise to a judicial proceedings relating to the conduct of the Government Servant. One of the main object of withholding gratuity is to compensate the Government from the loss caused by the Government servant during his tenure in the service.

8. However, section 14 of the Act provides that the provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act. The overriding effect of any law and amount of gratuity is protected by statutory provisions. Therefore, such amount cannot be denied by the employer to the employee or employer has no power to withhold or forfeit the said amount unless the provisions of section 4(6) of Payment of Gratuity Act is satisfied. It is not the case of the respondents that procedure which is required under section 4(6) of the Act was followed by the respondents because it is not the case of termination but it is the case of superannuation. Therefore, section 4(6) of the Act procedure has not been followed by the respondents.

9. Hon''ble Apex Court in Balbir Kaur and Another Vs. Steel Authority of India Ltd. and Others, , has opined "...As regards the provisions of the Payment of Gratuity Act, 1972 (as amended from time to time) it is no longer in the realm of charity but a statutory right provided in favour of the employee..."

10. Perusal of the Act shows that it is a neat scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, sub-section (6) of section 4 of the Act contains a non-obstante clause vis-avis sub-section (1) thereof. As by reason thereof, an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of sub-section (6) of section 4 of the Act speaks of termination of service of an employee for any act, willful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. Conditions laid down therein are also not satisfied."

11. In the present matter, it is admitted case that in pursuance of the criminal proceeding, there was no departmental inquiry had ever been initiated against the petitioner, infact there is no averments in the counter-affidavit for the same. In absence of any department inquiry, the payment towards the retiral dues cannot be forfeited. The Hon''ble Apex Court in catena of decisions had clearly held that the criminal proceeding as well as departmental proceeding may go simultaneously. In peculiar facts and circumstances, if the facts are similar, the department may stop the disciplinary proceeding and wait for out come of criminal trial, but in the present matter no departmental inquiry had been initiated against the petitioner. Therefore, the stand taken by the respondent is contrary to the settled proposition of law and same is not sustainable and liable to be rejected.

12. The contention of the petitioner is that no departmental proceeding is pending against the petitioner at present and, therefore, submission is that the petitioner is entitled for full pension. It is further submitted that mere pendency of criminal proceeding will not disentitle the petitioner to get full pension, inasmuch as there is no charge of the financial irregularities. Reliance is placed on the Division Bench decision of this Court in the case of Mahesh Bal Bhardwaj v. U.P. Co-operative Federation Ltd. and another 2007(10) ADJ 561 and the decision of learned Single Judge in the case of Radhey Shyam Shukla Vs. State of U.P. and Another, and Division Bench decision of this Court in the case of Lal Sharan Vs. State of U.P. and Others, .

13. In the case of Deokinandan Prasad Vs. The State of Bihar and Others, , the Apex Court ruled that the pension is a right and payment of it does not depend upon the discretion of the Government but is governed by the Rules and the

Government servant coming within those Rules is entitled to claim pension and grant of pension does not depend upon anyone''s discretion. It is only for the purpose of quantifying the amount, having regard to service and other allied matters, that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was further affirmed by the Apex Court in the case of State of Punjab and Another Vs. Iqbal Singh, .

14. In the case of D.S. Nakara and Others Vs. Union of India (UOI), , the Apex Court has observed as under:

"From the discussion three things emerge: (1) that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to 1972 Rules which are statutory in character because they are enacted in exercise of powers conferred by the proviso to Article 309 and Clause (5) of Article 148 of the Constitution; (ii) that the pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is a social welfare measure rendering socioeconomic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch....."

15. The ratio laid down in these cases had been subsequently followed by the Apex Court in series of its decisions including the case of Secretary, O.N.G.C. Ltd. and Another Vs. V.U. Warrier, .

16. Division Bench of this Court in the case of Mahesh Bal Bhardwaj v. U.P. Co-operative Federation Ltd. and another (supra) has held that gratuity and other post retiral dues, which the petitioner is otherwise entitled under the Rules, could not have been withheld either on the pretext that criminal proceedings were pending against the petitioner or for the reason that on the outcome of the criminal trial, some more punishment was intended to be awarded.

17. Learned Single Judge of this Court in the case of Radhey Shyam Shukla v. State of U.P. and another (supra) has also taken the similar view and has held that mere pendency of the criminal proceedings would not authorize withholding of gratuity.

18. Division Bench of this Court in the case of Lal Sharan v. State of U.P. and others (supra) has held that mere intention to obtain sanction for initiating disciplinary enquiry could not be basis for withholding the post retiral dues unless sanctioned, granted and the disciplinary proceedings started.

19. Apex Court in the case of State of Punjab and another v. Iqbal Singh (supra) has further held that since the cut of the pension and the gratuity adversely affects the retired employee as such order cannot be passed without giving reasonable opportunity of making his defence.

20. In the aforementioned facts and circumstances, the impugned order dated 6.2.2002 (Annexure No. 2 to the writ petition) is hereby quashed. Respondents

are directed to release the entire post retiral dues of the petitioner including the gratuity, pension, etc., within a period of three months from the date of production of certified copy of this order before him. The petitioner shall be allowed to continue to be paid the interim pension within the said period. The respondents shall fix the final pension and shall pay the same regularly thereafter. The petitioner shall also be entitled to interest at the rate of 6% per annum towards the delayed payment of gratuity, namely from the date when it became payable and till it is actually paid. With the aforesaid observation, the writ petition is allowed.