(2005) 02 MP CK 0026

In the Madhya Pradesh High Court

Case No : W.P.S. No. 13302 of 2004

Justice S.K. Dubey (Retired) APPELLANT

Vs

Accountant General and another RESPONDENT

Date of Decision : 08-02-2005

Acts Referred:

Consumer Protection Act, 1986 — Section 16, 9(b)

Citation : (2005) 4 MPLJ 371

Hon'ble Judges : Arun Mishra, J

Bench : Single Bench

Advocate : Kishore Shrivastava, for the Appellant; Smt. I. Nair, with Naveen Dubey for Respondent No. 1 and V.P. Nema, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Arun Mishra, J.

Petitioner, former Judge of this Court, has prayed for quashment of communication dated 10-12-2003 issued by Accountant General, M. P. informing respondent No. 2/Department of Food, Civil Supplies and Consumer Protection Department to the effect that pension and gratuity was not payable as proposed by respondent No. 2 State of M. P. as per letter dated 23-9-2004 and 4-11-2004. Mandamus has been sought to count the period spent by petitioner as President of State Consumer Dispute Redressal Commission as pensionable service as per the terms of appointment issued by State Government.

It is averred in the petition that petitioner was appointed as a judge of High Court of M.P., he rendered the services of 10 years 5 months and 12 days, pension for the service rendered as Judge of the High Court has been determined under Schedule-I of High Court Judges (Conditions of Service) Act, 1954. It is further averred that by virtue of power vested in the State Government u/s 16 of Consumer Protection Act, 1986 (hereinafter referred to as "the Act") notification dated 18-9-1998 was issued by which petitioner was appointed as President of State Consumer Redressal Commission established u/s 9(b) of the Act. Office was assumed by petitioner on 21-9-1998 and he held the same till 13-8-2003. He demitted the office on completion of 67 years of age as per sub-section (3) of section 16 of the Act. Section 16(2) of the Act provides that salary, honorarium and other allowances payable to, and other terms and conditions of service of the members of the Commission shall be such as may be prescribed by the State Government. It is submitted that State Government is fully empowered as per power conferred under the Act to prescribe the terms and conditions of service. State Government on 26.5/3-6-1999 issued an Order (P. 1) prescribing the terms and conditions of appointment of petitioner. It was ordered that petitioner shall be paid salary as payable to a Judge of the High Court minus pension payable. Another order (P.2) was issued by Government of M. P. through Department of Food, Civil Supplies and Consumer Protection Department on 5-4-2002 for counting the period of service as President of Commission for the purpose of payability and determining the pension making the same as term and condition of service in Order (P.1) dated 3-6-1999. It was mentioned that State Government accorded sanction of counting service rendered on the post of President for the purpose of pension subject to condition that cumulative amount of pension receivable for service as Judge and on the post of President shall not exceed the maximum pension payable for a service as Judge of the High Court. Order (P. 2) expressly makes pension payable as the terms and conditions of appointment of petitioner as President of State Commission which in turn was issued after obtaining the due approval of the Finance Department of State Government, copy of order was forwarded to Accountant General, no objection was raised at the relevant time by the Accountant General to the Order (P.2) of State Government.

It is further averred that in accordance with the Order (P.2) of the State Government petitioner is entitled to pension and gratuity from the State Government from its consolidated fund for the services rendered by petitioner on the post of President of State Commission. Necessary papers were prepared in the prescribed form and submitted to the Office of Accountant General, M. P. on 29-8-2003 by Registrar of the State Commission vide covering letter (P. 3) of the same date requesting for pension and gratuity payable to petitioner be fixed for the period of service rendered as President of Commission. The State Government as per memo (P. 4) dated 12-9-2003 recommended to the Accountant General and forwarded the pension case for fixation and revision of pension, matter remained pending, administrative officer of the State Commission, Bhopal sent a reminder to the office of Accountant General, M. P. for expeditious action. The Accountant General as per letter (P. 5) dated 10-12-2003 sent a letter to Department of Food, Civil Supplies and Consumer Protection Department based on erroneous view to the effect that in absence of clear provision, pension and gratuity to the petitioner was not payable as proposed, certain query was raised which was properly replied by the

Department of Food, Civil Supplies and Consumer Protection Department of the State Government Food, Civil Supplies and Consumer Protection Department of the State Government vide memo (P. 6) dated 16th February, 2004 reiterated the entitlement for pension and gratuity on the post of President of State Commission to the petitioner. Another letter (P. 7) dated 16-4-2004 was written by Accountant General to the Secretary of Department to get the suitable provision incorporated in the Consumer Protection Act, 1986 for payment of pension etc. Copy of the Act was sent to State Government, State Government sent reply (P. 8) on 27-5-2004 clarified the legal position with reference to provisions of the Act and reiterated that pension and gratuity is payable to petitioner for service rendered on the post of President of State Commission. State Government clarified that no amendment is called for in the Consumer Protection Act, 1986, Accountant General was requested to expedite the finalization of pension case of petitioner.

Petitioner has placed reliance on a decision of the Apex Court in Justice Justice P. Venugopal Vs. Union of India (UOI) and Others, to submit that the pension payable to a High Court Judge would depend upon the terms and conditions of the appointment. As the terms and conditions of appointment provide for payment of pension and other benefits, pension shall be payable separately by the State Government it is further submitted that State Government has agreed to bear the financial liability for payment of pension and gratuity, the office of Accountant General of M. P. ought to have ensured by now the legal right of petitioner fructifying the actual payment of pension. Accountant General has sent another letter (P. 10) 23-9-2004 and matter was referred to Government of India, Ministry of Law and Justice, New Delhi. Opinion of Government of India, Ministry of Law and Justice was sent, Under Secretary to the Government of India has opined that petitioner is not entitled to any pensionary benefit in respect of the services rendered by petitioner as President of State Commission. Office of the Accountant General (A and E)-II, M. P. has further opined as per letter (P. 11) dated 4-11-2004 that services cannot be clubbed for pensionary benefit as a Judge of the High Court and President of MP State Consumer Dispute Redressal Commission. Aggrieved by the action of respondent No. 1 in not following the decision of respondent No. 2 to club the period for the purpose of pension and other benefits this writ petition has been preferred to claim pension and other admissible retrial benefits.

In the return filed by respondent No. 1/Accountant General it is submitted that the services were governed by the Consumer Protection Rules, 1987, rules have been framed under the Act. Reliance has been placed on Rule 6 of the rules. It is further submitted that State Government by Order (P. 2) dated 5-4-2002 ordered to club the services of petitioner rendered in Commission with that of High Court Judge for the purpose of pension and sent the pension case to answering respondent for revision of pension. Since the pension of petitioner stood already settled under the provision of High Court Judges Act, 1954 there being no provision for pension under Consumer Protection Act, 1986 or the rules made thereunder pension case of petitioner was returned to the State Government as per letter (P. 5) dated 10-12-2003. It is further submitted that matter remained in correspondence and ultimately the same was referred to Government of India, Ministry of Law and Justice, New Delhi vide letter (P. 10) clarification has been issued by the Ministry that in view of law laid down in case of Justice P. Venugopal (supra) by the Apex Court the petitioner was not entitled to any pension. This position was communicated to the petitioner vide letter (P. 11) dated 4-11-2004. It is not permissible to club the period for the purpose of pensionary benefits even if State Government intends to grant pension to the petitioner for services rendered in commission, necessary provision duly ratified by State legislature as required under sub-section (2) of section 31 of the Act will have to be made in the said rules. Petition has, therefore, no force. The communication made by the State Government was not correct hence pension and gratuity has not been paid.

Shri Kishore Shrivastava, learned counsel appearing for petitioner has submitted that matter is covered by the decision rendered by the Apex Court in Justice P. Venugopal (supra), it is open to State Government to pass an order of appointment fixing the terms and conditions. He has placed reliance on a decision of Apex Court in Justice P. Venugopal (supra) and submits that decision of State Government ought to have been acted upon by the Accountant General.

Ms. I. Nair, learned senior counsel appearing for respondent No. 1 has submitted that there is no provision in Rule 6 that services rendered as President of M. P. State Consumer Dispute Redressal Commission is pensionable hence services rendered as High Court Judge and President cannot be clubbed for the purpose of pension and gratuity, decision taken by the State Government was not correct, State has to amend the law as provided under sub-section (2) of section 31 of the Act to make it a pensionable service. In the absence of statutory provision, decision taken by the State Government was not justified, hence, the decision of respondent No. 2 has been rightly superseded by respondent No. 1.

Shri V.P. Nema, learned GA appearing for respondent No. 2 has stated that decision was taken by the State Government, matter was recommended to Accountant General Office time and again, the matter now is left in between petitioner and the Accountant General, State has to abide by the orders which were passed by it.

Rule 6 of the Rules deals with salary and allowances and terms and conditions of the President and Members of the State Commission. It is conceded that there is no provision in Rule 6 that services is pensionable nor it creates bar. Rules have been framed by State Government in exercise of power under subsection (2) of section 30 of the Act. Rules are silent with respect to the service being pensionable.

Sub-section (2) of section 16 of the Act provides for salary or honorarium and other allowances payable to, and the other terms and conditions of service of, the members of the State Commission shall be such as may be prescribed by the State Government. Sub-section (2) of section 16 is quoted below:-

Composition of the State Commission -

(2) The salary or honorarium and other allowances payable to, and the other terms and conditions of service of, the members of the State Commission shall be such as may be prescribed by the State Government;

Provided that the appointment of a member on whole-time basis shall be made by the State Government on the recommendation of the President of the State Commission taking into consideration such factors as may be prescribed including the work load of the State Commission.

The Apex Court in Justice P. Venugopal v. Union of India (supra) has considered the matter in the backdrop of the fact that Justice P. Venugopal was a former Judge of Madras High Court. He was appointed on 25-1-1979 and superannuated on 7-12-1981. After his superannuation he was appointed as Commission of Enquiry to inquire into the incident which took place in Coimbatore town on 23-7-1981, despite of superannuation on 7-12-1981 as a High Court Judge, Justice P. Venugopal continued to occupy the post of commission of enquiry. Government of Madras (as the State was called then) passed an order on 28-12-1981 to the effect that Justice P. Venugopal who has been appointed as commission of enquiry on full time basis will draw the total emoluments last drawn by him as a Judge of the High Court minus pension to which he is eligible excluding the pension commuted, if any, for the period he functions as commission of enquiry. Yet again he was appointed by Government of Madras as one man commission of enquiry in relation to communal riots which took place in Kanyakumari vide order dated 22-3-1982. He was appointed as an ad hoc Judge for a term of one year in the year 1982 and for another year in 1983. After he demitted the office as an ad hoc Judge of Madras High Court, he submitted his reports on 29-1-1985 and 30-4-1987, he was appointed as Commissioner of Payments under the Madras Race Club (Acquisition and Transfer of Undertaking) Act, 1986 by an order dated 1-8-1986 which post he held till 31-12-1988. Petitioner-Justice P. Venugopal was allowed pension as a High Court Judge for holding office for 2 years 10 months and 14 days. In the year 2001, he filed a writ petition in Madras High Court claiming inter alia for refixation of his pension upon taking into account the purported period of service from 1-8-1981 to 31-12-1988. Writ petition was dismissed by the Madras High Court. The question which arose for consideration before the Apex Court is quoted below:-

As to whether the pension of the petitioner can be refixed keeping in view the fact that he held different offices from 1-8-1981 to 31-12-1988.

The Apex Court has held that as an ad hoc Judge Justice Venugopal was not entitled for pension.

The Apex Court in the above decision while considering the question whether the period during which Justice P. Venugopal services as commission of enquiry or as Commissioner of payments under Madras Race Club (Acquisition and Transfer of Undertaking) Act, 1986 can be taken into consideration for computing the pensionary benefits. The Apex Court has noted that said petitioner in terms of notification of Government of Madras dated 28-12-1981 was to receive the emoluments drawn by him as a High Court Judge minus pension to which he was eligible. The Apex Court has considered the pension payable under Article 221 of the Constitution of India. While considering Article 112 of Constitution of India it was observed that what is charged to the consolidated fund of India is envisaged in clause (2) of Article 221 of the Constitution of India. The Apex Court has also considered sections 14, 15 and 16 of High Court Judges (Conditions of Service) Act, 1954, on consideration of schedule I appended to the Act of 1954, Rule 8 of Part I of the schedule appended to the Act of 1954 has laid down that High Court Judge is entitled to pensionary benefits only in terms of the said Act not otherwise as ad hoc Judge from Consolidated Fund of Government of India.

The Apex Court after discussing various decisions in P. Venugopal (supra) has ultimately concluded that pension payable to a High Court Judge would be only for the period rendered in that capacity which would constitute charge to the consolidated fund of India and services rendered subsequent thereto in terms of the order made by State Government would not be charged to the consolidated fund of India. The question as to whether such person would be entitled to pension from the State concerned or not would depend upon "statute" or "the terms and conditions of appointment." The Apex Court has laid down thus :-

26. We, therefore, in agreement with the judgment of the Madras High Court are of the opinion that for the purpose of computation of pension, different services of the petitioner could not have been clubbed in terms of Act 28 of 1954. The pension payable to a High Court Judge would be only for the period rendered in that capacity which would constitute charge to the Consolidated Fund of India and services rendered subsequent thereto in terms of the order made by a State Government would not be charged to the Consolidated Fund. The question as to whether such a person would be entitled to pension from the State concerned or not would depend upon the statute or the terms and conditions of appointment.

In the instant case, it is not in dispute that State Government has made it a part of condition of appointment of petitioner/Justice S. K. Dubey as per Order (P.2) dated 5th April, 2004 that services rendered by him as President of the State Commission is to be counted as pensionable services modifying Order (P. 1) dated 3-6-1999. Thus, Order (P. 2) forms part of condition of appointment of petitioner. It was further ordered that pension payable by the State Government or from the Consolidated Fund of Government of India shall not exceed the maximum pension payable to a High Court Judge. Rules are silent with respect to pensionable period, it was open to the State to take a decision in the matter, State Government understanding its liability has taken a conscious decision to make the service pensionable and has made it a condition of appointment of petitioner, State Government has as per letter (P. 6) reiterated its stand on 16th February, 2004, it has stated that the dues payable to petitioner shall be paid by the State Government. An Order (P.2) was issued with concurrence of Finance Department of State of M. P.

The opinion rendered by the Government of India, Ministry of Law and Justice on 9th September, 2004 is based on the Act of 1954, it appears that opinion rendered turns on the basis of liability of the Consolidated Fund of India. Obviously liability cannot be saddled for the pension and other benefits which may be admissible as per the order passed by the State Government on Consolidated Fund of India under Act of 1954. The condition of appointment of petitioner in Order (P. 2) has not been considered by the Government of India, obviously Government of India is not to be liable to make the payment even as per the order passed by the State Government as also held by the Apex Court in the case of Justice P. Venugopal (supra).

Consequently, it has to be held following the decision of the Apex Court in Justice P. Venugopal (supra) that petitioner is entitled to pension from State Government as per the terms and conditions of appointment (P. 2). Hence the action of respondent No. 1 cannot be allowed to sustain, period has to be counted as pensionable one, the liability has to be borne by the State Government with the rider that payable pension shall not exceed which is drawn from Consolidated Fund of India and from State Government the maximum pension payable to a High Court Judge. Thus, writ petition is allowed. Respondent No. 1 is directed to finalize and make payment of the pension and other admissible dues within a period of two months.

Writ petition is allowed. Parties to bear their own costs as incurred of this writ petition.

