
(2008) 03 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No. 7592 of 2003

Keshav Gopal Chandanshive

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 13-03-2008

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 69, 8(5), 9, 9(1), 9(2)
Constitution of India, 1950 — Article 41

Citation : (2009) 1 BomCR 436 : (2008) 4 MhLj 741

Hon'ble Judges : D.K. Deshmukh, J;A.A. Sayed, J

Bench : Division Bench

Advocate : S.V. Marne, for the Appellant; J.C. Satpute, for the Respondent

Judgement

D.K. Deshmukh, J.—By this petition, the petitioner challenges the order passed by the Central Administrative Tribunal, Mumbai on 8th of August, 2003 in Original Application No. 101 of 2002. That application was filed by the petitioner, challenging the order dated 16th of August, 2001 passed by the Under Secretary to the Govt. of India, imposing the penalty of 20% cut in the monthly pension receivable by the petitioner for a period of two years. In Appeal, the Central Administrative Tribunal has by the order dated 8th of August, 2003 dismissed the said application filed by the petitioner. The facts that are material and relevant in the case are as follows:

2. The petitioner was in service of the respondent No. 1 Union of India as Assistant Collector. He retired from the service on 30th April, 1993. The charge-sheet dated 27th of July, 1994 was served on him after his retirement; two charges were levelled against him. This charge-sheet, admittedly, was served under the provisions of Rule 9 of the Central Civil Services (Pension) Rules, 1972 (hereinafter referred as "Pension Rules"). Thereafter, a departmental enquiry was held. The Departmental Enquiry Officer submitted a report holding that the petitioner is guilty of both the charges levelled against him. Then as required by the provisions of Rule 9 of the Pension Rules, advice of the Union Public Service

Commission was sought. The Union Public Service Commission (hereinafter referred as the "UPSC for short) submitted its advice on 19-3-1999. The UPSC disagreed with the findings of the departmental enquiry officer and held that both the charges have not been proved against the petitioner and exonerated him. It appears that the Secretary to the Government of India addressed a letter dated 10-1-2000 to the Union of India. Pursuant to that letter, the Union Public Service Commission's second advice dated 2-6-2000 was submitted to the Government of India. In this second advice, the UPSC noted that so far as the charge number one is concerned, the Commission has not been asked to reconsider its finding on charge number one and therefore, it is assumed that its finding on the charge number one is accepted by the Union of India and the UPSC with regard to Article II - charge number two has maintained its earlier advice that charge number two is not proved. Thereafter, order dated 16-8-2001 was served on the petitioner. This was made by the disciplinary authority holding that both the charges are proved against the petitioner and that the disciplinary authority does not agree with the advice of the UPSC and therefore, punishment of 20% cut in monthly pension of the petitioner for a period of two years was upheld. This order was challenged before the Central Administrative Tribunal. The Central Administrative Tribunal, however, dismissed the petition. Hence, the present petition has been filed.

3. The first submission of the learned Counsel for the petitioner is that consultation with the UPSC under Rule 9 is mandatory and, therefore, the advice given by the UPSC has to be considered its entirety by the disciplinary authority. He submits that though the UPSC has held that the charge number one is not proved and that the UPSC was not asked to reconsider that finding, still the disciplinary authority disregarded the findings recorded by the UPSC without discussing the observations made by the UPSC in its second opinion/advice, that the disciplinary authority did agree with the finding of the UPSC in its first advice that the charge No. 1 is not proved. The learned Counsel, therefore, submits that the order, imposing punishment excludes from consideration this vital and material aspect of the matter and therefore, the order impugned is required to be set aside. He further submits that under Rule 9, insofar as government servants are concerned, the punishment can be imposed only on finding that the concerned pensioner is guilty of grave misconduct. He submits that neither in the charge-sheet nor in the report of the enquiry officer nor in the order of the disciplinary authority, a finding has been recorded that the charges which are held to be proved against the petitioner are of grave nature. He relies in support of his submission on a judgment of the Apex Court in the case of D.V. Kapoor Vs. Union of India and others, . The learned Counsel also made other submissions in relation to the order in question.

4. We have heard the learned Counsel for the respondents only in relation to the aforementioned grounds. The learned Counsel submits that these grounds were not raised before the Central Administrative Tribunal and, therefore, they cannot be permitted to be urged for the first time in the writ petition. He submits that it

was not necessary for the disciplinary authority to consider the observations made in the second advice by the UPSC. He also submits that it was not necessary to record a finding that the misconduct is of grave nature.

5. So far as the objections raised by the learned Counsel for the respondents that because these two submissions were not raised before the Central Administrative Tribunal, we should not permit the petitioner to raise the contentions for the first time in this petition is concerned, in our opinion the petitioner is entitled to argue these points because the entire material necessary for consideration of these points is available on record and both the points go to the very root of the matter.

6. Now in the light of these rival submissions, taking up first the second submission for our consideration, it is common ground that the punishment is imposed in accordance with the provisions of Rule 9 of the Pension Rules. Rule 9 reads as under:

9. Right of President to withhold or withdraw pension.- (1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity 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 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:

Provided further that where a part of pension is withheld or withdrawn the amount of such pensions shall not be reduced below the amount of rupees three hundred and seventy-five per mensem)

(2)(a) The departmental proceedings referred to in Sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service:

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President.

(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his reemployment,-

(i) shall not be instituted save with the sanction of the President,

(ii) shall not be in respect of any event which took place more than four years

before such institution, and

(iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.

(3)(* * *)

(4) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under Sub-rule (2), a provisional pension as provided in (Rule 69) shall be sanctioned.

(5) Where the President decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule,-

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which the complaint or report of a police officer, of which the Magistrate takes cognisance, is made, and

(ii) in the case of civil proceedings, on the date the plaint is presented in the Court.

Perusal of Rule 9, quoted above, shows that an order, imposing penalty, withholding whole or part of the pension can be made if the pensioner is found guilty of grave misconduct or negligence during the period of service. The Supreme Court has considered the provisions of Rule 9 in the judgment in D.V. Kapoor's case, referred to above. The observations of the Supreme Court in paragraphs 5, 6 and 7 of that judgment read as under:

5. It is seen that the President has reserved to himself the right to withhold pension in whole or in part thereof whether permanently or for a specified period or he can recover from pension of the whole or part of any pecuniary loss caused by the Government employee to the Government subject to the minimum. The condition precedent is that in any departmental enquiry or the judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service of the original or on re-employment. The condition precedent thereto is that there should be a finding that the delinquent

is guilty of grave misconduct or negligence in the discharge of public duty in office, as defined in Rule 8(5), explanation (b) which is an inclusive definition, i.e. the scope is wide of mark dependent on the facts or circumstances in a given case. Myriad situation may arise depending on the ingenuity with which misconduct or irregularity was committed. It is not necessary to further probe into the scope and meaning of the words "grave misconduct or negligence" and under what circumstances the findings in this regard are held proved. It is suffice that charges in the case are that the appellant was guilty of wilful misconduct in not reporting to duty after his transfer from Indian High Commission at London to the Office of External Affairs Ministry, Government of India, New Delhi. The Inquiry Officer found that though the appellant derelict his duty to report to duty, it is not wilful for the reasons that he could not move due to his wife's illness and he recommended to sympathetically consider the case of the appellant and the President accepted this finding, but decided to withhold gratuity and payment of pension in consultation with the Union Public Service Commission.

6. As seen the exercise of the power by the President is hedge with a condition precedent that a finding should be recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty while in office, subject of the charge. In the absence of such a finding the President is without authority of law to impose penalty of withholding pension as a measure of punishment either in whole or in part permanently or for a specified period, or to order recovery of the pecuniary loss in whole or in part from the pension of the employee, subject to minimum of Rs. 60/-.

7. Rule 9 of the rules empowers the President only to withhold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory right. The measure of deprivation therefore, must be correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Article 41 of the Constitution. The impugned order discloses that the President withheld on permanent basis the payment of gratuity in addition to pension. The right to gratuity is also a statutory right. The appellant was not charged with nor was given an opportunity that his gratuity would be withheld as a @ page SCI927 measure of punishment. No provision of law has been brought to our notice under which, the President is empowered to withhold gratuity as well, after his retirement as a measure of punishment. Therefore, the order to withhold the gratuity as a measure of penalty is obviously illegal and is devoid of jurisdiction.

7. Perusal of the above quoted paragraphs of the judgment of the Supreme Court shows that recording of finding either in the report by the enquiry officer or in the order imposing punishment passed by the disciplinary authority that the misconduct proved against the pensioner is grave is mandatory. On recording

that satisfaction only the disciplinary authority gets jurisdiction to make the order imposing punishment. Insofar as the present case is concerned, the disciplinary authority nowhere in its order, imposing punishment, say that the misconduct found to have been proved is of grave nature. We do not find that such a finding is recorded also by the enquiry officer. In our opinion, therefore, there is serious flaw in the order imposing punishment.

8. So far as the second ground is concerned, perusal of the order, imposing punishment passed by the disciplinary authority shows that the disciplinary authority has relied on both the charges which have been held to be proved by the enquiry officer and that it has disagreed with the advice of the UPSC. This has been done by the disciplinary authority without considering paragraph 4.1 of Article-I in the second advice of the UPSC. That paragraph reads as under:

4.1 The Commission observe that the DA has not referred to the first charge in its letter under reference. Presumably, they have accepted the Commission's analysis contained in the letter of advice on this specific article. As such this has not been discussed.

9. The UPSC in the above quoted paragraph has clearly stated that as the letter dated 10-1-2000 does not even refer to the advice on charge number one, the Commission takes it that its finding on charge number one has been accepted. In our opinion, without referring to the above quoted paragraph from the second opinion of the U.P.S.C, the disciplinary authority could not have imposed the punishment relying on the charge number one also. The learned Counsel for the petitioner submitted that both flaws which have been pointed out above are enough to set aside the order, imposing punishment on the petitioner. There is substance in his submission but fact remains that both these grounds were not raised before the Central Administrative Tribunal. In our opinion, therefore, while setting aside the order, imposing punishment for the above said two grounds, liberty will have to be given to the Union of India to make a fresh order after considering the relevant aspects of the matter.

10. In our opinion, therefore, following order would meet ends of justice:

- i. The order dated 16-8-2001, imposing punishment on the petitioner is set aside.
- ii. The Union of India shall be at liberty to make fresh order, imposing penalty on the same material in accordance with law. However, before doing that a show cause notice shall be issued to the petitioner so that the petitioner gets an opportunity to submit his point of view.
- iii. In case the Union of India decides to avail of the liberty granted by this Court, it shall issue show cause notice within a period of 12 weeks from today.
- iv. It is directed that, therefore, the amount to which the petitioner would be entitled pursuant to this judgment may not be paid for a period of 12 weeks from today.

v. In case the show cause notice is issued, payment of the amount will be governed by the ultimate order that the disciplinary authority may pass. In case the liberty is not availed of and the show cause notice is not issued within 12 weeks, the Union of India shall pay the amount to which the petitioner becomes entitled due to this order immediately.

Rule is made absolute in the above terms with no order as to costs.