(2022) 11 TEL CK 0067

In the Telangana High Court

Case No : Writ Petition No. 14855 Of 2018

K.Muthaiah APPELLANT

Vs

District Audit Officer, State Audit, Khammam And Others RESPONDENT

Date of Decision : 14-11-2022

Acts Referred:

Constitution Of India, 1950 — Article 300A
Andhra Pradesh Revised Pension Rules, 1980 — Rule 13, 14

Citation : (2022) 11 TEL CK 0067

Hon'ble Judges : Surepalli Nanda, J

Bench : Single Bench

Advocate : S.Jagadish

Final Decision : Allowed

Judgement

1. Heard Sri S. Jagadish, the learned counsel for the petitioner and the learned Government Pleader for Services I.

2. This writ petition is filed to issue Writ, order or direction more in the nature of Mandamus declaring the action of the 1st respondent in not considering the claim of the petitioner for sanction of pension and pensionary benefits and returning the pension proposals of the petitioner vide proceedings Lr.D.A.O.S.A.No.523/ A1/2015-16, dated 13.01.2016 of the 1st respondent as illegal, arbitrary and contrary to law and consequently direct the respondents to process the pension proposals of the petitioner and issue the pension payment order sanctioning the pension and pensionary benefits duly computing the service from the date of appointment i.e. 22.06.1994 for the purpose of sanction of pension by holding the petitioner falls under old pension scheme.

3) The case of the petitioners, in brief, is as follows:

a) The petitioner retired from service on attaining the age of superannuation on 30.09.2015 as Office Subordinate. The petitioner was initially appointed as full time attender-cum-chowkadar, vide proceeding dated 22.06.1994 of the District

Collector and Chairman, District Bala Kendra, Khamma. The petitioner while working in Bala Kendra, the Government issued G.O.Ms.No.173, dated 17.12.2004 upgrading the Bala Kendras of Nellore and Khammam District as Bala Bhavans.

b) The salaries of the employees of Bala Bhavan Kendrams were being paid against A/c No.310/311 despite they are regular Government Employees. Taking into consideration the nature of services, the Director and Special Officer, Jawahar Bal Bhavans submitted proposals stating that the staff working in the District Bal Bhavans are regular Government Employees and the salaries are required to be paid through the account under the Head 010 – Salaries. Basing on the said proposal and request made by the employees of Bal Bhavan, the Government issued G.O.Ms.No.18, dated 01.03.2007 for payment of salaries from detailed Head 010- salaries.

c) After retirement the petitioner submitted pension papers. The 1st respondent without taking into consideration the factual and legal aspects, returned the pension papers assigning a reason that the employees appointed on or after 01.09.2004 in the scale post are not entitled for authorization of pension as per G.O.Ms.No.655, dated 22.09.2004, which was not applicable to the petitioner.

d) One K.Eswara Rao, who was working as Vocal Instructor and was appointed in the year 1986 on similar lines like petitioner was sanctioned with pension vide proceedings dated 07.07.2014 without raising any dispute. Therefore, the petitioner is also entitled for the relief as prayed for.

4. The counter filed by the respondents, in brief, is as follows:

a) The petitioner, Office Subordinate was appointed as Attender cum Chowkidar on 07.07.1994 in the contingent post and he was continued in the post up to 17.12.2004 and his services were regularized in the time scale of Rs.2550-4550 and pay has been fixed for Rs.2550/- vide proceedings of the District Collector, Khammam dated 17.10.2005 and entry made in the service register at page No.7. According to G.O.Ms.No.655, dated 22.09.2004, those who are appointed on or after 01.09.2004 in the said post, are not entitled for authorization of any pensionary benefits. Therefore, the writ petition is liable to be dismissed.

PERUSED THE RECORD :

5. The order of the appointment of Petitioner as Attender-cum-Chowkidar (Full Time) dt. 22.06.1994 issued by the 3rd Respondent is as under :

Sri K.Muthalah, S/o Pitchaiah, Nizampeta, Khammam is appointed as full time Attender-cum-Chowkidar, Dist. Bala Kendra Khammam on consolidated pay of Rs. 400/ - per month. He has to attend the duties of Attender from 4.30 p.m to 6.00 pm and Chowkidar at night.

The incumbent is hereby informed that this appointment is purely temporary and liable for termination at any time without any notice or without assigning any reasons therefore.

The incumbent is hereby instructed to report to the Dist. Educational Officer, Khammam on or before, 08.07.1994 without fail, failing which his appointment will be deemed to have been cancelled. He should abide by the rules and conditions stipulated in the order.

The receipt of the proceedings should be acknowledged.

DISCUSSION, ANALYSIS & CONCLUSION :

6. A bare perusal of the proceedings dated 22.06.1994 appointing the Petitioner vide RC.No.7362/JBK/B6/94(4) extracted above clearly indicates that the Petitioner was appointed as Attender-cum-Chowkidar (Full time) at District Bala Kendra, Khammam in pursuance to the interview held on 21.06.1994 at the Chamber of the District Collector and the Petitioner was further called upon to report for duty on or before 08.07.1994 without fail, and further that the said appointment was in pursuance to a selection process of sponsoring from the Employment Exchange and after facing the interview in the Chambers of the District Collector on 21.06.1994.

7. The impugned proceedings returning the pension papers and service register of the Petitioner herein is as under :

The Pension Papers and Service Register of Sri Koppula Muthaiah, Attender cum Chowkidar received through the reference cited, has been verified and returned herewith to rectify the defects as noted below and re-transmitted for authorization.

The incumbent was appointed as Attendar cum Chowkidar on 07.07.1994 in the contingent post and he was continued in the past up to 16.12 2004 and his service was regularized in the time scale of 2550-4550 and pay loved of Rs.2550/-. According to G.O.Ms No.655 dt.22.09.2004 who are appointed on are after 01.09.2004 in the scale post. They are not entitled authorization of any pension.

The receipt of the Pension Papers and Service Register and may be acknowledged.

8. A bare perusal of the impugned proceedings dated 13.01.2016 reveals that applying G.O.Ms.No.655, dated 22.09.2004 it is observed that all appointed on or after 01.09.2004 in the Scale Post are not entitled for authorization of any pension and accordingly Petitioner's pension proposals have been returned.

9. A bare perusal of G.O.Ms.No.173 dt. 17.12.2004 issued by the Principal Secretary to Government, clearly indicates that Bal Kendras at Nellore and Khammam have been upgraded to Bal Bhavan (Full Time). Further it is very clearly observed in the said proceedings dt. 17.12.2004 that Bal Kendra, Khammam has been functioning from 1980 and that Petitioner's services are being utilized against the sanctioned vacancy on full time basis.

10. Counter affidavit filed by the Respondents very clearly admits the fact that the Petitioner was appointed as Attender-cum-Chowkidar on 07.07.1994 and he was continued in the said post up to 17.12.2004 and further his services were regularized in the time scale of Rs.2550/- to 4550/- and pay has been fixed for Rs.2550/- vide proceedings of the District Collector, Khammam, dated 17.10.2005 and further as per G.O.Ms.No.655, dated 22.09.2004 those who are appointed on or after 01.09.2004 in the said post are not entitled for authorization of any pensionary benefits.

11. G.O.Ms.No.655, dated 22.09.2004 introduced contributory pension scheme w.e.f. 01.09.2004 and Clause (i) of the said G.O. holds that it is mandatory for all the new employees who are recruited on or after 01.09.2004 to become members of the scheme and further each employee will pay a monthly contribution of 10% of the basic pay and D.A. from his salary to the contributory pension scheme.

12. It is relevant to look into Rule 13 of A.P. Revised Pension Rules which reads as follows :

Rule 13 of the Andhra Pradesh Revised Pension Rules, 1980 (for short, 'the Rules') deal with the qualifying service of a temporary employee for the purpose of payment of pension. Rule 13 reads as under:

“13. Commencement of qualifying service: subject to the provisions of the rules, qualifying service of a Government Servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity”.

13. A reading of the above Rule would clearly show that qualifying service of a Government servant commences from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. A bare perusal of the order of the appointment dated 22.06.1994 of the Petitioner herein clearly indicates that the Petitioner has been appointed as Attender-cum-Chowkidar on 07.07.1994 after undergoing due selection process, in substantive vacancy on full time basis. Therefore, as per the above said provision Petitioner’s service has to be counted from the date on which he joined in the service in pursuance to the appointment made by the 3rd Respondent herein dated 22.06.1994. Therefore, the plea of the Respondent herein that the Petitioner will only come under the contributory pensionary scheme but not on a regular pension scheme is totally misconceived, since admittedly as borne on record the petitioner has been appointed on 22.06.1994 as full time Attender-cum-Chowkidar. The petitioner’s services were regularized vide District Collector, Khammam proceedings dated 17.10.2005 As borne on record the Petitioner has been in continuous service w.e.f. 22.06.1994 i.e., from the date of his appointment in a substantive vacancy. The plea in the impugned order of the 1st respondent herein dated 13.01.2016 that the Petitioner was appointed on or after 01.09.2004 in the scale post and therefore the Petitioner is not entitled for

authorization of any pension is totally misconceived since the Petitioner as borne on record was not appointed on or after 01.09.2004 but the Petitioner was appointed on 22.06.1994.

14. As per Rule 13 the pay scale is not the basis for counting of qualifying service. The Petitioner in the present case admittedly has been working continuously since 22.06.1994 and he has completed more than 2 decades of service under the Respondents and by taking the plea that the Petitioner is appointed after 01.09.2004 in the scale post the 1st Respondent herein is illegally depriving the Petitioner of his benefit to draw pensionary benefits. Even G.O.Ms.No.655 dt. 01.09.2004 very clearly stipulates that it applies to all the new employees who are recruited on or after 01.09.2004.

15. A Division Bench of this Court in W.P.No.8201/2016 dated 17.03.2016 in a Writ Petition preferred by the Government aggrieved against the order dated 12.12.2017 passed in O.A.No.654 of 2016 dealing with an identical situation as in the present case observed as follows :

Respondent No.1 was appointed temporarily as Junior Auditor in the office of the District Audit Officer, State Audit, Anantapur on daily wage basis, after he was sponsored by the Employment Exchange under proceedings Rc.No.586/A1/1986, dated 12.07.1986. Thereafter, he was absorbed as Junior Auditor against regular vacancy on 04.08.1990. His services were regularized in the said cadre and he was further promoted to the post of Senior Auditor and has retired from service on attaining the age of superannuation on 31.01.2011. Even before the retirement, he made a representation on 20.01.2011 to the petitioners, requesting them to count the temporary service rendered by him in the cadre of Junior Auditor prior to his absorption. As no order was passed on his representation, he has approached the Tribunal by way of the abovementioned O.A. On consideration of the rival pleas of the parties, the Tribunal has allowed the O.A by the impugned order. Feeling aggrieved thereby, the petitioners filed this writ petition.

Rules 13 and 14 of the Andhra Pradesh Revised Pension Rules, 1980 (for short, 'the Rules') deal with the qualifying service of a temporary employee for the purpose of payment of pension. These Rules read as under:

"13. Commencement of qualifying service: Subject to the provisions of the rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity:

Provided that –

(a) in the case of a Government servant in a Class IV service or post who held a lien or a suspended lien on a permanent pensionable post prior to the 17th November, 1960, service rendered before attaining the age of sixteen years shall not count for any purpose; and

(b) in the case of a Government servant not covered by clause (a), service rendered before attaining the age of eighteen years shall not count, except for compensation gratuity.

14. Conditions subject to which service qualifies: (1) The service of a Government servant shall not qualify unless his duties and pay are regulated by the Government, or under conditions determined by the Government.

(2) For the purposes of sub-rule (1), the expression service means service under the Government and paid by the Government from the Consolidated Fund of the State but does not include service in a non-pensionable establishment unless such service is treated as qualifying service by the Government."

From the above reproduced Rules, it is clear that qualifying service of a Government servant commences from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity, subject to the exceptions contained in clauses (a) and (b) of Rule 13 of the Rules. A temporary employee shall further satisfy the conditions stipulated in Rule 14 of the Rules for counting his temporary service for pensionary benefits. Under this Rule, unless his duties and pay are regulated by the Government or under the conditions determined by the Government, such service was not qualified for pension. The meaning of the word "service" under sub-Rule (1) of Rule 14 of the Rules is explained in sub-Rule (2) thereof, as per which the service is under the Government and the salary is paid by the Government from the Consolidated Fund of the State, but the same does not include the service of a non-pensionable establishment, unless such service is treated as qualifying service by the Government.

In the case on hand, it is not in dispute that the duties of respondent No.1 and his pay were regulated by the Government. Further it is also not in dispute that respondent No.1 was paid by the Government from the Consolidated Fund of the State and that the post is a pensionable one. Therefore, the Tribunal has rightly come to the conclusion that temporary service of respondent No.1 shall be counted as qualifying service for the purpose of pension under the abovementioned Rules.

For the above -mentioned reasons, we do not find any merit in this writ petition and the same is, accordingly, dismissed.

16. The learned counsel for the petitioner brings on record the judgment dated 02.05.2018 passed in W.P.Nos.33936 of 2011 and batch and contends that Petitioner is entitled for the relief as prayed for by the Petitioner herein since the Petitioner is appointed on a fixed pay and since NMRs are getting pension reckoning their services from the date of completion of 5 years in service on or before 25.11.1993 for the purpose of their pension and pensionary benefits. Placing reliance on the aforesaid judgment learned counsel for the petitioner pleads that since the petitioner is appointed on a fixed pay and since the petitioner completed more than two decades in service, the petitioner is entitled

for grant of relief as prayed for.

17. In a judgement of the Apex Court in the matter of State of Jharkhand and others v. Jitendra Kumar Srivastava and another reported in 2013 (12) SCC 210 it was held that pension and gratuity are not bounty but property within the meaning of Article 300-A of the Constitution of India. Paragraphs 16 and 17 of the report state as under:

"16. The fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognized as a right in "property". Article 300-A of the Constitution of India reads as under:

"300-A. Persons not to be deprived of property save by authority of law.—No person shall be deprived of his property save by authority of law." Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the constitutional mandate enshrined in Article 300-A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.

17. It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as "law" within the meaning of the aforesaid Article 300-A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold even a part of pension or gratuity. As we noticed above, so far as statutory Rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these Rules, the position would have been different."

18. This Court opines that the Petitioner cannot be deprived of his constitutional right for pension except by authority of law since pension is not a bounty but property within the meaning of Article 300-A of the Constitution of India. Taking into consideration the aforesaid facts and circumstances and Rule 13 and 14 of the Andhra Pradesh Revised Pension Rules, 1980 (for short the Rules) which deal with the qualifying service of a temporary employee for the purpose of payment of pension and the law laid down by the Apex Court in the matter of State of Jharkhand and others v. Jitendra Kumar Srivastava and another reported in 2013 (12) SCC 210 and the law laid down by the Division Bench judgment of this Hon'ble Court in WP No.82016/2016 in State of Andhra Pradesh, Rep. by its Secretary, Finance & Planning and M.Raja Rao, S/o. Late Laxman Rao & Another, dt. 17.03.2016, the Writ Petition is allowed and the Respondents are directed to forthwith process the pension proposals of the Petitioner returned vide Lr. D.A.O.S.A.No. 523/A1/2015-16, dt. 13.01.2016 of the 1st Respondent herein, and issue the pension payment order sanctioning the pension and pensionary benefits duly computing the service from the date of appointment of the PETITIONER i.e., 22.06.1994 for the purpose of sanction of pension, within a

period of ‘3’ weeks from the date of receipt of the order. There shall be no order as to costs.

Miscellaneous petitions, if any, shall stand dismissed.

