
(2016) 11 BOM CK 0047

In the Bombay High Court

Case No : Writ Petition No. 5403 of 2016

Mohan Madhavrao Khapke

APPELLANT

Vs

Ahmednagar Municipal Corporation

RESPONDENT

Date of Decision : 22-11-2016

Acts Referred:

Maharashtra Civil Services (Pension) Rules, 1982 — Rule 130(I)(c)

Citation : (2017) 3 AIRBomR 461 : (2017) 1 BCR 856 : (2017) MCR 419

Hon'ble Judges : V. Ravindra Ghuge, J.

Bench : Single Bench

Advocate : Shri Barde Parag Vijay, Advocate, for the Petitioner

Final Decision : Dismissed

Judgement

V. Ravindra Ghuge, J. - The petitioner is aggrieved by the judgment dated 14.10.2015, delivered by the appellate authority under the Payment of Gratuity Act, by which, Appeal No.3 of 2016, filed by the respondent / Corporation has been allowed and the judgment of the controlling authority dated 10.3.2015 has been set aside.

2. I have heard the learned Advocate for the petitioner at length and have gone through the grounds formulated.

3. There is no dispute that the petitioner has retired from service. A Criminal Case No.459 of 2006 instituted prior to his retirement is pending before learned VII Judicial Magistrate (F.C.). Based on the pendency of the said criminal proceeding, the respondent declined to pay Gratuity to the petitioner by placing reliance upon Rule 130(1)(c) of the Maharashtra Civil Services (Pension) Rules, 1982.

4. The petitioner had approached the controlling authority i.e. the Labour Court seeking gratuity and the same was allowed by judgment dated 10.3.2015. The Industrial Court allowed the Appeal of the Corporation by the impugned judgment and concluded that since the criminal case regarding mis-appropriation

of Rs.3,65,438.30 Ps. under Sections 469, 465, 467 and 477(a) read with 34 of the Indian Penal Code is pending, the gratuity cannot be released under Rule 130(1)(c). There is no dispute that the said criminal case for the said crime is pending.

5. Rule 130(1)(c) of the 1982 Rules reads as under:-

"130. Provisional pension where departmental or judicial proceedings may be pending.

(1)(c). No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders therein."

6. The Honourable Supreme Court in the matter of State of Jharkhand v. Jitendra Kumar Srivastava [(2013) 12 SCC 210], has observed in paragraph Nos. 1, 6, 7, 8, 16 and 17 as under:-

"1. Crisp and short question which arises for consideration in these cases is as to whether, in the absence of any provision in the Pension Rules, the State Government can withhold a part of pension and/or gratuity during the pendency of departmental/criminal proceedings? The High Court has answered this question, vide the impugned judgment, in the negative and hence directed the Appellant to release the withheld dues to the Respondent. Not happy with this outcome, the State of Jharkhand has preferred this appeal.

6. Mr. Amarendra Sharan, the learned Senior Counsel appearing for the Petitioner accepted the fact that in so far as the Pension Rules are concerned, there is no provision for withholding a part of pension or gratuity. He, however, submitted that there are administrative instructions which permit withholding of a part of pension and gratuity. His submission was that when the rules are silent on a particular aspect, gap can be filled by the administrative instructions which was well settled legal position, laid down way back in the year 1968 by the Constitution Bench judgment of this Court in Sant Ram Sharma v. Union of India : 1968 (1) SCR 111. He, thus, argued that the High Court has committed an error in holding that there was no power with the Government to withhold the part of pension or gratuity, pending disciplinary/criminal proceedings.

7. The aforesaid arguments of the learned Senior Counsel based on the judgment in Sant Ram Sharma would not cut any ice in so far as present case is concerned, because of the reason this case has no applicability in the given case. Sant Ram judgment governs the field of administrative law wherein the Constitution Bench laid down the principle that the rules framed by the authority in exercise of powers contained in an enactment, would also have statutory force. Though the administration can issue administrative instructions for the smooth administrative function, such administrative instructions cannot supplant the rules. However, these administrative instructions can supplement the statutory rules by taking care of those situations where the statutory rules are silent. This ratio of that judgment is narrated in the following manner:

It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade-officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions and inconsistent with the rules already framed.

There cannot be any quarrel on this exposition of law which is well grounded in a series of judgments pronounced post Sant Ram Sharma case as well. However, the question which is posed in the present case is altogether different.

8. It is an accepted position that gratuity and pension are not the bounties. An employee earns these benefits by dint of his long, continuous, faithful and unblemished service. Conceptually it is so lucidly described in D.S. Nakara and Ors. v. Union of India : (1983) 1 SCC 305 by Justice D.A. Desai, who spoke for the Bench, in his inimitable style, in the following words:

The approach of the Respondents raises a vital and none too easy of answer, question as to why pension is paid. And why was it required to be liberalised? Is the employer, which expression will include even the State, bound to pay pension? Is there any obligation on the employer to provide for the erstwhile employee even after the contract of employment has come to an end and the employee has ceased to render service?

What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date? We need seek answer to these and incidental questions so as to render just justice between parties to this petition.

The antiquated notion of pension being a bounty a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar and Ors. : (1971) Supp. S.C.R. 634 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one'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 reaffirmed in State of Punjab and Anr. v. Iqbal Singh : (1976) II LLJ 377 SC.

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

300A 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 300A 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 aforesaid Article 300A. 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."

7. It is thus settled by the Apex Court that unless the Rules provide for withholding the gratuity, gratuity in the above said backdrop cannot be withheld on the basis of a circular issued by the employer. In the instant case, Rule 130(1) (c) specifically provides that until the departmental or judicial proceedings are concluded and final orders are issued, gratuity could be withheld.

8. Shri Barde submits that notwithstanding the above, the gratuity can be paid as the petitioner is yet to be held guilty and there is no departmental proceedings pending except the criminal case. He further submits that in the event he is convicted, he would repay the gratuity amount with interest. I do not find the said submission worthy of acceptance considering Rule 130(1)(c) and the view taken by the Honourable Apex Court in the matter of State of Jharkhand (supra). Ends of justice would be met by directing the learned trial Court to decide the pending criminal case expeditiously.

9. In the light of the above, I do not find that the impugned judgment of the Industrial Court needs to be interfered with. This petition being devoid of merits is, therefore, dismissed. However, the learned VII Judicial Magistrate (F.C.), Ahmednagar shall decide the Criminal Case No.459 of 2006 as expeditiously as possible, and preferably within a period of nine months from today.