(2005) 07 J&K CK 0008

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2609/2001

M.P.Gupta	APPELLANT
Vs	
State and Ors.	RESPONDENT

Date of Decision : 19-07-2005

Acts Referred:
Civil Services Regulations, 1956 — Article 168A, 168D(1)
Revised Leave Rules, 1979 — Rule 37(2)(v)

Citation : (2005) JKJ 470 Supp

Hon'ble Judges : S.K.Gupta, J

Bench : Single Bench

Advocate : Sindhu Sharma, Advocates appearing for the Parties

Judgement

1. This petition is filed by the petitioner, Dr. M.P. Gupta, in making his grievance that though he was entitled to pension after his retirement, the

respondentauthorities are not paying him the said legitimate pension and the same has been with held illegally and unlawfully without any justification

by the respondents. According to the averments made in the writ petition, the petitioner who was superannuated from the post of Director, Health

Services, Jammu on 31.3.1998 seeks retiral benefits, be sides monthly pension which includes gratuity and leave encashment. It is further stated

that even three years after he was retired from the service, the respondents have failed to process his case for payment of pensionary benefits in

flagrant disregard of Article 284A of J&K Civil Services Regulations (For short hereinafter referred to as CSR) and also the Government

instructions appended thereto vide SR.O 45 of 1980 dated 28.1.1980. He has also pleaded that even though his case for payment of leave

encashment was forwarded by the Director, Health Service, Respondent2 to the

Government, as early as in April 1998, yet the sanction has not

been accorded for the payment of the same, which has occasioned immense hardships to him.

2. The stand of the respondents in their demurrer in so far as nonpayment of the pensionary benefits are concerned, is that the petitioner had made

some illegal appointments of ministerial staff without adopting any Rule during his tenure in service for which FIR No.131 of 1998 has been

registered against him under Section 5(2) of the Jammu & Kashmir Prevention of Corruption Act, 2006 BK read with Sections 161 and 120B of

the RPC.

3. As regards the payment of leave salary, reliance is placed on Rule 37(2)(v) of the Revised Leave Rules, 1979.

4. Regarding the payment of gratuity, the same, according to the respondents, cannot be released, until the conclusion of the trial. However, it is

admitted that the case of the petitioner for payment of provisional pension has been forwarded to the competent authority for according sanction.

5. I have heard the learned counsel appearing for the respective parties in extenso and also perused the relevant Rules and Regulations touching the

controversy.

6. While, the learned counsel for the petitioner relies on the mandate of Section 168A of CSR for grant of pension, the contention of learned

Government Advocate appearing for respondents is that mere registration of the case against the petitioner is sufficient ground to deny full pension

to him. It was further argued that leave encashment cannot be withheld under Rule 37 (2)(v) of revised leave Rules of 1979. It is urged that though

the payment of provisional pension has been authorized in favour of the petitioner during the pendency of the petition, that too, only after nearly

four years of his retirement.

7. The question involved in this petition for consideration is as to whether the petitioner is entitled to full pension as due to him under Article 232

(ChapterXVIII) of the GSR. However, the provisional pension is authorized under Article 168D (1) of the CSR in case departmental and judicial

proceedings have been initiated against the retiree in accordance with clause (a) of Article 168A of the CSR as is evident from the plain language

of Article 168D (1) which reads as under:

168D. (1) Where any departmental or judicial proceeding is instituted under Art. 168A or where departmental proceeding is continued under

clause (a) of proviso thereto against an officer who has retired on attaining the age of compulsory retirement or otherwise, he shall be paid during

the period commencing from the date of his retirement to the date on which upon conclusion of such proceedings final orders are passed, a

provisional pension not exceeding the maximum pension which would have been admissible on the basis of his qualifying service up to the date of

retirement or if he was under suspension on the date of retirement, up to the date immediately proceeding the date on which he was placed under

suspension, but no gratuity or deathcumretirement gratuity shall be paid to him until the conclusion of such proceeding and the issue of final orders

thereof.

8. It is further relevant to reproduce Article 168A and reads as under:

168A. The Government reserves to itself the right to order the recovery from the pension of an officer of any amount on account of losses found

in Judicial or Departmental proceedings to have been caused to Government by the negligence or fraud of such officer during his service, provided

that

(a) such Departmental proceedings if not instituted while the officer was on duty,

(i) shall not be instituted save with the sanction of Government:

(ii) shall be instituted before the officer's retirement from service or within a year from the date on which he was last on duty, whichever is later:

(iii) shall be in respect of an event which took place not more than one year before the date on which the officer was last on duty; and

(iv) shall be conducted by such authority and in such places as the Government may direct;

(b) all such departmental proceedings shall be conducted if the officer concerned so requests in accordance with the procedure applicable to

departmental proceedings on which an order of dismissal from service may be made; and

(c) such judicial proceedings if not instituted while the officer was on duty, shall have been instituted in accordance with subclauses (ii) and (iii) of

clause (a) above.

9. So provisional pension is payable only when clause (a) of Article 168A is satisfied. So, be it a case of departmental proceedings or judicial

proceedings, these have to be initiated within one year of retirement of a person in order to deny full pension to the pensioner.

10. The petitioner has specifically pleaded that neither the departmental proceedings were initiated against him nor such proceedings are pending. It

is further pleaded in paragraph12 of the petition that since no depart mental or judicial proceedings had been initiated against the petitioner in terms

of Article 168A of the CSR within one year, from the date of his retirement, as is envisaged under Article 168A of the CSR for denying him the

pensionary benefits. The respondents have not also disputed/denied it in their counter. Withholding of pensionary benefits is not only arbitrary, but

also amounts to punishment without affording an opportunity of hearing and it has visited the petitioner with penal consequences.

11. This apart, as per the certified copy issued by the Special Judge, Anticorruption, Jammu, challan in case State v. Dr. Mohan Parkash Gupta,

under Section 5(2) of the J&K Anti Corruption Act, 2006 BK, read with Sections 161 and 120B of the RPC was produced in the trial Court on

25.8.2000. So judicial proceedings against the petitioner were initiated after almost two and half years from the date of his retirement as he was

retired on 31.3.1998. As such, Article 168D (1) of the CSR could not be invoked and pension being compensation for the services rendered

could not be reduced much less, denied in the absence of any specific provision and there is no such provision except Articles 168A and 168D of

the CSR.

12. The scope of sub clause (iii) and clause (c) of Article 168A of the CSR were considered by the Hon'ble Division Bench of this Court in case

State of J&K & another v. Dr. Kulwant Singh and another, 2004 (1) JKJ351 and speaking for the Bench Brother, KakruJ in para3 of the

judgment held as under:

Para3. Understanding subclause (iii) clause (a) read with clause (c) of Article 168A CSR from its grammatical meaning inter alia it is deducible

that withholding of gratuity of a retired officer is permissible during the currency of judicial proceeding if the proceeding relates to an event which

has occurred within one year preceding the date on which the officer was last on duty. Whether judicial proceeding has commenced within the

period so prescribed is a question which is required to be examined in the light of the year the event relates to and the date on which respondent

was superannuated. As is seen from pleadings of the parties it is crystal clear that the event which was the subject matter of the judicial proceeding

dates back to 197980 whereas date of respondent's superannuation is 31.05.1982. Reckoned as such there is a gap of one year and five months

between the occurrence of the event and the date on which respondent was last on duty, apparently beyond the period stipulated by Article 168A

CSR, resultantly violation of its mandate, rendering the action of the Government illegal which is sufficient for allowing the interest to the respondent

on withheld gratuity leaving no option for us but to agree with conclusion arrived at by the Learned Single Judge. We may hasten to add that since

we are not called upon in this case to examine the fall out of prosecution instituted beyond the period envisaged by Article 168A CSR or to

examine the scope of the powers of the Government regarding the recoveries of outstanding from a retiree or to interpret expression 'judicial

proceeding' or to examine amplitude of the term 'judicial proceeding' as to when it can be said to have commenced, we, therefore, make it clear

that interpretation of the article above should not be misunderstood by deriving any conclusions by implication excepting the one we have expressly

laid down that in case a judicial proceeding is not instituted within the time limit prescribed by sub clause (iii) clause (a) of Article 168A CSR, the

gratuity of a retiree cannot be withheld by taking recourse to Article 240G CSR notwithstanding the commencement and pendency of a judicial

proceeding instituted beyond the period stipulated therein.

13. However, as the Bench declined to define the expression, 'judicial proceedings' as used in subclause (iii) of clause (a) and clause (c) of Article

168A of the CSR because it was found not necessary for the disposal of the case. Since, the expression 'judicial proceedings' is defined in Section

4 (i) of the Code of Criminal Procedure, and it will not require much debate. Section 4 (i) of the Code of Criminal Procedure, thus, reads, as

under:

S.4 (i) ""Judicial Proceeding"": includes any proceeding in the course of which evidence is or may be legally taken on oath.

In Black's Law Dictionary Seventh Edition, the term 'judicial proceedings' is defined as 'any Court proceeding'. Moreover, the expression

'instituted', occurring in clause (c) of Article 168A of the CSR means and connotes institution of judicial proceedings in Court and not a mere

complaint or First Information Report which only sets in motion investigation during which statements are recorded without administering oath. The

word 'judicial' has been defined in Black's Law Dictionary, Seventh Edition as belonging to the Office of a Judge as judicial authority relating to the

administration of justice as judicial officer, having the character of judgment or formal legal proceedings from a Court of justice; as judicial writ, a

judicial determination..."" So, the institution of judicial proceedings means an institution of proceedings relating to or by the Court.

14. In other words, the institution of proceedings in this case means the presentation of charge sheet in the Court of learned Special Judge,

AntiCorruption within one year from 31.3.1998, the date when the petitioner was retired from service, but it was produced after more than two

and half years in the Month of August 2000. Hence, Article 1G8D (1) of the CSR cannot be said to be attracted in this case and the petitioner is

entitled to pension which is due to him and not provisional pension.

15. Similarly, applying the ratio of the judgment given in Dr. Kulwant Singh's case (supra), the petitioner is also entitled to release of gratuity

because it could be withheld only if the criminal proceedings were initiated against him within one year of his retirement, because the consequences

of clause (a) (ii) and (iii) are the same.

16. Next comes the question of release of nonpayment of leave salary due to the petitioner at the time of his retirement. The stand of the

respondents in this context is that it is not payable under Rule 37 (2) (v) of the Revised Leave Rules, 1979 and the question as to whether the

respondents are justified in withholding the leave salary, it is relevant to advert to Rule 37 (2) (v) of the Revised Leave Rules, 1979 which reads, as

under:

37 (2) (v): The authority competent to grant leave may withhold whole or part of cash equivalent of earned leave in the case of a Government

servant who retires from service on attaining the age of retirement while under suspension or while disciplinary or criminal proceedings are pending against him. If in view of such authority there is possibility of some money becoming recoverable from him on conclusion of proceedings against

him on conclusion of proceedings, he will becomes eligible to the amount so withheld, after adjustment of Government dues, if any.

17. But before the resort can be had to this Rule either disciplinary or criminal proceedings must be pending against an employee. Admittedly, no

disciplinary proceedings are pending against the petitioner. It is also a fact that no criminal proceedings were pending against him at the time when

the leave salary became due to the petitioner.

18. The question for consideration is as to when criminal proceedings can be said to be pending so as to attract the bar of Rule 37 of Revised

Leave Rules, 1979.

19. The scope of expression 'criminal proceedings' pending as has been used in the Sealed Cover procedure prescribed for the Central Services

fell for the consideration of their lordships of the Supreme Court in case reported as AIR 1991 SC 2010, titled Union of India, etc. v. K.V.

Jankiraman, etc, etc., while affirming the judgment passed by the Central Administrative Tribunal held that;

...the Full Bench of the Tribunal has held that it is only when a charge memo in a disciplinary proceedings or a chargesheet in a criminal

prosecution is issued to the employee it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The

sealed cover procedure is to be resorted to only after the chargememo/ chargesheet is issued. The pendency of preliminary investigation prior to

that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point...

Their lordships further held that the pendency of criminal investigation is not the same as pendency of criminal proceedings. So, it is only when the

criminal proceedings are launched in the Court that Rule 37 of the Revised Leave Rules is attracted and not otherwise.

20. Mrs. Shaista Hakim, learned Dy. Advocate General though stated that the petitioner had made certain appointments on the last date of his

retirement without following procedure, but admitted that no salary was paid to the appointees and their appointments were stayed. She also made

no secret of the fact that no loss has been occasioned to the Government, so the possibility of some money becoming recoverable from the

petitioner on the conclusion of the proceedings is ruled out. If, this be the position, the provision of Rule 37 (2) (v) is not applicable/attracted in this

case and the petitioner, therefore, cannot be deprived of cash in lieu of leave salary which is payable to him on superannuation under Rules.

21. This is a complete answer to the argument in so far as the reliance is placed on Rule 37 (2) (v) of the Leave Rules, 1979 because the charge

sheet was filed in August 2000, while the salary in lieu of the leave was payable in April 1998. Moreover, the competent authority has not passed

any order under Rule 37 (2) (v) of the Leave Rules, 1979, which was necessary, in the absence of which the payment of leave salary could not be

denied. That apart, an order of withholding the payment of leave salary has to be a speaking order because the authority has to form an opinion

that there is possibility of money becoming recoverable from him on conclusion of proceedings, but admittedly, no such order has been passed,

therefore, withholding of leave salary is manifestly arbitrary, illegal and without application of mind which entitles the petitioner to receive interest in

view of the law laid down by the Hon'ble Supreme Court in case reported as Gorkhpur University v. Shitla Prasad Nagendra, 2001 AIR

SOW2819, holding as under:

This Court has been repeatedly emphasizing the position that pension and gratuity are no longer matters of any bounty to be distributed by

Government but are valuable rights acquired and property in their hands and any delay in settlement and disbursement whereof should be viewed

seriously and dealt with severely by imposing penalty in the form of payment of interest.

22. It is significant that the antequated 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 Deokinandan Prasad v. State of Bihar, 1971 Supp, SCR 634 (AIR 1971 SC 1409), wherein the Supreme

Court authoritatively ruled that Pension is a right and 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. Same view was reiterated by a Constitution Bench of Apex

Court in D.S. Nakara's case (1983 (1) SCC 305) and it was held that Pension is a payment for past service rendered and it is a social welfare

measure rendering socio economic justice to those who in their hey days ceasessly toiled for the employer on an assurance that in their old age they

would not be left in the lurch. This, in fact, is the underlying rationale for grant of pension and pensionary benefits to the employee which became

due to him on his retirement from service.

23. It may further be pointed out that the right to receive pension is property under Article 31 (1) and by a mere executive order the State has no

power to withhold the same. It may also be added that denying the petitioner's the right to receive pension affects the fundamental right of the

petitioner under Articles 19 (1) (f) and 31 (1) of the Constitution and, thus, a mandamus can be issued to the State for payment of pension to

which an employee has been found entitled according to law.

24. On a careful consideration of the facts and circumstance of the case, in its cumulative, I am of the view that there is no other conclusion

possible except to say that the petitioner is entitled to receive pensionary benefits, including full monthly pension, gratuity and leave encashment on

his retirement to which he was entitled but the Government had wrongly, anillegally recommended the provisional pension in favour of the petitioner

though he was entitled to full pension, gratuity, and leave encashment on the date he was superannuated from the post of Director, Health Services,

Jammu.

25. The writ petition is, accordingly allowed and the respondents are directed to grant and authorize full pensionary benefits to the petitioner

including monthly pension, gratuity and leave encashment salary to which he is found/held entitled, that has been withheld illegally and without any

justification. The claim of the petitioner for interest on the gratuity amount and leave encashment for the period he has been deprived on his

retirement, is also allowed and the respondents are directed to pay the interest @ 9% per annum on the amount of gratuity and the leave

encashment for the period it remained withheld till the date same is released. This shall be done by the respondents within a period of three months

from the date a copy of the order is made available by the petitioner to the respondents and also to the respondents' counsel. In case the same is not done, in compliance to the aforesaid direction by the respondents, the enhanced interest @ 3% per annum shall also become payable on the amount of gratuity and leave encashment.

26. Petition is disposed of in the terms indicated above.