
(2004) 02 BOM CK 0078
In the Bombay High Court
Case No : Writ Petition No. 3120 of 2002

N.C. Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-02-2004

Acts Referred:

Public Premises (Eviction of Unauthorised Occupants) Act, 1971 — Section 7
Railway Services (Pension) Rules, 1993 — Rule 15(2), 323

Citation : (2004) 3 ALLMR 562 : (2004) 3 BomCR 24 : (2004) 3 MhLj 478

Hon'ble Judges : S.C. Dharmadhikari, J; A.P. Shah, J

Bench : Division Bench

Advocate : Rahul G. Walia, for the Appellant; D.C. Dhawan and T.J. Pandian, for the Respondent

Judgement

S.C. Dharmadhikari, J.—Rule. Respondents waive service. By consent Rule made returnable forthwith. By this petition under Article 226 of the Constitution of India, the petitioner challenges an order dated 24th October 2001 passed by Central Administrative Tribunal, Mumbai in O.A. 305 of 1997. By the impugned order the Tribunal upheld the order dated 30th October 1996 issued by the respondents herein. The challenge arises in the following factual Background.

2. The petitioner retired as a Traffic Costing Officer from Central Railway on attaining age of superannuation on 31st October 1993. In the year 1991, when the petitioner was working as SEM (M and S), Head Quarter Mumbai he came to be transferred to Jhansi by office order No. 574 of 1991 dated 24th October 1991. He reported sick and joined duties on 6th July 1992 at Jhansi. While serving at Bombay, the petitioner was allotted railway quarter. It is the case of the respondents that even after the transfer order, the petitioner continued to occupy the said quarter and did not vacate the same. Even after reporting for duty at Jhansi, the petitioner did not vacate the staff quarter. The permission to retain the quarter came to an end on 5th September 1992 as it was only for a period of two months. The said permission was granted subject to payment of

flat rate of licence fee. Thereafter, the petitioner was permitted to retain the quarter upto 31st March 1993 as a special case and no further permission came to be granted. It is the case of the respondents that he was transferred back to Mumbai in October 1993. Although, as per the rules, upon transfer to Mumbai the petitioner was not entitled to remain in the said quarter and was required to make a fresh application, he continued to occupy the said quarter. Since the petitioner did not vacate the said quarter after the permission came to an end, letters were addressed on 25th May 1993 informing the petitioner that permitted period of retention being over, the retention beyond such permission will be treated as "unauthorised occupation" and rent will be recovered at damage rate. He was also called upon to vacate the quarter failing which eviction proceedings would be initiated. This demand was reiterated vide letter dated 29th December 1993.

3. It appears that ultimately an order was passed after the petitioner retired from service on 30th October 1996, recovering an amount of Rs. 54,609/- from the death cum retirement gratuity/terminal benefits granted to the petitioner. It is this order of the respondents which was impugned in the original application.

4. A reply/written statement was filed by the respondents dealing with the contents of the O.A. in which the respondents reiterated the above stand and invited the attention of the Tribunal to the correspondence on record. Further, reliance was placed on the rules and particularly Rule 15(2) of Railway Service Pension Rules 1993. It is the case of the respondents that these rules empower the authorities to recover dues which remained outstanding at the date of retirement and such dues include the dues pertaining to the outstanding rent. The recovery is to be made in accordance with these rules by adjusting amount of DCRG becoming payable to the concerned employee.

5. The Tribunal after hearing parties agreed with the submissions of the respondents. It negated the plea raised on behalf of the petitioner that the order of recovery suffered from serious legal infirmities and is also passed in violation of the principles of natural justice. Consequently the O.A. was dismissed.

6. Shri Walia, learned Counsel appearing on behalf of the petitioner contended before us that the order passed by the Tribunal suffers from serious errors apparent on the face of record. In his submission, the Tribunal has failed to appreciate basic and fundamental aspects of the matter. He contended that it is well settled position in law that merely because the employee concerned has refused to vacate or has over-stayed in the service quarters, dues pertaining such refusal or retention cannot be recovered from the terminal benefits due and payable to the employee nor can they be withheld on that ground. He further contended that the only remedy, in such cases, available to the authorities is to initiate proceedings u/s 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 by approaching authorities stipulated thereunder. He contended that authorities themselves cannot take upon the power to assess and recover such dues and that too by adjusting the same from terminal benefits of

the employee. He pointed out that the action in this case is thus wholly illegal. Further, he points out that the action is in complete breach of the principles of natural justice because no opportunity was given to the petitioner to put forward his case before the impugned order dated 30th October 1996 was passed by the authorities.

7. Shri Walia, in support of his submissions relies upon a decision of the Supreme Court in the case of Gorakhpur University v. Dr. Shitla Prasad Nagendra and Ors., reported in 2001 SCC 1032; and a Division Bench of this Court in the case of V.U. Warriar v. Secretary, Oil and Natural Gas Commission, Dehradun and Anr. reported in 2003 (3) M.L.J. 168.

8. Alternatively, it is contended by Shri Walia that assuming without admitting that some power to assess and recover dues such as outstanding rent, damage rent is conferred upon the authorities vide the rules framed in 1993, these rules can have no application to the case of the petitioner as he admittedly retired prior to the said rules coming into force. He further submits that rules themselves contemplate assessment and recovery of the sums due and in this behalf he invited our attention to Rule 15 of Railway Service Pension Rules, 1993.

9. On the other hand, Shri Dhavan learned Counsel appearing for the respondents contended before us that the view taken by the Tribunal is in accordance with law. Shri Dhavan, contended that not only in accordance with the rules then prevailing but also on account of instructions and circulars of railway board in force, it was permissible for the authorities to adjust the dues from the terminal benefits admissible to the petitioner. He pointed out that the order dated 30th October 1996, is issued pursuant to the correspondence exchanged between the parties and also on account of non compliance of undertaking given by the petitioner to vacate the staff quarters and upon non vacating the same, undertaking to pay damage rent. In his submission, in view of the admitted facts on record, there was no need for any adjudication or assessment and the admitted and obvious dues have been adjusted from the terminal benefits. In this view of the matter, according to Shri Dhavan, there is no substance in the contention raised on behalf of the petitioner.

10. In support of his submissions Shri Dhavan places reliance upon the decision of the Supreme Court in the case of Union of India v. Sisir Kumar Deb, reported in 7999 SCC 781. He also points out that the decision relied upon by Shri Walia in the case of Madan Mohan Prasad, reported in 2002 (2) SLJ 217 will not apply in the instant case and is distinguishable. Similar is his submission qua the judgment of the Supreme Court in Gorakhpur University (supra).

11. For properly appreciating the rival contentions, it is necessary to refer to the Manual of Railway Pension Rules, 1950 issued by the Government of India, Ministry of Railways and more particularly Clause 323 therein. The relevant portion of which reads thus :--

"323 (i) A claim against the Railway servant may be on account of one or the

other of the followings :--

a) losses (including short collection in freight charges shortage in stores) caused to the Government as a result of negligence or fraud on the part of the Railway servant while he was in service;

b) other Government dues such as overpayment on account of pay and allowances, or admitted and obvious dues such as house rent, Post Office Life Insurance premia, outstanding advance, etc.;

c) non-Government dues.

ii) Recovery from recurring pensions as also commuted value thereof, which are governed by the Pensions Act, 1871, can be made only in terms of para 315; accordingly, a recovery of only item (a) may be made from these provided the conditions laid down in para 315 are fulfilled. A recovery on account of item (a) which cannot be made in terms of Para 315, and any recovery on account of items (b) and (c), cannot be made from these even with the consent of the Railway servant. The amount due on account of item (a) which cannot be recovered from these and/or on account of item (b), can, however, be recovered from ordinary/terminal/death/death-cum-retirement gratuity which are not subject to the Pensions Act, 1871. It is permissible to make recovery of Government dues from the ordinary/terminal/death/death-cum-retirement gratuity due even without obtaining his consent, or without obtaining the consent of the members of his family in the case of a deceased Railway servant."

12. Since a reference is also made to Clause 15 of the Railway Service Pension Rules, 1993 the same is also reproduced hereinbelow :--

"15. Recovery and adjustment of Government of railway dues from pensionary benefits :--

(2) The railway or Government dues are ascertained and assessed, which remain outstanding till the date of retirement or death of the railway servant, shall be adjusted against the amount of the retirement gratuity or death gratuity or terminal gratuity and recovery of the dues against the retiring railway servant shall be regulated in accordance with the provisions of Sub-rule (4).

(3) For the purpose of this rule, the expression "railway or Government due" includes :--

(a) dues pertaining to railway or Government accommodation including of arrears of licence fee, if any;

(b) dues other than those pertaining to railway or Government accommodation, namely balance of house-building or conveyance or any other advance, overpayment or pay allowances, leave salary or other dues such as Post Office or Life Insurance premia, losses (including short collection in freight charges shortage in stores) caused to the Government or railway as a result of negligence or fraud on the part of the railway servant while he was in service."

13. In our view, Clause 323 of the Railway Pension Rules, 1950 (for short the 1950 Rules) provide for recovery of Government dues and vide Clause (b) thereof recovery of admitted and obvious dues such as house rent etc.

14. In the case of Union of India v. Madan Mohan Prasad (supra) ambit and scope of Rule 323 of 1950 Rules was considered by the Supreme Court. After referring to the said rule this is what the Supreme Court has observed in paras 2 and 3 of the said judgment:--

"2. The learned Counsel for the appellants relied upon the decisions of this Court in Union of India v. Sisir Kumar Deb, 1999 (1) SCC 781, Director of Technical Education v. K. Sita Devi, 1991 Supp. (2) 386 and Wazir Chand v. Union of India and ors., JT 2000 (Supp.1) SC 515 in none of these decisions, the actual import or the effect to the relevant rules regarding payment of DCRG had been considered. In that view of the matter, these decisions cannot be of much help to the appellants. The relevant rule applicable so far as the respondent is concerned is rule 323 which is available in the manual of Railway Pension Rules, 1950. It is made clear therein that claim against the railway servant may be on account of three circumstances;

(a) losses (including short collection in freight charges shortage in stores) caused to the government as a result of negligence or fraud on the part of the railways servant while he was in service;

(b) other government dues such as overpayment on account of pay and allowances, or admitted and obvious dues such as house rent, post office, life insurance premia, outstanding advance etc.

(c) Non government dues.

3. It cannot be said that the case put forth on behalf of the appellants can be brought in any one of these categories. The claim made on behalf of the appellants is not only to collect normal house rent but also penal damages, in addition. That is not within the scope of rule 323 at all. What is contemplated therein is "admitted" and "obvious" dues. The payment resulting in penal damages is neither "admitted" nor "obvious" dues apart from the fact that determination has to be made in such a matter. It is also permissible under relevant rules to waive the same in appropriate cases. In that view of the matter, it cannot be said that such due is either "admitted" or "obvious". Hence, we do not think that the view taken by the Tribunal calls for any interference. However, it is made clear that while the appellants have to disburse the DCRG to the respondent the normal house rent, inclusive of electricity and water charges, which are "admitted" or "obvious" dues can be deducted out of the same, if still due."

15. In this decision, the Supreme Court has considered all the decisions on which reliance has been placed by Shri Dhavan before us. This decision of the Supreme Court has not been noticed by the Tribunal in the impugned order. In para 3, the

Supreme Court has held that recovery of penal damages in addition to normal house rent is not within the scope of Rule 323 at all.

16. Further, the judgment in the case of Gorakhpur University has been erroneously distinguished by the Tribunal in the impugned judgment. The controversy before the Supreme Court in that case was identical. There a Professor in the said University retained the university accommodation. There, the facts are that the concerned Professor after retirement held on to the University accommodation and that too after the permissible period. There in para 2 it is observed by the Supreme Court that the action of the University in not settling the Professor's claim for terminal benefits in view of his retaining the accommodation is illegal and the claim was rightly allowed a direction came to be issued by the Allahabad High Court to release the amounts withheld with interest. In this decision, the Supreme Court has in para 5 observed as under :--

"5. We have carefully considered the submission on behalf of the respective parties before us. The earlier decision pertaining to this very university, reported in S. N. Mathur is that of a Division Bench, rendered after considering the principles laid down and also placing reliance upon the decisions of this Court reported in R. Kapur which in turn, relied upon earlier decisions in State of Kerala v. M. Padmanabhan Nair and Som Prakash. This Court has been repeatedly emphasising the position that pension and gratuity are no longer matters of any bounty to be distributed by the 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. Withholding of quarters allotted, while in service, even after retirement without vacating the same has been viewed to be not a valid ground to withhold disbursement of the terminal benefits. Such is the position with reference to amounts due towards provident fund, which is rendered immune from attachment and deduction or adjustment as against any other dues from the employee. In the context of this, mere reliance on behalf of the appellant upon yet another decision of a different Division Bench of the very High Court rendered without taking note of any of the earlier decisions of this Court but merely proceeding to decide the issue upon equitable considerations of balancing conflicting claims of respective parties before it does not improve the case of the appellant any further. Reliance placed for the appellant University on the decision reported in Wazir Chand does not also sound well on the facts and circumstances of this case. It is not clear from the facts relating to the said decision as to whether the person concerned was allowed to remain in occupation on receipt of the normal rent as in the present case. As noticed earlier, the case of the contesting respondent in this case is that the university authorities regularly accepted the rent at normal rates every month from the petitioner till the quarters were vacated and that in spite of request made for the allotment of the said quarters in favour of the son of the respondent, who is in the service of the University, no decision seems to have been taken and communicated though it is now claimed in the Court proceedings that he is not

entitled to this type of accommodation. Further the facts disclosed such as the resolutions of the University resolving to waive penal rent from all Teachers as well as that of the Executive Council dated 18-7-1994 and the actual such waiver made in the case of several others cannot be easily ignored. The lethargy shown by the authorities in not taking any action according to law to enforce their right to recover possession of the quarters from the respondent or fix liability or determine the so-called penal rent after giving prior show cause notice or any opportunity to him before even proceeding to recover the same from the respondent renders the claim for penal rent not only a seriously disputed or contested claim but the University cannot be allowed to recover summarily the alleged dues according to its whims in a vindictive manner by adopting different and discriminatory standards. The facts disclosed also show that it is almost one year after the vacation of the quarters and that too on the basis of certain subsequent orders increasing the rates of penal rent, the applicability of which to the respondent itself was again seriously disputed and to some extent justifiably too, the appellant cannot be held to be entitled to recover by way of adjustment such disputed sums or claims against the pension, gratuity and provident fund amounts indisputably due and unquestionably payable to the respondent before us. The claims of the University cannot be said to be in respect of an admitted or conceded claim or sum due. Therefore, we are of the view that no infirmity or illegality could be said to have vitiated the order, under challenge in this appeal, to call for our interference, apart from the further reason that the disbursements have already been said to have been made in this case as per the decision of the High Court."

17. We have reproduced the observations of the Supreme Court in this case because they cover identical dues. The Supreme Court has made the observations reproduced above in the context of terminal benefits. In the case before us, the Tribunal distinguishes this binding decision by observing that the said decision will not apply to the dues which are contemplated in the instant case viz., D.C.R.G. As to how this distinction can be made by the Tribunal is not clear to us. If D.C.R.G. is not terminal benefits or dues, then it partakes what other character is not explained to us by the respondents. In our view, the judgment of the Apex Court in Gorakhpur University's case is also applicable and the ratio therein was binding upon the respondents and the Tribunal. The ratio of decision cannot be ignored by holding that PF dues and D.C.R.G. are distinct payments. The Tribunal, in the instant case has, by placing reliance upon the decision in Rampujan v. Union of India reported in 1996 (1) ATJ 540, concluded that in such cases, it is permissible to pass an order as is issued in the instant case. In our view, the Tribunal committed a patent error in upholding the order dated 30th October 1996 impugned before it. A perusal of this order makes it abundantly clear that the recoveries that are being effected thereunder are not as a consequence of any assessment or adjudication of the dues. The order does not indicate as to whether any hearing was given to the petitioner before the recoveries were effected.

18. We find it difficult to hold that the power conferred vide Rule 323 of the 1950 Rules includes power to recover the amounts as are sought to be recovered in the instant case. Apart from the fact that they cannot be said to be admitted and obvious dues, in our view, recovery such as O.D. Wages, water charges, rent are clearly outside the purview of the Rules. The issue before us is concerned, also stands concluded by a decision of Division Bench of this Court in the case of V. U. Warner (supra). There, after noticing the Apex Court judgment in Gorakhpur University's case the Division bench has observed in para 5 as under :--

"5. Legal position is no more res integra that pension and gratuity becomes valuable rights and property in the hands of employees on their retirement and payment of pension and gratuity cannot be withheld even if the employee has remained in unauthorised occupation of employer's accommodation and become liable to pay damages under the allotment Rules for overstay. To recover damages from such retired employees for unauthorised occupation, the employer has to pursue appropriate remedy in law but the said amounts cannot be set off against pension and gratuity amount payable to retired employee. In M. Padmanabhan Nair case, the Apex Court held thus :--

"10. Pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become, under the decisions of this Court, valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment."

19. A debate was raised before us that the direction in this decision to recover dues for unauthorised occupancy of official quarters in accordance with law would include the Rules in question and powers conferred thereunder. We find it difficult to accept this contention. Here, the direction of the Division Bench cannot be misconstrued to mean recourse to any other mode than institution of proceedings under Public Premises (Eviction of Unauthorised Occupants) Act. If the premises partake the character of public premises then the remedy provided by Section 7 of this enactment coupled with the right of appeal provided thereunder would be the only remedy. In case of a doubt about the nature of occupancy and the character of the premises, civil suit is the other remedy. The moment authorities seek to recover penal damages in respect of official accommodation or its retention beyond the permissible period, then the aforesaid modes of recovery only are available. It is not permissible for the authorities to fall back on the Rules pertaining to grant of Terminal benefits and effect recovery therefrom.

20. It is no doubt true that it is contended by Shri Dhavan that the rules framed in 1993 permit the respondents to effect recoveries and make adjustments from terminal dues and pensionary benefits admissible to the petitioner. In the submission of Shri Dhavan, Rules framed in 1993 would cover the instant recovery. Shri Walia in rebuttal contends that the Rules which have come into force after retirement of the petitioner would not apply to him. He points out that

the petitioner retired on 31st October 1993 whereas Rules of 1993 have been brought into effect from December 1993. Prima facie, there is some substance in the contention of Shri Walia. However, it is not necessary for us to decide this question in the light of the conclusion already reached by us.

21. There is another angle from which this controversy can be appreciated. Assuming that Rule 15 of the 1993 Rules would apply, even then, a bare perusal of the Rule indicates that the railway or Government dues should be (a) ascertained and assessed and (b) they should remain outstanding till the date of retirement or death of railway servant. Only then, it is permissible to adjust the same against the amount of retirement gratuity or terminal gratuity and (c) recovery of all dues against railway servant shall be regulated in accordance with the provisions of Sub-rule (4) of Rule 15. Now, it is well settled that whenever the Legislature uses the words "ascertained and assessed" pertaining to the dues, they necessarily pre-suppose crystallisation of the dues after adjudication. That such an adjudication only will result in ascertainment and assessment of the dues is apparent. Further, that such an adjudication should be prior goes without saying. We are supported in these conclusions by the law laid down in two Supreme Court decisions reported in *S.K. Bhargava Vs. The Collector, Chandigarh and Others*, and *United Bank of India Vs. The Debts Recovery Tribunal and Others*, .

22. Therefore, it is obvious that principles of natural justice have to be adhered to and an opportunity will have to be given to the concerned employee before recoveries or adjustments are effected by the Railway or Government. In the instant case, in our view, merely addressing the letters as noted above, would not by any stretch of imagination mean compliance with the principles of natural justice. There is nothing in the order dated 31st October 1996 which would indicate that prior opportunity was given to the petitioner before adjustments were made from the terminal dues/benefits admissible to him. In this view of the matter, the conclusion of the Tribunal that opportunity was given or that there was no dispute about the dues is contrary to the material placed on record and wholly erroneous. It is difficult to agree with the conclusion of Tribunal on this aspect.

23. For the reasons aforesaid, in our view, the impugned order cannot be sustained. Consequently, the Rule is made absolute in terms of prayer Clause (a). In view of the decision of the Supreme Court in the case of *R. Kapoor v. Director of Inspection (Printing and Publication)*, reported in 1995 SCC 13 Rule is also made absolute in terms of prayer Clause (b). Respondents to make the payment as directed in prayer Clause (b) with interest at 9% p.a. within a period of twelve weeks from today. All concerned to act on an authenticated copy of this order.