
(2010) 10 AHC CK 0165
In the Allahabad High Court
Case No : Writ Petition No. 6610 of 2002

Om Prakash

APPELLANT

Vs

State of U.P. & Anr.

RESPONDENT

Date of Decision : 21-10-2010

Acts Referred:

Constitution of India, 1950 — Article 229(3), 360

Citation : (2010) 10 AHC CK 0165

Hon'ble Judges : F.I.Rebello, CJ and Shabihul Hasnain, J

Final Decision : Disposed Of

Judgement

F.I. Rebello, CJ.

1. Rule. By consent of parties, heard forthwith.

2. The writ petitioner is in the employment of respondent no.2. By means of the present writ petition, the writ petitioner seeks to challenge the Government Order dated 27.12.1999 by which, the State Government stayed the rule providing for encashment of leave in respect of Groups C and D employees. The writ petitioner is a Group C employee. This writ petition is purported to raise not only his personal grievance, but also off all similarly situated employees of respondent no.2.

It is the case of the writ petitioner that the impugned Government Order is arbitrary, unconstitutional and illegal on the ground that at the time of filing of the petition there was no financial hardship, but in pursuance of the impugned Government Order, till date, the State Government is not providing for leave encashment. Though in the writ petition issue was also raised regarding L.T.C. facility, as that is being subsequently paid, has not been argued.

3. The writ petitioner is in the service of respondent no.2. Conditions of service are regulated by Article 229 of the Constitution of India and the rules framed thereunder. For that purpose, we may gainfully referred to Rule 40 of the Allahabad High Court Officers and Staff (Conditions of Service and Conduct)

Rules, 1976 (hereinafter referred to as "the Rules, 1976"), which reads as under:

"40. Regulation of other matters. (1) All officers and servants of the Court shall be subject to the superintendence and control of the Chief Justice.

(2) In respect of all matters (not provided for in these rules) regarding the conditions of service of officers and servants of the Courts including matters relating to their conduct, control and discipline, the rules and orders for the time being in force and applicable to Government servants holding corresponding posts in the Government of Uttar Pradesh shall apply to the officers and servants of the Court subject to such modifications, variations and exceptions, if any, as the Chief Justice may, from time to time, specify.

Provided that no order containing modifications, variations or exceptions in rules or orders relating to salaries, allowances, leave or pensions shall be made by the Chief Justice except with the approval of the Governor:

Provided further that the said powers exercisable under rules and orders of Government of Uttar Pradesh by the Governor shall be exercised by the Chief Justice or by such officer as he may, by general or special order, direct.

(3) If any doubt arises in regard to a particular post in the establishment being corresponding to a post in the State Government, the matter will be decided by the Chief Justice."

4. Similarly, Article 229 of the Constitution of India, reads as under:

"229. Officers and servants and the expenses of High Courts. (1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct:

Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorized by the Chief Justice to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State.

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund."

5. The grievance of the writ petitioner is that in the impugned Government Order, it was provided that after March, 31, 2000, further instructions will be issued. However, to the writ petitioner's knowledge, no further instructions have been issued. It is pointed out that when there is any financial instability in any part of India or any part of Territory, it is open to the President under Article 360 of the Constitution of India, to issue by proclamation a declaration of financial emergency. In the absence of any such proclamation or declaration as prescribed under Article 360 of the Constitution of India, the impugned Government Order could not have been issued and consequently, it is illegal and unconstitutional. There are others averments, which are not necessary to be referred to, as they are not relevant for considering the main prayer clause, which is impugning the Government Order dated 27.12.1999 and consequential relief by way of a writ of mandamus to provide for leave encashment to the writ petitioner as well as other employees.

6. The principal grounds raised by the writ petitioner in the writ petition are: (a) that paragraph 2 of the impugned Government Order is against the provisions of Article 229 of the Constitution of India; (b) that the impugned Government Order is against the provisions of Article 360 of the Constitution of India; (c) that the impugned Government Order is violative of Article 283 of the Constitution of India and (d) that the implementation of the impugned Government Order is against the fundamental right of the writ petitioner as well as other employees.

7. A counter affidavit has been filed on behalf of respondent no.1. It is set out that the government servant earns leave in respect of the period spent on duty which is called Earned Leave. Earned Leave of 31 days is to be credited in advance in the leave account of every government servant in half yearly installments in each calendar year. 16 days Earned Leave shall be credited on first day of January and 15 days Earned Leave on the first day of July of every calendar year. In case, an employee renders lesser duties in the next 6 months, the same is adjusted @ two and half days per month.

8. For the first time, the facility of encashment of Earned Leave, credited to the leave account of the government employee, was made available w.e.f. 1.4.1973, vide G.O. dated 24.3.1973 with certain conditions. The same was suspended, vide G.O. dated 23.8.1974. The same was again provided by G.O. dated 10.10.1974 and again was affected in a modified form w.e.f. 30.10.1981. The benefit of leave encashment was provided to the employees of the State Government by means of the Government Order and initially the same was not referred in the Financial Rules. Subsequently, vide G.O. dated December 21, 1992, the provisions to the said effect were made, by making amendment to Rule 81B and Subsidiary Rule 157A of the Fundamental Rules, according to which, a government servant may be permitted to surrender a portion of earned leave at his credit and allowed cash payment in lieu thereof in accordance with orders issued by the Government in this regard from time to time.

9. Considering the financial position of the Government, vide Government Order

dated 29.1.1999, a provision was made to deposit the money of leave encashment of Group C and D State Government Employees in their General Provident Fund till 31.3.1999 and with regard to the Officers of Group A and B, benefit of leave encashment was stopped w.e.f. the calendar year of 1999. On account of the critical financial condition of the State, facility of leave encashment to Group C and D employees was stayed, vide Government Order dated 27.12.1999 and the same was extended till further orders, vide G.O. dated 13.4.2000 and at present such facility is stayed.

By amendment made in the Financial Hand Book, it has been provided that a Government servant may be permitted to surrender a portion of earned leave at his credit and allowed cash payment in lieu thereof in accordance with the orders issued by the Government in this regard from time to time. The benefit of leave encashment has not been stopped to the Group C and D employees but only stayed and there is no requirement of making amendment in the Financial Hand Book.

10. The facility of leave encashment according to the State is not the fundamental right of an employee. As a matter of fact, earlier the employees of the State Government were allowed to surrender a part of their earned leave during his service period. The same has, however, been abolished with regard to Group A and B Officers. In respect of Group C and D employees, the same has been stayed. The State Government, it is contended, is not bound to provide the facility of leave encashment in service and the reasons for suspending the facility of leave encashment have been mentioned in the Government Order dated 27.12.1999

11. Under the proviso to SubArticle (2) of Article 229 of the Constitution of India, it has been provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State. Therefore, without approval of the Governor of the State, it would not be proper to make such payments on account of salaries, allowances, leave or pension. The facility of leave encashment during the service period cannot be treated as property of an employee. The question, therefore, of applicability of Articles 360 and 283 of the Constitution of India will not arise. The salaries of the employees are paid from the consolidated fund of State and insofar as the leave encashment is concerned, it has only been stayed.

It is, therefore, stated that there is no merit in the contentions advanced on behalf of the writ petitioner and consequently, the writ petition may be dismissed.

12. Considering the contentions advanced, we have been called upon to answer the following questions:

(1) Whether there is any rule framed by the Chief Justice in exercise of the powers conferred under Article 229 of the Constitution of India, whereby an employee of respondent no.2 is entitled to leave encashment and if so, whether it is open to the Government, by an Office Memorandum, to withdraw the facility

of leave encashment?

(2) Whether considering Articles 229 (3) of the Constitution of India, refusal to allow leave encashment is violative of Article 266 read with Article 360 of the Constitution of India?

(3) Can it be said that the Circular, most specifically paragraph 2, is violative of Article 283 of the Constitution of India?

13. We may first deal with question no.1. Conditions of service of the employees of respondent no.2 are governed by Article 229 of the Constitution of India. The conditions of service of the officers and servants of a High Court, shall be such, as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorized by the Chief Justice to make rules for the purpose, provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State. The Chief Justice, therefore, has absolute control insofar as the employees of the High Court are concerned vis a vis the control by the High Court over the subordinate Courts. See High Court of Judicature of Rajasthan Vs. Ramesh Chandra Paliwal (1998) 3 SCC 72 and High Court of Judicature of Rajasthan Vs. P.P. Singh (2003) 4 SCC 239. Article 229 (3) of the Constitution of India further sets out that the administrative expenses of a High Court, including all salaries, allowances and pension payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State, and any fees or other money taken by the Court shall form part of that Fund. We have earlier reproduced Rule 40 of the Rules, 1976. In terms of the said Rules, in matters pertaining to conditions of service, the rules and orders for the time being in force and applicable to Government servants holding corresponding posts in the Government of Uttar Pradesh, shall apply to the officers and servants of the Court subject to such modifications, variations and exceptions, if any, as the Chief Justice may, from time to time, specify. Thus, it would be clear that in the absence of any other rules, the rules framed by the Government would be applicable in terms of Rule 40. As set out in the affidavit of respondent no.1, the provision for leave encashment was made for the first time w.e.f. 1.4.1973, vide Government Order dated 24.3.1973. It is not necessary to refer to the subsequent orders, as we have already set them out earlier. We may only refer to the Uttar Pradesh Subsidiary (First Amendment) Rules, 1992. Rule 80 (1) (xiii) as substituted by the Uttar Pradesh Subsidiary (First Amendment) Rules, 1992 and notified on December 21, 1992, reads as follows:

"80 (1) Earned Leave The following procedure shall deemed to have come into force with effect from January 1, 1978 in regard to calculation of an earned leave in respect of Government servants serving in the State for the period spent on duty from the date of commencement of continuous service:

(xiii)a government servant may be permitted to surrender a portion of earned leave at his credit and allowed cash payment for leave so surrendered by him in

accordance with the orders issued by Government in this regard from time to time."

14. The Government in exercise of its executive powers had issued Office Memorandum dated October 30, 1981 and subsequent Office Memorandums by which, provision was made for leave encashment as set out therein. Therefore, considering Article 229 (3) read with Rule 40 of the Rules, 1976, the provisions for payment of leave encashment to the Group C and D employees of the High Court would be governed by the Subsidiary Rules and Office Memorandums. This would be so considering Rule 40 of the Rules, 1976, which made applicable to the allowances available to the Government employees holding the corresponding posts in the service of the State Government. The law as to the scope of Article 229 of the Constitution of India and the powers of the Chief Justice, to make rules, has been settled by a series of judgments of the Supreme Court. We may gainfully refer to the State of A.P. Vs. Gopal Krishna Murthi [AIR 1976 SC 123]. We may also gainfully refer to the judgments in State of Assam Vs. Bhuvan [AIR 1975 SC 889] and Gurumoorthy Vs. A.G. [AIR 1971 SC 1850]. It would, thus, be clear that an employee holding Group C and D post in the service of the High Court would only be entitled to the leave encashment, if rule to that effect, has been made by the Chief Justice in consultation with the Governor of the State. The Government cannot, therefore, direct withholding or payment of allowances of High Court employees once rules have been made and notified. See: Akhil Kumar Bhattacharya Vs. State of U.P., AIR 1960 All. 193. The question, therefore, will be considering the rule made by the Chief Justice. In the Rules of 1976, Rule 40 refers to government rules and orders for encashment of leave and salary etc. Once an office memorandum has been stayed and has not been given effect to, in our opinion, the language of Rule 40 of the Rules, 1976 would result in holding that the Group C and D employees of the High Court would not be entitled to leave encashment, as it is stayed. Leave encashment was being paid pursuant to the Office Memorandum. It has been stayed pursuant to another Office Memorandum. Insofar as Group A and B Officers are concerned, that has been totally withdrawn. Considering Rule 80 (xiii) of the Rules of 1992 read with rule 40 (2) of the High Court Rules, the Office Memorandum providing for encashment of earned leave in respect of employees of the High Court holding Group C & D posts is also stayed.

15. Another incidental question for our consideration, is as to whether it is open to the State Government to have stayed the payment of leave encashment. The conditions of service of government employees are governed by Article 309 of the Constitution of India and the rules made thereunder and in the absence of any rule, by administrative instructions and Office Memorandums, as made from time to time. Salary and allowances form part of the conditions of service as contemplated under Article 309 of the Constitution of India. As discussed earlier, by virtue of the Subsidiary Rules, which flow from Rule 103 of the Fundamental Rules, the Government provided for leave encashment by surrender of earned leave, but that was subject to the orders issued by the Government in this

regard from time to time. The Government issued an Office Memorandum. If it was open to the State Government, by administrative instructions, to provide for leave encashment, that would also include the power to withdraw and/or to stay the Office Memorandum. This is not a case of reduction of pay but staying operation of a provision providing for leave encashment. It, therefore, cannot be said that there is no power in the Government to withdraw or stay the leave encashment and if it is so, it cannot be said that the part of the impugned Government Order is ultra vires or violative of Article 229 (3) of the Constitution of India, as the Chief Justice in making the rules has made applicable the Government rules and orders. The issue of staying payment of an allowance no doubt will be subject to Article 14 of the Constitution of India. If the State forms an opinion that the conditions are such, that the financial burden on account of payment of leave encashment, may be a small amount, for the time being, is resulting in financial hardship or the expression used as "critical financial condition", it cannot be contended on behalf of the writ petitioner that the payment of leave encashment ought not to have been stayed or stopped in the absence of any specific Act or Rule or any other Legislation and that the State Government is bound to pay the leave encashment, or to disclose how its financial position is critical. The writ petitioner has nowhere placed any material to hold that the impugned circular is a colourable exercise of power and/or to that extent, it is arbitrary. In the absence of any material, it is not possible for this Court to hold that it would not be open to the State Government to have issued the impugned order. The order staying the payment of leave encashment is a matter of policy decision of the State Government. The State apart from paying salary to its employees is also bound to implement economic programmes for the benefit of its economically backward sections of the Society. If, therefore, the State has taken a decision considering its financial position to stay the Office Memorandum, we cannot find fault with that action. The first contention is, therefore, accordingly answered.

16. We then come to the second question as to what is the effect of the provisions of Articles 360 and 266 of the Constitution of India read with Article 229 (3) of the Constitution of India. Article 229 (3) of the Constitution, charges the administrative expenses of a High Court, including all salaries, allowances and pension on the Consolidated Fund of the State. Article 266 of the Constitution of India provides for a Consolidated Fund of India and further provides as to which moneys or revenues would be included in the Fund called as "the Consolidated Fund of India". Thus, it is only in the event that allowances are payable, then it shall be chargeable on the Consolidated Fund of India maintained under Article 266 of the Constitution of India. Once we have held that presently the leave encashment is not available, the question of payment under Article 266 of the Constitution of India would not arise. Hence this contention is also liable to be rejected and is hereby rejected.

17. One more contention is based on Article 283 of the Constitution of India. In our opinion, placing reliance on Article 283, is totally misplaced. All the Article

283 of the Constitution of India provides for, is that the custody of the Consolidated Fund of India and other funds will be regulated by law made by the Parliament and, until provision in that behalf is so made, shall be regulated by rules made by the President. As we have set out while dealing with Article 266 of the Constitution of India, on the facts and circumstances of the case, Article 229 (3) of the Constitution of India is not attracted. Hence question of considering Article 283 is not, in any way, relevant for deciding the present controversy. Accordingly, that argument is also rejected.

18. The last argument as advanced is based on Article 360 of the Constitution of India. Article 360 is the power in the President. If the President is satisfied that a situation has arisen whereby financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect. Therefore, it is the executive power of the President. Merely because the State Government, in its Office Memorandum, has set out that the payment of leave encashment has been stayed on account of critical financial condition of the State, it does not ipso facto mean that the financial emergency as contemplated in Article 360 of the Constitution has arisen. As noted earlier, financial emergency would arise when the President so holds under Article 360 of the Constitution of India. We are not dealing with the issue as to whether it is open to the President, in respect of the States and the Unions, to impose financial emergency merely because the State has decided not to waive the stay on encashment of leave because of its financial condition. The expression used is "financial stability or credit of India or of any part of the territory thereof. It is true that under Article 1 (3) of the Constitution of India, the territory of India shall comprise, amongst others, the territories of the States, and that would also include the State of Uttar Pradesh. The President, having not issued any declaration under Article 360 of the Constitution of India, the argument advanced is devoid of substance and merit. We must also deprecate the practice of raising such frivolous grounds in a matter of serious jurisprudential issue. Merely because the State is not in a position to pay an allowance, a petitioner cannot plead Article 360. It is always within the right of a State to fix conditions of service based on its financial capacity. The only challenge in such matters may be under Articles 14 and 16 of the Constitution of India. Hence, this contention is also rejected.

19. In the light of the above, rule discharged. However, there shall be no order as costs.