

(2018) 01 CHH CK 0008
In the Chhattisgarh High Court
Case No : 1337 of 2005

T.P. Ratre

APPELLANT

Vs

State of Chhattisgarh & Ors.

RESPONDENT

Date of Decision : 25-01-2018

Acts Referred:

Constitution of India, Article 300A, Article 162, Article 166(3), Article 31(1), Article 19(1)(f) - Persons not to be deprived of

Citation : (2018) 01 CHH CK 0008

Hon'ble Judges : Sanjay K. Agrawal

Bench : Single Bench

Advocate : Manoj Paranjpe, Prafull N. Bharat, Ratan Pusty, Raj Kumar Gupta, Ashish Shrivastava

Final Decision : Dismissed

Judgement

1. The petitioner was subjected to departmental proceeding in accordance with the Chhattisgarh Civil Services (Classification, Control and Appeal) Rules, 1966 (for short, "the Rules of 1966") and pursuant to the said proceeding, enquiry report was submitted by the enquiry officer on 4-10-1997 holding that the petitioner was found guilty of charges levelled against him. On 6-6-1998, a copy of the enquiry report was served upon the petitioner and representation was asked to be submitted by him to which the petitioner represented vide Annexure P-3 on 28-1-1999 against the enquiry report, but the disciplinary authority did not take any decision. Meanwhile, the petitioner attained the age of superannuation and accordingly, he was superannuated on 30-6-2004 and thereafter, final order of imposition of penalty withholding an amount to the extent of 20% of pension from the petitioner, was passed by the Government of Chhattisgarh on 2-2- 2005. Questioning legality, validity and correctness of the order passed by the Government (Council of Ministers) in accordance with Rule 9 of the Chhattisgarh Civil Services (Pension) Rules, 1976 (for short, "the Rules of

1976"), this writ petition has been preferred by the petitioner holding the same to be unsustainable and contrary to Rule 9(1) of the Rules of 1976.

2. Return has been filed by the State stating inter alia that in accordance with the Rules of Business of the Executive Government, the Governor has delegated the power to withhold or withdraw pension to the Council of Ministers and accordingly, the Council of Ministers finding the petitioner guilty of grave misconduct, decided to exercise the power under Rule 9(1) of the Rules of 1976 and therefore there is no illegality in the order withholding pension to the extent of 20% and the writ petition deserves to be dismissed.

3. Rejoinder has been filed by the petitioner controverting the averments made in the return.

4. Mr. Manoj Paranjpe, learned counsel appearing for the petitioner, would attack the order on two counts firstly, that the power and jurisdiction under Rule 9(1) of the Rules of 1976 have to be exercised by His Excellency the Governor personally and said power cannot be delegated to the Council of Ministers and secondly, that even if the power and authority to pass order is delegated by His Excellency the Governor to the Council of Ministers, however, since right to receive pension is a statutory right as well as pension is a property within the meaning of Articles 300A, 19(1)(f) and 31(1) of the Constitution of India, therefore, it cannot be taken away without authority of law and the principles of natural justice have to be followed while taking away the pension of the petitioner. Mr. Paranjpe buttressed his submission by citing series of decisions rendered by the Supreme Court in the matters of *State of Punjab v. K.R. Erry and Sobhag Rai Mehta* (1973) 1 SCC 120 and *State of Punjab and Another v. Iqbal Singh* (1976) 2 SCC 1.

5. Mr. Prafull N. Bharat, learned Additional Advocate General and Mr. Ratan Pusty, learned Government Advocate appearing for the State/ respondents No.1 to 4 would strongly oppose the submissions made by learned counsel for the petitioner and would submit as under: - 1. Under Rule 7 of the Rules of Business of the Executive Government of Madhya Pradesh and Directions and Instructions issued under those Rules, the Governor of Chhattisgarh has issued directions in regard to Council of Ministers in which a list has been enumerated under which those cases shall be brought before the Council of Ministers one of which was cases relating to withholding / withdrawing or reduction in pension under Rule 9 of the Rule of 1976, therefore, power to cut pension has rightly been exercised by the Council of Ministers.

2. By virtue of Rule 9(2) of the Rules of 1976, the departmental proceeding initiated against the petitioner shall continue as if the petitioner has not retired from service and the Rules of 1966 would be applicable for imposition of penalty, but since penalty under Rule 10 of the Rules of 1966 cannot be imposed in view of actual superannuation of the petitioner from service, therefore, under Rule 9(1) of the Rules of 1976, no further opportunity of hearing is required to be

given to the delinquent Government servant and the only condition precedent to pass order under Rule 9(1) of the Rules of 1976 is, there must be finding by the Council of Ministers that the delinquent Government servant is guilty of grave misconduct. This power under Section 9(1) of the Rules of 1976 can be exercised by the Council of Minister as held in the Rules of Business of the Executive Government and Directions and Instructions issued accordingly and it has rightly been exercised.

6. Mr. Ashish Shrivastava, learned amicus curiae, would submit that under Rule 9(1) of the Rules of 1976, the competent authority is required to satisfy himself that the delinquent Government servant (retired) is guilty of grave misconduct or negligence during his service period and by virtue of Rule 9(2)(a) of the Rules of 1976, the disciplinary enquiry initiated shall be deemed to continue even after retirement.

7. I have heard learned counsel for the parties and considered their rival submissions and also went through the record with utmost circumspection.

8. In order to consider the plea raised at the Bar, it would be expedient to notice the provisions contained in Rules 9(1) and 9(2)(a) of the Rules of 1976 which provide as under: - "9. Right of Governor to withhold or withdraw pension.-(1) The Governor reserves to himself the right of withholding or withdrawing a pension or part thereof, whether permanently or for a specified period, any of ordering recovery from pension of the whole or part of any pecuniary loss caused to the Government if, in any departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon reemployment after retirement :

Provided that the State Public Service Commission shall be consulted before any final orders are passed: Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the minimum pension as determined by the Government from time to time;

(2) (a) The departmental proceedings, if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced, in the same manner as if the Government servant had continued in service :

Provided that where the departmental proceedings are instituted by an authority subordinate to the Governor, that authority shall submit a report regarding its findings to the Governor."

9. Power to withhold or withdraw pension has definitely been conferred upon His Excellency the Governor under Rule 9(1) of the Rules of 1976 by the rule making authority. The question for consideration would be power under Rule 9(1) of the Rules of 1976 has to be exercised by His Excellency the Governor personally or it

can be allocated to the Council of Ministers under the Rules of Business of the Executive Government framed by His Excellency the Governor of Chhattisgarh under Article 166(3) of the Constitution of India. In this regard, it would be appropriate to notice the relevant clause of the Rules of Business of the Executive Government of Chhattisgarh as on 1-9-2000. "PART II-DIRECTION ISSUED UNDER RULE 7 OF THE BUSINESS RULES IN REGARD TO COUNCIL CASES OR CASES TO BE BROUGHT BEFORE THE COUNCIL Under rule 7 of the Business rules, the Governor of Madhya Pradesh is pleased to issue the following directions as to the cases which shall be brought before the Council :-

The following cases shall be brought before the Council, subject to the proviso that if the Chief Minister considers any case to be so urgent as to necessitate the immediate issue of orders, he may direct the issue of orders at once, and when orders have been issued, the papers shall, without avoidable delay, be circulated and brought, before a meeting of the Council in accordance with the procedure laid down in supplementary instruction 18 under rule 13:-

(i) to (xxv) xxx xxx xxx

(xxv-A) Cases relating to withholding/withdrawing or reduction in Pension under Rule-9 of the Madhya Pradesh Civil Service (Pension) Rules, 1976."

10. Thus, the aforesaid Rules of Business framed under Article 166(3) of the Constitution of India would clearly show that under the business allocation rules, the cases relating to withholding / withdrawing or reduction in pension under Rule 9 of the Rules of 1976 shall be placed for consideration before the Council of Ministers and the Council of Ministers is the competent authority to exercise power under Rule 9 of the Rules of 1976.

11. The question as to whether the power under Rule 9 of the Rules of 1976 has to be exercised by His Excellency the Governor personally or by the Council of Ministers in accordance with the Rules of Business framed by the Government of Madhya Pradesh was the specific question raised and determined by the Supreme Court in a decision in the matter of State of M.P. and others v. Dr Yashwant Trimbak (1996) 2 SCC 305 in which Their Lordships have clearly held that under Article 166(3) of the Constitution of India, the Governor has made rule for convenient transaction of the business of the Government and the question of sanction to prosecute was dealt with by the Council of Ministers in accordance with the Rules of Business and under Article 154 of the Constitution, the executive power of the State vests in the Governor and is exercised by him either directly or through officers subordinate to him in accordance with the Constitution of India. It has been observed as under: - "14. ... It is undisputed that under Article 166(3) of the Constitution the Governor has made rule for convenient transaction of the business of the Government and the question of sanction to prosecute in the case in hand was dealt with by the Council of Ministers in accordance with the Rules of Business. Under Article 154 of the Constitution, the executive power of the State vests in the Governor and is

exercised by him either directly or through officers subordinate to him in accordance with the Constitution. The expression "executive power" is wide enough to connote the residue of the governmental function that remains after the legislative and judicial functions are taken away.

15. Under Article 163(1) of the Constitution, excepting functions required by the Constitution to be exercised by the Governor in his discretion, the Governor acts on the aid and advice of the Council of Ministers. This Court in the case of *Samsher Singh v. State of Punjab*⁴ had indicated that any function vested in the Governor, whether executive, legislative or quasi-judicial in nature and whether vested by the Constitution or by a statute (sic can) be delegated by Rules of Business unless the contrary is clearly provided for by such constitutional or statutory provision. The Court further held: (SCC p. 847, para 48)

"The President as well as the Governor is the constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Whenever the Constitution requires the satisfaction of the President or the Governor for any exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or officer under Rules of Business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of a Minister or officer under the Rules of Business is the decision of the President or the Governor."

16. After referring to the several previous authorities this Court further held: (SCC p. 849, para 57)

"For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of Union and the Chief Minister at the head in the case of State in all matters which vests in the Executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally."

17. The order of sanction for prosecution of a retired Government servant is undoubtedly an executive action of the Government. A Governor in exercise of his powers under Article 166(3) of the Constitution may allocate all his functions to different Ministers by framing rules of business except those in which the Governor is required by the Constitution to exercise his own discretion. The expression "business of the Government of the State" in Article 166(3) of the

Constitution, comprises functions which the Governor is to exercise with the aid and advice of the Council of Ministers including those which he is empowered to exercise on his subjective satisfaction and including statutory functions of the State Government. The Court has held in *Godavari Shamrao Parulekar v. State of Maharashtra*⁵ that even the functions and duties which are vested in a State Government by a statute may be allocated to Ministers by the Rules of Business framed under Article 166(3) of the Constitution. In *State of Bihar v. Rani Sonabati Kumari*⁶, where power of issuing notification under Section 3(1) of the Bihar Land Reforms Act, 1950 have been conferred on the Governor of Bihar, this Court held:

"Section 3(1) of the Act confers the power of issuing notifications under it, not on any officer but on the State Government as such though the exercise of that power would be governed by the rule of business framed by the Governor under Article 166(3) of the Constitution".

18. Therefore, excepting the matters with respect to which the Governor is required by or under the Constitution to act in his discretion, the personal satisfaction of the Governor is not required and any function may be allocated to Ministers."

12. Finally, in para 20 of *Dr Yashwant Trimbak's* case (supra), the Supreme Court has opined and clearly held that the power of the Governor under Rule 9(2) (b)(i) of the Rules of 1976 has been duly allocated in favour of the Council of Ministers under Article 166(3) of the Constitution of India and the said Council of Ministers has rightly taken the decision, and held as under: - "20. In our considered opinion, in the facts and circumstances of the present case the power of the Governor under Rule 9(2)(b)(i) has been duly allocated in favour of the Council of Ministers under Article 166(3) of the Constitution and the said Council of Ministers has taken the decision to grant sanction for prosecution of the respondent."

13. Not only this, in the matter of *Rai Sahib Ram Jawaya Kapur and others v. The State of Punjab* A.I.R. 1955 S.C. 549, the Supreme Court has clearly held that the executive power of the State under Article 162 of the Constitution is exclusively in respect of matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by Parliament. Their Lordships observed as under: - "(14) In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature? Under Article 53(1) of our Constitution, the executive power of the Union is vested in the President but under Article 75 there is to be a council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.

The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part."

The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them."

14. Likewise, in another Constitution Bench judgment of the Supreme Court in the matter of Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly and others (2016) 8 SCC 1, Their Lordships have examined as to which of the powers of His Excellency the Governor lies exclusively in his discretion and held as under: - "155. We may, therefore, summarise our conclusions as under:

155.1. Firstly, the measure of discretionary power of the Governor, is limited to the scope postulated therefor, under Article 163(1).

155.2. Secondly, under Article 163(1) the discretionary power of the Governor extends to situations, wherein a constitutional provision expressly requires the Governor to act in his own discretion.

155.3. Thirdly, the Governor can additionally discharge functions in his own discretion, where such intent emerges from a legitimate interpretation of the provision concerned, and the same cannot be construed otherwise.

155.4. Fourthly, in situations where this Court has declared that the Governor should exercise the particular function at his own and without any aid or advice, because of the impermissibility of the other alternative, by reason of conflict of interest.

155.5. Fifthly, the submission advanced on behalf of the respondents, that the exercise of discretion under Article 163(2) is final and beyond the scope of judicial review cannot be accepted. Firstly, because we have rejected the submission advanced by the respondents, that the scope and extent of discretion vested with the Governor has to be ascertained from Article 163(2), on the basis whereof the submission was canvassed. And secondly, any discretion exercised beyond the Governor's jurisdictional authority, would certainly be subject to judicial review.

155.6. Sixthly, in view of the conclusion drawn at fifthly above [para 155.5], the judgments rendered in Mahabir Prasad Sharma case⁹, and Pratapsingh Raojirao

Rane case¹⁰, by the High Courts of Calcutta and Bombay, respectively, do not lay down the correct legal position. The constitutional position declared therein, with reference to Article 163(2), is accordingly hereby set aside."

15. In view of the aforesaid authoritative pronouncements of the Supreme Court clearly indicating the cases in which His Excellency the Governor has to act personally or in his own discretion, I do not have any slightest doubt in my mind that the power of the Governor under Rule 9(1) of the Rules of 1976 has been duly allocated in favour of the Council of Ministers under Article 166(3) of the Constitution of India by the Rules of Business of the Executive Government and that power can be exercised by the Council of Ministers as allocated by the Rules of Business.

16. Reverting to the facts of the present case, it is not in dispute that the power under Rule 9(1)(a) of the Rules of 1976 has been exercised by the Council of Ministers and order has been passed which states as under: - "VERNACULAR MATTER OMITTED"

17. Thus, the Council of Ministers in exercise of power conferred under Rule 9(1) of the Rules of 1976 has directed to withhold 20% of pension of the petitioner.

18. In view of the above, the first point raised by learned counsel for the petitioner that power under Rule 9(1) of the Rules of 1976 has to be exercised by His Excellency the Governor personally, holds no water and accordingly, it is rejected and it is held that it has rightly been exercised by the Council of Ministers.

19. This brings me to the next question vehemently urged by learned counsel for the petitioner that in order to cut the pension to the extent of 20%, an opportunity of hearing ought to have been afforded by the competent authority i.e. the Council of Ministers before passing order for cutting pension, as right to pension is a property which is not only a constitutional right covered by Article 300A of the Constitution of India, but also a right under Articles 19(1)(f) and 31(1) of the Constitution, therefore, at least, minimum opportunity of hearing ought to have been afforded to the petitioner by the Council of Ministers.

20. Rule 9(2) of the Rules of 1976, as noticed herein-above, clearly provides that the departmental proceedings instituted during the service tenure of a Government servant (the petitioner herein), even after his retirement, shall be deemed to be proceedings under this rule and shall be continued and concluded in the same manner as if the Government servant had continued in service. This clearly stipulates that the Rules of 1966 would be applicable to conclude the enquiry proceeding initiated against the petitioner even after his retirement.

21. It is not in dispute that regular departmental proceedings were initiated against the petitioner in which he has not only submitted his reply, but also participated in the said proceeding and ultimately, copy of the enquiry report was served to him and he was asked to represent against the final enquiry report

served to him which he has admittedly and undisputedly submitted, but meanwhile he stood retired and after conclusion of hearing the matter was concluded. Since the petitioner superannuated from service, the enquiry report along with representation of the petitioner was sent to the Council of Ministers by virtue of Rule 9(1) of the Rules of 1976 to exercise the power under Rule 9 and the matter was considered by the Council of Ministers.

22. The argument of Mr. Paranjpe that one more opportunity of hearing is required deserves to be rejected, as the Rules of 1966 are applicable for holding enquiry against the petitioner in which two opportunities have already been granted to him to represent the case and to oppose the departmental proceeding to which he had already represented and the matter was sent along with enquiry report and representation to the competent authority under Rule 9(1) of the Rules of 1976. Therefore, the petitioner is not entitled for further (third) opportunity in shape of show cause notice while taking decision under Rule 9(1) of the Rules of 1976.

23. Madan B. Lokur, J (as then His Lordship was), speaking for the Delhi High Court, in the matter of R.K. Garg v. Union of India 2009 DLT (162) 670 while dealing with Rule 9(2) of the Central Civil Services (Pension) Rules, 1972 which is the *pari materia* provision to the Rules of 1976, reiterating the similar contention and repelling the argument of third show cause notice, held as under: - "10. MOREOVER, it is not as if the report of the disciplinary authority is prepared without the Petitioner's participation or without any knowledge of the material. In this context, it is important to note the procedure and circumstances in which the findings of the disciplinary authority are required to be forwarded to the President. As per the procedure explained to us, the report given by the Enquiry Officer on the conclusion of the disciplinary proceedings is furnished to the delinquent official who is entitled to make a representation in respect of the discussion and conclusions of the Enquiry Officer. Both the enquiry report as well as the representation of the delinquent official thereon are placed before the disciplinary authority who then gives his report and forwards the entire record to the President for taking a final decision in the matter on whether to impose any penalty on the delinquent official or not. It is nobody's case that while taking a decision, the President considers only the findings of the disciplinary authority and not the report of the Enquiry Officer or the representation of the delinquent official, which are the primary documents.

11. UNDER the circumstances, it is quite clear that, as per the procedure, the delinquent official fully participates in the entire process. Giving the delinquent official an opportunity to represent against the report of findings of the disciplinary authority before the award of a punishment (as canvassed by learned Counsel), would virtually amount to giving to that delinquent official a third opportunity to explain why he should not be punished - the first opportunity being during the departmental enquiry, the second opportunity being by way of a representation against the enquiry report and the third opportunity being against

the findings of the disciplinary authority. Surely, the principles of natural justice which require a fair hearing cannot be stretched to mean three fair hearings as contended by the Petitioner."

24. In a judgment rendered by the Supreme Court in the matter of D.V. Kapoor v. Union of India and others AIR 1990 SC 1923, Their Lordships again while considering the provisions contained in Rule 9(1) of the Central Civil Services (Pension) Rules, 1972 which is the *pari materia* provision to the aforesaid Rules of 1976 clearly held that under Rule 9(1) of the Central Civil Services (Pension) Rules, 1972, the only requirement for withholding or withdrawing pension is that the pensioner must be guilty of committing grave misconduct or negligence during the period of service including the service under re-employment. Their Lordships observed as under: - "5. It is seen that the President has reserved to himself the right withhold pension in whole or in part thereof whether permanently or for a specified period or he can recover from pension of the whole or part of any pecuniary loss caused by the Government employee to the Government subject to the minimum. The condition precedent is that in any departmental enquiry or the judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service of the original or on re-employment. The condition precedent thereto is that there should be a finding that the delinquent is guilty of grave misconduct or negligence in the discharge of public duty in office, as defined in Rule 8(5), explanation (b) which is an inclusive definition, i.e. the scope is wide of mark dependent on the facts or circumstances in a given case. Myriad situation may arise depending on the ingenuity with which misconduct or irregularity was committed. It is not necessary to further probe into the scope and meaning of the words "grave misconduct or negligence" and under what circumstances the findings in this regard are held proved. ...

6. As seen the exercise of the power by the President is hedged with a condition precedent that a finding should be recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty while in office, subject of the charge. In the absence of such a finding the President is without authority of law to impose penalty of withholding pension as a measure of punishment either in whole or in part permanently or for a specified period, or to order recovery of the pecuniary loss in whole or in part from the pension of the employee, subject to minimum of Rs.60/-.

7. Rule 9 of the rules empowers the President only to withhold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory right. The measure of deprivation therefore, must be correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Art. 41 of the Constitution. The impugned

order discloses that the President withheld on permanent basis the payment of gratuity in addition to pension. The right to gratuity is also a statutory right. The appellant was not charged with nor was given an opportunity that his gratuity would be withheld as a measure of punishment. No provision of law has been brought to our notice under which, the President is empowered to withhold gratuity as well, after his retirement as a measure of punishment. Therefore, the order to withhold the gratuity as a measure of penalty is obviously illegal and is devoid of jurisdiction."

25. In view of the above, the petitioner is not entitled for third opportunity of hearing / show cause notice while cutting the pension and exercising the power under Rule 9(1) of the Rules of 1996 by the Council of Ministers. Thus, the second contention of the petitioner that further / third opportunity of hearing ought to have been afforded to the petitioner by the Council of Ministers before passing the order under Rule 9(1) of the Rules of 1996, is hereby rejected.

26. As a fallout and consequence of the aforesaid discussion, the writ petition deserves to be and is accordingly dismissed leaving the parties to bear their own costs. This Court appreciates the valuable assistance rendered by Mr. Ashish Shrivastava, Advocate, who appeared as amicus in the instant case and same is placed on record.