
(2013) 02 MP CK 0119

In the Madhya Pradesh High Court

Case No : Writ Petition No. 6284 of 2008 (S)

Union of India and Others

APPELLANT

Vs

Radhelal Goud

RESPONDENT

Date of Decision : 25-02-2013

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2013) ILR (MP) 1325 : (2013) LabIC 3081 : (2013) 2 MPLJ 432

Hon'ble Judges : S.A. Bobde, C.J.;K.K. Trivedi, J

Bench : Division Bench

Advocate : S.A. Dharmadhikari, for the Appellant; Narendra Sharma, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Trivedi, J.—By this petition under Article 227 of the Constitution of India, the petitioners have called in question the order dated 12-3-2008 passed in O.A. No. 793/2007 by the Central Administrative Tribunal, Bench at Jabalpur (hereinafter referred to as the Tribunal for brevity). It is contended that the Original Application filed by the respondent was wrongly allowed directing fixation of the pay of the respondent in the higher pay scale, treating it as an appointment to a post carrying higher responsibility and pay him the arrears and pensionary benefits based on such fixation. It is contended that the respondent was only given the charge of the next higher post, since he has discharged the duty of the said post, he was entitled to grant of benefit of pay of the said post, but was not entitled to get the benefit of fixation of pensionary claims on the basis of such pay of the higher post and to that extent the order passed by the learned Tribunal is bad and is liable to be set aside. Hence, this writ petition is required to be filed. Briefly stated facts of the case are that the respondent was working as Head Sorting Assistant. While discharging the duty as such, he was posted as officiating Head Record Officer vide order dated 20-1-2006. However, since the pay of the post of Head Record Officer was not granted to the respondent, he

made an approach to the Tribunal by way of filing Original Application No. 917/2006. The said Original Application was disposed of vide order dated 20-2-2007 by the Tribunal directing the petitioners herein to consider and decide the representation of the respondent by passing a reasoned and speaking order within three months. The representation of the respondent was decided by the petitioner on 13/16-4-2007 and since the same was rejected, the Original Application No. 793/2007 was filed by the respondent seeking a direction against the petitioners to pay the salary to the respondent in the pay scale of Rs. 6500-10,500/- with effect from 20-1-2006 to 31-7-2006. The respondent in fact had attained the age of superannuation and had retired on 31-7-2006. A further prayer was made by the respondent for refixation of his pensionary claim on the basis of refixation of his salary in the higher post.

2. Such a claim made by the respondent was opposed by the petitioners stating that the recruitment Rules prescribed promotion on the higher post and since the respondent was not selected for promotion, mere officiating working of the respondent was not enough for grant of pay of the higher post. It was contended that since the respondent was not substantively holding the post of Head Record Officer which falls within the cadre of higher service Grade-I, the respondent was not entitled to the pay of the said post and was also not entitled to get the pensionary benefits fixed on the basis of such higher pay scale.

3. After hearing learned counsel for the parties at length, the Tribunal came to the conclusion that once the respondent was made to officiate on a post carrying higher responsibility and he actually discharged the duties of the higher post he was entitled to salary attached to the higher post. Mere payment of the salary of the higher post will not amount to a regular promotion on the said post if on account of officiating working on the higher post such salary of the higher post is paid. Relying on the decisions rendered by the Apex Court in the case of Selvaraj Vs. Lt. Governor of Island, Port Blair and Others, and in the case of Dwarka Prasad Tiwari Vs. M.P. State Road Transport Corporation and Another, the Tribunal reached to the conclusion that the respondent was entitled to the salary of the post on which he was made to officiate and, accordingly, if he has retired from the services, while working on the higher post, he would be entitled to grant of pensionary benefits only on the basis of calculation to be done taking into account the salary of the higher post. In view of this finding, the Original Application of the respondent was allowed, against which order this writ petition is filed.

4. Learned counsel appearing for the petitioners, vehemently, contended that even if (he pay in the pay scale attached to the higher post is granted to the respondent, it cannot be treated as pay within the meaning of Fundamental Rule 9(21) for the purposes of computing and calculating the average emoluments on the basis of which the pension and pensionary claims of the retired Government servant are to be settled. It is contended that under the Central Civil Services (Pension) Rules, 1972 (hereinafter referred to as Pension Rules for short),

specific provisions are made with respect to the emoluments. Drawing attention of this Court to the provisions of Rule 33 of the Pension Rules, it is contended that the pension is required to be fixed taking into account the average emoluments which according to learned counsel for the petitioners means in terms of the provisions of Rule 34 of the Pension Rules, with reference to the average emoluments drawn by a Government servant during the last ten months of his service. It is contended that the expression emoluments makes it clear that only the pay which is sanctioned for a post held by any employee substantively or in officiating capacity is to be taken into account and, thus, it was not correct on the part of the Tribunal to hold that since the respondent would be entitled to draw the salary in the pay scale of a higher post, his pension was also required to be fixed computing the said pay as emoluments defined under the Pension Rules.

5. Per contra, it is contended by learned counsel appearing for the respondent that once the pay of the higher post is ordered to be paid to the respondent, average emoluments would be calculated on the basis of whatever emoluments the respondent has drawn during the last ten months of service and in accordance to the said emoluments, the pension is required to be fixed. All other retiral dues are also to be computed taking into account the aforesaid average emoluments. Thus, if such a direction is given by the Tribunal, no wrong has been committed. It is contended that all such submissions made by learned counsel for petitioners are devoid of any substance and deserve to be rejected. The writ petition is liable to be dismissed.

6. We have heard the learned counsel for the parties at length and have carefully gone through the provisions of Rules and the findings recorded by the learned Tribunal.

7. It is not in dispute that the respondent had officiated on a higher post and has discharged the greater responsibility than the substantive post of the respondent. Thus, to us it is clear that the Tribunal was right in holding that the respondent would be entitled to payment of salary in the pay scale of the higher post. The law is well settled in this respect in the cases of Selva Raj and Dwarika Prasad Tiwari (supra) which have been rightly relied on by the Tribunal. To this extent, the order of the Tribunal is to be upheld.

8. However, we have to examine whether there was any justification in directing calculation of the pension of the respondent on the basis of the salary which he has drawn on the higher pay scale and whether could it be treated that the respondent was in fact appointed to a post carrying the higher responsibility. The Pension Rules 33 and 34 need to be examined and interpreted which are reproduced for the aforesaid purposes as under:--

33. Emoluments. -- The expression "emoluments " means basic pay as defined in Rule 9(21)(a)(i) of the Fundamental Rules which a Government servant was receiving immediately before his retirement or on the date of his death, and will

also include non-practising allowance granted to medical officer in lieu of private practice.

Explanation -- Stagnation increment shall be treated as emoluments for calculation of retirement benefits.

Note 1. -- If a Government servant immediately before his retirement or death while in service had been absent from duty on leave for which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn had he not been absent from duty or suspended shall be the emoluments for the purposes of this rule:

Provided that any increase in pay (other than the increment referred to in Note 4) which" is not actually drawn shall not form part of his emoluments.

Note 2. -- Where a Government servant immediately before his retirement or death while in service had proceeded on leave for which leave salary is payable after having held a higher appointment whether in an officiating or temporary capacity, the benefit of emoluments drawn in such higher appointment shall be given only if it is certified that the Government servant would have continued to hold the higher appointment but for his proceeding on leave.

Note 3. -- If a Government servant immediately before his retirement or death while in service had been absent from duty on extraordinary leave or had been under suspension, the period whereof does not count as service, the emoluments which he drew immediately before proceeding on such leave or being placed under suspension shall be the emoluments for the purposes of this rule.

Note 4. -- If a Government servant immediately before his retirement or death while in service, was on earned leave, and earned an increment which was not withheld, such increment, though not actually drawn, shall form part of his emoluments:

Provided that the increment was earned during the currency of the earned leave not exceeding one hundred and twenty days, or during the first one hundred and twenty days of earned leave where such leave was for more than one hundred and twenty days.

Note 5. -- (Deleted).

Note 6. -- Pay drawn by a Government servant while on deputation to the Armed Forces of India shall be treated as emoluments.

Note 7. -- Pay drawn by a Government servant while on foreign service shall not be treated as emoluments, but the pay which he would have drawn under the Government had he not been on foreign service shall alone be treated as emoluments.

Note 8. -- Where a pensioner who is re-employed in Government service elects in terms of clause (a) of sub-rule (1) of Rule 18 or clause (a) of sub-rule (1) of

Rule 19 to retain his pension for earlier service and whose pay on re-employment has been reduced by an amount not exceeding his pension, the element of pension by which his pay is reduced shall be treated as emoluments.

Note 9. --(Deleted).

Note 10. -- When a Government servant has been transferred to an autonomous body consequent on the conversion of a Department of the Government into such a body and the Government servant so transferred opts to retain the pensionary benefits under the rules of the Government, the emoluments drawn under the autonomous body shall be treated as emoluments for the purpose of this rule.

34. Average Emoluments. -- Average emoluments shall be determined with reference to the emoluments drawn by a Government servant during the last ten months of his service.

Note 1. -- If during the last ten months of his service a Government servant had been absent from duty on leave for which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn had he not been absent from duty or suspended shall be taken into account for determining the average emoluments:

Provided that any increase in pay (other than the increment referred to in Note 3) which is not actually drawn shall not form part of his emoluments.

Note 2. -- If, during the last ten months of his service, a Government servant had been absent from duty on extraordinary leave, or had been under suspension the period whereof does not count as service, the aforesaid period of leave or suspension shall be disregarded in the calculation of the average emoluments and equal period before the ten months shall be included.

Note 3. -- In the case of a Government servant who was on earned leave during the last ten months of his service and earned an increment, which was not withheld, such increment though not actually drawn shall be included in the average emoluments:

Provided that the increment was earned during the currency of the earned leave not exceeding one hundred and twenty days or during the first one hundred and twenty days of earned leave where such leave was for more than one hundred and twenty days.

A plain and simple reading of Rule 33 of the Pension Rules will make it clear that the emoluments means basic pay as defined in Rule 9(21)(a)(i) of the Fundamental Rule. Such a definition is also important for examination and, therefore, the same is also reproduced for ready reference:--

9(21)(a) Pay means the amount drawn monthly by a Government servant as --

(i) the pay, other than special pay or pay granted in view of his personal

qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and

(ii) overseas pay, special pay and personal pay; and

(iii) any other emoluments which may be specially classed as pay by the President.

9. Now if the provisions of the Pension Rules are seen, it is not in dispute that the respondent was paid the salary of the higher post with effect from 20-1-2006 to 31-7-2006 for working on the higher post though in officiating capacity. For the rest of the period, completing ten months average, the salary as was drawn by the respondent was to be taken into consideration and then the average emoluments of the respondent was to be fixed and only on the basis of the said average emoluments the pension of respondent was required to be calculated and all other retiral dues of the respondent are to be computed and payment is required to be made. However, officiating posting will not mean an appointment to the post carrying higher responsibility.

10. A plain and simple interpretation of the Rules would be that whatever actual payments were made to the respondent for the last ten months of working were to be taken into consideration while computing his average emoluments on the date of his retirement and the calculation of pension was required to be done accordingly.

11. The crux of the order passed by the Tribunal is only this much and nothing else. No other meaning of the order of the Tribunal is possible. That being so, we find no infirmity in the order passed by the Tribunal. The writ petition fails and is hereby dismissed. However, there shall be no order as to cost.