
(2014) 07 AHC CK 0160

Allahabad High Court

Case No: C.M.W.P. No. 26825 of 2009

Kishan Lal Pathak

APPELLANT

Vs

U.P.S.R.T.C.

RESPONDENT

Date of Decision: July 24, 2014

Acts Referred:

- Constitution of India, 1950 - Article 300A
- Payment of Gratuity Act, 1972 - Section 4
- Road Transport Corporations Act, 1950 - Section 34

Citation: (2014) 106 ALR 642 : (2014) 6 AWC 5470 : (2014) 4 ESC 2119 : (2014) 143 FLR 937 :
(2014) 3 UPLBEC 2577

Hon'ble Judges: Suneet Kumar, J

Bench: Single Bench

Advocate: R.G. Prasad, Advocate for the Appellant; V.C. Dixit, Advocate for the Respondent

Judgement

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Suneet Kumar, J.

Heard learned Counsel for the petitioner and Sri V.C. Dixit appearing for the respondents. The writ petition was filed by Kishan Pal Pathak employee of the Uttar Pradesh Road Transport Corporation challenging the order dated 5.3.2009 passed by the Assistant Regional Manager, Hathras, making deductions from the gratuity. During the pendency of the writ petition Kishan Lal Pathak died and his legal heirs have been brought on record. For the sake of convenience, the deceased is being referred to as the "petitioner".

2. The petitioner had joined the corporation on 1.7.1970 and on 1.4.1983 was made permanent and retired on attaining the age of superannuation on 30.6.2008. Prior

to his retirement, a first information report was lodged against several persons including the petitioner on 5.10.2007 and a parallel disciplinary proceeding was initiated, a charge-sheet was issued on 15.1.2008, the petitioner submitted his reply on 12.6.2008 and during the pendency of the criminal proceedings as well as disciplinary proceedings, the petitioner superannuated on 30.6.2008 and after superannuation, the order dated 6.2.2009 was passed to culminate the disciplinary proceedings and to recover Rs. 37,274/- from the gratuity for causing loss to the property of the Corporation.

3. Submission of learned Counsel for the petitioner is that the service conditions of the petitioner is governed under U.P. Road Transport Corporation (Employees other than Officers) Service Regulations, 1981 and as per the regulation, there is no provision for continuing the proceedings beyond retirement and further there is no provision to withhold the gratuity merely on the pendency of departmental/criminal proceedings, lastly, it is submitted that under sub-clause (6) of section 4 of the Payment of Gratuity Act, 1972, no recovery can be made against the petitioner, as his services was not terminated by the Corporation for causing loss nor was the petitioner convicted. In support of his submission learned Counsel for the petitioner relied upon the case of [State of Jharkhand and Others Vs. Jitendra Kumar Srivastava and Another, ; Jaswant Singh Gill Vs. Bharat Coking Coal Ltd. and Others, ; Suresh Kumar Gadi Vs. State of U.P. and Others,](#).

4. In rebuttal Sri V.C. Dixit submits that the order imposing recovery is appealable under Regulation 69 of the Regulations and the petitioner though had superannuated, the Corporation cannot terminate his services but was entitled to make recovery from the gratuity.

5. Rival submission fall for consideration.

6. The Supreme Court in the case of [Jaswant Singh Gill Vs. Bharat Coking Coal Ltd. and Others,](#) while dealing with the case of a delinquent employee, who was issued charge-sheet for shortage of stock of coal and during the pendency of the departmental proceedings was allowed to retire and was denied payment of gratuity amount under the Payment of Gratuity Act, 1972 for the purpose of making recovery in the event recovery is directed in the disciplinary proceedings. The question before the Apex Court was as to whether the service rules shall prevail over the Act and Rule 27 provided for making recovery from the pay or gratuity for pecuniary loss caused to the company.

7. The Supreme Court held that the rules framed by the Coal India Limited are not statutory rules. The provisions of the Act, therefore, must prevail over the rules. Paragraphs 9 and 10 are as follows:

"9. A statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of a statute. It will bear repetition to state that the Rules framed by respondent No. 1 or its holding company are not statutory in nature. The

Rules in any event do not provide for withholding of retrial benefits or gratuity.

10. The Act provides for a closely neat scheme providing for payment of gratuity. It is a complete Code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, sub-section (6) of section 4 of the Act contains a non-obstante clause vis-a-vis sub-section (1) thereof. As by reason thereof, an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of sub-section (6) of section 4 of the Act speaks of termination of service of an employee for any act, willful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. The disciplinary authority has not quantified the loss or damage. It was not found that the damages or loss caused to respondent No. 1 was more than the amount of gratuity payable to the appellant. Clause (b) of sub-section (6) of section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or disorderly conduct or any other act of violence on his part or if he has been convicted for an offence involving moral turpitude. Conditions laid down therein are also not satisfied."

8. Supreme Court in [State of Jharkhand and Others Vs. Jitendra Kumar Srivastava and Another,](#) considered as to whether in absence of any provisions in the pension rules, State Government can withhold a part of pension or gratuity during the pendency of the departmental or disciplinary proceedings. Paragraph 11 is as follows:

"11. Reading of Rule 43(b) makes it abundantly clear that even after the conclusion of the departmental inquiry, it is permissible for the Government to withhold pension etc. Only when a finding is recorded either in departmental inquiry or judicial proceedings that the employee had committed grave misconduct in the discharge of his duty while in his office. There is no provision in the rules for withholding of the pension/gratuity when such departmental proceedings or judicial proceedings are still pending."

9. The Supreme Court further held that since pension and gratuity are property within the meaning of Article 300A of the Constitution of India any circular or order not having a statutory character or force of law cannot withhold the gratuity. Paragraph 15 is as follows:

"15. It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as within the meaning of aforesaid Article 300A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold - even a part of pension or gratuity. As we

noticed above, so far as statutory rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these rules, the position would have been different."

10. Division Bench of this Court in [State of U.P. and Others Vs. Jai Prakash](#), , relying upon Supreme Court judgment held that pension would include gratuity and the gratuity cannot be withheld merely due to pendency of criminal case unless there is a specific provision under the Rules. The Court was dealing with the provisions of Civil Service Regulations, 1920, which provided for withholding of gratuity Paragraphs 8, 9 and 10 are as follows:

"8. The learned Single Judge, in the present case, has proceeded on the basis that neither in Regulation 351 nor in Regulation 351-A is a withholding of gratuity contemplated during the pendency of a judicial proceeding. The learned Single Judge, with respect, has overlooked the provisions of regulation 351-AA and a specific bar which is contained in Regulation 919-A(3). In view of the specific prohibition which is contained in regulation 919-A(3), no death-cum-retirement gratuity would be admissible until the conclusion of a departmental or judicial proceeding. The expression "judicial proceeding" would necessarily include the pendency of a criminal case.

9. In a judgment of a Division Bench of this Court in *Shri Pal Vaish v. U.P. Power Corporation Limited* and another 2009 (123) FLR 794 (All.), it has been held that Clause 3 of, Regulation 919-A is a provision which specifically deals with the payment of gratuity during pendency of departmental or judicial proceedings and in view thereof, the payment of gratuity has to be deferred until the conclusion of such a proceeding. The Division Bench also held that the payment of gratuity cannot be made in view of the bar contained in regulation 919-A during the pendency of a criminal case.

10. In a recent judgment of the Supreme Court in *State of Jharkhand and others v. Jitendra Kumar Srivastava and another*, the Supreme Court dealt with the provisions of Rule 43(b) of the Pension Rules of the State of Bihar as applicable to the State of Jharkhand. Regulation 43(b) was *pari materia* to Regulation 351-A of the Civil Service Regulations in the State of U.P. In that context, the Supreme Court held that Rule 43(b) made it clear that it was permissible for the Government to withhold pension only when a finding is recorded in a departmental inquiry or judicial proceeding in regard to the commission of misconduct while in service and Rule 43(b) contains no provision for withholding gratuity when departmental or judicial proceedings are still pending. However, the Supreme Court clarified that though there was no provision for withholding pension or gratuity in the given situation, had there been any such provision in the rules, the position would have been different. In the present case, there is a specific provision contained in Regulation 351-AA read with Regulation 919-A(3)."

11. The Supreme Court in [Dev Prakash Tewari Vs. U.P. Cooperative Institutional Service Board,](#), was considering the case as to whether disciplinary proceedings after retirement of an employee could be continued in absence of any rule to that effect. In paragraphs 6 and 7 held as follows:

"6. While dealing with the above case, the earlier decision in Bhagirathi Jena's case (supra) was not brought to the notice of this Court and no contention was raised pertaining to the provisions under which the disciplinary proceeding was initiated and as such no ratio came to be laid down. In our view the said decision cannot help the respondents herein.

Once the appellant had retired from service on 31.3.2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits.

7. The question has also been raised in the appeal with regard to arrears of salary and allowances payable to the appellant during the period of his dismissal and upto the date of reinstatement. Inasmuch as the inquiry had lapsed, it is, in our opinion, obvious that the appellant would have to get the balance of the emoluments payable to him."

12. Applying the law on the facts of the case. Regulation 31 of U.P. State Road Transport Corporation Employees (Other than Officers) Service Regulations, 1981 provides for pension and other retirement benefits. Sub-clause (ii) of Clause 2 of Regulation 39 provides for gratuity in accordance with the provisions of Payment of Gratuity Act, 1972 or the relevant Government rules, as may be applicable.

13. Learned Counsel for the respondents was not able to point out any regulation or any instruction issued by the State Government under section 34 of the Road Transport Corporation Act, 1950, as to whether, gratuity can be withheld during the pendency of disciplinary proceedings or after retirement of the employee. The facts of the case are not disputed that the petitioner retired on attaining the age of superannuation and the enquiry was pending on the date of superannuation, as such, the respondents cannot withhold the payment of gratuity for want of any rules or regulations to that effect.

14. For the facts and reasons stated herein above, the writ petition is allowed. The impugned order dated 5.3.2009 is set aside and hereby quashed. The respondents shall release the gratuity amount of Rs. 37,274 to the petitioner. Legal expenses assessed at Rs. 10,000.