

Neutral Citation No. - 2024:AHC-LKO:11137-DB

Court No. - 1

Case :- SPECIAL APPEAL No. - 2 of 2024

Appellant :- U.P. Rajya Nirman Sahkari Sangh Ltd. Lko. Thru. Its Managing Director And Another

Respondent :- Purushottam Verma And Others

Counsel for Appellant :- Rakesh Kumar Chaudhary

Counsel for Respondent :- Alok Mishra,C.S.C.

Hon'ble Attau Rahman Masoodi,J.

Hon'ble Brij Raj Singh,J.

ORAL

1. Heard learned counsel for the appellants, Sri Alok Mishra learned counsel who has put in appearance on behalf of the respondent no. 1/petitioner. Respondent nos. 2 and 3 are the proforma parties.
2. The intra-court appeal under Chapter VIII Rule 5 of Allahabad High Court Rules, 1952 is directed against the order dated 22.09.2023 passed in Writ-A No. 6409 of 2023, whereby the writ petition filed by the respondent/petitioner has been allowed with certain directions as well as the order dated 28.11.2023 passed in Civil Misc. Review Application No. 239 (D) of 2023 whereby the review petition filed by the department has been allowed negatively. The aforesaid writ petition was firstly decided on 22.9.2023 and while allowing the writ petition, the writ court in paragraph Nos.6 to 8 issued the following directions:-

"6. Impugned order dated 10.05.2023 is quashed.

7. *Respondents are directed to pay the entire dues, including the gratuity and leave encashment withheld vide impugned order dated 10.05.2023, to the petitioner within a period of three months.*

8. *The petitioner shall also be entitled to interest at the rate of 7% per annum from 30th day of retirement till actual payment/realization on the unpaid amounts".*

3. The appellants herein feeling aggrieved chose to file an intra-court appeal arising out of the writ court's order passed on 22.9.2023 and the same being registered as Special Appeal No. 502 of 2023 was disposed of on 28.10.2023 in terms of the following order:-

"1. Learned counsel for the appellant submits that ends of justice would be served if the appellant is permitted to file review application before the same Bench.

2. In view of above, the appeal is, accordingly, disposed of permitting the appellant to file appropriate application before the writ Court".

4. It appears that the order dated 21.09.2023 which obstructed the release of retiral dues was already placed on record along-with the counter affidavit but the same had escaped attention of the writ court while issuing the directions extracted above. This anomaly led the appellants (employer) to invoke the remedy of filing the review application for which permission was granted by order dated 28.10.2023 mentioned above.
5. It is in this backdrop that the review application was filed by the appellants to put-forth the entire explanation so as to justify

the impediments coming in the way of release of the entire post-retiral dues admissible to the respondent no. 1(employee).

6. The option to pursue the course of review might have been opted looking to the prayer set-out in the writ petition wherein nothing, except the order dated 10.5.2023, was assailed, therefore, the directions issued by the Writ Court were understood to have been issued beyond the scope of relief. The review application instituted by the appellants was registered as Civil Miscellaneous Review Application Defective No. 239 of 2023. The writ court after hearing the parties allowed the delay condonation application and proceeded to consider on merit the review application on the same day. In paragraph 11 of the order dated 28.11.2023, the court allowed the review application. But to the utter surprise, in the preceding paragraph, the writ court proceeded to set aside the order dated 21.9.2023 apart from the order dated 10.05.2023 which was already set aside. The operative part of the order passed on review application reads as under :-

"10. Considering the submissions made at the bar, in the judgment dated 22.09.2023, this Court was of the view that unless the proceedings as contemplated under Section 4(6) of the Act are initiated merely on the basis of audit objection, the retiral dues including the gratuity cannot be withhold and the same is in violation of the provisions of Article 300-A of the Constitution of India. Even the subsequent order dated 21.09.2023 is based upon the audit objection. As no proceedings have been initiated, which can be deciphered in the order dated 21.09.2023, the analogy

on which the judgment and order dated 22.09.2023 passed, cannot be faulted.

11. To further clarify, the order dated 21.09.2023 also suffers from the same vice, based upon which, the order dated 10.05.2023 was quashed, as such, it is directed that the petitioner shall be paid the entire dues. Even otherwise, no disciplinary proceedings have also been initiated, which can be termed as the proceedings referable to Section 4(6) of the Act. The order dated 21.09.2023 is also quashed on the same reasoning.

11. The review application is allowed."

7. The direction issued by the Writ Court for release of the entire retiral dues on 22.09.2023 and setting aside the order dated 21.09.2023 in the review petition vide order dated 28.11.2023 impugned herein this intra-Court appeal were beyond the scope of relief sought in the writ petition and the very spirit of review application is the precise case put up before us.
8. It is further submitted that the directions issued by the Writ Court beyond the scope of relief which was confined to the order dated 10.5.2023 were erroneous, even if it is assumed, that the respondent no. 1 enjoyed the protection of Section 4(6) of the Payment of Gratuity Act, 1972 (hereinafter referred to as '**the Act**').
9. After decision on the review application as aforesaid, the appellants have filed the instant intra-court appeal assailing both the orders passed by the writ court firstly on 22.9.2023 issuing the directions extracted at the beginning and secondly

on 28.11.2023 while deciding the review petition in terms of the order extracted above. The review application was rather allowed by a negative order.

10. In order to appreciate the controversy, it is apt to extract the prayer made in the writ petition as follows :-

"(i) to issue a writ, order or direction in the nature of Certiorari quashing the impugned decision as taken by the opposite party no.3 for deduction of amount of Rs. 1,83,250/- from the post-retiral dues of the petitioner; as is evident from the impugned order dated 10-05-2023, contained as Annexure No.1 to this writ petition, after summoning the originals of the same;

(ii) to issue a writ, order or direction in the nature of Mandamus commanding the opposite parties not to give effect to the impugned decision so taken by the opposite party no.3 for deduction of amount of Rs. 1,83,250/- from the post-retiral dues of the petitioner; as is evident from the impugned order dated 10-05-2023, contained as Annexure No.1 to this writ petition, after summoning the originals of the same;

(iii) to issue a writ, order or direction in the nature of Mandamus commanding the opposite parties to pay the petitioner his post-retiral dues including Leave Encashment and Group Gratuity with all consequential benefits including interest thereon @ 12% w.e.f. 31-07- 2021 till the date of actual payment to the petitioner ;"

11. Undisputedly, the main relief sought in the writ petition revolved round the order dated 10.5.2023 and there were no pleadings to assail the order dated 21.09.2023.
12. On a careful perusal of the order dated 10.5.2023, we gather that the same was passed in the light of the own representation made by the respondent-employee on 11.8.2021, wherein, an

amount of Rs. 1,83,250/- was agreed to be adjusted from his post-retiral dues with reference to audit objection of the year 2002-2003.

13. Learned counsel for the appellants has argued that once the respondent no. 1-employee had himself accepted the liability to the tune of Rs.1,83,250/- to be recovered from his post-retiral dues, there was no occasion for him to have approached this Court against the said order contrary to his own undertaking.
14. The respondent no. 1 on the other hand has argued that the representation dated 11.8.2021 was made under duress as the entire post-retiral dues were withheld by the appellant(employer), therefore, the occasion to make such a representation arose under compelling circumstances.
15. Analyzing the scope of the writ petition, it is gathered that the audit objection and adjustment of an amount of Rs. 1,83,250/- by order dated 10.5.2023 from the post-retiral dues of respondent no. 1 as per his own representation were the only questions, which were relatable to the writ petition. The writ court by referring to Section 4(6) of the Payment of the Gratuity Act went unnecessarily into such an issue of no relevance. We hasten to reproduce Section 4(6) of the Payment of the Gratuity Act as under :-

"(6) Notwithstanding anything contained in sub-section (1), -

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused.

(b) the gratuity payable to an employee may be wholly or partially forfeited] -

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment".

16. The statutory provision extracted above makes it abundantly clear that unless the conditions stipulated therein are satisfied, no part of the gratuity can be withheld by the employer. It is not the case before us that the order dated 10.5.2023 was passed on satisfaction of the conditions stipulated in Section 4(6) of the Payment of Gratuity Act. The very premise of the order dated 10.5.2023 is based on an acceptance of liability by the employee i.e. respondent no. 1, therefore, any discussion on the applicability of Section 4(6) of the Act was not relevant for understanding the legal impediment, if any.
17. **The real question that crops up before us is as to whether the writ court has rightly issued the directions for release of the entire pensionary benefits.**

18. We have no doubt that the gratuity is a component of post-retiral dues and the same is regulated under the Statute. In the present case, there are two sets of provisions regulating payment of gratuity viz. Payment of Gratuity Act, 1972 and Regulation-95 of the Uttar Pradesh Co-operative Societies Employees Service Regulation, 1975.
19. We are informed that the payment of gratuity under the central legislation being more advantageous would be applicable.
20. On a close scrutiny of the judgment passed by the writ court on 22.9.2023, we do not find any anomaly insofar as the direction as to the payment of gratuity is concerned but what remains unconsidered is the effect of acceptance/undertaking submitted by the respondent-employee. Moreover, the order dated 21.9.2023 according to which a further amount to the tune of more than rupees twenty lakhs is recoverable was yet another impediment on account of which the post-retiral dues payable to respondent-employee stood held up.
21. The aforesaid analysis shows that there are two main impediments coming in way of release of the entire post-retiral dues in favour of the respondent no.1. The first impediment is the order dated 10.5.2023 which according to the appellants was passed on the own representation dated 11.08.2021 of respondent no.1-employee. The second impediment is the office memorandum dated 21.9.2023 which again is based on an audit

objection recorded in the year 2021-2022, according to the stand of the appellants.

22. These audit objections mentioned in the order dated 21.9.2023 are strongly disputed by the respondent-employee to be pertaining to the period mentioned therein.
23. According to the stand of respondent-employee, these audit objections relate to the year 2004-2005.
24. From the record, it reveals that as the post-retiral dues were not paid to the respondent No.1-employee, therefore, under compelling circumstances, the respondent No.1-employee alongwith one Dharmdev Sahu had preferred a representation on 11.08.2021 on their own for payment of post-retiral dues after deducting a sum of Rs.3,66,499/- divided equally as there was an audit objection pertaining to the F.Y. 2002-03. Thereafter, the Sangh has paid a sum of Rs.28,31,394/- to the respondent No.1-employee on 15.12.2021 towards Employees Provident Fund (EPF), and Rs.10,325/- towards Group Insurance Scheme (GIS) on 25.03.2022.
25. It is noteworthy to mention that though the respondent No.1-employee had submitted an application for deduction of a sum of Rs.1,83,250/- towards his share, yet the Sangh has not taken into consideration this fact. Surprisingly, the Sangh has neither passed any order in the above respect till 10.05.2023 nor released the dues towards Gratuity and Leave Encashment till

date. In these circumstances, the respondent No.1-employee had filed the writ petition, as aforesaid and the Writ Court has passed the impugned orders, which are under challenge in the present proceedings.

26. On considering the relevant provisions of the Payment of Gratuity Act that the respondent No.1-employee has not been terminated, the Writ Court observed that the gratuity amount can neither be withheld nor deducted from the payable amount. Thus, a direction was issued to the appellants to pay the entire amount and the impugned order dated 10.05.2023 was quashed.
27. When the aforesaid order reached the office of appellants, they immediately filed a Special Appeal which was dismissed as withdrawn with liberty to file a review petition and thereafter, they filed the review application. A specific plea has been taken by the appellants in the review petition that without considering the order dated 21.09.2023 issued by the Managing Director as well as without considering the facts mentioned in the short counter affidavit, the impugned order dated 22.09.2023 was passed by the Writ Court.
28. It appears that a short counter affidavit was filed in the writ proceedings on 22.09.2023 annexing therewith a copy of order dated 21.09.2023. Immediately on the same day, i.e., 22.09.2023 the Writ Court has allowed the writ petition filed by the respondent No.1-employee. It is not clear from the record as

to when the order dated 21.09.2023 was served upon the respondent No.1-employee except alongwith the counter affidavit. Since it has not been established from the record that the order dated 21.09.2023 had been served to the respondent No.1-employee before disposal of writ petition, therefore, it cannot be stated that the respondent No.1-employee had omitted to challenge the aforesaid order in the writ proceedings.

29. It is worthwhile to mention that since the orders dated 10.05.2023 and 21.09.2023 are on similar grounds, which do not offer any legal justification for withholding the gratuity and leave encashment, as such, they have rightly been quashed by the Writ Court on two different occasions.
30. In view of what has been stated above, the letter submitted by the respondent No.1-employee dated 11.08.2021 cannot be said to be an undertaking and moreover, the communication dated 21.09.2023 issued by the Managing Director based on the audit objections is merely a one sided objection having no force of a legal bar, therefore, the same has rightly been quashed and directed to be ignored by the Writ Court in review petition.
31. For the aforesaid reasons, the Special Appeal is **disposed of** leaving it open to the appellants to proceed for the recovery of any financial loss by adopting the due proceedings as may be permissible under law. The orders passed by the Writ Court

shall be complied with timely, subject to the proceedings initiated, if any.

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[Brij Raj Singh, J.] [Attau Rahman Masoodi, J.]

Order Date :- 7.2.2024

kanhaiya/Lakshman