

THE HON'BLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION No.15963 OF 2010

Dated:30.11.2017

Between:

T. Sudhakar, S/o. Late Lakshman Gupta,
Aged about 60 years, Occ: Retd. Conductor,
E.No.43012, R/o.21-77/1, Market Road,
Nakrekal, Nalanga District .. Petitioner

And

The Depot Manager, APSRTC, Bus
Depot, Shadnagar, Mahabubnagar
District and others .. Respondents



The Court made the following:

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ORDER:

Heard learned counsel for the petitioner and learned Standing Counsel for the respondent – Corporation.

2. Petitioner joined service as Conductor on 23.03.1973. On the allegation of cash and ticket irregularities, disciplinary proceedings were initiated against the petitioner resulting in his removal from service on 27.02.1982. This removal from service was challenged before Additional Industrial Tribunal-cum-Additional Labour Court (for short, 'the Labour Court'). Aggrieved by the order of the Labour Court in I.D.No.89 of 1986, petitioner filed W.P.No.7439 of 1989. The Writ Petition was disposed of by order dated 15.02.1996. This Court, having found punishment of removal imposed was disproportionate to charges leveled and proved, ordered for appointment of the petitioner as a fresh recruit. In terms thereof, petitioner was inducted into service as a fresh recruit on 10.10.1996 and continued to work till he attained the age of superannuation and retired from service on 31.05.2008. The instant Writ Petition is filed praying to grant gratuity payable to petitioner for the period he worked from 23.03.1973 to 27.02.1982 and for payment of pension under the Employees' Pension Scheme (EPS), 1995 for the period of service rendered by him after induction into service as a fresh candidate.

3. Learned counsel for the petitioner submits that as the petitioner rendered service for a period of approximately nine years, he is entitled to gratuity accumulated for the said period

and non-payment of gratuity is illegal and is in violation of the mandate of payment of Gratuity Act, 1972 (for short, 'the Act, 1972). He further submits that petitioner is governed by the EPS, 1995 and for the service of approximately 11 years 7 months rendered by him after his induction into service as a fresh candidate, he is entitled to pension and not paying pension amounts to arbitrary exercise of power and authority and illegally the benefits are denied to him causing hardship and suffering. Learned counsel therefore submits that petitioner is entitled to these amounts with interest for the delayed payment @ 12% per annum from the date of due till the amounts are paid.

4. Sri B. Mayur Reddy, learned Standing Counsel for the respondent – Corporation, submits that as employee was removed from service consequent to disciplinary action taken against him and he was only inducted as a fresh candidate pursuant to the directions of this Court, the entire past service gets wiped out and therefore petitioner is not entitled to claim any benefit including gratuity. Petitioner neither rendered continuous service nor had rendered satisfactory service. He was under suspension from 07.03.1977 to 10.08.1977 on the allegation of cash and ticket irregularities and again he was suspended from 20.09.1977 to 19.06.1981 on same allegation of cash and ticket irregularities. Thus, as petitioner did not render satisfactory service during this period, he is not entitled to benefit of gratuity. Further, as petitioner has rendered very limited service after his induction into service, he is not entitled to pension under EPS, 1995. For the period after his induction into service till he retired, an amount of Rs.49,175/- was paid towards gratuity and no other amount is due

to the employee. Learned standing counsel therefore submits that the petitioner's claim for these amounts and interest on the alleged delayed payments is not justified.

5. Having regard to submission made by learned counsel following point arise for determination:

- A) Whether writ petition is maintainable in view of adjudication mechanism available under the Payment of Gratuity Act, 1972?
- B) Whether petitioner is entitled to gratuity for the period of service rendered prior to his removal from service?
- C) Whether petitioner is entitled to pension under EPS, 1995?

A. MAINTAINABILITY OF WRIT PETITION:

6. Respondent – Corporation objected to maintainability of Writ Petition on the ground that under the Act, 1972 adjudicatory mechanism is created to redress grievance on payment of gratuity aggrieved and petitioner ought to have availed said remedy. When effective alternative remedy is available writ petition is not maintainable.

7. In response to this objection, learned counsel for the petitioner submits that alternative remedy is not a bar for entertaining the Writ Petition and therefore Writ Petition cannot be thrown out on the ground of availability of alternative remedy. By placing reliance on the decision of the Supreme Court in the case of ***Dr. Bal Krishna Agarwal v. State of U.P. and others***¹ and the decision of this Court in ***Smt. Narangi Bai v. Yadagiri Bal***

¹ (1995) 1 SCC 614

Raj @ Ausha Balraj² he contends, Writ Petition cannot be thrown out on the ground of availability of alternative remedy at this distance of time. Learned counsel further contends that petitioner retired from service in the year 2008 and the benefit of gratuity payable to him relates back to 1982. Thus, if the petitioner is driven to avail remedy under the Act, 1972 at this stage, it would cause grave hardship and suffering and therefore as held by the Supreme Court and this Court in the above decisions, the Court can entertain the Writ Petition and the Writ Petition need not be thrown out on that ground.

8. The petitioner rendered service from 23.03.1973 to 27.02.1982 before he was removed as a result of disciplinary action taken against him. He was later re-inducted into service in 1996, in pursuance of the directions of this Court and retired from service on 31.05.2008 on attaining the age of superannuation. This Writ Petition was instituted in the year 2010 and is now disposed of. In terms of the provisions of Act, 1972 for service rendered, employee is entitled to gratuity. It can be denied only if the conditions as incorporated in Section 4(6) of the Act, 1972 are attracted. As noted hereunder, the said requirements are not fulfilled. Thus, employee is entitled to payment of gratuity. On the claim of gratuity, relevant facts are not disputed. What is contended is on the scope of Section 4 of the Act, 1972. It is contended that as the employee was removed and subsequently re-inducted into service as a fresh candidate, gratuity for the past service prior to removal cannot be paid.

² 2011 (1) ALT 323

9. Writ remedy is an extra-ordinary remedy. It being extra-ordinary remedy, though no fetters are imposed on the writ court to entertain writ petition even if alternative remedy is available, ordinarily writ court do not entertain the writ petition if an effective remedy is available to a party, more so if it is created by statute that also creates the right and relegates to seek redress by availing statutory remedy. On the relevant facts which form the basis to determine the issue, there is no dispute. Petitioner retired from service in 2008 and is now aged about 69 years. In the facts of this case, following the decision of Hon'ble Supreme Court in **Dr. Bala Krishna Agarwal** and the decision of this Court in **Smt. Narangi Bai**, the Writ Petition need not be thrown out and the petitioner need not be relegated to the remedy available under the Act, 1972 at this distance of time. Thus, the objection of the respondent – Corporation with regard to maintainability of Writ Petition on the ground of availability of statutory remedy is rejected.

B.CLAIM ON GRATUITY:

10. To appreciate the stand of the respondent – Corporation, it is necessary to look into provision in Section 4 (6) of the Act, 1972. According to Section 4 of the Act, 1972 gratuity shall be payable to an employee on termination of his employment. Sub-section (1) thereof, does not specifically mention termination in the form of removal from service, consequent to disciplinary action. However, sub-section (6) of Section (4) of the Act, 1972 has to be considered in the light of what is contained in sub-section (1). In terms thereof, the conclusion is irresistible and employee removed from service by measure of punishment for

delinquency is also entitled to gratuity for the past service rendered. Employer can deny the gratuity only if any of the circumstances incorporated in sub-section (6) are attracted.

11. Sub-section (6) of Section 4 of the Act, 1972 reads as under:

“Notwithstanding anything contained in sub-section (1),-

(a) the gratuity of an employee, whose services have been terminated for any act, willful 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 has 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.”

12. A reading of Section 4 (6) of the Act, 1972 makes it clear, gratuity can be denied if termination of employee was on account of willful omission or negligence causing damage or loss or destruction of property belonging to the employer. Even under this clause, withholding can be to the extent of damage or loss caused, but not to the full gratuity accrued to the account of the employee. Further, gratuity also can be forfeited partially or fully, if services are terminated on account of riotous or disorderly conduct or any other act of violence on the part of the employee or the said termination is on account of offence involving moral turpitude and such offence is committed in the course of employment. These conditions are not attracted to the case on hand. At any rate no

decision was made invoking the provision under Section 4(6) of the Act, 1972 either when order of removal was passed or separately. The order passed against the petitioner was only removal without any further conditions. Thus, as the exception carved in Section 4(6) of the Act, 1972 is not attracted to the case on hand, the mandatory payment as required by substantive provision in Section 4 of the Act, 1972 is attracted and therefore the petitioner is entitled to gratuity. It is also appropriate to note that the removal from service was held to be disproportionate to the delinquency alleged and proved. Thus, petitioner cannot be called as an employee removed from service.

13. In the counter affidavit also the respondent - Corporation has not assigned any justification to deny payment of gratuity, more so in the light of the statutory mandate. Thus, the denial is *ex facie* illegal.

14. Gratuity is determined based on the service rendered by employee. Act, 1972 regulates payment of gratuity. A right is vested in an employee to receive gratuity for the service rendered by him. Thus, the amount accumulated belongs to employee and it is his property. Employer has no manner of right to withhold said amount except in accordance with Section 4(6) of the Act, 1972. Not paying gratuity to petitioner amounts to misappropriation by respondent. Since the gratuity is illegally withheld for more than 25 years, the petitioner is entitled to payment of gratuity amount with interest at 12% per annum from the date it was due till the date of amounts are paid.

C.CLAIM FOR PENSION UNDER EPS, 1995:

15. Petitioner is governed by the Employees' Pension Scheme, 1995. Minimum service required for grant of pension under the scheme is ten years. Petitioner has rendered 11 years 7 months of service after his appointment afresh in the year 1996 and till he retired in the year 2008. Petitioner has started a new journey as an employee on his induction into service as a fresh candidate in the year 1996. Service rendered by petitioner is not in dispute. The counter affidavit is silent as regards disciplinary action taken against petitioner and break in service that would disentitle him for computation of 11 years 7 months service.

16. According to the averments in the counter affidavit of the 3rd respondent, proposal sent by the respondent – Corporation was received by the Regional Provident Commissioner office on 20.08.2008. Proposal was returned with certain objections on 15.12.2008 and thereafter proposal was not resubmitted by employer; no further communication was received.

17. In the counter affidavit of respondents 1 and 2, the claim of the petitioner for payment of pension under EPS, 1995 is not denied, but is blissfully silent as to why further steps were not taken for payment of pension.

18. According to learned counsel for petitioner, even today pension is not paid to petitioner. Thus, for no justifiable reason or cause, pension payable to the petitioner under EPS, 1995 is denied. Pension under this scheme is payable by the Employees' Provident Fund Organization, but only after the proposals in

proper form are received from the employer. According to EPF authorities, on scrutiny of proposals sent, they were returned and were not resubmitted and therefore pension is not released.

19. On account of lapses on the part of the employer, the employee cannot be denied payment of pension for the service rendered by him.

20. At this stage, learned counsel for the petitioner points out that since the delay in sending proper proposals in proper form to EPFO is attributable to employer; employer has to be mulcted with interest. As there is inordinate delay in settlement of pension, petitioner is entitled to interest on delayed payment.

21. It appears, if there is delay in settlement of pension the amount of pension payable to a member of EPS, 1995 has to be kept in deposit account and would carry interest for the period of deposit. Thus, after adjusting the interest accrued in EPF account, the respondent employer has to pay balance amount by computing interest at the rate of 12% per annum. Thus, petitioner is entitled to payment of arrears of pension under EPS, 1995 with interest at 12% per annum from the date it was due till the arrears are settled and paid and continuous payment of monthly pension thereafter. However, the amount of interest accrued to the account shall be deducted. The EPF authorities shall calculate the interest amount and inform the employer. On information received from the EPF authorities, the respondent – Corporation shall deposit the interest portion of the amount to the account of petitioner and on

depositing such amount, the EPF authorities shall release the same to the petitioner.

CONCLUSION:

22.

- (i) The petitioner is entitled to payment of gratuity for the service rendered by him from 23.03.1973 to 27.02.1982;
- (ii) Petitioner is entitled to interest @ 12% per annum from the date gratuity was due till it is paid;
- (iii) Petitioner shall be paid arrears of pension under EPF, 1995 with interest @ 12% per annum from the date amount due till it is paid;
- (iv) Pension under EPF, 1995 shall continue to be paid;
- (v) The entire exercise shall be completed by the respondent – Corporation within eight weeks from the date of receipt of a copy of this order regarding payment of gratuity with interest and sending of proposals in proper form for payment of pension under EPF, 1995;
- (vi) After the proposals are received in full form for pension under EPS, 1995, the EPF authorities shall release the pension and arrears of pension to the petitioner within a period of two weeks thereafter;
- (vii) The EPF authorities shall calculate the interest amount accrued to the account of petitioner and inform the employer;
- (viii) On information received from the EPF authorities, the respondent – Corporation shall deposit the interest

portion of the amount to the account of petitioner within 4 weeks;

- (ix) EPF authorities shall release the interest portion immediately after the amount is credited by the respondent – Corporation.

23. The Writ Petition is accordingly allowed. There shall be no order as to costs. Miscellaneous Petitions, if any, filed in this Writ Petition shall stand closed.

Date:30.11.2017

KH

P. NAVEEN RAO, J



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