HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WRIT PETITION No.29357 of 2017

ORDER:

This writ petition is filed challenging the action of the 3rd respondent in issuing letter vide Lr.DAO.SA.No.15/A7/16-17, dated 23.01.2017, whereby the 3rd respondent advised the 2nd respondent to recover, pay and allowances paid to the petitioner between 31.10.2014 to 31.10.2016 from the pensionery benefits of the petitioner, and consequential recovery orders of the 2nd respondent vide Proceedings in Roc.No.C1/1425/2016, dated 18.02.2017 and proceedings of the 4th respondent vide Lr.No.AG(A&E)/AP/P16/I/V-288/SP155/2017-05/968, dated 16.06.2017 and consequently to set aside the same.

2. The case of the petitioner is that initially he joined in service on 20.04.1977 and subsequently, he was appointed by transfer as Driver from Public Health worker on 01.07.2006 and ultimately retired from service on attaining the age of superannuation w.e.f.30.10.2016. Prior to his retirement the 2nd respondent vide proceedings dated 22.09.2015 instructed the petitioner to submit his pension papers in five sets, as he is attaining the age of superannuation as on 31.10.2016 after completing 60 years, and in pursuance of the same, the petitioner submitted his pension papers and accordingly the 2nd respondent herein

permitted the petitioner to retire from service on 31.10.2016 vide proceedings dated 31.10.2016. On receipt of pension papers the 2nd respondent forwarded the same to the Accountant General for sanction of the pension and other retirement benefits. However, the petitioner received present impugned letter dated 23.01.2017 of the 3rd respondent wherein the 3rd respondent instructed the 2nd respondent to recover the pay and allowance paid to the petitioner for a period of two years by stating that the post of driver in which the petitioner retired falls under superior category and the age of superannuation for the said category is 58 years only and further stating that the petitioner could have been retired from service on 31.10.2014 instead of 31.10.2016.

3. The grievance of the petitioner is that the respondents themselves allowed him to work beyond 31.10.2014 upto 31.10.2016, and now issued impugned proceedings stating that the petitioner could have retired from service on 31.10.2014 as he has attained the age of 58 years by that date. Aggrieved by the same, he filed the present writ petition.

4. Respondents filed counter stating that petitioner was allowed to work upto 31.10.2016, though he had to retire on 31.10.2014. Hence, the 2nd respondent sought to recover the salary and allowances for the said excess service of two years rendered by the petitioner, vide proceedings in Roc.No.C1/1425/2016, dated 18.02.2017 and thereafter the

petitioner submitted representation dated 20.02.2017 to the Municipal Commissioner, Yellandu Municipality, Yellandu, requesting to deduct salary for the said excess period i.e. beyond 31.10.2014 from out of his pensionary benefits and to pay remaining balance pension amount to him. After receipt of petitioner's representation pension proposals of the petitioner were submitted to District Audit Officer, State Audit, Bhadradri, Kothagudem District vide proceedings in Roc.No.C1/1425/2016, dated 20.02.2017 along with necessary documents and recovery proposals. Only after accepting petitioner's representation for recovery of salary paid to him for the excess service of two years rendered by the petitioner, papers were submitted. Accordingly the 4th respondent issued proceedings dated 16.06.2017 sanctioning service pension and enhanced family pension, family pension, gratuity and other benefits to the petitioner, as such, sought for dismissal of the writ petition.

5. Learned counsel for the petitioner filed reply stating that the respondents obtained signatures of the petitioner on blank white papers stating that it is for the purpose release of pension; and that no such undertaking was given by the petitioner to the respondent accepting for recovery of salary and other allowance from the pensionary benefits.

6. This Court on 31.08.2017 while admitting the writ petition granted interim order in WP.MP.No.36535/2017

directing the respondents to forthwith release the pension duly accepting the pension proposals of the petitioner forwarded by the 2nd respondent consequent on retirement of the petitioner by suspending the operation of the impugned Lr.DAO.SA.No.15/A7/2016-17, dated 23.01.2017.

7. Against the said interim order dated 31.08.2017 vacate petition is filed on 11.04.2018. Meanwhile, Contempt Case No.2165/2017 is filed alleging violation of the order dated 31.08.2017 passed by this Court in WP.MP.No.36535/2017.

8. When the matter is listed today, both the counsel argued the main writ petition itself. As such, writ petition itself is being disposed of.

9. Learned Counsel for the petitioner filed IA.No.1 of 2019 seeking to amend the prayer of the writ petition for challenging the proceedings issued by the respondents consequent to the impugned proceedings and the same is allowed by this Court.

10. The only question that has to be considered is whether the respondents are entitled to recover the pay and other allowances paid to the petitioner for the period from 31.10.2010 to 31.10.2016 on the ground that he was allowed to work beyond the age of superannuation i.e. 31.10.2014.

11. The fact that the petitioner worked beyond the age of superannuation i.e. beyond 31.10.2014 is not in dispute. It is to be seen that there is no justification in the counter affidavit as to why the petitioner was allowed to continue beyond 31.10.2014 upto 31.10.2016, except stating that petitioner could have retired on 31.10.2014. Petitioner cannot be blamed or faulted for rendering services beyond 31.10.2014.

12. Learned counsel for the petitioner relied on the Judgment rendered by the Apex Court in ***Kailash Singh v. State of Bihar and others (2005) 13 SCC 576,*** wherein at para-6 it is held as follows;

> "*6.So far as post-retiral benefits are concerned it is submitted that they may not be admissible to him. We fail to appreciate the submission made on behalf of the respondents in the background of the facts indicated in earlier paragraph. The respondents took work from the appellant without any dispute. He would obviously be entitled to his salary and there is no reason as to why he should be denied the post-retiral benefits. His total service comes to 32 years. We have already adverted to the fact that the medical report has not been placed on the record, nor as to what is meant by the term "average age", has been explained to us. In the totality of the facts and the circumstances of this case, we find no good reason to deny those benefits to the appellant.*"

13. The Supreme Court while dealing with exactly similar situation in ***State of Punjab and others v. Rafiq Masih***

(white washer) and thers (2015) 4 Supreme Court Cases 334, *at para 4 & 6 held as follows;*

> *"4. Merely on account of the fact that the release of these monetary benefits was based on a mistaken belief at the hands of the employer, and further, because the employees had no role in the determination of the employer, could it be legally feasible, for the private respondents to assert that they should be exempted from refunding the excess amount received by them? Insofar as the above issue is concerned, it is necessary to keep in mind, that the following reference was made by a Division Bench of two Judges of this Court, for consideration by a large Bench:*
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> *6. In view of the conclusions extracted hereinabove, it will be our endeavour, to lay down the parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In out considered view the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee."*

14. The Calcutta High Court in WP.No.28467 (W) of 2017 while dealing with similar situation in respect of undertaking held as follows;

> "*In my considered view the issue regarding undertaking exercised by the petitioner has already been discussed in plethora of decisions of Hon'ble Supreme Court as well as Hon'ble Division Bench of this Hon'ble Court. In Stte of West Bengal & others v. Harekrishna Sardar & Anr. reported in 2009 (4) CHN (CAL) Page 136 where the Hon'ble Division bench relying on the Hon'ble Supreme Corut decision reported in AIR 1957 SC 1269 (State of Orissa vs. Dr.Miss Binapani Dey) held that even if undertaking was given but after retirement deduction from the gratuity amount without giving any opportunity of hearing to the petitioner when the petitioner was in service cannot be sustained since it is an administrative order which causes civil consequences. Accordingly the Hon'ble Division Bench affirmed the Trial Court Judgment without any interference.*"

15. In view of the above, I do not see any justification on the part of the respondents in recovering salary and allowances paid to the petitioner for the period from 31.10.2014 to 31.10.2016, from the retirement benefits of the petitioner. As far as the other aspect with regard to calculation of retirement benefits is concerned, even according to petitioner he attained the age of superannuation by 31.10.2014 and the Rules permit only calculation of period upto the age of superannuation. In view of the same, the said excess service

of two years rendered by the petitioner from 31.10.2014 to 31.10.2016 cannot be counted for calculation of pension. Though learned counsel for respondents states that proceedings dated 16.06.2017 were not challenged, those are consequential proceedings to the impugned proceedings, more so, by way of amendment the same are sought to be challenged by the petitioner.

16. In view of the aforesaid facts and circumstances, the writ petition is allowed to the extent indicated above. The amount already recovered, if any, from the petitioner shall be refunded to the petitioner within a period of six weeks from the date of receipt of a copy of this order. No order as to costs.

As a sequel to the disposal of this petition, miscellaneous petitions, if any, pending shall stand closed.

A.RAJASHEKER REDDY, J

21.02.2019
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