Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.723 OF 2014

WITH

MISC. CIVIL APPLICATION NO.1454 OF 2021 (Filing No.)

Shri Domingos Savio Monteiro Cloves Da
Costa
aged 59 years, Indian National,
Resident of T-1, Kanchanganga Apartments,
Abadefaria Road,
Margao Goa. … Petitioner

Versus

1 Agnel Polytechnic,
Through its Director,
Agnel Technical Education
Complexagnel Ashram,
Verna Goa.
2 The State of Goa,
Through its Chief Secretary
Secretariat, Alto Porvorim,
Bardez Goa.
3 The Director of Technical Education,
Directorate of Technical Education,
Porvorim Goa. …Respondents

Mr. Jitendra P. Supekar, Advocate for the Petitioner.
Mr. G. K. Sardessai with Mr. A. Carvalho and Ms. S. Bangera, Advocates for Respondent No.1.
Ms. Sapna Mordekar, Additional Government Advocate for Respondent Nos. 2 and 3.

CORAM: SUNIL P. DESHMUKH &
M. S. SONAK, JJ

DATED: 24th August 2021

ORAL JUDGMENT (Per M. S. Sonak, J)

1. Heard learned counsel for the parties. The petitioner was working as a Lecturer in the Computer Engineering Department since the year 1987 and had put in service of almost 24 years at the time when he was permitted to voluntary retire vide order dated 01.03.2013 but with effect from 12.09.2011 from service with respondent no.1, which is a Government-aided institution. On 12.08.2011, the petitioner was placed under suspension pending departmental proceedings. A charge-sheet was issued to the petitioner on 29.08.2011 and the petitioner filed his written statement denying the charge.

2. On 12.09.2011, the petitioner has pleaded that on account of humiliation and mental agony, gave the notice to opt for voluntary retirement without prejudice to his rights and contentions. On 01.03.2013, respondent no.1 informed the petitioner that his notice to proceed on voluntary retirement has been accepted with retrospective effect from 12.09.2011.

3. The petitioner was then informed on 20.3.2013 that he would not be entitled to any salary for the period between 12.09.2011 to

20.02.2013. Thereafter, on 24.06.2013 the petitioner was informed that he has to refund an amount of Rs.6,24,726/- towards excess subsistence allowance. On 17.09.2013 the petitioner was informed that unless these issues are sorted out, the petitioner's file for retirement dues will not be processed.

4. The petitioner has thereafter referred to the correspondence with ensued mainly with respondent no.1 on the issue of release of retiral dues in the year 2013-14. Ultimately, since the petitioner was not paid retiral or other dues, the petitioner on 13.11.2014 instituted the present petition seeking an appropriate writ to direct the respondents to pay the petitioner all dues including gratuity, provident fund, leave encashment, pension, etc. accrued on acceptance of the voluntary retirement notice, along with interest at the rate of 18% per annum from 12.09.2011 till actual payment and for a direction to pay the petitioner full salary for the period between 12.08.2011 and 20.02.2013 along with the interest at the rate of 18% per annum.

5. The rule was issued in this petition on 03.02.2015 and the concerned authorities were directed to process the pension documents concerning the petitioner. The matter was referred to Lok Adalat but the same was not resolved. On 25.02.2020, this

Court allowed the petitioner's application for early hearing of the main petition by making the following order:

> *" Heard Mr. S. Sayed, learned counsel for the Applicant.*
>
> *2. Taking into consideration that the petition relates to the release of retiral dues, we place the Writ Petition No.723 of 2014 for final disposal in the week commencing from 15th June, 2020.*
>
> *3. In case any of the Respondents wish to file reply in the main petition, they are granted further four weeks time to do so. Rejoinder, if any, to be filed within two weeks thereafter.*
>
> *4. However, we make it clear that once the matter is appeared on the final hearing board, no further time will be granted to the Respondents to file affidavit and the petition will proceed on the basis that the Respondents do not wish to deny any of the averments in the petition.*
>
> *5. The Misc. Civil Application is disposed of in the aforesaid terms."*

6. Despite the aforesaid order, no affidavit in reply was filed by and on behalf of respondent no.1. The petitioner took out yet another Misc. Civil Application seeking a fixed date for final hearing. The matter was accordingly listed for final disposal on 24.08.2021, after hearing the learned counsel for the parties.

7. At the stage of final hearing Mr. Supekar, the learned counsel for the petitioner admitted that as of now only the following two issues survive, since, in the meantime, the petitioner has been paid other retiral benefits like gratuity, provident fund, pension etc.:

> (i) the issue of full salary for the period between 12.08.2011 to 20.02.2013 by making necessary adjustments towards the subsistence allowance already paid during the said period along with interest on such amount;
>
> (ii) the issue of leave encashment amounting to Rs.5,72,287/- together with interest, which amount has been unduly withheld by the respondent.

8. Mr. Supekar submits that though the petitioner's notice for voluntary retirement was accepted w.e.f. 12.09.2011, such acceptance was vide order dated 20.02.2013 which was communicated only on 01.03.2013. He, therefore, submitted that for the period between 12.09.2011 and 20.02.2013, the petitioner continued in service and was entitled to full salary after making adjustments towards subsistence allowance that may have been already paid. He submits that there is no dispute whatsoever that the petitioner had accumulated and encashable leave to the extent of Rs.5,72,287/- and there was no justification whatsoever for

withholding the same. Mr. Supekar submitted that this is a fit case where damages ought to be paid to the petitioner by respondent no.1.

9. Mr. G. K. Sardessai learned counsel for respondent no.1 submits that since the petitioner was voluntarily retired from 12.09.2011, the subsistence allowance of Rs.6,24,726/- paid to the petitioner for the period beyond 12.09.2011 amounts to excess payment. He submitted that since the petitioner refused to refund this amount, the leave encashment amount of Rs.5,72,287/- was adjusted against the same. He submits that no further payments are due to the petitioner and this petition may be dismissed.

10. Ms. Mordekar learned Additional Government Advocate pointed out that the main dispute is between the petitioner and respondent no.1 and the respondent nos. 2 and 3 have paid the amounts in terms of the bills raised and particulars furnished by the respondent no.1. She, therefore, submits that no reliefs may be granted as against respondents nos. 2 and 3.

11. The rival contentions now fall for our determination.

12. In this matter, respondent no.1 despite opportunity has not filed any return. If respondent no.1 was serious about contesting this petition, then, the least that was expected was a timely return,

particularly since this matter concerns the payment of pension and other retiral benefits of the petitioner. Be that as it may, Mr. Sardessai was fully heard in the matter.

13. On the first issue on payment of full salary minus the subsistence allowance already paid, technically, the petitioner may have a point because there is no dispute that the petitioner was in actual service with respondent no.1 until he was communicated the order dated 20.02.2013 informing him about the acceptance of his notice for voluntary retirement though such acceptance was with effect from 12.09.2011. There is no dispute that for the period between 12.09.2011 i.e. the date on which the petitioner is deemed to have voluntarily retired from service and 20.02.2013, the petitioner was paid subsistence allowance because he was in actual service with respondent no.1, though under suspension.

14. This means that for the period between 12.09.2011 and 20.02.2013, it is not as if the petitioner had actually discharged his duties. Therefore, based only on the technical point made out by the petitioner in this petition, we do not deem it appropriate to make an order for a grant of full salary to the petitioner during this period. Had the petitioner, actually worked during this period, the position would have been different and we would have perhaps been persuaded to grant the petitioner the relief of full salary by adjusting

the subsistence allowance already paid during the said period.

15. Therefore, though there is nothing wrong with the payment of subsistence allowance to the petitioner for the period between 12.09.2011 and 20.02.2013, no case is made out for the award of full salary as claimed by the petitioner for the said period.

16. On the issue of leave encashment amount of Rs. 5,72,287/-, there is no dispute that the same is actually payable to the petitioner. Mr. Sardessai only contended that this amount was adjusted against the excess payment towards subsistence allowance for the period between 12.09.2011 and 20.02.2013. Since there was no excess payment made, respondent no.1 was not entitled to withhold the leave encashment amount by way of adjustment or otherwise. In any case, this plea of adjustment does not appear to be bonafide and has perhaps been raised only to avoid payment of full salary to the petitioner. The respondent no.1 had no right or authority to link the two matters and withhold the leave encashment amount. Therefore, the petitioner is entitled to relief in so far as the leave encashment amount is concerned.

17. There is no prayer in the petition for damages and in any case, such a prayer is normally not entertained in a writ petition. The petitioner during the pendency of this petition was paid most of his retiral benefits like gratuity, provident fund, pension, etc., together

with interest thereof. Therefore, there is no case made out to direct respondent no.1 to pay any interest on the withheld leave encashment amount in the first instance.

18. Mr. Sardessai stated that the leave encashment amount would be paid within four weeks from today. If this statement is indeed honored, then there shall be no liability to pay interest on the leave encashment quantified at Rs.5,72,287/-. However, if such amount is not paid to the petitioner by respondent no.1 within four weeks from today, then respondent no.1, shall pay interest thereon at the rate of 9% per annum w.e.f. 20.02.2013 till the actual date of payment. Such directions for payment of interest will not absolve respondent no.1 from the charge of non-compliance with the direction of this Court for payment of leave encashment amount of Rs. 5,72,287/- within four weeks from today.

19. Mr. Sardessai submitted that liberty may be granted to respondent no.1 to represent respondent nos. 2 and 3 seeking reimbursement of the amount of Rs.5,72,287/- since respondent no.1 is an aided institution. Liberty is granted. If, after the payment of Rs.5,72,287/- by respondent no.1 to the petitioner, the petitioner makes such representation with proof of payment then, the respondent nos. 2 and 3 to consider such representation in accord with law and on its own merits as expeditiously as possible.

20. The rule is made partly absolute in the aforesaid terms without any order for costs.

21. All concerned to act on an authenticated copy of this order.

M. S. SONAK, J **SUNIL P. DESHMUKH , J**

TARI AMRUT NAGESH Digitally signed by TARI AMRUT NAGESH Date: 2021.08.25 15:04:43 +05'30'