IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 12.04.2024

Pronounced On : 04.06.2024

CORAM

THE HON'BLE MRS. JUSTICE J.NISHA BANU

AND

THE HON'BLE MR. JUSTICE P. DHANABAL

W.A.No.2481 of 2021

and C.M.P.Nos.16014 and 16015 of 2021

M.Thangam ... Appellant/Petitioner

Versus

1.Government of India
Rep. By its Secretary
Ministry of Commerce and Industry
Department of Commerce
Udyog Bhawan
New Delhi 110 107

2.The Executive Director
The Plastics Export Promotion Council
Crystal Tower
Gundivali Road
No.3, Off Sir M.V.Road
Andheri East
Mumbai 400 069

3.The Regional Director
The Plastics Export Promotion Council
Rasheed Mansion 3rd floor
408, Anna Salai, Chennai-600 006 ... Respondents/Respondents.

PRAYER: Writ Appeal filed under Clause 15 of Letters Patent Act, as against the order dated 13.08.2021 passed in W.P.No.3249 of 2020.

For Appellant : M/s. Balan Haridas

For R1 : Mr. R.P.Pragaidisit for R1

For R2 and R3 : Mr.Ravi for M/s.Gupta and Ravi

J U D G M E N T

Per J.NISHA BANU, J.

This writ appeal is filed as against the order passed in W.P.No.3249 of 2020 dated 13.08.2021. The order passed by the Writ Court is that the petitioner and other employees shall be paid all the terminal benefits upto the age of 58 years and not beyond that, including gratuity. The Writ Court further directed the 1st respondent/Government to refer the matter to the appropriate Tribunal or labour court for adjudication. Further, observed that there is no impediment for Plastic Export Promotion Council to recover the amount paid beyond 58 years from the petitioner in terms of the interim order of this court dated 11.02.2020 in W.P.No.3249 of 2020 and the amount can be recovered either from the provident fund payable by the employer or from the gratuity amount.

2. The facts of the case of the appellant which are necessary for the disposal of this writ appeal is as under;-

(a) The appellant joined the 2nd respondent-Plastic Export Promotion Council in the year 1991 as daily wager. Later he was appointed in the regular post of Peon by order dated 30.01.1993. The service conditions of the appellant are governed by the service rules of the 2nd respondent. His date of birth is 11.02.1962 and he is entitled to continue in service till 60 years of age, as per service rules. As such he should continue in service till 28.02.2022.

(b) The appellant had applied for a loan for a sum of Rs.2.5 lakhs to repair his house. At that time, he received an e-mail dated 20.12.2019 wherein it was stated that he is to retire based on the revised age of retirement at 58 years viz., 28.02.2020.

(c) The appellant who is a workman coming under the definition under the ID Act. As per Schedule Item 8 and 9 read along with section 9A of the ID Act, 1947, the age of retirement cannot be reduced without giving 21 clear days' notice.

(d) Admittedly no notice was given before altering the age of retirement. The appellant filed W.P.No.3249 of 2020 for declaration declaring that the action of the 2nd respondent in reducing the age of retirement from 60 to 58 unilaterally is illegal and to retain the appellant in service till he completes the age of retirement on 28.02.2022.

(e) This court granted interim order to the following effect;-

> "there shall be an order of interim injunction restraining the respondents/Management from retiring the petitioner from service for a perod of 4 weeks subject to a condition that if the petitioner fails to succeed in this writ petition, all the monetary benefits dervied out of such continuation of service during pendency of this writ petition will have to be returned/refunded to the management."

(e) The appellant continued in service till the writ petition was dismissed on 13.08.2021 on the ground that the appellant will have to take recourse under the provisions of the ID act by raising an industrial dispute. Further the writ court allowed the respondent management to recover the money paid by way of salary from the appellant's terminal benefits payable based on the interim order and also based on judgment reported in MANU/SCOR/46090/202-*Steel Authority of India Ltd Vs. Raghbendra Sing and ors*.

(f) Before the writ court, the 2nd respondent/Management taken the stand that they are not amenable to writ jurisdiction as they are not "State" under Article 12 of the Constitution of India. The age of retirement is a disputed question of fact and the same cannot be determined under Article 226 of the Constitution of India. For violation of Section 9A of the ID Act, the appellant should take recourse to the remedy provided under the ID act.

(g) The decision with regard to the reduction in the age of retirement of the petitioner and other employees of Plastic Export Promotion Council was taken by the Committee by way of Human Resources Manual for regulation of the Service conditions of the employees. The contention of respondents 2 and 3 before the writ court is that PEPC is an independent organization and therefore writ is not maintainable against any private body.

(h) The writ court found that when the service condition of the employees of PEPC has been modified from time to time and having accepted such modifications and having allowed to come into force, the petitioner cannot make a hue and cry that there is a statutory violation. In case the petitioner feels that there is a dispute with regard to the increase and reduction in the retirement age and that the Model Standing Orders alone will prevail then he is entitled to raise an industrial dispute through union and question the reduction of retirement age from 60 years to 58 years. As it is a disputed question of fact that has got to be decided only by the appropriate industrial tribunal or labour court.

(i) The writ court further pointed out that applicability of Section 9-A is doubtful, but in any event, as stated supra, there is a dispute and if the contention of the petitioner is accepted, several such petitions will get piled up before this court.

(j) The writ court, referring to judgment in the case ***A.P.Foods Vs. S.Samuel reported in 2006 (5) SCC 469***, given a finding that if there is an existence of a Union and any application is made by the Union, the 1st respondent/Government is directed to refer the matter to the appropriate Tribunal or Labour Court for adjudication. The writ court dismissed the writ petition filed by the appellant-workman and observed that in case the petitioner succeeds in the industrial dispute, the difference in backwages, if any shall be paid, after adjusting the amount already made pursuant to the interim order, it is open to the petitioner and other employees to accept the terminal benefits without prejudice to their rights. The writ court also held that there is no impediment for PEPC to recover the amount paid beyond 58 years from the petitioner.

3. The learned counsel for the appellant would submit that the 2nd respondent is a "State" under Article 12 of Constitution of India. At every stage of its activity, it is covered by Government Control. As per clause 9 of the Memorandum of Association governing the 2nd respondent, it says "No change, alteration of modification shall be made in the Memorandum without the prior concurrence of the Union Government". Clause 47.1 is as follows:-

Powers to give directions:-

(1) The Central Government shall have power to give directions to the Council as to the performance of its functions, where the Government considers such directions to be necessary.

(a)in the interest of national security or

(b) in the interest of national economy or

(c) otherwise in public interest

(d) in respect of promotion and development of international trade.

...

(3) the Council shall be bound to comply with all directions issued by the Central Government under sub-article 1 or 2 of this article and all provisions contains in the Export-import policy of the Central Government for the time being in force.

Clause 48 is as follows;-

Alteration in Articles:- No addition to, modification in, or deletion of any of these articles shall be made without the prior approval of the Central Government.

4. The learned counsel for the appellant would submit that there is a General power to modify and the Central Government may at any time direct by an order in writing that the provisions of these articles shall stand modified in such manner as the Central Government may direct as in relation to Councils generally or be in relation to a group of councils or a particular council where such a direction appears to be necessary in public interest.

5. On a conjoint reading of the entire memorandum of association, the learned counsel would invite the attention of this court that every activity of the council is controlled by the Central Government and it is certainly a State under Article 12 of the Constitution of India. Further the learned counsel for the appellant would contend that the 2nd respondent had not issued a notice under Section 9A of the ID Act and therefore, the writ is maintainable even against a private body if their action is contrary to the provisions of the I.D.Act.

6. The learned counsel for the appellant would submit that there is no

disputed question of fact in the case. The age of retirement is 60 years and it was unilaterally altered to 58 years. Only by e mail addressed by the 2nd respondent, on 20.12.2019, it was stated "the revised age of retirement now stands at 58 years". The said revised age to 58 years from 60 years was done on 19.08.2019.

7. The learned counsel for the appellant further submitted that no notice under Section 9A of the ID act was issued by the 2nd respondent. As per the settled proposition of law, when there is a violation of statutory provision and when the action is in violation of principles of natural justice, there is no need to relegate for alternative remedy.

8. The learned counsel for the appellant would contend that the action of the 2nd respondent is in a discriminatory manner. One Jaswant Soundarapandiyan was allowed to continue till he attained the age of 60 till 30.11.2019 even though the change in policy came into effect on 19.08.2019, as such, the case of the petitioner cannot be discriminated. He would further submit that till 60 years, some employees were allowed to continue as per the whims and fancies of the 2nd respondent.

9. The learned counsel for the appellant would also point out the case of one Sribash Dasmohapatra, Executive Director who completed 58 years on 30.04.2022; he was allowed to continue and he is working even now. The 2nd respondent has stated that based on the decision taken in the Committee of Administration, he was allowed to continue in service.

10. The learned counsel for the appellant would also contend that the unilateral decision of reducing the age of 58 years from 60 years is without following the principles of natural justice. The learned counsel relied on the decision of a Division Bench judgment in W.A.(MD).No.477 of 2011 ***[P.Theetha Pillai Vs. The Director, Gandhigram Institute of Rural Health and Family Welfare Trust]*** and submitted that the issue is squarely covered by the said decision and in the said case it was held that the parties need not be relegated to alternative remedy.

11. The learned counsel for the appellant would stoutly contend that when the Writ court not decided the case on merits, recovery ordered from 11.02.2020 till 13.08.2021 is uncalled for and in the interim order, it is specifically stated that if the appellant did not win the case on merits, recovery

can be made. In the case on hand, the appellant has worked and earned his wages and if sought to be recovered, that too from the Provident Fund and gratuity, it will be totally against the law.

12. The learned counsel for the appellant would submit that the action of the 2nd respondent is contrary to Articles 14 and 16 of Constitution of India and it also amounted to deprivation of livelihood guaranteed under Article 21 of Constitution of India.

13. The learned counsel for the appellant would further prayed for setting aside the order in W.P.No.3249 of 2020 dated 13.08.2021 and sought for a direction to the 2nd respondent to pay the deducted terminal benefits and salary paid to the appellant from 11.02.2020 till 13.08.2021.

14. The learned counsel appearing for the 2nd and 3rd respondents filed counter and stated that the writ petition is not maintainable when there is an effective alternate remedy prescribed by the provisions of the Industrial Disputes Act. When the dispute was an industrial dispute both within the meaning of the Industrial disputes Act as well as UPIDA, the rights and

obligations sought to be enforced by the respondent-Union in the writ petition are those created by the Industrial Disputes Act. It was settled in the decision ***U.P.State Bridge Corporation Ltd., Vs. U.P.Rajya Setu Nigam Karamhari Sangh reported in (2004) 4 SCC 268***, that when the dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the claimant is to get adjudication under the Act.

15. Heard both sides and perused the records.

16. The provisions of Section 9-A of the Industrial Disputes Act is very clear that it is the mandatory duty cast upon the employer to issue a Notice under Section 9-A of the Act before any change is effected and if there is no dispute or objections raised by the workmen, the change can be effected after 21 days of such notice. If the change is effected pursuant to any settlement or award, no notice is required. In the case on hand, it is the contention of the appellant that no notice under Section 9A of the ID Act was issued by the 2nd respondent. The learned counsel for 2nd and 3rd respondent has not submitted any document to show that Notice was issued by the 2nd respondent for change of service condition. This clearly shows that there is a violation of statutory provision and also violation of principles of natural justice.

17. The Honourable Supreme Court in the matter of ***Hindustan Petroleum Corporation Ltd., and another Vs. Dolly Dass, MANU/SC/0268/1999 : 1999 (4) SCC 450*** has held that when the facts are not in dispute, relegating the parties to alternative remedy is not required. In such a situation, relegating to an alternative remedy and directing the petitioner/appellant to go and approach the industrial forum, cannot be sustained. Further the act of the 2nd respondent is bad in the eyes of law as it unilaterally reduced the age of superannuation from 60 to 58 years, without giving reasonable opportunity of being heard and without any notice.

18. In view of the above detailed discussion, we are of the considered view that in the interest of justice, the order of the writ court is to be set aside. The 2nd respondent is directed to pay the salary for two years and pay other consequential benefits including terminal benefits to the petitioner. In the result, this Writ Appeal is allowed on the terms stated supra. No costs. Consequently, connected Miscellaneous Petitions are closed.

(J.N.B, J.) (P.D.B, J.)

04.06.2024

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J. NISHA BANU, J.
and
P.DHANABAL,J.

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To
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