

HON'BLE SMT. JUSTICE VENKATA JYOTHIRMAI PRATAPA

WRIT PETITION No.16011 of 2019

ORDER:

This Writ Petition is filed under Article 226 of the Constitution of India seeking *Mandamus*, for the following relief:

“...to set aside the Memo No.277327/VIG.I.1/2017, dated 27.12.2018 in rejecting payment of encashment of earned leave in so far as the Petitioner as illegal, arbitrary and unjust and direct the respondents to pay encashment of earned leave to the Petitioner and pass necessary order or orders as this Hon'ble Court may deem fit.”

2. The facts of the case, as stated in the Writ Affidavit in brief, are as follows:

a. While Petitioner was working as Junior Assistant in the Respondent No.2-Corporation, on account of ACB trap, C.C.No.27 of 2011 was registered and after regular trial, he was convicted by the Court of Special Judge for SPE & ACB Cases, Visakhapatnam, *vide* Judgment dated 30.06.2014. Questioning the same, the Petitioner filed Crl.A.No.703/2014 and this Court by order dated 09.07.2014 suspended the sentence of imprisonment and the Appeal is pending before this Court.

b. Though the department framed charges against the Petitioner, *vide* G.O.Rt.No.41, dated 21.01.2019, the charges were dropped against the Petitioner. Because of the conviction order passed by the

ACB Court, the Petitioner was dismissed from service, by order dated 23.12.2014.

c. Petitioner joined in the Corporation on 20.01.1987 and rendered 28 years of total service in the Respondent No.2-Corporation. Petitioner is entitled for earned leave encashment for which he is eligible before his dismissal. He made a representation seeking encashment of earned leave and the same was rejected by the respondent No.1 *vide* Memo dated 27.12.2018.

d. Questioning the same, the present W.P. has been filed.

Version in the Counter Affidavit

3. A counter affidavit has been filed by the Respondent No.1 denying all the material allegations except such of those specifically admitted. The following are key averments;

a. Petitioner while working as Junior Assistant in the office of the Assistant Medical Officer, Public Health Zone-III, GVMC, Visakhapatnam demanded and accepted the bribe amount of Rs.2,500/- and on 04.10.2010, ACB officials trapped him. In C.C.No. 27/2011, the Petitioner was convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.2500/- and in default, to suffer six months simple imprisonment for the offence under Section 7 of the Prevention of Corruption Act, 1988.

b. The Government after careful examination of the report of the D.G. ACB and in view of the Judgment dated 30.06.2014, issued

instructions to dismiss the Petitioner from service and Respondent No.2 by proceedings dated 23.12.2014 dismissed him from service.

c. The Petitioner preferred an appeal in CrI.A.No.703 of 2014 and as per the interim order dated 09.07.2014 in CrI.A.M.P.No.1043 of 2014, this Court suspended the imprisonment and granted bail to the Petitioner till disposal of the Appeal.

d. The Commissioner and Director Municipal Administration in its letter dated 21.05.2017 to the Respondent No.2, while enclosing representation of the Petitioner sought clarity about the entitlement of the Petitioner for encashment of his earned leave account prior to dismissal from service i.e., 23.12.2014.

e. Dismissal/removal of an employee entails forfeiture of his past services. As such, the question of payment of terminal benefits such as DCRG., and encashment of Earned Leave to dismissed/removed employee does not arise. It is a general practice that the total encashment of leave will be sanctioned to the employee at his superannuation/ voluntary retirement only. As per the A.P. Leave Rules, the maximum un-availed Earned Leave available into the leave account of an employee shall not exceed 300 days. In the instant case, the Petitioner was dismissed from service in ACB trap case, on the conviction orders passed by the Hon'ble Trial court. hence the sanction of encashment leave to the Petitioner does not arise, while the Criminal Appeal filed by him is pending.

f. The Writ Petition is totally devoid of merits and there are no valid grounds.

4. Thereafter, a reply affidavit has been filed by the Petitioner reiterating the contents stated in the writ affidavit.

Arguments Advanced at the Bar

5. Heard Sri K.R. Srinivas, learned counsel for the Petitioner, learned Government Pleader for Services-IV for respondent No.1 and Sri K.Madhava Reddy, learned Standing Counsel for respondent No.2-Corporaton.

6. Learned counsel for the Petitioner in elaboration to what was stated in the Petition would submit that the departmental enquiry initiated against the Petitioner was dropped and the criminal case ended in conviction for the self-same cause. It is stated that the Criminal Appeal is pending for consideration before the Court and that the Petitioner was dismissed from service on 03.01.2015. He would submit that the claim of encashment of the earned leave was rejected by the department, since the Criminal Appeal is pending. Learned Counsel further submitted that the counter affidavit would show that because an order of conviction is pending against him, they cannot realize the encashment of the earned leave is not correct and not a valid reason and there is no rule of law as such, to withhold the encashment of the earned leave, which is the property of the employee as per Article 300-A of the Constitution of India.

7. Learned Counsel would finally submit that the Petitioner is entitled for encashment of the earned leave though the criminal case is pending before the Court. In support of his contentions, learned counsel placed reliance on the decisions rendered by the High Court of Madras, in W.P. (MD) No.1484 of 2016. dated 29.01.2016.

8. On the other hand, learned Standing Counsel for the Respondent -Corporation would submit that the employee is entitled to earned leave encashment only when he is superannuated and not in case of dismissal from service. Further, learned counsel would submit that Section 52 Sub-rule-(1)(c) of the Andhra Pradesh Revised Pension Rules, 1980¹, does not deal with the situation where the judicial proceedings are pending against the employee, who was dismissed from service and his entitlement towards encashment of the earned leave.

9. On the other hand, learned Government Pleader would submit that since the employee was dismissed from service and conviction is pending against him, the department has not obliged his request for encashment of the earned leave. However, he would submit that the Court may pass appropriate orders.

10. Perused the material on record.

¹ for short "the Rules, 1980

Point for Determination

11. Having heard both the counsel, now the point that would emerge for consideration is:

Whether the Petitioner is entitled for encashment of earned leave when the Criminal Appeal on his conviction is pending before the Appellate Court and when he was dismissed from service?

Consideration by the Court

12. The short issue that falls for consideration in the present W.P. is in regard to the encashment of the earned leave when the Criminal Appeal on conviction is pending and when the disciplinary proceedings on the very same allegations are dropped. It is appropriate to extract Rule 52 of the Rules, 1980 which was cited by the learned Counsel for the Respondents and it reads as under:

"Rule 52. Provisional pension where departmental or judicial proceeding may be pending :-

(1) (a)

(b)

(c) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders: Provided that where departmental proceedings have been instituted under Rule 9 of Andhra Pradesh Civil Services (Control Classification and Appeal) Rules, 1991, for imposing any of the penalties specified in clauses (i), (ii) and (iv) of Rule 9 of the said rules, except the cases falling under sub-rule (2) of Rule 22 of the said rules, the payment of gratuity shall be authorised to be paid to the Government servant.

Provided further that notwithstanding anything contained in clauses (a), (b) and (c) of sub-rule (1) above, where a conclusion

has been reached that a portion of pension only should be withheld or withdrawn and the retirement gratuity remains unaffected in the contemplated final orders, the retirement gratuity can be released upto 80%.”

13. As relied on by the learned counsel for the Petitioner, it is relevant to refer to the decision dated 16.02.2022 of the Hon'ble Division Bench of this Court in in W.A.No.196 of 2022, captioned as **State of Andhra Pradesh v. Miryala Jagannadham**, which is an Appeal against the order of learned Single Judge, whereby the action of not releasing the encashment of earned leave amount and 80% of retirement gratuity on the account of pendency of a C.C. before the ACB Court was declared to be illegal. The Division Bench modified the judgment to the extent of gratuity, but upheld the view taken on earned leave encashment. Relevant portion reads thus;

“**11.** Learned counsel for the writ petitioner submits that the petitioner is entitled for leave encashment. To this extent, learned State counsel would not object to the prayer because, according to him, the judgment rendered by the Division Bench in W.P. No.30443 of 2016 deals with encashment of leave and moreover, clause(c) of sub-rule(1) of Rule 52 of the Rules, 1980 deals with gratuity and not with leave encashment.

12. For the foregoing discussion, the said part of the impugned order passed by the leaned single Judge allowing payment of 80% of the retirement gratuity to the writ petitioner is set aside. However, we observe that the writ petitioner is entitled to leave encashment.”

(emphasis supplied)

14. It is also relevant to refer to the decision of the Hon'ble Supreme Court in **State of Jharkhand v. Jitendra Kumar Srivastava**,² wherein the following observations were made:-

“16. The fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognised as a right in “property”. Article 300-A of the Constitution of India reads as under:

“300-A. Persons not to be deprived of property save by authority of law.—No person shall be deprived of his property save by authority of law.”

Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the constitutional mandate enshrined in Article 300-A of the Constitution. **It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.**

17. It hardly needs to be emphasised that the executive instructions are not having statutory character and, therefore, cannot be termed as “law” within the meaning of the aforesaid Article 300-A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold even a part of pension or gratuity. As we noticed above, so far as statutory Rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these Rules, the position would have been different.”

(emphasis supplied)

² (2013) 12 SCC 210

15. In the backdrop of the legal position referred to supra, the Petitioner is entitled for earned leave encashment, though the Appeal is pending for consideration before the Appellate Court as there is no Rule stipulating otherwise. In that view of the matter, the impugned Memo dated 27.12.2008 passed by the Respondent No.1 rejecting the claim of the Petitioner is liable to be interfered with as the due is only relating to payment of earned leave encashment, but not gratuity.

16. Accordingly, the Writ Petition is allowed and the impugned Memo dated 27.12.2008 passed by the respondent No.1 is hereby set aside. The respondent authorities are directed to settle the encashment of the earned leave of the Petitioner pending before them, which is due and payable to the Petitioner, within a period of six (6) weeks from the date of receipt of a copy of this order. No order as to costs.

As a sequel, interlocutory applications, if any, shall also stand closed.

JUSTICE VENKATA JYOTHIRMAI PRATAPA

02.04.2024

*Mjl/**

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