

Krishna Chandra Pandey vs State Of U.P. And 3 Othrs. on 5 December, 2018

Author: Yashwant Varma

Bench: Yashwant Varma

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Court No. - 6

Case: - WRIT - A No. - 24624 of 2017

Petitioner: - Krishna Chandra Pandey

Respondent: - State Of U.P. And 3 Othrs.

Counsel for Petitioner: - Vishwanath Mishra

Counsel for Respondent: - C.S.C.

Hon'ble Yashwant Varma, J.

Heard learned counsel for the petitioner and Shri Piyush Shukla, learned standing counsel for the State - respondents.

This petition challenges an order dated 6 May, 2015, pursuant to which a provisional pension has been fixed in relation to the petitioner and the gratuity and other emoluments withheld on account of a criminal trial, in which the petitioner is arraigned as an accused. The criminal trial alleges commission of offences under sections 418, 420, 409, 467, 468, 471 & 120-B IPC and Prevention of

Corruption Act, 1988.

The petitioner retired from the service of the respondents on 30 April 2006. On 13 September, 2011, a decision is stated to have been taken, five years after his retirement, for initiation of disciplinary proceedings with reference to Regulation 351-A of the Civil Services Regulations, as applicable in the State of Uttar Pradesh. The aforesaid order was assailed by the petitioner by means of Writ A No. 36303 of 2012. The petition was allowed by a Division Bench of this Court on 17 July, 2014 in the following terms: -

"The specific averments made in Paragraphs 13, 14 and 15 of the writ petition regarding absence of sanction by the Governor and the bar of four years, referred in Article 351-A have not been specifically denied. No material has been placed before us to show any sanction for the proceedings by the Governor. The impugned order do not refer to such sanction. Admittedly, proceedings against the petitioner were initiated after five years of his retirement. In view of this admitted factual position, the impugned order dated 13.09.2011 cannot be sustained in the light of the provisions contained in Article 351-A. In view of the above, the order dated 13.09.2011 is quashed. It is, however, made clear that the criminal proceedings pending in the concerned court shall not be adversely affected in any manner by this judgment.

As the petitioner contends that he has not been paid his retirement benefits on account of passing of the impugned order, it is provided that the petitioner may submit a representation to the competent authority, in this regard, within a period of one month. In that eventuality, the said authority shall consider and dispose of the matter pertaining to the post retirement benefits of the petitioner within a period of two months thereafter, as per law.

The writ petition is accordingly allowed."

The claim of the petitioner for grant of retiral benefits, including gratuity, was thereafter taken up for consideration and has been decided by the order impugned herein. Pursuant to the last order, passed in these proceedings, the respondents have filed a counter affidavit, today, which is taken on record. The affidavit discloses that leave encashment of 300 days has already been disbursed. Similarly, 90% of the GPF has also been paid to the petitioner in two instalments with the first initially on 6 October, 2006 and thereafter, the balance on 11 January, 2007. The petitioner is also stated to be in receipt of interim pension.

The respondent - authorities take the position that 10% of the GPF has been withheld in light of pendency of the criminal trial, in which the petitioner is charged of serious crimes, including those under the provisions of the Prevention of Corruption Act. It is in this backdrop that the Court proceeds to consider the prayers, as made in the writ petition, for the release of the balance retiral benefits.

The fact, that the disciplinary proceedings, which were initiated after the superannuation of the petitioner, have been brought to a close, is evident from the decision rendered by the Division Bench on the writ petition preferred by the petitioner. Although the disciplinary proceedings no longer subsist, the sole issue, which remains, is the entitlement of the petitioner to the retiral benefits, which have been retained on account of pendency of the criminal trial.

This aspect would necessarily be governed by the provisions of Regulation 351-AA, which empowers the respondents to pay a provisional pension in a situation where departmental or judicial proceedings are pending against a government servant who is retiring. Regulation 351-AA reads thus: -

"Regulation 351-AA. In the case of a Government Servant who retires on attaining the age of superannuation or otherwise and against whom any departmental or Judicial proceedings or any enquiry by Administrative Tribunal is pending on the date of retirement or is to be instituted after retirement a provisional pension as provided in Regulation 919-A may be sanctioned."

The provisions of Regulation 919-A also have a bearing and are, therefore, extracted herein below: -

"Regulation 919-A. (1) In case referred to in Regulation 351-AA the Head of Department may authorise the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service upto the date of retirement of the Government servant or if he was under suspension on the date of retirement upto the date immediately preceding the date on which he was placed under suspension.

(2) The provisional pension shall be authorised for the period commencing from the date of retirement upto and including the date on which after conclusion of departmental or judicial proceeding or the enquiry by the administrative Tribunal; as the case may be, final orders are passed by the competent authority.

(3) No death-cum-retirement gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings or the enquiry by the Administrative Tribunal and issue of final orders thereon.

(4) Payment of provisional pension made under clause (1) above shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of the proceedings or enquiry referred to in clause (3) but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or withheld either permanently or for special period."

Both these Regulations were simultaneously introduced in the Civil Services Regulations by the Government of U.P. in terms of Government Notification No. G-3-79/X-909-79 dated 9 January 1983 and published in the U.P. Gazette Part 1-A dated 11 June 1983. Under the provisions of the

Regulations aforementioned, it is evident that the respondents are empowered to withhold gratuity and to pay a provisional pension during the pendency of departmental or judicial proceedings, which may be pending against the retiring government servant. Sub-regulation (3) of Regulation 919-A further unambiguously empowers the respondents to withhold gratuity in its entirety during the pendency of departmental or judicial proceedings.

The powers, so inhering in the State - respondents under the provisions of the Civil Services Regulations as prevalent in the State of Uttar Pradesh, fell for consideration before a Division Bench of this Court in State of Uttar Pradesh & Others Vs. Jai Prakash¹, where the following observations were made: -

"7. The learned Single Judge, in the present case, has proceeded on the basis that neither in regulation 351 nor in regulation 351-A is a withholding of gratuity contemplated during the pendency of a judicial proceeding. The learned Single Judge, with respect, has overlooked the provisions of regulation 351-AA and a specific bar which is contained in regulation 919-A (3). In view of the specific prohibition which is contained in regulation 919-A (3), no death-cum-retirement gratuity would be admissible until the conclusion of a departmental or judicial proceeding. The expression 'judicial proceeding' would necessarily include the pendency of a criminal case.

8. In a judgement of a Division Bench of this Court in Shri Pal Vaish vs. U.P. Power Corporation Limited and another, it has been held that clause 3 of regulation 919-A is a provision which specifically deals with the payment of gratuity during pendency of departmental or judicial proceedings and in view thereof, the payment of gratuity has to be deferred until the conclusion of such a proceeding. The Division Bench also held that the payment of gratuity cannot be made in view of the bar contained in regulation 919-A during the pendency of a criminal case.

9. In a recent judgement of the Supreme Court in State of Jharkhand & Ors. v. Jitendra Kumar Srivastava & Anr., the Supreme Court dealt with the provisions of Rule 43 (b) of the Pension Rules of the State of Bihar as applicable to the State of Jharkhand. Regulation 43(b) was pari materia to regulation 351-A of the Civil Service Regulations in the State of U.P. In that context, the Supreme Court held that Rule 43(b) made it clear that it was permissible for the Government to withhold pension only when a finding is recorded in a departmental inquiry or judicial proceeding in regard to the commission of misconduct while in service and rule 43(b) contains no provision for withholding gratuity when departmental or judicial proceedings are still pending. However, the Supreme Court clarified that though there was no provision for withholding pension or gratuity in the given situation, had there been any such provision in the rules, the position would have been different. In the present case, there is a specific provision contained in regulation 351-AA read with regulation 919-A(3).

10. In the circumstances, we are of the view that the order passed by the Superintendent of Police, Etah withholding the payment of gratuity until the conclusion of the criminal trial was correct and proper and was in accordance with the provisions of regulation 351-AA read with regulation 919-A (3). The respondent would however be entitled to the payment of provisional pension as contemplated in law. In view of the above, we allow the appeal and set aside the impugned order of the learned Single Judge dated 10 May 2013. In consequence, the petition which has been filed under Article 226 of the Constitution shall stand dismissed. There shall be no order as to costs." (emphasis supplied) In *Jai Prakash*, the Division Bench of the Court specifically noted the powers vesting in the State - respondents to withhold the payment of gratuity during the period where a criminal case or departmental proceedings were pending against a retiring government servant.

The distinction between Regulation 351A and 351AA was duly highlighted by a Division Bench of this Court in *State of U.P. & 3 Others Vs. Faini Singh*², as follows: -

"16. We also find that Regulations 351 and 351A of Civil Service Regulation provide guidelines for exercise of powers to withhold the retiral dues. Regulation 351 provides that if the pensioner is convicted of a serious crime or being guilty of a grave misconduct the State Government reserves the right of withholding or withdrawing a pension or any part of it. Regulation 351A is thus attracted where a person is convicted. Regulation 351A is applicable where the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct or to have caused pecuniary loss to the government by misconduct or negligence during his service including the services rendered on reemployment after retirement. Regulation 351A is thus applicable in a case where a person is found in a departmental or judicial proceedings to be guilty of grave misconduct or to have caused pecuniary loss to the government. Regulation 919A authorises grant of provisional pension in the cases referred in Regulation 351AA. A combined reading of these regulations would go to show that the powers of withholding or withdrawing pension to be used in the cases where there are no allegations of serious crime or grave misconduct or any pecuniary loss caused to the government by misconduct or negligence during his service including services rendered on reemployment after retirement"

The Division Bench in *Faini Singh* then proceeded to deal with the well-recognised distinction between the existence of power and its exercise. While recognising the power vesting in the State to withhold gratuity during the pendency of departmental or judicial proceedings, the Court proceeded to hold that the exercise of power to withhold must otherwise be established to be justified in the facts of each case. It was held that the power conferred by these provisions were not to be invoked mechanically or without due application of mind. This was explained as follows: -

"17. The object of these powers clearly demonstrates that these powers have to be exercised with circumspection and caution and have to be utilised for the purposes

for which they have been vested in the State Government. Such powers cannot be used mechanically on the pendency of any judicial proceedings. The delay in judicial proceeding is also required to be taken into consideration and counted for the purposes of exercise of such powers.

20. In our opinion the continuance of the embargo on payment of gratuity and full pension amounts to injustice to the petitioner, who was not accused of causing any loss to the State Government. The allegations were not levelled against the petitioner with regard to discharge of his statutory duty. In the circumstances withholding the gratuity and full pension is not justified at all.

21. We may point out that a mere pendency of any judicial proceeding cannot be a ground to exercise the powers under Article 351AA read with Regulation 919A for withholding the retiral dues. The nature of allegations and the gravity of charge has to be taken into consideration by the competent authority before making an order to withhold the retiral dues. In case the pendency of any judicial proceeding is held to be sufficient, a minor offence or even a parking ticket may be a ground to withhold the pension of a retired employee. Such a situation is not contemplated under the powers conferred on the competent authority under the Civil Services Regulations." (emphasis supplied)."

As is evident from the principles enunciated in Faini Singh, while recognizing the power of the State to withhold gratuity and to fix a provisional pension during the pendency of judicial or departmental proceedings, the Division Bench further proceeded to hold that the action of withholding such benefits must be preceded by due application of mind and consideration of whether the charges levelled against the employee were serious and related to grave misconduct. The Division Bench in Faini Singh further proceeded to observe that there must be a due application of mind by the respondents while invoking the provisions of Regulation 919-A, as to whether any pecuniary loss stood caused to the Government or whether the allegations against the employee were of a serious crime, grave misconduct or negligence during his service. The Division Bench, essentially, highlighted that while the power did exist, the same must be exercised with due circumspection and action not taken mechanically.

The subsistence of judicial proceedings or departmental inquiry against a retiring government servant would, at best, lead to a position where the State - respondents would be entitled to invoke these provisions. Independently and as was mandated by the Division Bench in Faini Singh, the competent authority must take into consideration the nature of allegations levelled, gravity of the charge against the retiring government servant, the role ascribed to the government servant in the commission of the crime, nature of offenses of which he is charged and other relevant factors. The decision to withhold would, thus, have to be taken upon due consideration of the above and other germane factors.

Learned Standing Counsel has drawn the attention of the Court to the fact that a learned Judge of the Court in Kalika Prasad Yadav Vs. State of U.P.³ took the view that there seemed to be a conflict

between Jai Prakash on the one hand and the decisions rendered in Faini Singh, Bangali Babu Misra Vs. State of U.P.⁴, State of U.P. Vs. Bal Krishna Tewari⁵, Dr. Chandra Prakash Vs. State of U.P.⁶ on the other and has referred the issue for consideration of a larger Bench which is yet to rule on the issue. However, this need not detain this Court from deciding the issue which arises for the following reasons.

Firstly, the mere reference of a decision to a larger Bench for considering a perceived conflict does not detract from the dictum laid down therein. The principle, in law, as enunciated in the said decision continues to operate and bind this Court so long as it is not overruled. This was also the position propounded by the Supreme Court in *Manager, National Insurance Company Ltd. Vs. Saju P. Paul*⁷. Secondly, this Court notes that Bangali Babu Misra, Bal Krishna Tewari and Dr. Chandra Prakash perhaps, inadvertently, failed to notice the provisions of Regulations 351AA and 919A, which existed on the statute book at the time when these decisions were rendered. Thirdly and with respect to the view expressed in *Kalika Prasad Yadav*, this Court finds no conflict as such between Jai Prakash and Faini Singh. While Jai Prakash noticed the existence of the power vesting in the State to detain the release of gratuity and authorise payment of a provisional pension by virtue of the Regulations, noted above, Faini Singh only expanded upon the scope and the exercise of power thereunder. Faini Singh is not an authority for the proposition that gratuity cannot be withheld. It only elucidates the legal position that the power conferred by Regulations 351AA and 919A cannot be invoked mechanically or irrationally without adverting to circumstances, such as, the seriousness of the crime or charge levelled against the employee. It, principally, underlines the need for the power to be exercised bona fide, with due circumspection and application of mind. This is evident when the Division Bench observes, "The discretion given should not consume the power for which such discretion is to be exercised."

It would also be relevant to note that the decisions in Jai Prakash and Faini Singh have also been followed by two learned Judges of the Court in two separate decisions, namely, *Narendra Pratap Singh Vs. State of U.P.*⁸ and *Surendra Pal Vs. State of U.P.*⁹ Having recognized the basic principles, which would govern the invocation of Regulation 919-A, this Court reverts to the facts of the present case. As noted above, the petitioner is charged of commission of serious offenses under the IPC. The provisions of the Prevention of Corruption Act have also been invoked against him. The petitioner has failed to establish from the material on record that the commission of these crimes is unrelated to the discharge of his duties as a government servant. Tested of the anvil of the principles enunciated in Jai Prakash and Faini Singh, this Court finds no ground to hold that the view taken by the respondents, to deny disbursal of complete benefits, merits interference. Bearing in mind the seriousness of the allegations and the nature of the criminal charges which the petitioner is facing, this Court finds that the action of the respondents, duly authorized by Regulations 351AA and 919-A, is justified and valid.

For the reasons afore-noted, the order impugned is upheld. The writ petition is dismissed. It shall, however, be the obligation of the respondents to consider the release of all remaining benefits dependent upon the result of the criminal case pending against the petitioner.

Order Date: - 5.12.2018 Amit Mishra