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Court : Mumbai Aurangabad

Decided On : Jul-19-2016

Judge : S.S. Shinde & Sangitrao S. Patil

Appeal No. : Writ Petition No. 10010 of 2014

Appellant : Dr. Dinkar

Respondent : The State of Maharashtra, Through Principal Secretary, Urban Development Department and Another

Judgement :

S.S. Shinde, J.

1. Heard.
2. Rule. Rule made returnable forthwith, and heard finally with the consent of the parties.
3. This Petition is filed with the following prayers:

B) By issue of writ of mandamus or any other writ of like nature, the respondent No.2 Corporation be directed to release the pensionary benefits with interest for causing delay in making payment of the same within period of two weeks.

C) It be held and declared that, the action of Corporation seeking suspension / rescission of the resolutions passed by the standing committee and general body by invoking powers contemplated U/sec. 451 of the Bombay Provincial and Municipal Corporation Act is without authority of law and void abinitio.

4. It is the case of the petitioner that the petitioner came to be appointed as a Medical Officer of Health in the respondent Corporation on 21.04.1983. The petitioner, since then, discharged his duties honestly and sincerely to the utmost satisfaction of his superiors. The petitioner was on the verge of retirement when the departmental proceedings for imposing major penalty as contemplated under Rule 8 of the Maharashtra Civil Services (Discipline and Appeal) Rule, 1989 were initiated against him on the basis of audit report submitted by the Chief Auditor of the respondent Corporation in respect of medicines purchased in the Health Department for the years 2000-2001 and 2001-2002. The petitioner was served with a copy of chargesheet to which he filed detailed reply and explained that the charges levelled against him are false, baseless and made with a mala fide intention and denied the same.

5. It is further the case of the petitioner that during pendency of the departmental proceedings, the petitioner stood retired on attaining the age of superannuation. Due to the pendency of departmental enquiry, his pensionary benefits as well as other benefits accrued to him were withheld by the respondent Corporation. Being aggrieved by the said action of respondent Corporation withholding the pensionary benefits, the petitioner approached this Court by way of filing Writ Petition no.2449/2003, seeking directions to the respondent Corporation to release the provisional pension from the date of superannuation and to release the benefits such as leave encashment, GPF and gratuity etc. During pendency of the said Writ Petition, the disciplinary enquiry was concluded and the disciplinary authority i.e. the Commissioner of Municipal Corporation, Aurangabad, by order dated 27.07.2004 imposed punishment of recovery against the petitioner. It is submitted that this Court declined to consider the prayer made in the said Writ Petition in view of the remedy of appeal provided under the Discipline and Appeal Rules. Ultimately, the Court was pleased to dispose off the said Writ Petition, with a liberty to approach the Appellate Authority.

6. It is further the case of the petitioner that the respondent Municipal Corporation, pursuant to the order dated 30.07.2004 passed by the Court in Writ Petition no.2449/2003, paid provisional pension for a period from 01.08.2002 to 31.01.2004 and till today is paying the same. In view of the liberty granted by this Court to approach the Appellate Authority under Discipline and Appeal Rules, the petitioner filed Appeal before the Standing Committee, which is a Superior Authority next to the Commissioner, challenging the order dated 27.07.2004. The Standing Committee, in its meeting dated 27.01.2005, discussed the matter on merits and passed a Resolution no.211 and unanimously allowed the appeal after hearing the Commissioner of the Municipal Corporation, Aurangabad. The Standing Committee not only set aside the order dated 27.07.2004 imposing punishment of recovery against the petitioner, but also directed to release the pensionary benefits to which the petitioner is entitled.

7. It is further the case of the petitioner that he was under an impression that as the Standing Committee had allowed his appeal, the pensionary benefits to which he is legally entitled would be released, however, the respondent Municipal Corporation did not release the pensionary benefits in favour of the petitioner. The petitioner made several representations to the respondent Municipal Corporation, requesting to release the pensionary and other monetary benefits, however, the respondent did not reply to any of his representations and sat tight over those representations. It is submitted that in this background, the respondent Municipal Corporation, Aurangabad, shockingly and surprisingly, kept the matter of the petitioner on agenda of general body meeting to be held on 20.02.2010. It is submitted that during pendency of the Writ Petition, the general body of respondent no. 2 Corporation passed a Resolution in respect of the petitioner to the effect that the decision of Standing Committee be implemented. The general body also approved the said Resolution no.1060 dated 26.04.2010. It is further the case of the petitioner that twice the general body had resolved in favour of the petitioner and passed a Resolution to implement the decision of the Standing Committee, taken earlier to the extent of pensionary benefits to the petitioner, keeping in view 32 years service rendered by the petitioner.

8. The learned counsel appearing for the petitioner submits that though the Standing Committee has taken a decision, which is approved by the general body, respondent no.2 Corporation acted contrary to the said decision by withholding the pensionary benefits of the petitioner without any just and proper reasons and virtually harassed the petitioner. It is submitted that the respondent Corporation, vide its communication dated 24.09.2013, requested respondent no.1 herein to suspend / rescind the Resolutions passed by the Standing Committee as well as the general body. It is submitted that in the month of September, 2014, letter was addressed by the Corporation to the Desk Officer of respondent no.1 stating therein that appeal filed by the petitioner before the Standing Committee in the year 2005 itself was not maintainable as the Standing Committee had no jurisdiction. It is submitted that the said point was not raised before the Standing Committee by the Officers of the Corporation. It is submitted that the Standing Committee of respondent no.2 Corporation is an Appellate Authority as the same is superior to respondent no.2 Commissioner as per the provisions of Section 56 (4) of the Maharashtra Provincial Municipal Corporations Act, 1949 (the Act of 1949 for short). It is submitted that it is an accepted position that the gratuity and pension are not the bounties. An employee earns these benefits by dint of his long, continuous, faithful and unblemished service. It is submitted that the right of employee to receive pension is right to property under Article 300A of the Constitution of India and by executive orders, the State has no power to withhold the same. Therefore, the learned counsel for the petitioner submits that the Petition deserves to be allowed.

9. The petitioner has filed rejoinder-affidavit and stated that the purchase order, which is subject matter of the enquiry, the said order was approved by the Standing Committee and the Commissioner at the relevant time. The learned counsel for the petitioner submits that in the similar fact-situation in the case of Dattatray Anandgir Giri Vs. The Aurangabad Municipal Corporation, Aurangabad in Writ Petition no. 4146/2014 on 08.05.2015, the Division Bench of the Bombay High Court Bench at Aurangabad has taken a view that the Commissioner is not Competent to sit over the decision of the Appellate Authority. It is also observed that in case of one Shri Ramteke, who was also employee of the Municipal Corporation, the decision of the Appellate Authority was accepted by the

respondent and pensionary benefits were extended to him, though he was held guilty in the department enquiry.

10. The learned counsel appearing for respondent no.2 relying upon the averments in the affidavit-in-reply submits that since the petitioner was held guilty in the departmental enquiry, the petition filed by the petitioner in the year 2004 was not entertained by the High Court and the petitioner was asked to file appeal and liberty was granted to the petitioner to file appeal. It is submitted that based upon the enquiry report, the Commissioner, Municipal Council issued office order on 27.07.2004, directing the petitioner that he is held to be guilty in the enquiry whereby the amount of Rs.10,55,323/- is the loss caused to the Corporation and the petitioner was directed to deposit the said amount within 7 days, in view of clause 56 (2) (c) of the Municipal Councils Services (Discipline and Appeal) Rules, 1979 as a penalty. However, the Standing Committee passed a Resolution no.211 on 27.01.2005 wherein appeal filed by the petitioner was allowed and the service benefits were directed to be given to the petitioner. The Municipal Commissioner placed the report of Standing Committee before the general body on 07.10.2005 bearing Resolution no.80/2011, wherein the general body passed a resolution to appoint again two member committee for enquiry. The said Committee requested respondent no.1 to cancel the part of the Resolution by the general body and allowed recovery of the amount from the petitioner.

11. It is submitted that the said Enquiry Committee gave its enquiry report to the Corporation on 31.08.2009, wherein the petitioner was held to be guilty under Rule 3 (1) of the Maharashtra Civil Services (Conduct) Rules, 1979 (the Rules of 1979 for short). The said report was placed before the general body of the Corporation on 26.04.2010. The general body without assessing first and second enquiry report directed the Corporation to implement the order of Standing Committee. The Commissioner, Municipal Council, wrote a letter to the Principal Secretary, Urban Development Department, Mantralaya, Mumbai on 24.09.2013, requesting to cancel / rescind the Resolution passed by the Standing Committee dated 27.01.2005 and the Resolution of the general body dated 26.04.2010 and 18.10.2012 in view of the fact that these Resolutions are taken without considering seriousness of the case whereby the Municipal Corporation has sustained

financial loss because of passing such Resolution. The Desk Officer, Urban Development Department, by its letter dated 15.10.2013 communicated to the Commissioner, Municipal Corporation, Aurangabad, seeking certain clarifications and in reply, the Municipal Commissioner addressed a letter on 19.09.2014 to respondent no.1. It is submitted that two Writ Petitions filed by the petitioner arising out of the same issue and subject matter have been dismissed by this Court. The Municipal Corporation has not yet received response from respondent no.1 in respect of decision of the State Government under Section 451 of the Act of 1949 to cancel / rescind the Resolution passed by the Standing Committee as well as the general body directing the Corporation to extend pensionary benefits to the petitioner.

12. We have considered the submissions of the learned counsel appearing for the petitioner, learned AGP appearing for respondent no. 1 State and the learned counsel appearing for respondent no.2. With their able assistance, perused the pleadings in the petition, grounds taken therein, annexures thereto, rejoinder-affidavit filed by the petitioner, reply filed by respondent no.2 and also the judgment in the case of Dattatray Anandgir Giri (supra). It is not in dispute that the Standing Committee had taken a decision to extend pensionary benefits to the petitioner, though the Enquiry Committee held the petitioner guilty. In the similar fact-situation wherein the stand taken by the Municipal Commissioner was that the appeal was not maintainable before the Standing Committee, this Court in the case of Dattatray Anandgir Giri (supra) in para 11 held thus:

The stand taken by the Municipal Commissioner that, the appeal filed by the petitioner under Section 56 (4) of the said Act was not maintainable is concerned, the appellate authority i.e. Standing Committee has taken decision in the year 2009. As already observed, there is no specific challenge to the said decision by the Respondent Corporation before the appropriate Forum. The said decision has attained finality. The Supreme Court in the case of **Santoshkumar Shivgonda Patil and ors V/s Balasaheb Tukaram Shevale and ors** (2009 (6) Bom.C.R. 664) while interpreting the provisions of Section 247 of the Maharashtra Land Revenue Code, meant for filing revision, observed that, in absence of any limitation provided for filing such revision, the reasonable period would be of three

years from the date of cause of action. Applying the said parameters in the present case, if the respondents were said to have been aggrieved by the said decision of the Standing Committee, they ought to have challenged the said decision within three years from passing of such decision. Even as on today, there is no specific challenge to the said decision and only by way of filing reply in the present Petition which is filed by the petitioner, the stand is taken by the respondent no.1 that, such appeal was not maintainable. Therefore, the belated attempt of the respondents to say that, the appeal is not maintainable cannot be countenanced in the peculiar facts and circumstances of the present case.

13. In the facts of the present case, though the Municipal Corporation has requested respondent no.1 by communication dated 24.09.2013 to cancel the Resolution passed by the Standing Committee on 27.01.2005 and Resolutions of the general body dated 26.04.2010 and 18.10.2012, no decision of the State Government is placed on record either by respondent no.1 or by respondent no.2. In that view of the matter, the petitioner cannot be asked to wait anymore for receiving his retiral benefits for which he is legitimately entitled to. The Supreme Court in the case of State of Jharkhand V. Jitendra Kumar Srivastava (2013 (12) SC 210) held thus:

14. Article 300 A of the Constitution of India reads as under:

300A - 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 his 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.

15. It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as law within the meaning of

aforesaid Article 300A. 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.

14. In the light of discussion in the foregoing paragraphs, though at this stage we are not inclined to entertain prayer clause-C in the Petition, since it appears that the State Government has not taken any decision under Section 451 of the Act of 1949, in respect of request of the respondent Commissioner, Municipal Corporation to cancel the Resolution passed by the Standing Committee on 27.01.2005 and Resolutions of the general body on 26.04.2010 and 18.10.2012. However, we are inclined to issue directions to the respondent Corporation to prepare and submit the proposal in respect of pensionary benefits of the petitioner within four weeks from today and release the said pensionary benefits to the petitioner as expeditiously as possible, however, within 12 weeks from today subject to filing personal undertaking by the petitioner that in case the Resolution passed by the Standing Committee and General Body is cancelled by invoking powers contemplated under Section 451 of the Act of 1949 by the State Government, he would redeposit the amount disbursed to him so as to suffer the order passed by the Disciplinary Authority on 27.07.2004.

15. The Rule is made absolute partly and the Writ Petition stands disposed of accordingly. No costs.

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