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**(2008) 03 RAJ CK 0011**

**In the Rajasthan High Court**

Abdul Sattar and Others APPELLANT

Vs

State of Rajasthan and Others RESPONDENT

**Date of Decision :** 04-03-2008

**Acts Referred:**

COMPANIES ACT, 1956 — Section 446
Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Section 5

**Citation :** (2008) 3 RLW 1899

**Hon'ble Judges :** M.C. Sharma, J

**Bench :** Single Bench

## Judgement

Mahesh Chandra Sharma, J.—By way of this petition the petitioners have prayed that the respondents be directed to give benefit of pension to them with interest and any other relief or direction which this Court may think just and proper, looking to the facts and circumstances of the case, same may also be given in their favour.

2. Brief facts of the case are that the petitioners were initially appointed in Rajasthan Agriculture Engineering Board (Hereinafter to be referred in short ''the Board''), a department of Agriculture, which was renamed as Rajasthan State Agro Industries Corporation Limited (Hereinafter to be referred in short ''the Corporation''.

3. Learned counsel for the petitioners submit that they were initially appointed on work charged basis in the Agriculture Department on 30.4.62, 31.8.65, 1.7.61 and 3.8.62 respectively and from there they were shifted one to another department and after having converted the Rajasthan Agriculture Engineering Board to Rajasthan Agro Industries Corporation, the services of the petitioners remained same. The services of the petitioners were neither terminated nor they were appointed as fresh candidate in the Corporation and even their services were not interrupted even for a single day and due to this action the Board was converted into the Corporation. The petitioners were continued in services since

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their appointment.

4. The respondent Corporation initiated a scheme namely ''Voluntarily Retirement Scheme'' (Hereinafter to be referred in short ''the VRS'') to its employees and under that scheme the petitioners sought benefit of VRS. They were given the benefits of VRS and they retired from the service vide orders 30.9.2000, 1.9.1990, 27.5.95 and 10.12.1990 respectively.

5. The Government of Rajasthan issued a circular No. F2 (26) FD (Gr. 2)/74 Jaipur dated 13.7.1994 extending the benefit of pension to the work-charged employees. After retirement, the petitioners made representation to the respondents on 31.10.2002 praying therein to grant pension to them as they were initially appointed in the Corporation w.e.f. 8.7.1970 and the services of the petitioners were not interrupted by such transfer, therefore, they be treated as government employees. The petitioners were never given termination letters from the Board nor they were informed at any time about their services being treated as a newly appointed in the Corporation. If the petitioners'' had received any order of termination/new appointment in the Corporation, then definitely they would have challenged the same before the appropriate forum to get the relief.

6. Learned counsel for the petitioners further submits that when the services of the petitioners were changed from Board to the Corporation on 8.7.1970, the petitioners were not given any letter to this effect in writing. The place of the industries was not changed, machines/plants were not disturbed, assets/ properties were the same as it was, only name of Engineering Board was changed to the Corporation. Only this change cannot make any difference in the services of the petitioners and because of this reason the petitioners are entitled for grant of benefit of pension.

7. After changing the name of Board to the Corporation, neither the post held by the petitioners nor pay-scale and duties were changed. The names of the present petitioners in the list are at S. No. 148, 254, 79 and 117 respectively, although this list of transfer of industry was not provided to the petitioners and workmen thought at that time such change in the name of industry was internal matter of the management and in absence of any order/instructions in the regard the petitioners did not raise any objections.

8. From the narration of facts it is clear that there is no reason what-so-ever for the respondents for subjecting some employees of one group from benefit of pension and others are granted and a discriminatory treatment is given in the matter of grant of pension. The petitioners who were absorbed in the Corporation were initially under direct control of respondent No. 2 and if they would have refused their absorption in the Corporation, then their service conditions would have governed by the same set of rules or orders which are applicable to the employees of the Agriculture Department. The parent department of the petitioners is still the Agriculture Department and same set of rules are

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applicable upon them and one person namely Shri Badri Prasad, who is working in the same department has been allowed the pension.

9. Learned counsel for the petitioners further submits that the State Government vide circular No. F.1 (12) FD (Rules) 96 dated 6.3.1997 has taken a decision to pay the benefit of pension to the work-charged employees irrespective of whether deduction towards contributory provident fund was made from their salaries or not. The petitioners were never asked to submit their option according to this circular, had they been asked earlier to submit option for pension, de finitely they would have submitted option for pension. After taking VRS, the petitioners made representation/application for giving benefit of pension as per the circular.

10. Learned counsel appearing for the respondents have filed a detailed reply along with preliminary objections, in which these facts have been controverted to certain extent. He contends that the Rajasthan State Agro Industries Corporation Ltd., was incorporated as a Company under the provisions of the Companies Act of 1956 on 1.8.1969 and the entire share capital of the Corporation is held by the State Government. The Corporation is running into losses since its incorporation on 1.8.1969, except for four years and as there was no possibility of its revival, the Corporation filed a winding up petitioner before the learned Company Judge of this Hon''ble Court on or about 20.8.1996 which was registered as S.B. Civil Company Petition No. 30/96. This winding up petitioner was contested by the employees of the Corporation by filing replies and producing various documents. The said company petition was finally decided on 3.9.1997 whereby the winding up petition of the Corporation was allowed and the company was directed to advertise the winding up order and also to file certified copy of the winding up order before the Registrar within the prescribed time period along with intimation to be sent to the Official Liquidator. By the said order, the Official Liquidator attached to the Court was also appointed as Liquidator of the Company with the direction that he will discharge his duties in accordance with the, provisions of the Companies Act of 1956 and the Rules made thereunder and he shall take into his custody or under his control all the properties, effects and actionable claims to which the company is or appear to be entitled.

11. Learned counsel for the respondents further contends that aggrieved by the aforesaid judgment and order of the learned Company Judge, DB Special Appeal (Company) 94/97 and 96/97 were filed by the employees of the Corporation. The Division Bench of this Hon''ble High Curt, after hearing arguments of both the parties, has been pleased to dismiss both these appeals and upheld the judgment of the learned Company Judge dated 3.9.1997 vide its order and judgment dated 17.7.2000.

12. Aggrieved by this Judgment dated 17.7.2000, the employees of the Corporation have filed SLP before the Hon''ble Supreme Court which was registered as Special Leave to Appeal (Civil) No. 1271 and 1272. The said SLPs

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were admitted but the stay applications were rejected by the Hon''ble Supreme Court and the said appeals are still pending before the Hon''ble Supreme Court.

13. u/s 446 of the Companies Act, it has been specifically provided that when a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceedings shall be commenced, or if pending at the ate of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.

14. In view of the aforesaid provisions of the Companies Act, it is only the Company Court which has exclusive jurisdiction to deal with any matter by or against the Corporation as per the provisions of Section 446 of the Companies Act, and the present writ petition is not maintainable and liable to be dismissed summarily.

15. Learned counsel for the respondents has further argued that said judgment is not applicable in the case of the present petitioners. The options were invited from the petitioners either to remain in Government service or in the services of the respondent Corporation for permanent absorption and the petitioners exercised his option for permanent absorption with the respondent Corporation and the same was forwarded to the Agriculture Production Secretary by the respondent Corporation. The option given by the petitioner was accepted by the Government of Rajasthan and accordingly the petitioner was permanently absorbed in the services of the respondent Corporation w.e.f. 1.5.1973. As such, the petitioners, are not entitled to get the pension as claimed by them. Moreover, the order under which the petitioners were permanently absorbed was passed as early as 1973 and according to the same the petitioners are not entitled for pension and as such the petitioners have claimed the said relief after a long delay of 22 years by which no explanation what-so- ever has been given by the petitioner. Without prejudice to the above submission it is submitted that the judgment which the petitioners have referred was given on 3.11.1993 by the Hon''ble High Court and the petitioners have filed the writ petitions after a long delay and even according to the same the petitions filed by the petitioners is hopelessly delayed and the same is liable to be dismissed summarily on this ground alone. This is being submitted without prejudice to the submissions that the petitioners are not entitled for any relief as per the judgment dated 3.11.1993.

16. As per the respondents the petitioners are not entitled to file the present writ petitions, as they are very much having an alternative remedy to file a civil suit. Since they have not exhausted the remedy of filing of a suit, as such the petitions filed by the petitioners is liable to be dismissed summarily. Moreover the reliefs of the petitioners are already time barred and the Hon''ble High Court and the Hon''ble Supreme Court have held from time to time in their Judgments that in case any relief is time barred for filing of the civil suit the Hon''ble High Court cannot entertain the matter and exercise its extra ordinary jurisdiction

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under Article 226 for giving any relief to the person.

17. The petitioners were working temporarily in the Agriculture Workshop (Workshop under the Erstwhile Rajasthan Agriculture Engineering Board) and was appointed on 8.7.1970 when their services were transferred in the respondent Corporation and since then the petitioners became employees of the respondent Corporation and they become subject to all Rules and Regulations of the Corporation and as per law provident fund was deducted from their salary.

18. The employees who opt for the services of the Corporation were further asked to opt whether they want to be governed by the pension scheme or by the provident fund scheme. Only 35 employees opted for the provident fund scheme and did not opt for the pension scheme.

19. The petitioners were not well within their rights to accept the appointment of the Corporation and had gone back to their home. But since they were appointed in the respondents Corporation on 8.7.1970 which they accepted and since they became employees of the respondent Corporation. The petitioners ceased to be a Government servant since 8.7.1970 and became employees of the Corporation. The notification dt. 13.7.1994 is not applicable at all in the case of the petitioners.

20. I have heard learned Counsel for both the parties and perused the material available on record. I have also gone through the various judgments cited before me.

21. Similarly situated persons namely Badri Singh who worked as Bulldozer Operator and after retirement pension was allowed to him vide pension payment order dated 23.6.1999. Similarly situated persons, like the petitioners, were allowed benefit of pension opted for pension but the petitioners did not opt. In fact petitioners were never asked to opt for pension. Circular dated 13 7.1994 states that even in case option for pension is not filled by employees then it shall be deemed to have opted for pension.

22. This Court in S.B. Civil Writ Petition Nos. 2793/98, 2185/99, 6824/99, 2968/98 decided on 13.8.2002, 14.2.2003, 11.2.2003 and 30.7.2005 respectively, directed the respondents to pay pensionary benefits to the employees concern, after adjusting the amount of CPF paid to the employees at the time of retirement.

23. The State Government challenged the order passed in SBCWP. No. 2793/1998 by filing DB Civil Special Appeal which was also dismissed vide order dated 2.4.2003, on the basis of delay and merit, the operative portion of which is reproduced as under:

We find no reason to condone the delay in filing the appeal by the State against the order of learned Single Judge. Otherwise also, the respondent No. 1 petitioner was entitled for pension and that''s why exactly, the learned Single Judge has ordered. We do not find any error in the order of learned Single Judge, as there is no merit in the appeal itself. No useful purpose will be served to

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condone the delay of 80 days. Accordingly, the application u/s 5 of the Limitation Act is dismissed. Consequently, the appeal is dismissed as barred by limitation.

24. Against the order dated 2.4.2003, the State preferred a SLP before Hon''ble Apex Court. The Hon''ble Apex Court admitted the appeal but no stay was granted and disposed of the appeal vide its Judgment dated 8.5.2007, the operative portion of which is quoted as under:

After hearing learned Counsel for the parties, we are of the opinion that the Division Bench not to have dismissed the appeal. This matter has serious repercussions and financial liability on the State for payment of pension. The High Court should have condoned the delay and heard the matter on merits. We set-aside the order dated 2.4.2003 passed by the High Court, condone the delay and remit the matter back to the High Court to decide the matter on merits. Since it is a pension matter, the matter should be taken up by the High Court immediately and dispose it of as early as possible within three months after receipt of a copy of this order.

The appeal is, accordingly, disposed of. In case the incumbents are drawing the pension, the same will not be disturbed till the order is passed by the High Court.

25. The Division Bench of this Court finally decided the special appeal filed by the State of Rajasthan, bearing number as DB Civil Special Appeal No. 320/2003, State of Rajasthan and Anr. v. Mohd. Rafiq and Anr. vide judgment dated 22.11.2007. The judgment dated 22.11.2007 is reproduced as under:

This matter was called out on 21.11.2007 twice but no-one appeared on behalf of the appellant. Today again it has been called out for hearing yet no on appears. It has been pointed out by the counsel for the respondents that the respondents has been availing the pensionary benefit for the last ten years and his entitlement has been upheld by the learned Single Judge also.

The appeal under the circumstance is dismissed in default as also on merit.

26. So far as the submission of Mr. M.D. Agarwal, learned Counsel for the respondents regarding granting stay by the Division Bench of this Court vide order dated 23.8.2005 in D.B. Civil Special Appeal No. 768/2005, is concerned, in my view the same does not reverse the final judgment of this Court because the stay order is in personam and interlocutory in nature. Hence, the same will not be applicable in all pendings cases. The operative portion of the order dated 23.8.2005 passed by the Division Bench is reproduced as under:

Issue notice to the respondents, Issue notice of stay application also. Meanwhile, the operation of the impugned order dated 30.7.2005 shall remain stayed.

27. This Court in a similarly situated case bearing SBCW P. No. 2968/98, Usman Ali v. State, vide order dated 11.2.2003 has been pleased to grant pensionary benefits to the petitioner, the operative portion of which is quoted as under:

For the reasons afore-mentioned, I direct the respondents to allow pensionary

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benefits to the petitioner and pay pension after deducting the amount of Contributory Provident Fund paid to petitioner. This order shall be complied with within ninety days from today. No order as to costs.

However, it is made clear that neither the petitioner is entitled to the interest nor the respondents can change the interest on the amount of Contributory Provident Fund.

28. The case of the present petitioners is squarely covered by the Judgments, referred to above and the same have not been reversed by any appellate Court. It is a fact that similarly situated persons after retirement are getting pension and this Court cannot over-look the above discrimination and three similarly situated persons are getting the pension vide orders dated 13.8.2002, 14.2.2003 and 11.2.2003 respectively. Apart from the afore-said order, there are other cases decided by this Court. The same are, therefore, binding for deciding the present controversy.

29. So far as circular dated July 13, 1994 issued by the Finance Department is concerned, it is stated that on absorption/appointment of work-charged employee on regular post, the period of service rendered by him as work-charged employee while drawing pay in the pay scale prescribed for him excluding the period of Muster roll service (dally wages/casual labour) be counted as a service qualifying for pension irrespective of whether deduction towards contributory provident fund was made from his salary or not.

30. Such work-charged employees may be allowed option either to retain contributory provident fund within two months from the date of his appointment/ absorption on regular post, as the case may be. In case where option is not received within the stipulated period, it shall be deemed that he has opted for pension rules in lieu of Contributory Provident Fund.

31. Hence, in view of above discussion, this writ petition stands disposed of on the following terms:

A. The writ petition filed by the petitioners is allowed and the respondents are directed to give pensionary benefits to the petitioners within a period of three months from the date of receipt of certified copy of this order. However, the petitioners shall not be entitled to any interest on the arrears of pension. The respondents are further directed that they shall not charge any interest on the amount of Contributory Provident Fund.

B. Parties shall bear their own costs.

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