

(2016) 05 DEL CK 0264
In the Delhi High Court
Case No : RSA No. 68 of 2009

Delhi Transport Corporation		APPELLANT
	Vs	
Om Prakash Sharma		RESPONDENT

Date of Decision : 16-05-2016

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 29, 30

Citation : (2016) 158 DRJ 503

Hon'ble Judges : Mr. V.K. Shali, J.

Bench : Single Bench

Advocate : Mrs. Avnish Ahlawat, Advocate with Ms. Latika Choudhary, Advocate, for the Appellants; Mr. Ved Prakash Sharma, Advocate with Ms. Amrit Kaur Oberoi, Advocate and Mr. Kunal Dutt, Advocates, for the Respondents; Mr. Ved Prakash Sharma, Advocate with Ms. Amri

Final Decision : Disposed Off

Judgement

Mr. V.K. Shali, J.—These are two cross appeals filed by the appellants (i.e. DTC and Om Prakash Sharma respectively) against the same order dated 10.02.2009 passed by the learned Senior Civil Judge by virtue of which the judgment and the decree passed by the learned Civil Judge on 20.10.2007 was affirmed.

2. The DTC has challenged the impugned order by raising substantial question of law while as Mr. Sharma has challenged the rejection of the prayer by the learned Senior Civil Judge with regard to grant of interest @ 24% per annum on the pensioner benefits and awarding interest only @ 8% per annum.

3. Before dealing with the respective contentions of the parties, it would be pertinent here to give the brief facts of the case. It is also made clear that the parties are being referred by their names in order to avoid any confusion with regard to the status in the present appeal.

4. Om Prakash Sharma filed a suit for declaration that he is entitled to pension in

terms of office Order No.16 notified vide Circular No.Admn-1-5(41)/92 dated 27.11.1992 w.e.f. 01.05.1994 and for grant of mandatory injunction directing the defendant to pay to the plaintiff pensionary benefits including computation of pension and arrears of pension after giving benefits under rules 29 and 30 of C.C. Pension Rules for 10 years in his qualifying service with interest @ 24% per annum because the said benefits have been withheld illegally and against the provisions of law, w.e.f. 01.05.1994

5. He stated that he joined the DTC as Law Officer on 27.11.1978 and in course of time was promoted to the post of Legal Advisor. On 27.11.1992, DTC introduced a pension scheme for its employees at par with the Central Government employees vide office order which is Ex.PW-1/1 which reads as under:-

"No.Adm1-5(41)/92

Dated: 27-11-92

OFFICE ORDER NO.16

Sub:- Introduction of Pension Scheme in DTC as applicable to the Central Govt. Employees.

The introduction of Pension Scheme for the employees of the D.T.C. has been sanctioned by the Central Govt. and conveyed by the M.O.S.T. vide letter No.RT-12019/21/88-TAG dated 23.11.1992 as on the same pattern as for the Central Govt. employees, subject to the following conditions:-

- (1) The pension Scheme would be operated by the LIC on behalf of DTC.
- (2) The date of effect of Pension Scheme would be 3.8.1981.
- (3) All the existing employees including those retired w.e.f. 3.8.1981 onwards would have the option to opt for the pension scheme of the Employees Contributory Provident Fund as at present, within 30 days from the date of issue of this ? for the implementation of the Pension Scheme as approved by the Govt. of India.
- (4) The Pension Scheme would be compulsory for all the new employees joining D.T.C. w.e.f. 23.11.92, the date of sanction of the Scheme.
- (5) The Pension Scheme would be operated by the LIC on behalf of DTC. The employers share in the EPF A/c of the DTC employees, who opt for pension scheme would be transferred to the LIC, for operating the pension scheme on behalf of DTC and the amount deposited in the Central Govt./State Govt./Guaranteed Securities would be encashed on maturity.
- (6) The employees who have retired on or after 3rd August, 1981 and the existing employees, who have drawn the employer's share, under the EPF Act, partly or wholly shall have to refund the same with interest in the event of their opting for the pension scheme. The total amount to be refunded by the retired

employees/existing employees would be the amount that would have accrued, had they not withdrawn the employer's share.

(7) Excess amount of gratuity, if already paid to ex-employees and which is not admissible under the Pension Scheme, will have to be refunded by them before any benefit under the scheme, is granted to them.

(8) A due and drawn statement would be prepared in respect of retired employees opting for pension scheme and the amount to be paid/refunded, would be worked out by the concerned unit, wherefrom the employee had retired from service.

(9) If any of the employee of DTC, who does not exercise any option within the prescribed period of 30 days or quit service or dies without exercising an option or whose option is incomplete conditional or ambiguous, he shall be deemed to have opted the pension scheme benefits.

Application forms for exercising option would be available with the Unit officers and all employees including retired employees wishing to exercise option, should do so with the unit of their present working/where from they retired, within a period of 30 days from the date of issue of this office order.

The Unit Officers, after receiving the options from the ex-employees, will take further necessary action for getting the necessary forms completed, which will be supplied to them by the LIC for pension, etc. They will also ensure the recovery of DPF and Gratuity from the Ex-employees before forwarding their applications as mentioned above.

The cases of all officers will be dealt with at Headquarters.

The options received from the existing employees for not opting pension may be kept in their personal file and entry made in their Service Book.

Sd/-

(L.C. Goyal)

Dy. Chief General Manager (P)"

6. In March, 1993 DTC introduced Voluntary Retirement Scheme (VRS) vide office order dated 03.03.1993 and 16.03.1993 which are Ex.PW-1/2 and PW-1/3 respectively which read as under:-

"Delhi Transport Corporation

(A Govt. Of India Undertaking)

I.P. Estate: New Delhi

No. Adml-5(41)/93

Dated: 3.3.1993

Subject: Voluntary Retirement of Employees of Delhi Transport Corporation.

The matter pertaining to the introduction of Voluntary retirement Scheme for the employees has been under consideration of Delhi Transport Corporation. Salient features of the proposed voluntary retirement scheme are as under:

1. Applicability:

The scheme will be applicable to all regular employees of the Corporation, i.e. workers and executives who are appointed against regular vacancies in the Corporation.

2. Eligibility:

An employee must have completed ten years of service in this Corporation or completed 40 years of age to qualify for consideration under the Scheme. For this purpose, period of deputation/retention of lien in the parent office in lieu of deputation prior to absorption in the regular service of the Corporation will be excluded.

3. Conditions governing voluntary retirement:

(a) Voluntary retirement will be normally allowed only in cases of incumbents of the posts which has been declared surplus or redundant. However, voluntary retirement scheme could also be allowed in other cases depending on the merits of each case and in the interest of the corporation.

(b) Voluntary Retirement cannot be claimed by any employees as a matter of right. The Corporation will have the right not to grant voluntary retirement for reasons to be recorded in writing. Under no circumstances will the relief under this scheme be allowed from a date earlier than the date of passing orders.

(c) An employee in whose case any disciplinary case is pending will not be considered under this scheme until the disposal of the same.

4. Benefits under the Scheme:

An employee who takes voluntary retirement will be eligible to the following refunds/payments:

(a) Balance in his PF account as per rules of Provident Fund applicable to him.

(b) Encashment of refused leave and accumulated Earned Leave as per rules of the Corporation applicable to him as if he retires under the normal rules of retirement.

(c) Gratuity as per Payment of Gratuity Act and Gratuity Rules of the Corporation applicable to him.

(d) Three months' notice pay as is applicable in the individual case as per the terms of his/her employment.

(e) An Ex-gratia payment equivalent to 12 months' basic pay plus DA for each completed year of service limited to one month pay multiplied by the number of whole months of service left before normal date of retirement.

(f) Expenses for travelling by the entitled class for the employee and his/her family comprising his/her spouse and dependent members from the place of his/her posting to the place where he/she intends to settle down in India.

(g) Pensionary benefits as per office order No.16 dated 27.11.1992.

All amounts due to the Corporation will be adjusted against the payments under (d) & (e) above and the employee concerned should clear any outstanding dues/advances taken before the date of effect of voluntary retirement.

Employees working on the post of Conductor in the Corporation are proposed to be covered under the Voluntary Retirement Scheme in the first instance. Such Conductors who are desirous of seeking voluntary retirement in the proposed scheme may give their option in the prescribed proforma through proper channel within 15 days to the concerned unit officers who will forward the same to the Secretary, DTC Board.

This issues with the approval of competent authority.

Sd/-

3.3.93

(A.K. Sharma)

Dy. Chief General Manager (IR)"

"Delhi Transport Corporation

(A Govt. of India Undertaking)

I.P. Estate: New Delhi

No. Adml-5(41)/93

Dated: 16.3.1993

Subject: Voluntary Retirement of Employees of Delhi Transport Corporation.

Salient features of the proposed Voluntary Retirement Scheme were announced vide this office circular of even number dated 3.3.1993 (copy enclosed). Initially the coverage of this scheme was applicable only to the employees working on the post of Conductor.

Now, it has been decided to cover all the employees of the Corporation under the proposed Voluntary Retirement Scheme. Such employees who are desirous of seeking voluntary retirement in the proposed Scheme may give their option in the prescribed proforma through proper channel within 15 days to the concerned Unit Officers, who will forward the same to the Secretary, DTC Board. This issue

with the approval of the competent authority.

Sd/-

16.3.93

(A.K. Sharma)

DY. Chief General Manager (IR)"

7. The scheme of VRS as contained in Ex.PW-1/2 was given wide publicity and a circular came to be issued by the DTC calling upon its employees to exercise their options in terms of the aforesaid circular. It is the case of Mr.Sharma that he exercised his option for VRS which was accepted by DTC vide acceptance letter dated 29.04.1994 which is Ex.PW-1/4. The respondent retired from the service of the Cooperation w.e.f. 30.4.1994. Further, It has been stated that the incumbent had completed 15? years of qualified service at the time of acceptance of his option of VRS. Certain benefits were released to Mr.Sharma vide letter dated 29.04.1994 Ex.PW-1/5 which were received by him under protest as certain benefits under VRS in respect of salary and encashment of leave were not properly calculated. This question of having received the benefits "under protest" is disputed by the DTC and even the photocopies of the original record which were shown in the court also does not show any protest having been lodged by the incumbent at the time of acceptance although an argument in this regard is being made. Mr.Sharma was found eligible to get pension and in terms of VRS Scheme Para 4 (g) of Ex.PW-1/2 it was alleged that the DTC withheld its share towards contributory provident fund. After about two years of acceptance of VRS in 1996, Mr.Sharma was intimated that he was not entitled to any pension as he had not completed 20 years of service. He served a legal notice dated 17.06.1996 Ex.PW-1/8 which was followed up by him, allegedly by several reminders which did not yield and result finally culminating into filing of a suit for declaration in September, 1998 and mandatory injunction to the effect that he was entitled to pensioner benefits including computation of pension and arrears after giving benefits under Rule 20 and 30 of CCS (Pension Rules) with interest @ 24% per annum.

8. It has been also stated that the decision of the DTC not to pay any pension to any of its employees who had not completed 20 years of service was challenged by some of the employees before the High Court of Delhi in which the court vide its judgment dated 19.09.1997 had held that "who ever had completed ten or more years of service, was entitled to pension." It was observed that "VRS Scheme was meant to get rid of its staff and all those who opted for it were entitled to the benefits detailed in Clause 4 of the Scheme including pension as per CCS (Pension) Rules."

9. The said judgment was challenged by the DTC in LPA which was rejected on 16.03.2000 and SLP also did not bring any desired result. On the basis of the aforesaid facts it was alleged that Om Prakash Sharma is entitled to the aforesaid

benefits.

10. It has been stated by the respondent that on 23.04.2001 the counsel for the DTC and its representative gave a statement in the suit proceedings filed by Mr. Sharma conceding that the respondent was entitled to benefit of Rule 29 and 30 of the CCS (Pension) Rules and that the DTC would file due and drawn statement accordingly. The DTC filed due and drawn statement Ex.PW-1/16 but did not give the benefit of Rule 29 and 30 of the CCS (Pension) Rules and also did not grant any arrears of pension or commutation thereof. On the contrary, it is alleged that the statement showed recovery of compound interest @ 12% per annum on loan taken by Mr.Sharma from his provident fund and also Mr.Sharma's share to the provident fund which DTC had decided to recovery from him which the DTC had released in 1996.

11. The learned Civil Judge after completion of the pleadings framed following issues:-

"1. Whether the plaintiff is entitled to the pension benefits, including the computation of pension and arrears after giving benefits under Rule 29 and 30 of the CCS (Pension) Rules? OPP.

2. Whether the plaintiff is entitled for the interest on the pensionary benefit, if so, at what rate and for what period? OPP.

3. Relief?"

12. Mr.Sharma in support of his case examined himself as PW-1 and the DTC examined only one witness, namely, DW-1 Daulat Singh, Deputy Manager (Pension Scheme), DTC.

13. The learned Civil Judge after hearing arguments decreed the suit on 20.10.2007 after holding that Mr.Sharma was surplus and was entitled to the benefit of Rule 29 together with interest @ 8% per annum on the arrears of pension and other benefits and since the DTC had decided to give pension to him pursuant to the decision by the Hon'ble High Court the declaratory relief with regard to pension was not pressed and Mr.Sharma gave up his claim with regard to applicability of Rule 30 of CCS (Pension) Rules.

14. Thus, the only question which remains in to be considered is as to whether Rule 29 of the CCS (Pension) Rules apply. The DTC challenged the judgment and the decree of the learned Civil Judge. The first Appellate Court upheld the said judgment and the decree vide its judgment dated 10.02.2009. Thus, there was a concurrent finding of fact by the learned Civil Judge and by the first Appellate Court that Mr.Sharma was declared surplus and was entitled to benefit of Rule 29 of the CCS (Pension) Rules.

15. DTC has challenged the same under the present appeal while as sensing that the challenge to the appeal is on merits, Mr.Sharma also filed a cross appeal though belatedly challenged the rejection of his prayer for grant of interest @

24% per annum on the delayed payment of pensionary benefits.

16. Before this Court Mrs. Ahlawat, the learned counsel for the DTC made submissions and accordingly, the Court had framed the following three questions for being considered:-

"(i) Whether the post of Legal Advisor which the respondent in the instance case was holding at the time of seeking voluntary retirement was declared surplus or redundant, if so, to what effect?

(ii) If the answer to question (i) is in affirmative, whether Rule 29 of CCS (Pension) Rules would be applicable to him?

(iii) Whether the respondent had been granted voluntary retirement under clause-3 of the VRS Scheme vide Circular No.AdmI-5(41)/93 dated 3.3.1993 ?"

17. I have heard Mrs. Ahlawat, the learned counsel for the DTC and Mr. Ved Prakash Sharma, the learned counsel for Om Prakash Sharma.

18. Mrs. Ahlawat, the learned counsel for the DTC has contended that the respondent himself in his cross-examination has admitted that he is not in possession of any order to indicate that he was ever declared as surplus or redundant. Accordingly, it is contended since respondent himself has admitted that he was not declared as surplus, therefore, he could not be given the benefit of five added years service for the calculation of his pensionary benefits. The exact words which has been used by Mr. Om Prakash Sharma in his cross-examination are reproduced as under:-

"? It is correct to suggest that I was not issued any such letter showing therein myself as a surplus employee."

19. This question has been countered by Mr. Ved Prakash Sharma, the learned counsel for the respondent by contending that under the order dated 03.03.1993 Rule 3 reads as under:-

"3 (a) Voluntary retirement will be normally allowed only in cases of incumbents of the posts which has been declared surplus or redundant. However, voluntary retirement scheme could also be allowed in other cases depending on the merits of each case and in the interest of the corporation."

20. It has been contended that the perusal of the aforesaid rule clearly shows that the voluntary retirement would normally be granted only in cases where the incumbent was declared surplus or redundant and the very fact that the voluntary retirement was permitted in the case of the respondent clearly indicated that he was surplus or redundant and, therefore, he had to be given the benefit of five years added service for the benefit of calculation of his pension. It has been further stated by him that the respondent Om Prakash Sharma had made averments in Para 14 of the plaint in this regard. It was stated that the appellant/defendant in the written statement had taken the plea that Om Prakash Sharma is not entitled to pension because Rule 48-A of the Pension

Rules because he had not completed 20 years of service.

21. I have carefully considered the respective submissions. I have also gone through the record.

22. It has been averred to in Para 14 of the plaint and WS as under:-

"14. That at the time of retirement, the plaintiff was having 15? years of qualifying service at his credit, and in addition to this, as per provisions of Rule 29 and 30 of the CC Pension Rules, the plaintiff was further entitled to an additional benefits of about 10 years under the said Rules i.e. five years under Rule 29 and five years under Rule 30, as he was given voluntary retirement after he was declared surplus, because the said voluntary retirement scheme was meant only for surplus staff and further when he joined the defendant/ Corporation, as Law Officer as per R.Rs. for the said post, he was having more than 10 years of service at his credit. ?..

Para 14 of WS

14. Contents of para No.14 of the plaint are wrong and denied, it is denied that the case of the plaintiff comes under the provision of Rule 29 and 30 of the CC Pension Rules, it is submitted that Rules 29 and 30 of CC Pension Rules related to those employee, who was declared surplus by the DTC, but in this case the plaintiff himself applied for VRS and accordingly his request has acceded to by the management. So the case of the plaintiff comes under Rule 48-A."

23. Curiously, the Court has not framed any issue with regard to the same, i.e. an issue as to whether the respondent was declared surplus or not, if so, to what effect. Further, no evidence has been produced by the plaintiff on that very point. The plaintiff would not succeed on this issue merely because the appellant had taken an incorrect defence and no evidence has been produced by it. Further, in my view, a declaration which confers a legal character ought to have been obtained by the respondent. Under Section 34 of the Specific Relief Act, 1963. No such relief was ever claimed by the respondent then how could he be declared as surplus.

24. I do not agree with the contention of Mr. Sharma that under Rule 3, the very fact that an incumbent has been granted VRS then ipso facto he is to be treated as surplus or redundant. The said rule states that "normally" incumbent who has been declared surplus or redundant may be granted VRS. This is further amplified in the subsequent sentence used in the same rule which says that "depending on the merits of each case VRS could be granted in "other cases" also. Therefore, it cannot be said that VRS can be granted only in surplus cases or vice versa. Meaning thereby that the very fact that voluntary retirement has been granted to a person then he has to be presumed as surplus. It is further stated that as a matter of fact in Government of India or its undertaking before an employee is declared surplus there is a surplus inspection unit attached to Ministry of Human Resources or DOP which conducts a study and identifies the

staff which is surplus. Empirical research is done to streamline the staff and cut the flab keeping in view the work of the organization. While as no such inspection in the instant case has been done internally or even externally to show that the post which the respondent was holding was surplus. Therefore, merely because respondent was granted voluntary retirement, it cannot be presumed that his post was surplus. Moreover, it is a matter of fact that the respondent was holding the post of a Law Officer and was promoted as a Legal Advisor and he applied for VRS in the capacity of Legal Advisor. There was not more than one post of Law Officer /Legal Advisor while as there may be number of posts of lower categories of law officers or Assistant Law Officers or Junior Law Officers. Where a particular post is only one in number, whether it is of Deputy Law Officer or Law Officer or Legal Advisor itself, how could such one post be treated as having become surplus, because in such an event the entire decision making process in the organisation would crumble.

25. Mr. Sharma, the learned counsel for the respondent has drawn my attention to some documents which is a note put to the Director and to the Board where the total strength of the legal Department has been given. It has been stated in the note that the respondent who was Law Officer at the relevant time and was permitted to take VRS. It has been further stated that till date the Law Officer has not been recruited and his function are being attended to by the Assistant Law Officer or Additional Law Officer. That cannot be a ground to assume that he has been declared surplus or that he was granted VRS because of this reason.

26. I do not get persuaded by this submission of the learned counsel for the respondent. There has to be a positive order passed by the organisation that the respondent has been declared a surplus and therefore, he has been permitted to take VRS. This is not so. Further, merely because no regular law officer has been recruited and his work is being attended to by the Assistant Law Officer is also not at all helping the case of the respondent.

27. Moreover, if one sees the plaint which has been filed by the respondent himself he has nowhere used the word "surplus" or that he was declared surplus in the entire plaint except in para 14 nor has he sought declaration that he be declared as surplus and therefore he applied for voluntary retirement. Since there was no such issue framed by the respondent, consequently there was no occasion for the DTC herein to produce the evidence in the negative. The fundamental rule of evidence is one who asserts must prove. Since the respondent was alleging that he was surplus, he ought to have proved the same which he has failed to do so. Yet there is finding returned by the trial Court and confirmed by the first Appellate Court holding the respondent to be surplus. This finding returned by the two Courts below concurrently is without any evidence on record and, therefore, such a finding which is based on no evidence would be a perverse finding. Accordingly, the substantial question No.1, which is framed by this Court is decided in affirmative in favour of the appellant/DTC.

28. The contention of Mr. Sharma that the Division Bench of this Court headed by

Hon?ble Ms. Justice Usha Mehra in Jagpal Singh v. Delhi Transport Corporation, 1997 (6) AD (Delhi)1001 had upheld the validity of Rule 29 and granted pension to the employees of the DTC after completion of ten years does not help the respondent in any manner because it is not an authority with regard to addition of five years because of VRS.

29. If the question No.1 is decided in favour of the appellant/DTC in affirmative, obviously, the only question which would arise is as to whether the relief which has been granted to the appellant with regard to the pension on the strength of Rule 29 of the CCS (Pension) Rules is in order or not? In other words, the respondent having put in 15? years of service is entitled to pensionary benefit under Rule 29 without being given the benefit of added weightage of five years of service on account of being declared as a surplus and therefore, the pension of the respondent including commutation of pension had to be modulated. Accordingly, the second question also gets answered in the same tone that is to say that five years service will not be added to his service for calculation of his pensionary benefits.

30. The third contention is with regard to the payment of interest. In the cross appeal which has been filed by the respondent Om Prakash Sharma, has prayed for grant of interest @ 24% per annum. It has been stated that the respondent had received belated payment of pensionary benefits in pursuance of the directions passed by the two Court below and he has been granted interest only @ 8% per annum. It has been stated that the respondent was entitled to interest @ 24% per annum. The learned counsel for the respondent in support of his contention on grant of interest has relied upon the judgments wherein such rate of interest has been granted on account of belated payment of pensionary benefit to the incumbent.

31. I have considered the submissions and gone through the judgments. The judgments relied upon by the respondent are-

1. Bank of India & Anr. v. K. Mohandas & Ors, 2009 (4) SCALE 576

2. Gurdev Kaur & Ors. v. Kaki & Ors, JT 2006 (5) SC 72 These judgments which has been relied upon by the learned counsel for the respondent are distinguishable from the facts of the present case. In the present case the issue was as to whether the respondent was to be granted benefit of five years of added service to his actual service of 15? years and thereby the pension to be sanctioned to him. It is a matter of fact that the respondent had put in only 15 years of service and applied for VRS and all the benefit except a portion of which was released to him which was accepted by the respondent without prejudice. Though the learned counsel for the respondent had stated that the payment was accepted subject to reservation or without prejudice. However, it has not been shown on original record by the respondent that such a payment was ever accepted by him without prejudice. On the contrary, this was a belated plea taken by the respondent to further his own interest. Once the payment is

accepted by an incumbent without reservation, he cannot retrace his steps and then say that he has accepted the payment without prejudice. Only a fraction of some benefits were to be released to him because there was a confusion with regard to reversing of the incumbent from Contributory Provident Fund Scheme to the Pension Scheme and certain contributions were to be re-adjusted or repaid to the employer.

32. All these points were not involved in the cases which has been relied upon by the learned counsel for the respondent. So, therefore, there are fundamental differences in the facts of the cases which has been relied upon by the learned counsel for the respondent and the case in hand.

33. It has been held by this Court that the respondent is not to be given the benefit of five years of service because he was never declared surplus and, therefore, he was to be granted pensionary benefits in pursuance to Rule No.29 as he had rendered 15? years service. While as the eligibility for grant of pension was ten years. This pension in substantial portion had been paid to him and only a small fraction was paid belatedly. For this small fraction, the respondent's interest cannot be increased to 24% per annum as the grant of interest is a matter of discretion by the Court and no question, much less a substantial question can be deemed to have arisen in the second appeal. This aspect has already been dealt with by the Court below and some interest has been granted.

34. Therefore, I feel that the appeal of the respondent Om Prakash Sharma with regard to payment of interest @ 24% deserves to be dismissed and the appeal filed by the appellant/DTC deserves to be allowed and the concurrent finding of fact returned by the two Courts below holding that the respondent was permitted to take voluntary retirement as he was declared surplus and therefore, he was given the benefit of five years of service is based on no evidence and to that extent the judgment and the decree deserves to be modified. Ordered accordingly. Parties to bear their own costs. Pending applications, also stand disposed of.