
(2011) 02 JH CK 0097

In the Jharkhand High Court

Case No : Writ Petition (S) No. 4837 of 2002

Dhananjay Sharma

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 11-02-2011

Acts Referred:

All India Services (Death-Cum-Retirement Benefits) Rules, 1958 — Rule 16(3)
Army Act, 1950 — Section 42, 47, 63, 64
Bihar Pension Rules, 1950 — Rule 130, 74
Constitution of India, 1950 — Article 309

Citation : (2011) 02 JH CK 0097

Hon'ble Judges : J.C.S. Rawat, J

Bench : Single Bench

Final Decision : Allowed

Judgement

J.C.S. Rawat, J.—Heard the parties.

2. It is admitted to the parties that the Petitioner who had been working as a clerk in the Respondents' Department filed an application for seeking voluntary retirement vide application dated 13.12.2001 and it was addressed to the Regional Director of the Respondents' Department which was forwarded by the Department of the Respondents to the appointing authority. The said application contained the communication that the Petitioner entails to seek voluntary retirement with effect from 31st March, 2002 after three months of the notice. It is also admitted that no communication for the rejection of the said request was received by the Petitioner within stipulated period. On 16.5.2002, a communication was received by the Petitioner by which his application seeking voluntary retirement was rejected and he was asked to join his duties and he preferred the writ petition. During the pendency of the writ petition, he was suspended and the departmental proceedings were initiated against him and punishment was awarded.

3. The moot question for consideration arises as to what is the true impact and

purport and the scope of Rule 74(b) of Bihar Pension Rules and the Circular dated 27.4.1979 issued by the Government of Bihar as to whether the voluntary retirement sought by the employee becomes effective on expiry of the period of notice served to the employee or any order of acceptance is a condition precedent for giving effect to the request of the employee. Before entering into the discussion, I would like to refer the relevant provisions of Rule 74 of Bihar Pension Rules quoted as under:

74. (a) The state Government may require any Government servant who has completed twenty one years of duty and twenty-five years of total service calculated from the date of his first appointment to retire from Government service, if it considers that his efficiency or conduct is not such as to justify his retention in service. Whether any Government servant is so required to retire not claim to any special compensation shall be entertained.

(b) (i) Notwithstanding anything contained in the preceding sub rule a Government servant may, after giving at least three months previous notice, in writing, to the appointing authority concerned retire from service on the date on which such a Government servant completes thirty years of qualifying service or attains fifty years of age or on any date thereafter to be specified in the notice:

Provided that no Government servant under suspension shall retire from service except with the specific approval of the State Government:]

[Provided further that in case of the officers and servant of the Patna High Court (including those of Circuit Bench at Ranchi) under the rule making authority of the Chief Justice, no such officer and servant under suspension shall retire from service except with the specific approval of the Chief Justice.

[(ii) The appointing authority concerned may after giving a Government servant at least three month's pay and allowance in lieu of such notice, require him in public interest, to retire from service on the date on which such a Government servant completes thirty years of qualifying service or attains fifty years of age or on any date thereafter to be specified in the notice.

[(iii) A Government servant who retires voluntarily is required to retire in public interest under this rule on attaining the age of 50 years, or completing qualifying service of 30 years, shall be entitled to retiring pension and death-cum-retirement gratuity.

4. The Circular dated 27.4.1979 which has been issued by the Government under/appended to Rule 74 of the Pension Rules which reads as follows;

1. A Government Servant whose qualifying service is not less than 20 years can take retirement by giving three months' prior notice to the competent appointing authority.

This scheme is completely voluntary in which the Government servant has himself to initiate and the Government has no alternative to retire Government

servants under this scheme.

2. Under this scheme Pension shall be payable to the retiring Government servants.

6. Voluntarily one can withdraw his notice for retirement with the consent of appointing authority provided the request of this withdrawal is made before the expiry of three months of furnishing notice.

7. After 20 years of qualifying service the approval of the competent appointing authority is essential in furnishing notice of voluntary retirement. If the date of retirement falls prior to the date of expiry of such notice on the date of the Government servant would have retired voluntarily in his regard according to the existing rules (i.e., Rules 74 B of Bihar Service Code). Paragraph 2 of Clause 1 of Liberalized Pension Scheme 1950 under Bihar Pension Rules & Rule 130 of Bihar Pension Rule or other similar rules and such approval can be generally given in all cases (Excluding cases of the category of the following "Ka" and "Kha")

(Ka) Such cases in which with a view of awarding major punishment against a Government servant disciplinary action has to be taken or if any such action is pending and if it is the opinion of the Officer conducting the disciplinary action that in the concerned case it is essential to award punishment of dismissal and termination of the said Government servant keeping in view all the aspects of charges (framed against him).

(Kha) In such cases when Prosecution is expected against Government servant in the court of prosecution has been initiated.

But in case of this category if there is proposal to accept notice if such voluntary retirement than approval of the Minister-in-charge may be taken in the case of Government servant coming under Category ("Ka") and ("Kha"). In cases other than those the approval of the Head of the department is essential.

In cases in which approval of notice for voluntary retirement is essential to be taken from appointing authority in such cases also approval to this effect in respect of the Government servants giving notice shall be deemed to be approved provided that no adverse order is passed by the competent authority prior to the date of giving notice. The date of retirement shall be deemed to have come into effect from the date mentioned in such cases.

5. The Government servant may, after giving at least three months notice in writing to the appointing authority concerned, retire from the service on the date on which the government servant completes thirty years of qualifying service or attains fifty years of age or any date thereafter which is to be specified in the notice. Thereafter an executive order was issued under which the rule was relaxed and the qualifying service only of twenty years instead of 20 years was prescribed in the Circular and thereafter the government servant had an option to give a notice and there was a provision in the said rules that if no adverse had been received by the competent authority prior to the date of expiry of the

notice, the retirement shall be deemed to come into effect from the date mentioned in such notice.

6. Thus, moot question which was indicated at the outset arose before the Hon"ble Supreme Court time and again. The Hon"ble Apex Court in the matter of State of Haryana v. S.K. Singhal reported in (1999) 4 SCC 923 has discussed all the earlier decisions in its judgment. In this case, the respondent was a Medical Officer and he served a three months notice on 16.8.1995 seeking voluntary retirement under Rule 5.32B of the Punjab Civil Services Rule after completing 25 years of qualifying service. The petitioner-State did not serve any rejection order of the said notice or any adverse communication during the said period. Subsequently, on 13.12.1995, he was informed that his request could not be considered, hence the controversy arose where the respondent in that case should be treated to be retired or it had not been retired, what would be the effect of the said rules. The relevant rule 5.32B of the Punjab Civil Services Rule is identical to the rule of 74(b) of Bihar Pension Rules and the Circular which has been quoted above. Rule 5.32 (B) of the Punjab Civil Services Rule reads as follows:

5.32(B) (1) At any time a government employee has completed twenty years" qualifying service, he may, by giving notice of not less than three months in writing to the appointing authority retire from service. However, a government employee may make a request in writing to the appointing authority to accept notice of less than three months giving reason thereof. On receipt of a request, the appointing authority may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the appointing authority may relax the requirement of notice of three months on the condition that the government employee shall not apply for commutation of a part of his pension before the expiry of the period of notice of three months.

(2) The notice of voluntary retirement given under subrule (1) shall require acceptance by the appointing authority subject to Rule 2.2 of the Punjab Civil Services Rules Vol.II:

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in sub-rule (1) supra, the retirement shall become effective from the date of expiry of the said period:

Provided further that before a government employee gives notice of voluntary retirement with reference to sub-rule(1) he should satisfy himself by means of a reference to the appropriate authority that he has, in fact, completed twenty years" service qualifying for pension.

7. In the said rule, sub-clause-2 clearly emphasises that notice of voluntary retirement given by the employee shall require acceptance by the appointing

authority. Sub-Rule 2.2 (a) of the Punjab Civil Services Rules of Para-7 reads as under:

2.2(a) Future good conduct is an implied condition of every grant of a pension. The (appointing authority) reserve to itself the right of withholding or withdrawing a pension or any part of it if the pensioner be convicted of serious crime or be guilty of grave misconduct. The decision of the (appointing authority) on any question of withholding or withdrawing the whole or any part of pension under this rule shall be final and conclusive.

8. Thus, interpretation of the above Rule 5.32B came before the Hon"ble Apex Court. In the said Rule, there is a provision, where the appointing authority does not refuse to grant the permission for retirement from the expiry specified as in the Sub-section-1, the retirement shall become effective from the date of expiry of the said period. Thus, this Rule is identical to the Rule of the State of Bihar (applicable in the State of Jharkhand) The Hon"ble Apex Court while dealing with the controversy has held as in Para 9, 13, 14, and 16 in the above said judgment, quoted as under;

9. The employment of government servants is governed by rules. These rules provide a particular age as the age of superannuation. Nonetheless, the rules confer a right on the Government to compulsorily retire an employee before the age of superannuation provided the employee has reached a particular age or has completed a particular number of years of qualifying service in case it is found that his service has not been found to be satisfactory. The rules also provide that an employee who has completed the said number of years in his age or who has completed the prescribed number of years of qualifying service could give notice of say, three months that he would voluntarily retire on the expiry of the said period of three months. Some rules are couched in language which results in an automatic retirement of the employee upon the expiry of the period specified in the employee's notice. On the other hand, certain rules in some other departments are couched in language which makes it clear that even upon expiry of the period specified in the notice, the retirement is not automatic and an express order granting permission is required and has to be communicated. The relationship of master and servant in the latter type of rules continues after the period specified in the notice till such acceptance is communicated; refusal of permission could also be communicated after 3 months and the employee continues to be in service. Cases like *Dinesh Chandra Sangma Vs. State of Assam and Others*, , *B.J. Shelat Vs. State of Gujarat and Others*, and *Union of India and others Vs. Sayed Muzaffar Mir*, belong to the former category where it is held that upon the expiry of the period, the voluntary retirement takes effect automatically as no order of refusal is passed within the notice period. On the other hand *Himachal Pradesh Horticultural Produce Marketing and Processing Corporation Ltd. Vs. Suman Behari Sharma*, belongs to the second category where the bye-laws were interpreted as not giving an option "to retire" but only provided a limited right to "seek" retirement thereby implying the need for a

consent of the employer even if the period of the notice has elapsed.

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13. Thus, from the aforesaid three decisions it is clear that if the right to voluntarily retire is conferred in absolute terms as in Dinesh Chandra Sangma case by the relevant rules and there is no provision in the rules to withhold permission in certain contingencies the voluntary retirement comes into effect automatically on the expiry of the period specified in the notice. If, however, as in B.J. Shelat case and as in Sayed Muzaffar Mir case the authority concerned is empowered to withhold permission to retire if certain conditions exist, viz., in case the employee is under suspension or in case a departmental enquiry is pending or is contemplated, the mere pendency of the suspension or departmental enquiry or its contemplation does not result in the notice for voluntary retirement not coming into effect on the expiry of the period specified. What is further needed is that the authority concerned must pass a positive order withholding permission to retire and must also communicate the same to the employee as stated in B.J. Shelat case and in Sayed Muzaffar Mir case before the expiry of the notice period. Consequently, there is no requirement of an order of acceptance of the notice to be communicated to the employee nor can it be said that non-communication of acceptance should be treated as amounting to withholding of permission.

14. Before referring to the second category of cases where the rules require a positive acceptance of the notice of voluntary retirement and communication thereof, it is necessary to refer to the decision of this Court in Dr. Baljit Singh Vs. State of Haryana, strongly relied upon by the learned Counsel for the Appellants and to Power Finance Corporation Ltd. Vs. Pramod Kumar Bhatia, The former case arose under Rule 5.32B of the Punjab Civil Services Rules. That rule extracted earlier contains an express provision in the proviso to Sub-rule (2) that the retirement takes effect automatically if refusal is not communicated within 3 months. In that case, when the employee gave notice for voluntary retirement on 20.9.1993, criminal cases were pending against him. After expiry of 3 months, on 25.2.1994, the competent authority declined to accept the notice. A two-Judge Bench of this Court, however, held that the voluntary retirement did not come about automatically on the expiry of the notice period but that it could take effect only upon acceptance of the notice by the Government and that the acceptance must also be communicated and till then the jural relationship of master and servant continues. This Court referred only to the decision of the two judge Bench in Sayed Muzaffar Mir case and stated that the case was to be confined to its own facts. The two Judge Bench of this Court in Baljit Singh case did not notice that there were two-three Judge Bench cases in Dinesh Chandra Sangma and Shelat taking the view under similar rules that a positive order was to be passed within the notice period withholding permission to retire and that the said order was also to be communicated to the employ during the said period. By stating that an order of acceptance of the notice was necessary and

the said acceptance must be communicated to the employ and till that was done the jural relationship continued and there was not automatic snapping thereof on the expiry of three months period, the two Judge Bench, in our view, has gone contrary to the two three Judge Bench cases which were not brought to its notice. In the above circumstances, we follow the two three judge Bench cases for deciding the case before us.

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16. We then come to the second category of cases where the rules require that an order of acceptance of notice be passed to make the voluntary retirement effective. In *HPMC v. Suman Behari Sharma* it will be noticed, the principal in *Dinesh Chandra Sangma* case was accepted but the case was distinguished on the ground that Bye-law 3.8(2) in *HPMC* case provided differently and that under that bye-law an employee could be permitted at his request to retire on completion of 25 years' service or 50 years of age. Para (5) of Bye-law 3.8 stated as follows: (SCC p.588, para7)

(5) Notwithstanding the provision under Para (2) above, the corporation employees who have a satisfactory service record of 20 years may also seek retirement from the service of the Corporation after giving three months' notice in writing to the appropriate authority. Persons under suspension would not be retired under this clause unless proceedings of the case against them are finalized.

9. Thus, the Hon'ble Apex Court held that if no communication has been received, the Petitioner will be deemed to have been retired from service. While discussing the ratio discussed in its earlier judgments, the earlier judgments which were referred before me by the learned Counsel for the Respondents which has already been dealt with in para-4 of the above judgment.

10. The matter again cropped up before the Hon'ble Supreme Court in the case of *Tek Chand Vs. Dile Ram*, in which Nikka Ram was an employee of the Government on the date of filing and scrutiny of his nomination paper. Thus the matter originally relates to election petition and a question arose as to whether Nikka Ram was holding office of profit under the State Government. Nikka Ram served a three months notice for seeking voluntary retirement on 5.12.1994. He requested that he may be retired w.e.f. 28.2.1995. He gave an application for voluntary retirement on the said date to the Superintending Engineer, Irrigation Department. The said application indicated three months notice with a request that he may be permitted to retire with effect from 28.2.1995. Accordingly, the Respondents filed the election petition challenging the election on the post of MLA, that the voluntary retirement of Nikka Ram had not so far been accepted by the Government and Nikka Ram deemed to be continued in the government service and the said request of Nikka Ram was rejected on 26.3.1998. Thus, the question cropped up whether Nikka Ram will be deemed to have retired from the service of the State Government w.e.f. 28.2.1995. The matter relates to Rule 48-

A of Himachal Pradesh. The Himachal Pradesh Civil Services Rule which reads as follows;

31. It is not disputed that the appointing authority did not refuse to grant the permission for retirement before expiry of the period specified in the said application dated 5.12.1994 given by Nikka Ram. Further, no communication whatsoever was made to him within the said period. During the course of the argument before the High Court, the learned Counsel for the parties referred to Rule 48-A of the Rules, of course, placing their own interpretation. Since the said Rule is material and has bearing on the question to be determined, it is extracted below:

48-A. Retirement on completion of 20 years" qualifying service. - (1) At any time after a government servant has completed twenty years" qualifying service, he may, by giving notice of not less than three months in writing to the appointing authority, retire from service:

Provided that this sub-rule shall not apply to a government servant, including scientist or technical expert who is-

(i) on assignments under the Indian Technical and Economic Cooperation (ITEC) Programme of the Ministry of External Affairs and other aid programmes.

(ii) posted abroad in foreign-based offices of the Ministries/ Departments.

(iii) on a specific contract assignment to a foreign Government, unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year.

(2) The notice of voluntary retirement given under Sub-rule (1) shall require acceptance by the appointing authority:

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

11. This Rule 48A, Sub-Clause-1 also provides for qualifying service and other condition for seeking voluntary retirement. Sub-Clause-2 provides that the notice of voluntary retirement given under Clause-1 shall require acceptance by the appointing authority and there is proviso added to the said Clause that if the appointing authority does not refuse to grant permission for the voluntary retirement before the expiry of the period in the said notice, the retirement shall become effective from the date of the expiry of the said period. Thus, Clause-2 is also identical to above Rule-74(b) and the Circular issued by the State of Bihar (applicable in the State of Jharkhand). From perusal of the said Rule, the Hon"ble Supreme Court held that the appointing authority is required to accept the notice of the voluntary retirement given under Sub-clause 1. It is open to the appointing authority to refuse also on whatever grounds available to him, but

such refusal is to be made before the expiry of the period specified in the notice, as proviso to Sub-Rule 2 is clear. If the appointing authority does not refuse to grant the permission for retirement before the expiry of the specified period in the said notice, retirement sought for becomes effective from the date of the expiry of the said period. It was also held that admittedly the appointing authority did not refuse to grant the permission to retire within the expiry period specified in the notice dated 5.12.1994, the Hon''ble Court held that Nikka would be deemed to have retired w.e.f. 28.2.1995. The Hon''ble Apex Court held as under in Para 33, 34 and 35 of the said Judgment.

33. It is dear from Sub-rule (2) of the Rule that the appointing authority is required to accept the notice of voluntary retirement given under Sub-rule (1). It is open to the appointing authority to refuse also, on whatever ground available to it, but such refusal has to be made before the expiry of the period specified in the notice. The proviso to Sub-rule (2) is clear and certain in its terms. If the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement sought for becomes effective from the date of expiry of the said period. In this case, admittedly, the appointing authority did not refuse to grant the permission for retirement to Nikka Ram before the expiry of the period specified in the notice dated 5.12.1994. The learned senior counsel for the Respondent argued that the acceptance of voluntary retirement by appointing authority in all cases is mandatory. In the absence of such express acceptance the government servant continues to be in service. In support of this submission, he drew our attention to Rule-56 (K) of the Fundamental Rules. He also submitted that acceptance may be on a later date, that is, even after the expiry of the period specified in the notice and the retirement could be effective from the date specified in the notice. Since the proviso to Sub-rule (2) of Rule 48-A is clear in itself and the said Rule 48-A is self-contained, in our opinion, it is unnecessary to look to other provisions, more so in the light of law laid down by this Court. An argument that acceptance can be even long after the date of the expiry of the period specified in the notice and that the voluntary retirement may become effective from the date specified in the notice, will lead to anomalous situation. Take a case, if an application for the voluntary retirement is accepted few years later from the date specified in the notice and voluntary retirement become operative from the date of expiry of the notice period itself, what would be the position or status of such a government servant during the period from the date of expiry of the notice period up to the date of acceptance of the voluntary retirement by the appointing authority? One either continues in service or does not continue in service. It cannot be both that the voluntary retirement could be effective from the date of expiry of the period mentioned in the notice and still a government servant could continue in service till the voluntary retirement is accepted. The proviso to Sub-rule (2) of Rule 48-A Rule does admit such situation.

34. This Court in a recent judgment in the case of State of Haryana and Others Vs. S.K. Singhal, after referring to few earlier decisions of this Court touching the

very point of controversy in Para 13 of the judgment has held thus: (SCC p.303)

13. Thus, from the aforesaid three decisions it is clear that if the right to voluntarily retire is conferred in absolute terms as in *Dinesh Chandra Sangma Vs. State of Assam and Others*, by the relevant rules and there is no provision in the rules to withhold permission in certain contingencies the voluntary retirement comes into effect automatically on the expiry of the period specified in the notice. If however, as in *B.J. Shelat* case and as in *Sayed Muzaffar Mir* case the authority concerned is empowered to withhold permission to retire if certain conditions exist, viz, in case the employee is under suspension or in case a departmental enquiry is pending or is contemplated, the mere pendency of the suspension or departmental enquiry or its contemplation does not result in the notice for voluntary retirement not coming into effect on the expiry of the period specified. What is further needed is that the authority concerned must pass a positive order withholding permission to retire and must also communicate the same to the employee as stated in *B.J. Shelat* case and in *Sayed Muzaffar Mir* case before the expiry of the notice period. Consequently, there is no requirement of an order of acceptance of the notice to be communicated to the employee nor can it be said that non-communication of acceptance should be treated as amounting to withholding of permission.

35. In our view, this judgment fully supports the contention urged on behalf of the Appellant in this regard. In this judgment, it is observed that there are three categories of rules relating to seeking of voluntary retirement after notice. In the first category, voluntary retirement automatically comes into force on expiry of notice period. In the second category also, retirement comes into force unless an order is passed during notice period withholding permission to retire and in the third category voluntary retirement does not come into force unless permission to this effect is granted by the competent authority. In such a case, refusal of permission can be communicated even after the expiry of the notice period. It all depends upon the relevant rules. In the case decided, the relevant Rule required acceptance of notice by appointing authority and the proviso to the Rule further laid down that retirement shall come into force automatically if the appointing authority did not refuse permission during the notice period. Refusal was not communicated to the Respondent during the notice period and the Court held that voluntary retirement came into force on expiry of the notice period and subsequent order conveyed to him that he could not be deemed to have voluntarily retired had no effect. The present case is almost identical to the one decided by this Court in the aforesaid decision.

12. The Hon''ble Apex Court has reiterated the same view in the case of *Padubidri Damodar Shenoy v. Indian Airlines Ltd.* Reported in (2009) 10 SCC 518.

13. This controversy also cropped up before this Court in Writ Petition Service No. 3079 of 2004. The co-ordinate Bench of the Court also decided the question in favour of the Petitioner in the light of the above judgments of the Hon''ble Apex Court.

14. From analysis of the above propositions of law, it is revealed that the voluntary retirement would fall in three categories. Firstly, whether the voluntary retirement is automatically, comes into force on the expiry of the notice period. Secondly, whether the voluntary retirement comes into force on the expiry period unless an order is passed within the notice period withholding the permission to retire and thirdly, whether the voluntary retirement does not come into force unless permission to this effect is granted by the controlling authority. First two category cases are the cases of S.K. Singhal and Tek Chand (*supra*) whereas in the third category the case of B.J. Shelat (*supra*). In the first two cases, there was a provision for the automatic retirement if no adverse communication has been received from the Respondents. The 3th category cases has been dealt within P.D. Senoy case (*supra*) where the rules were very specific that the voluntary retirements had to be accepted by the Respondents employer and there was no deeming provision of the retirement in case of non-communication by the authority as provided in the first two categories of the case.

15. Learned Counsel for the Respondent also relied upon the judgment of the Apex Court in the matter of Board of Trustees, Vishakhapatnam Port Trust and Ors. v. T.S.N. Raju and Anr. reported in 2006 (7) SCC 666. Learned Counsel vehemently relied upon the observation made in the said judgment that the Voluntary Retirement Scheme was not a proposal or an offer but it was merely an invitation to offer the applications filed by the employees would be an offer. It must be accepted by the employer and thereafter the said offer can be acted upon.

16. In this case, a letter was given by the Appellant before the Board of Trustees, Vishakhapatnam, for seeking voluntary retirement under VRS Scheme. It was felt that there is a surplus manpower in the said port and the VRS Scheme should be applied and a Circular for V.R.S. was issued. The learned Counsel could not demonstrate from the Circular that there is a deeming provision indential to Rule-74(b) and Circular of the proviso of the Bihar Pension Rules or as provided in the Punjab Civil Services Rules 5.32 (2) or in the Himachal Pradesh Civil Services Rules 48B (2). The V.R.S. Scheme only provides that if an employee port who had completed the qualifying service, may apply for seeking VRS and it was the right of the Respondents either to grant or not to grant. Thus, this falls within 3rd category as enumerated above. As per V.R.S. Scheme, an specific order regarding the acceptance or the refusal, was required. As such, Hon''ble Supreme Court has held that the request for seeking VRS is a proposal and it can only be acted up when it is accepted by the port trust. In the case in hand there is a deeming provision that the voluntarily retirement automatically comes into effect if no adverse order has been received from the Respondents within the stipulated period. Thus this ruling is not applicable in this case.

17. Learned Counsel for the Respondents tries to emphasis that the Circular contemplates that if after 20 years of qualifying service, the employee submits his notice for seeking voluntary retirement, the approval of appointing authority

is essential which has been provided in Sub-clause 7 of the said order, the learned Counsel for the Petitioner refuted the contention & contended that the proviso appended to Clause-7 proviso-2 is clear that, in case no communication has been received from the Respondents about the rejection of the approval of the notice, the employee deemed to be retired provided no adverse order is passed by the competent authority prior to the date of the notice period. The date of the retirement would be deemed to have come into effect from the date mentioned therein. I have discussed above in the case of Mr. Singhal (supra) and Tek Chand (supra), in both the cases, there was a provision that acceptance was required. There was also a proviso with said clause that if it is not refused by the employer within the notice period, the retirement will become effective from the date of expiry of the said period. Bihar rule is identical to the above rules. The Hon'ble Court considered the said aspect of the matter and the Hon'ble Supreme Court held that the General Rule is that the approval is required where there is proviso which gives an acceptance in favour of the Petitioner or the employee that if no adverse communication is received, the employee shall be deemed to have retired from the date of expiry of the notice. It is a settled principal of law that the function of the proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. In *Ayyasami Vs. State of Tamil Nadu*, has held in para No. 14 and 15 as under:

14. It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the filed which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms.

15. The scope of the proviso, therefore, is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule. It has to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says not set at naught the real object of the main enactment, unless the words of the proviso are such that it is its necessary effect.

In *Tek Chand (supra)*, para 37. it is held as under in para-37:

37. If we accept the argument of the learned Senior Counsel of the Respondent, even if the refusal of voluntary retirement is not communicated within the period specified in the notice, the voluntary retirement cannot be effective unless it is accepted by the appointing authority, no meaning and effect can be given to the proviso to Sub-rule (2) to Rule 48--A. It is cardinal rule of construction that no word or provision should be considered redundant or superfluous in interpreting the provisions of a statute or a rule.

In view of the above, I do not find any force in the contention of the learned Counsel for the Respondents.

18. Learned Counsel for the Respondents further contended that the claim of the Petitioner is based on mere executive instruction dated 27.4.1979 and not on the Rule made under Article 309 of the Constitution. It does not confer any legal right to the employer. Learned Counsel for the Petitioner refuted the contention.

19. It is settled position of law where there is a gap in between the Rule framed under Article 309 of the Constitution, the Circulars or the executive orders can be issued by the State Government or by the Union Government. It is also settled position of law that the executive instruction can only fill up the gaps not covered by the Rules and can not be in derogation of the statutory rules. I specifically enquire from the learned Counsel for the State whether the Circular dated 27.4.1979 which empowers the employee to seek the voluntary retirement is in derogation of the statutory rules or it is in addition to the statutory Rule. Learned Counsel appearing for the State stated that the said instruction is not in derogation and it is in addition to the Rule. It is also to be noted that the Preamble enshrined in the Constitution and the Articles contained in the Constitution reflects that the State is a welfare State, so all the Rules and Regulations and the Circulars which give power to the authorities in favour of the employees should be read as it confers power regarding the welfare of the Subject and it should be read in consonance with the Constitution. It is not disputed that the State has issued the said Circular at the same time, the State is arguing that they are not bound by the said Circular rather they are saying that the Petitioner cannot take the benefit of the said Circular. Firstly, whether the State can take this plea at this stage, I have doubt. The Hon''ble Apex Court in the case of Swaran Singh Chand Vs. Punjab State Electricity Board and Others, in which the Circular was issued by the Government in the year 1981 laying down the guidelines for the compulsory retirement and it was held that the State has to follow the said guidelines while compulsorily retiring the employees from the services.

20. It is settled position of law that when the State laying down the Rules for taking action against the employee it is imperative on the part to scrupulously follow the same. The Hon''ble Apex Court also held that the guidelines issued by the State are binding upon it; the Appellant in that case who had been directed to be compulsorily retire, the State has to follow the guidelines and as such, the order was quashed. The Hon''ble Supreme Court in the case of State of

Maharashtra and Another and A.W. Dhope and Others Vs. Sanjay Thakre and Others, has held as in Para-7 quoted as under:

7. The contention of Shri Bhandare that the provisions concerned are executive instructions, having no statutory force, because of which the State could deviate from the ratio, lacks force and deserves to be rejected. Apart from the fact that it was not factually pleaded and contested before the Tribunal, the State having laid down the ratio, even though the same be by way of executive instructions, it does not really lie in the mouth of the State to contend that the instructions having no statutory force could be deviated.

Thus, in view of the above, contention of Respondents is not tenable.

21. It is also admitted that the said Circular is not derogation of the general rule and it empowers the authorities to grant the benefit of the voluntary retirement to those employees who had attained the qualifying service of 20 years. Thus, the qualifying service was relaxed from 21 years on duty and 25 years service to 20 years service by the said Circular. The scope of the said Rule 74(b) Bihar Pension Rule was made wider. It cannot be said that Circular is in derogation of the rule. As a matter of fact it is in addition to the Rule 74(b). In this regard, the matter came up before Hon''ble Supreme Court in the case of Naga People's Movement of Human Rights v. Union of India before the constitution Bench of the Apex Court reported in Naga People's Movement of Human Rights Vs. Union of India (UOI), . The Hon''ble Supreme Court while dealing the issue has held that the subordinate legislation and executive instruction when issued, can fill up the gaps in the statutory provision. Certain instructions, do's and don'ts were issued to the armed forces by the Central Government and it was challenged that these instructions had no statutory force. The Hon''ble Supreme Court has enumerated all the do's and don'ts in paragraph 53 of the judgment and has held in Paragraph 55 to 58 quoted as under:

55. The learned Attorney General has submitted that these instructions provide an effective check against any misuse or abuse of the powers conferred under the Central Act on an officer in (he armed forces inasmuch as contravention of these instructions is punishable under Sections 47, 42(e), 63 and 64(f) of the Army Act, 1950.

56. In State of Uttar Pradesh Vs. Chandra Mohan Nigam and Others, . this Court, while considering the validity of Rule 16(3) of the All India Services (Death-cum-Retirement Benefits) Rules, 1958, which empowered the Central Government to compulsorily retire a member of the All India Service, took note of the instructions issued by the Government and observed: (SCC p.355, para 26).

Since Rule 16(3) itself does not contain any guidelines, directions or criteria, the instructions issued by the Government furnish an essential and salutary procedure for the purpose of securing uniformity in application of the rule. These instructions really fill up the yawning gaps in the provisions and are embedded in the conditions of service. These are binding on the Government and cannot be

violated to the prejudice of the government servant.

57. In Supreme Court Advocates-on-Record Association and another Vs. Union of India, , one of us. Verma, J. (as the learned Chief Justice then was), speaking for the majority, after pointing out that in actual practice, the real accountability in the matter of appointments of superior Judges is of the Chief Justice of India and the Chief Justice of the High Court and not of the executive, has said: (SCC pp.694-95, para-455).

455. If that is the position in actual practice of the constitutional provisions relating to the appointments of the superior Judges, wherein the executive itself holds out that it gives primacy to the opinion of the Chief Justice of India, and in the matter of accountability also it indicates the primary responsibility of the Chief Justice of India, it stands to reason that the actual practice being in conformity with the constitutional scheme, should also be accorded legal sanction by permissible constitutional interpretation.

58. The instructions in the from of "Dos and Don'ts" to which reference has been made by the learned Attorney General have to be treated as binding instructions which are required to be followed by the members of the armed forces exercising powers under the Central Act and a serious note should be taken of violation of the instructions and the persons found responsible for such violation should be suitably punished under the Army Act, 1950.

22. The Hon'ble Supreme Court held that the do's and don'ts has been made by the government and have to be treated to a binding instruction which is required to be followed by the members of the armed forces exercising power under Central Act and serious action should be taken in violation of such instruction and the persons who found responsible should be punished. Thus, in view of the above, I do not find any force in the contention of the learned Counsel /Tor the Respondents.

23. Learned Counsel for the Respondents further contended that the said notice for seeking voluntary retirement was served on Regional Director who was not the appointing authority of the Petitioner. It must be given to the appointing authority. He further contended that when the said notice was received to the Director-the appointing authority after receiving the same from the Regional Director, the said proposal was rejected by the Director within three months. Learned Counsel for the Petitioner refuted the contention and relied upon the Rules as referred above. In the Circular, it is not provided that it must be given or to be handed over to the appointing authority. The Circular provides that it should be handed over to the competent authority not to the appointing authority When the notice was given to the Regional Director, it was the duty to send it to the Director, Animal Husbandry. It is also mandatory for the government employees under the Government Conduct Rule that if any communication is made to the higher authorities, he will send it through his immediate superior officer who will in his turn forward it to the higher authority.

Since, the said communication was received by the competent authority, that there is the sufficient compliance of the said Circular. Thus, in view of the above, I don't find any force in the said contention of the learned Counsel for the Respondents.

24. Learned Counsel for the Respondents further contended that the said Circular contains that refusal can be granted in two contingencies as provided in "Ka" and "Kha". There was a pending case against the Petitioner and as such the Petitioner could not get the benefit of the said Circular. Learned Counsel for the Petitioner refuted the contention. From perusal of Para-7 of the said Circular, the general rule is provided that the appointing authority will grant the permission/ approval in all cases except the case mentioned in (ka) and (kha) of the Circular. Both the contingencies enumerated as (ka) and (kha) has been mentioned in preceding paras of my judgment. The said Circular is clear that the said refusal must be within the period of the notice, not beyond that. Thus, in view of the above, I do not find any force in the contention of the learned Counsel for the Respondents.

25. After the order dated 18.5.2002 rejecting the said voluntary retirement, thereafter the departmental enquiry proceeded against him on the basis that there was jural relationship between the employer-Respondent and the employee-Petitioner. It is a settled position of law that after the retirement of the employee, no disciplinary action except in terms of Bihar Pension Rules or any other law enforced can be taken by the Respondents. All the consequential orders passed by the Respondents in the departmental enquiry is hereby quashed however the Respondent Department will have a liberty to proceed against him under the provision of the law treating him to be a retired employee of the Respondent. The Respondent will proceed expeditiously if further proceeding is to be taken against him.

26. The order dated 18.5.2002 contained in Memo No. 626 is hereby quashed and the order of punishment of terminating the Petitioner from the services is also quashed with all consequential benefits which is contained in order dated 15.11.2003 (annexure-a to the I.A. No. 2491 of 2003) of the writ petition. The Respondents would be at liberty to proceed against the Petitioner under the provisions of the law treating him to be retired employee of the Respondents w.e.f. 30th March, 2002 in accordance with law. Thus, the writ petition is allowed. The Respondents are directed if any enquiry is to be proceeded against him, be proceeded expeditiously. No order as to cost.