(2006) 01 BOM CK 0044

In the Bombay High Court

Case No : Writ Petition No. 8644 of 2005

Divisional Railway Manager and Others	APPELLANT
Vs	
M.C. Baviskar and Others	RESPONDENT

Date of Decision : 20-01-2006

Acts Referred:
Railway Establishment Code — Rule 49

Citation : (2006) 2 ALLMR 497 : (2006) 5 BomCR 770 : (2006) 109 FLR 1054 : (2006) 3 MhLj 82

Hon'ble Judges : F.I. Rebello, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Suresh Kumar, for the Appellant; R.P. Saxena, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—Rule, by consent returnable forthwith. Counsel appearing on behalf of the respondents waives service. By consent of Counsel and at their request taken up for hearing.

2. In its judgment dated 5th July, 2005, the Central Administrative Tribunal has held that the respondents are entitled to have the Special Pay that was allowed to them while in service reckoned as part of emoluments for the purposes of pension and retiral benefits. The respondents retired on 31st May, 1993 from the service of the Western Railways. As Chief Health Inspectors additional duties of a Food Inspector under the Prevention of Food Adulteration Act, 1964 were assigned to the respondents for which a Special Pay of Rs. 50/- came to be allowed from 1st February, 1981. That was increased to Rs. 100/- with effect from 1st January, 1986. On 8th December, 1981, the Railway Board introduced a Special Pay for Health Inspectors who had been entrusted with additional duties of Food Inspectors under the Prevention of Food Adulteration Act, 1964 with effect from 1st January, 1981. The Railway Board, however, clarified that this component of Special Pay shall not count as pay for the purposes of pay fixation.

3. Paragraph 1303 of the Indian Railway Establishment Code defines the expression "pay" as follows:

(a) Pay means the amount drawn monthly by a Government servant as:

(i) the pay other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity or to which he is entitled by reason of his position in a cadre; and

(ii) overseas pay, special pay and personal pay; and

(iii) any other emoluments which may be specifically classified as pay by the President.

4. The respondents moved the Central Administrative Tribunal claiming that in terms of the recommendations of the Fourth Pay Commission, their pay as Health Inspectors was to be fixed in the revised pay scale taking into consideration, amongst other things, the Special Pay that was granted to them for the additional workload of Food Inspector. The Tribunal allowed the O. A. on 13th March, 2002 by directing the respondents to take into account the Special Pay for the purposes of the grant of pension and other retiral benefits. On 16th August, 2004, the order of the Tribunal was set aside by a Division Bench of this Court in Writ Petition 5592 of 2002 with the observation that the Tribunal had not considered the effect of Para 1303 of the Railway Establishment Code fully and that the order consequently suffered from an error apparent on the face of the record. Upon remand by this Court, the Tribunal has once again held that the relief which was sought by the respondents was liable to be allowed. In doing so, the Tribunal has relied upon its earlier decision in K.B. Meshram v. Union of India decided on 19th July, 1994 (O.A. 340 of 1993) against which a SLP was dismissed by the Supreme Court. In holding thus, the Tribunal has held that the expression "Special Pay" in Clause (i) of paragraph 1303 of the Railway Establishment Code is relatable to personal qualifications. However, the Special Pay in Clause (ii) "for any other reasons other than personal qualifications" is a part of pay and, is liable to be included for the purposes of calculating pensionary benefits. On this count, reliefs have been granted to the respondents.

5. On behalf of the petitioner, it has been submitted that the judgment of the Tribunal overlooks the definition of the expression "emoluments" in paragraph 49 of the Code under which only the basic pay as defined in Clause (i) of Para 1303 of the Railway Establishment Code is to be taken into consideration and since the Tribunal held that the Special Pay did not fall under Clause (i), but under Clause (ii) of para 1303, it could not have been included as a part of the emoluments for the purposes of calculating retiral benefits. Reliance was placed on a judgment of the Supreme Court in Government of Andhra Pradesh and others Vs. Syed Yousuddin Ahmed, , where the Supreme Court construed a similar provision of Fundamental Rule 9(21)(a)(i) of the Fundamental Rules in a matter which arose from the State of Andhra Pradesh.

6. While dealing with the submissions which have been urged on behalf of the petitioner, it would be necessary at the outset to advert to the definition of the expression "emoluments" in Rule 49 which reads thus:

49. Emoluments. - The expression.- (a) "emoluments", for the purpose of calculating various retirement and death benefits, means the basic pay as defined in Clause (i) of Rule 1303 of the Code which a railway servant was receiving immediately before his retirement or on the date of his death:

Provided that the stagnation increment shall be treated as emoluments for calculation of retirement benefits; (b) "pay" in these rules means the pay in the revised scales under the Railway Services (revised pay) Rules, 1988.

7. Now, even a bare reading of Rule 49 would indicate that the emoluments of an employee for the purpose of calculating his retiral benefits are defined to mean the basic pay; basic pay being as defined in Clause (i) of Rule 1303 of the Railway Establishment Code, which the Railway servant was receiving immediately before his retirement or as the case may be, death. Clause (i) of Rule 1303 specifically excepts Special Pay or pay granted in view of the personal qualifications of an employee from the purview of pay. The Tribunal proceeded on the basis that even though the Special Pay that was drawn by the respondents did not fall under Clause (i) of Rule 1303, it fell nevertheless within the purview of Clause (ii) and that consequently it formed part of the emoluments for the purposes of determining pensionary benefits. This finding of the Tribunal is in the teeth of Rule 49 under which it is only the basic pay as defined in Clause (i) of Rule 1303 that is to be included in computing the emoluments for calculating retiral and death benefits.

8. The view which we take on the interpretation of the relevant provisions of law is in consonance with the law laid down by the Supreme Court in Government of Andhra Pradesh and others Vs. Syed Yousuddin Ahmed, , In that case under the Family Welfare Programme, an incentive was granted to Government servants and the State of A. P. had issued an administrative order stating that advance increments sanctioned for sterilization operations undergone in a lower post or a higher post shall continue to be available as "personal pay", to be reckoned as basic pay for the purpose of pension. The Supreme Court held that the administrative orders of the Government would not render an incentive increment a part of emoluments under Rule 31 of the Pension Rules. The Supreme Court held thus:

It may be stated here that for the purpose of Rule 31 of the Pension Rules ''emoluments" of Government servant would mean the pay which he is drawing as defined in Rule 9(21)(a)(i) clearly excludes the "special pay" or "personal pay" granted to a government servant in view of his personal qualifications or otherwise from the purview of the expression "pay" and, therefore, whether the "incentive award" is held either to be a "special pay" or "personal pay", the same would not form part of "pay" under Rule 9(21)(a)(i) of the Fundamental Rules and consequently would not form part of emoluments under Rule 31 of the Rules for being taken into account for computation of pension of the respondent. The tribunal, therefore, is wholly in error in directing that the "incentive award" granted to the respondent may be taken into account for determining his pension. The contention of the learned Counsel appearing for the respondent, on this score is devoid of any force.

9. This judgment which interprets provisions of law, similar to those involved in the present case must squarely apply to the facts of this case as well. The decision in Meshram''s case would thus, not aid the case of the respondents. In the circumstances, this petition has to be allowed and is accordingly allowed. The impugned judgment and order of the Central Administrative Tribunal dated 5th July, 2005 shall stand quashed and set aside and Rule is made absolute in terms of prayer Clause (a). In the facts and circumstances of the case, there shall be no order as to costs.

