
(2001) 05 DEL CK 0085
In the Delhi High Court
Case No : CWP of 3510 of 1997

Ex-GNR, Birbal

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 18-05-2001

Acts Referred:

Citation : (2001) 5 AD 425 : (2001) 92 DLT 183 : (2001) 59 DRJ 242

Hon'ble Judges : Dr. Arijit Pasayat, C.J.; S.K. Mahajan, J; Mukul Mudgal, J

Bench : Full Bench

Advocate : Mr. V.P. Sharma, for the Appellant; Mr. Jayant Bhushan and Ms. Jasleen K. Oberoi, for the Respondent

Judgement

Arijit Pasayat, C.J.—Doubting correctness of view expressed in Ex-Sepoy S.D.P. Yadav v. Union of India & Others C.W.P. No. 4156 of 1995 decided on 22nd August 1997 by a Division Bench reference has been made by the Division Bench to the Larger Bench. Present Civil Writ Petition under Article 226 of the Constitution of India, 1950 (in short the "Constitution") is filed by the petitioner for quashing the orders dated 7th March 1991 and 1st August 1997 of the respondents, by which he was refused pension under Pension Regulation for the Army, 1961 (Part-I) (hereinafter referred to as the "Regulation"). Refusal was on the ground that petitioner had not rendered the requisite period of qualifying service. Period of desertion was not reckoned to be a part of qualifying service. When the matter was placed before the learned Single Judge petitioner placed strong reliance on a decision of the Division Bench in S.D.P. Yadav's case (supra). Learned Single Judge felt that the judgment required reconsideration, as according to him, the correct position in law was not kept in view while deciding the case. When the matter was placed before the Division Bench it also differed from the views expressed in SDP Yadav's case (supra). Therefore a reference has been made to Larger Bench.

2. Learned counsel appearing for the petitioner stated that the views expressed in S.D.P. Yadav's case (supra) were in order and did not require any

reconsideration. On the contrary the learned counsel appearing for the respondents submitted that true purport and ambit of regulation 122 and 123 of the Regulations were not kept in view in S.D.P. Yadav's case (supra) and Therefore the views ought not to be affirmed.

3. S.D.P. Yadav's case (supra) was also one of desertion from service. Considering Regulations 122 and 123, it was held that Clause (b) of Regulation 123 applied to case of desertion, and the period of desertion has to be reckoned while working out the period of service. As the controversy lies in a very narrow compass, the scope, ambit and parameters of Regulations 122 and 123 need to be quoted in full. The provisions read as follows:

Service qualifying for pension and gratuity

122.(a) All service from the date of appointment of enrolment/transfer for man's service to the date of discharge shall qualify for pension of gratuity with the exception of:

(i) Any period of service on a temporary establishment or for which a special rate of pay is granted on the understanding that no pension is admissible.

(ii) Any period of service rendered before reaching the age of 17 years.

(iii) Any period of unauthorized absence unless pay and allowances are admitted for the period of absence;

(iv) Any period of absence without leave which is regularized as extraordinary leave without pay and allowances.

(v) Any period intervening between the date of dismissal/discharge/release and that of its cancellation which is regularized as extraordinary leave without pay and allowances.

(vi) Any period of absence as a prisoner of war, unless pay and allowances are admitted for the period of absence.

(vii) Any period of detention in civil custody before being sentenced to imprisonment or fine, unless the President, in a special case, issues order reducing the period that shall not count.

(viii) Any period of imprisonment by sentence of a civil court or of a court martial.

(b) In cases of claims to disability pension all service from the date of appointment or enrolment to the date of discharge shall qualify for pension or gratuity subject to exceptions (i) and (iii) to (vii) above.

Forfeiture of service for certain offences and its restoration:

123 (a) A person who has been guilty of any of the following offences:

(i) Desertion, vide Section 38 of the Army Act.

(ii) Fraudulent enrolment, vide Section 34(a) of the Army Act, shall forfeit the whole of his prior service towards pension or gratuity upon being convicted by court martial of the offence.

(b) A person who has forfeited service under the provisions of the preceding clause but has not been dismissed shall, on completion of any period of three years further service in the colours and/or service in the reserve with exemplary conduct without any red ink entry, be eligible to reckon the forfeited service towards pension or gratuity.

4. Learned counsel for the petitioner submitted that by giving a narrow and restricted meaning to sub-clause (iii) and (iv) and clause (a) of Regulation 122, the overriding effect of Regulation 123 cannot be wiped out. It has to be noted that under Regulation 122, all service from the date of appointment or enrolment or transfer for man's service to the date of discharge qualifies for pension or gratuity with the exception of any period of unauthorized absence, unless pay and allowances are admitted for this period of absence or any period of absence without leave which is regularised an extraordinary leave without pay and allowances. In other words Regulation 122 deals with a situation where certain periods are excluded from the period prescription required to be fulfilled in order to qualify for pension and gratuity. Regulation 123, on the other hand, deals with a separate situation. It deals with consequence of desertion or fraudulent enrolment. Emphasis is laid by learned counsel for the petitioner on the restoration of the period for inclusion of the forfeited service. As rightly contended by learned counsel for the respondent restoration of the forfeited service would mean that (a) there was a forfeiture and (b) that the same related to a period of service. When a person is a deserter he does not really render any service. If no service is rendered, the question of forfeiting it does not arise. "Forfeit" used as a noun is that which is forfeited or lost by neglect of duty; something by the commission of a crime, something paid for the expiation of the crime, or in other words a fine (see: Com v. Avsy 29 Ame Rep. 429), that which is or may be taken from one in requital of a misdeed committed - that which is lost, or the right to which is alienated by a crime, offence, neglect of duty, or breach of contract, not merely that which is actually taken from a man by reason of some breach of condition, but also that which becomes liable to be taken. The word "forfeiture" is used in the sense of deprivation or losing of the rights or extinction of rights. It is the divestiture of specific property without compensation in consequence of some default or act forbidden by law.

5. Both Regulations 122 and 123 have to be read together and not in isolation. As observed in Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam and others, the Courts strongly lean against a construction which reduces the statute to a futility. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat*. It is an application of this principle that Courts while pronouncing upon the constitutionality of a statute start with a presumption in

favor of constitutionality and prefer a construction which keeps the statute within the competence of the legislature. A statute is designed to be workable and the interpretation thereto by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. A statute must be read as a whole and one provision of the same should be construed with reference to other provisions in the same statute so as to make a consistent enactment of the whole statute. When the question arises as to the meaning of a certain provision in a statute it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in *pari materia*, the general scope of the statute and the mischief that it was intended to remedy. (see: *Powdrill v. Watson* (1995) 2 All ER 65. It is a rule now firmly established that intention of the legislature must be found by reading the statute as a whole. This rule is referred to as an elementary rule by Viscount Simonds in *Attorney General v. HRH Prince Ernest Augustus of Hanover* (1957) All E R 49. Every clause of a statute should be construed with reference to the context and other clauses of the Act so as to as far as possible to make a consistent enactment of the whole statute or series of statutes relating to the subject matter. The provisions of one Section of a statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. To harmonise is not to destroy. A familiar approach in all such case is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one has to exclude the more specific. If a special provision is made on a certain matter that matter is excluded from the general provision. In the Attorney General's case it was observed that "No one should profess to understand any part of a statute or of any other document before he has read the whole of it."

6. As noted above, Regulation 122 deals with the period which qualifies for pension and gratuity. There are exceptions carved out. We are primarily concerned with the exceptions (iii) and (iv). It is not the petitioner's case that for the period of unauthorized absence, pay and allowance was admitted; or that the period of absence without leave was regularized as extraordinary leave without pay and allowance. The case is one of desertion. It is accepted that the petitioner was a deserter for a period of 797 days i.e. from 21st January 1965 to 26th November 1967.

It was submitted by learned counsel for the petitioner that the expression "prior service" includes the period of desertion also, and Therefore even if it is forfeited for any purpose for fulfillment of the conditions stipulated in clause (b) of Regulation 123, same is to be reckoned. A bare reading of Regulation 123(a) makes it clear that the same deals with two situation i.e. desertion and fraudulent enrolment. So far as the fraudulent enrolment is concerned, the entire period which is subsequent to the enrolment is wiped out because the enrolment was on account of a fraud and no person, as is well settled in law, can derive any benefit from a fraud practiced by him. So far as desertion is concerned, there is no service actually rendered during that period. It is an absence without

intimation to the authorities of the concerned official's whereabouts. As the official had not rendered any service no right in reality accrued, and Therefore the question of a forfeiture of right does not arise. Therefore Regulation 123(a) cannot come to the aid of the petitioner in given situation which is covered by the exceptions (iii) and (iv) spelt out in Regulation 122. The contrary view expressed in S.D.P. Yadav's case (supra) does not appear to be sound. We Therefore overrule the said decision to the extent it is in conflict with out views expressed above.

7. Arguments were advanced by learned counsel for the petitioner on the merits of the case, as regards claim of proportionate pension, etc. We do not think it is necessary to delve into those questions as the same can be appropriately dealt with by the learned Single Judge when the matter is placed before him. Reference is accordingly answered.