
(2015) 10 DEL CK 0167
In the Delhi High Court
Case No : W.P.(C) 1923/2007

F.D. Singh Raghav

APPELLANT

Vs

Directorate General Border Roads Organisation

RESPONDENT

Date of Decision : 15-10-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 224 DLT 482

Hon'ble Judges : S. Ravindra Bhat and Deepa Sharma, JJ.

Bench : Division Bench

Advocate : R.S. Mathur, Advocate, for the Appellant

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—The petitioner, in these proceedings under Article 226 of the Constitution of India, seeks directions to the respondents to fix his pension pro-rata for the period he was in Central Government employment. He also seeks release of his corresponding terminal dues, such as gratuity etc.

2. The brief facts needed to decide this case are that the petitioner joined the Central Government in the General Reserve Engineering Force (GREF), a wing of the Border Roads Organization (BRO) on 28.04.1962. He apparently applied to the National Projects Construction Company (NPCC) for the post of Sectional Officer (C), in February, 1975. By letter dated 22.02.1975, he was asked to inter alia, present a "no objection" letter from his existing public or Government employer - in case he was a public servant. He attended the interview and was selected for the post. He sought two years' lien from the GREF, his employer. On 03.04.1975, NPCC asked GREF to release the petitioner as he was urgently required to work in its project. Accordingly on 19.04.1975, the GREF issued a movement order, facilitating the petitioner to join NPCC. On 27.04.1975, he joined NPCC and started working in that organization.

3. On 29.01.1977, the GREF issued a letter stating that according to the previous

order of 19.04.1975 and a subsequent letter of 03.07.1975 (both addressed by GREF to NPCC), the petitioner was to hold his lien in GREF for two years. It was, therefore, stated by GREF that NPCC was fully aware about the petitioner's status as a quasi-permanent government employee holding lien for two years. In these circumstances, the NPCC's stand was not agreed upon. The petitioner in the meanwhile continued to work in the NPCC. Apparently, there were some inter se correspondences between the NPCC and GREF with respect to gratuity payment for the period the petitioner had rendered service - as is evident from the letters dated 30.12.1992 and 10.10.1996. On 30.09.1996, the petitioner retired from the NPCC's services after attaining the age of superannuation. He thereafter wrote to both his erstwhile employers claiming proportionate pension for the period he was in Central Government's service, i.e., 28.04.1962 to 24.04.1977. In the midst of this correspondence between NPCC, GREF and the petitioner, the former (NPCC) on 19.11.1998 - writing to the Central Government, i.e., the GREF - inter alia observed that:--

"i) That the selection of Shri Singh was made vide this office appointment letter 500617 dated 27.02.1975 on his direct application whereas his application through proper channel was sent vide your office letter No. 71551/DGBR/Coorde dated 1.03.75 i.e. after his selection. As such neither he was selected on deputation basis nor on lien, service prior to joining NPCC i.e. 27.04.75 does not arise at our end.

ii) Being a gap of around 24 years the copy of advertisement for the said selection is not available in this office.

iii) As desired a copy of your office letter No. 71531/DGBR/Coord dated 74-75 is dated 26.03.75 (enclosed)."

After much correspondence, on 13.07.2004, the GREF rejected the petitioner's claim for pro-rata retirement benefit, inter alia stating as follows:--

"2. As you are aware that the case for grant of Pro-rata retirement benefits is not being admitted by audit authorities on the ground that your appointment in the NPCC Ltd. was not through proper channel and your selection was made on your direct application dated 29 Jan 1975 as per your previous employer's letter dated 19 Nov. 1998. Therefore it is advised to approach NPCC Ltd. for issuing a fresh letter indicating your appointment through proper channel permission so that pro-rata pension benefits can be processed."

The NPCC appears to have indicated that since the petitioner's appointment was not through proper channel, it would not be in a position to issue any certificate to facilitate the release of any dues to the petitioner. Consequently, on 11.09.2006, he was asked again - by GREF to approach the NPCC for a clarification which the latter declined.

4. Learned counsel for the petitioner, besides reiterating the written submissions, contended that the record unambiguously points to the fact that the petitioner

had in fact applied through proper channel - even though the application was received belatedly on 01.03.1975. In support of this argument, the petitioner relies upon the NPCC's letter dated 19.11.1998. It is also pointed out that the GREF's letter dated 11.03.1975 in response to Headquarters' letter of 01.03.1976 is relied upon. That letter states:--

"2. An application dated 8th March, 1975 received from G/33088 D"ManGde-II Fauzdar Singh is forwarded herewith duly recommended for further necessary action."

It is stated that resultantly this was a clear case where the application to join a public sector undertaking had been made and the surrounding circumstances point to the approval of the Central Government. Having regard to all these facts, the petitioner cannot be denied terminal benefits and pro-rata pension. To support the latter submission, i.e. entitlement to pro-rata pension, learned counsel relied upon Rule 49(2) of the Central Civil Services (Pension) Rules, 1972 (hereafter called the "Pension Rules"). Learned counsel urged that since the petitioner had admittedly served for more than 13 years and had held lien for two years, upon his absorption by the NPCC, other provisions of the Pension Rules such as Rule 37 clearly applied and he was entitled to pro-rata pension.

5. Both NPCC and GREF, who are respondents, contest the petitioner's claims. The NPCC submits that there is no question of any liability on its part to pay proportionate pension. It is pointed out that NPCC did not have a pension scheme at the time when the petitioner retired. It is sought to be urged on its behalf that the petitioner was appointed on 27.04.1975 as a direct recruit and there was nothing to indicate at that point in time that he had applied as an existing public employee/Central Government servant through proper channel and that there is nothing on the record indicative of the Central Government's "No Objection" Certificate. It is stated that the letter of 19.11.1998 relied upon merely shows that the application through proper channel was sent by the Central Government on 01.03.1975. It is stated that on 26.06.1975, the petitioner was clearly informed that his entry would be treated as fresh appointment. A letter to that effect has been produced and relied upon. Mr. Mishra, learned counsel for the Central Government reiterated its submissions with regard to lack of any material indicative of prior approval on the part of the GREF permitting the petitioner to join NPCC or that he had applied before selection.

6. It is stated that besides the petitioner is not eligible for any terminal benefits. The determination of the Ministry of Defence, Central Government dated 14.02.1985 has been relied upon. The same is to the following effect:

"A case has come to the notice of Defence Ministry wherein a quasi-permanent employee of Defence Ministry got himself absorbed in a Public Sector Undertaking and claimed terminal benefits for the service rendered in the Ministry of Defence. The case was examined by Bureau of Public Enterprises in

consultation with Deptt. of Personnel & A.R. and it has been ruled that only permanent Government employees are entitled to terminal benefits on their absorption in Central Public Enterprises. Army Headquarters etc. may kindly note this position and bring it to the notice of their employees so that they may not be under the impression that quasi-permanent employees are also eligible for terminal benefits on their permanent absorption in Central Public Enterprises."

7. It is also contended that the effect of the petitioner's application for appointment to the NPCC which led to his selection is that his prior period of service is deemed forfeited by virtue of Rule 26(1) of the Pension Rules.

8. The counter affidavit inter alia also records as follows:--

"As regards the service benefits, it is submitted that in accordance with the Govt. of India, Ministry of Home Affairs OM No. 70/62/62/Estt (A) dated 27 Jul 1968 (embodied on para 8A and 24 under Article 67 of CSR Vol-I), permanent Government servants selected for appointment in Public Sector Undertaking on the basis of their applications are allowed to retain lien on their permanent posts in their parent office for a period of two years subject to the conditions that government would not accept any liability to pay any retirement benefits in respect of such persons for the period of service rendered by them under the government. However, further vide Govt. of India, Cabinet Secretariat (Deptt. of Personnel) OM No. 8/1/72-Estt (C) dated 21 April 1972 (embodied as para 20 and 24 under article 67 of CSR Vol-I), it was reviewed that permanent govt. servants who has been appointed in Public Sector Undertaking on the basis of his own application shall be entitled to the same retirement benefits in respect of his past service under Government as admissible to a permanent Govt. servant on deputation to the Public Sector Undertaking on his permanent absorption therein. Had the petitioner been permanent at the time of relieving from our department, he would have been eligible for retirement benefits under the provision of ibid Govt. orders. Whereas the petitioner was holding Quasi-Permanent status and not in a substantive capacity as per averment made by him in para 4 of petition. As such, he was not eligible for any retirement benefits under the provisions of Govt. of India, Ministry of Defence UO No. 64023/233/E1B/731/D (Civ) dated 14 Feb 1985. Copy of the relevant portion of orders reproduced Appendix-33 of CSR Vol-IV, 13th Edition is annexed herein as Annexure R. 3. As far as the provisions of Rule 49(2) of CCS (Pension) Rule, 1972 are concerned, the same are only applicable to a Govt. servant who proceeds on superannuation retirement."

9. During the hearing, it was contended that Rule 49(2) relied upon by the petitioner would have no application to the facts and circumstances of the present case since concededly the petitioner did not fulfill the eligibility conditions requisite to qualify for pension. It was urged in this regard that a Central Government's employee is entitled to pension upon superannuation in terms of Rule 48 or Pension on voluntarily retiring from service under Rule 48A. The only other classes of pension are specifically mentioned in the rules and the petitioner does not answer the description of any of them having regard to the

terms of his cessation of employment with the Central Government. None of the specified conditions were fulfilled; consequently, the petitioner is disentitled to any pensionary benefit. It was urged that pension on absorption in or under the Corporation has to be with prior permission of the Central Government. In this case, since the Central Government never permitted the petitioner to apply, he is deemed to have resigned and consequently forfeited his service and all pensionary benefits. Analysis and Conclusions

10. The facts necessary to decide the controversy are not many. The petitioner had served the GREF for over 13 years when he apparently applied for appointment to NPCC. The precise dispute is whether he sought prior approval or had intimated his then employer GREF. Although there is no direct material indicative of this circumstance, the letter of NPCC dated 19.11.1998 clearly reveals that Central Government itself had under cover of the letter dated 01.03.1975 forwarded his application "through proper channel" to it (NPCC). The petitioner was asked to join NPCC. That he did intimate his employer GREF is evident from the fact that (a) NPCC wrote directly to the GREF and (b) more importantly GREF issued a movement order (dated 19.04.1975) asking the petitioner to report to the NPCC. In these circumstances, even if there were some doubts about whether the petitioner had prior to his selection intimated to, or sought approval of the Central Government or contemporaneously obtained it, there would be no doubt at all that at the time that he did join the NPCC, the Central Government approved of the move. What is more, a subsequent letter of the Central Government clarified that the petitioner was allowed to retain his lien for two years, i.e. the maximum period permitted under the Fundamental Rules and Supplementary Rules (FRSR). This would have been impossible without the Central Government's approval.

11. From the records it appears that the petitioner's claim for pension got lost in the maze of paper work and inter se correspondence between the NPCC and the GREF. Unfortunately, his superannuation from the NPCC in 1996 only worsened his plight inasmuch as neither organization was willing to look into the matter - the NPCC required the Central Government to settle the issue and the latter tossed the ball back into the NPCC's court. The Central Government's stand previously was that the petitioner had resigned from service after the completion of his lien (deemed resignation). Later, however, on 28.08.2004, it veered round to the position that his appointment with the NPCC was not through proper channel. This is evident from the following extract of that letter:--

"It is once again intimated that the case for grant of pro-rata retirement benefits in respect of EX-GS-033088 D/Man Grade II Fauzdar Singh for the period he served in BRO (i.e., w.e.f. 28.04.1962 to 27.04.1975) is not being admitted by audit authorities on the plea that the individual's appointment in NPCC Ltd. was not through proper channel dated 29.01.1975 as per your letter No. 5841284 dated 19.11.1998. In view of above, it is requested to issue a fresh letter about his appointment with you through proper channel/permission favouring the

individual and modifying the earlier letter dated 19.11.1998. Your help as above will only make the individual eligible for getting pension/gratuity from this deptt."

12. This Court is of the opinion that the circumstances surrounding the petitioner's selection and release as well as the contemporaneous correspondence clearly point to the fact that GREF was made aware at all material times about his application and selection. Equally NPCC too wrote on 03.04.1975 requesting the GREF to relieve him "at the earliest possible of his present assignment" since his services were needed in Lagyap Hydel Project Unit. Accordingly, the GREF obliged with some promptitude and issued a movement order dated 19.04.1975 to the effect that he was to proceed to National Projects Construction Corporation Ltd., Lagyap Hydel Project Unit, C/o. Shri A.M. Krishna, Superintending Engineer, Lower Lagyap Hydel Project Circle, Central Water Commission, Gangtok (Sikkim) on selection for the post of Sectional Officer (C). This movement order would not have been issued if GREF nursed any objection or if it had not been duly intimated prior. Indeed this letter of 01.03.1975 forwarding the petitioner's application to the NPCC (belatedly) clinches the issue. It is, therefore, declared that the petitioner had applied "through proper channel" and was duly relieved by movement order dated 19.04.1975 by the GREF. This is sufficient to infer approval of the Central Government, the previous public employer, for the NPCC to have acted upon it.

13. Consequently, terminal dues such as gratuity and other accumulated amounts payable to the petitioner for the length of service he rendered with the GREF, i.e., from 28.04.1962 till the period his lien ended, i.e., on 24.04.1977, have to be released to him.

14. So far as the other question as to the petitioner's entitlement to pension is concerned, this Court notes that "qualifying service" is defined by Rule 3(1)(q) of the Pension Rules; it merely states that qualifying service means service rendered by government servant while on duty or otherwise which shall be taken into account for the purpose of pensions and gratuities admissible under the said rules. The term "pension" under Rule 3(1)(o) "includes gratuity except when the term pension is used in contradistinction to gratuity". Rule 3(1)(r) defines retirement benefits - it "includes pension or service gratuity, and retirement gratuity, where admissible". Rule 26 - which the GREF relies upon undoubtedly disentitles the Central government servant resigning from service to pension. Rule 26(2) states that a resignation "shall not entail forfeiture of past service if it has been submitted to take up, with proper permission, another appointment, whether temporary or permanent, under the Government where service qualifies." Rule 36 defines under what circumstances is the government servant is entitled to pension. It deals with retiring pension and states that retiring pension would be granted to a Government servant who retires, or is retired, in advance of the age of compulsory retirement in accordance with the provisions of Rule 48 or 48-A of these rules, or Rule 56 of the Fundamental Rules or Article 459 of the Civil Service Regulations. According to Rule 36(b), a Government

servant declared surplus and opting for a voluntary retirement in accordance with the provisions of any Special Voluntary Retirement Scheme in that regard would also be entitled to pension.

15. Rule 37 reads as follows:--

"[37. Pension on absorption in or under a corporation, company or body

(1) A Government servant who has been permitted to be absorbed in a service or post in or under a Corporation or Company wholly or substantially owned or controlled by the Central Government or a State Government or in or under a Body controlled or financed by the Central Government or a State Government, shall be deemed to have retired from service from the date of such absorption and subject to sub-rule (3) he shall be eligible to receive retirement benefits if any, from such date as may be determined, in accordance with the orders of the Central Government applicable to him].

EXPLANATION.--Date of absorption shall be -

(i) in case a Government employee joins a corporation or company or body on immediate absorption basis, the date on which he actually joins that corporation or company or body.

(ii) in case a Government employee initially joins a corporation or company or body on foreign service terms by retaining a lien under the Government, the date from which his unqualified resignation is accepted by the Government.

(2) The provisions of sub-rule (1) shall also apply to Central Government servants who are permitted to be absorbed in joint sector undertakings, wholly under the joint control of Central Government and State Governments/Union Territory Administrations or under the joint control of two or more State Governments/Union Territory Administrations.

(3) Where there is a pension scheme in a body controlled or financed by the Central Government in which a Government servant is absorbed, he shall be entitled to exercise option either to count the service rendered under the Central Government in that body for pension or to receive retirement benefits for the service rendered under the Central Government in accordance with the orders issued by the Central Government."

16. A collective reading of Rules 36-40 and 48-48A indicate that they spell out the classes of pension which Central Government officers and employees are entitled. Broadly, they can be categorized in regard to the manner their employment ceases: a) Involuntary, such as invalid pension (Rule 38); compensation pension (Rule 39) upon abolition of post; compulsory retirement before attainment of entitlement to apply for voluntary retirement (Rule 40) such as in the case of punishment; compassionate allowance (Rule 41, in the event of termination or dismissal upon proven misconduct) and b) volitional or upon fulfillment of certain conditions, such as voluntary retirement after completing 20

years service (Rule 48A); superannuation (after completing 30 years service); compulsory retirement under Rule 56(j) FRSR, i.e. after completing 50 years" service and minimum qualifying service, in public interest. Rule 26 talks of forfeiture of past service upon resignation; the exception, Rule 26(2) does not spell out any independent right to claim pension. Rule 48A of Pension Rules, enables a Government servant to seek "retirement" after completion of 20 years of qualifying service. No Rule entitles a Government to apply for "retirement" after completion of 10 years" service. A fortiori, a Government servant is not permitted to seek retirement before she completes 20 years.

17. Rule 49, which the Petitioner relies upon, reads as follows:

"49. Amount of Pension.

(1) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half months emoluments for every completed six monthly period of qualifying service.

(2)(a) In the case of a Government servant retiring in accordance with the provisions of these rules after completing qualifying service of not less than thirty-three years, the amount of pension shall be calculated at fifty per cent of average emoluments, subject to a maximum of four thousand and five hundred rupees per mensem.

(b) In case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of thirty-three years, but after completing qualifying service of ten years, the amount of pension shall be proportionate to the amount of pension admissible under clause (a) and in no case the amount of pension shall be less than Rupees three hundred and seventy-five per mensem.

(c) Notwithstanding anything contained in Clause (a) and Clause (b) the amount of invalid pension shall not be less than the amount of family pension admissible under sub-rule (2) of Rule 54.

(3) In calculating the length of qualifying service, fraction of a year equal to three months and above shall be treated as a completed one half-year and reckoned as qualifying service.

(4) ..."

18. The entire rules have to be kept in mind, while considering Rule 49(2). The petitioner's claim for pro rata pension is not borne out by the rules, as is also evident from the judgment of the Supreme Court, reported as Union of India and Others Vs. Rakesh Kumar etc., . The Court had then rejected an almost identical contention - as to entitlement to pro rata pension upon fulfilling a 10 years" qualifying service, in the following terms:

"On the basis of Rule 49, it has been contended that qualifying service for getting

pension would be ten years. In our view, this submission is without any basis. Qualifying service is defined under Rule 3(q) to mean service rendered while on duty or otherwise which shall be taken into account for the purpose of pensions and gratuities admissible under these rules. Rule 13 provides that qualifying service by a government servant commences from the date from which he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. This rule nowhere provides that qualifying service for getting pension is 10 years. On the contrary, there is specific provision that if a government servant retires before completing qualifying service of 10 years because of his attaining the age of compulsory retirement, he would not get pension but would get the amount of service gratuity calculated at the rate of half months emoluments for every completed six monthly period of qualifying service. In these appeals, we are not required to consider other conditions prescribed for qualifying service as it is admitted that respondent-members of the BSF have completed more than 10 years of qualifying service. Further clause 2(a) of Rule 49 specifically provides for grant of pension if a government servant retires after completing qualifying service of not less than 33 years. The amount of pension is to be calculated fifty per cent of average emoluments subject to maximum provided therein. Clause 2(b) upon which much reliance is placed indicates that in case of a government servant retiring in accordance with the provisions of the Rules before completing qualifying service of 33 years, but after completing qualifying service of ten years, the pension shall be proportionate to the amount of pension admissible under clause (a) and in no case, the amount of pension shall be less than Rs. 375/- per month. This would only mean that in case where government servant retires on superannuation i.e. the age of compulsory retirement as per service conditions or in accordance with the CCS (Pension) Rules, after completing 10 years of qualifying service, he would get pension which is to be calculated and quantified as provided under clause (2) of Rule 49. This clause would cover cases of retirement under Rules 35 and 36, that is, voluntary retirement after 20 years of qualifying service, compulsory retirement after prescribed age and such other cases as provided under the Rules. However, this has nothing to do with the quitting of service after tendering resignation. It is also to be stated that Rule 26 of CCS (Pension) Rules specifically provides that resignation from a service or post entails forfeiture of past service unless resignation is submitted to take up, with proper permission, another appointment under the government where service qualifies."

19. If one considers the above decision, the effect of Rule 37 would be apparent. Rule 37(1) prescribes that the Government servant, who is permitted to be absorbed in "a service or post...under a Corporation or Company wholly or substantially Company wholly or substantially owned or controlled by the Central Government... shall be deemed to have retired from service from the date of such absorption and subject to sub-rule (3) he shall be eligible to receive retirement benefits if any, from such date as may be determined, in accordance

with the orders of the Central Government applicable to him..."

20. Rule 37(3) enables such absorbed Government servant to opt for the pension scheme, if there is any, in the organization where he is absorbed or "to receive pro rata retirement benefits for the service rendered under the Central Government in accordance with the orders issued by the Central Government." The term "retirement benefits" is inclusively defined in Rule 3(1)(r). Nevertheless, the petitioner's absorption - in terms of Rule 37(1) - in our opinion entitles him only to receive pro-rata gratuity benefits for the period he was in service, and not to "pro-rata pension" as he is contending. The authority of the Supreme Court in Rakesh Kumar, is categorical on this aspect. There is no species of retirement other than those mentioned in Rules 38-41 and 48-48A read with Rule 56(j) FRSR. The only exception, Rule 37 entitles a Government servant absorbed in a public sector undertaking, to "pro-rata retirement benefit". As pension is not admissible, that can only imply gratuity.

21. In view of the above conclusions, this petition has to succeed only to the extent of the claim for pro-rata gratuity benefit. The Central Government is accordingly directed to calculate such pro-rata gratuity benefits admissible to the petitioner for the period he was in its employment, and issue an order in this regard within 8 weeks. The payment of such amounts shall be disbursed within 10 weeks. The amounts shall carry interest at 10% per annum from the period 01-01-2004 till the date of payment since the petitioner approached this court only in 2007. The writ petition is allowed in the above terms. In the circumstances, the respondents shall bear costs quantified at Rs. 50,000/- to be borne equally by the Central Government and the NPCC. The same too shall be paid within 10 weeks.