

(2014) 04 CAL CK 0075
In the Calcutta High Court
Case No : W.P.S.T. No. 532 of 2010

Nemai Ch. Chatterjee and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 30-04-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2014) 2 CALLT 444 : (2014) 3 CHN 608 : (2014) LabIC 4495

Hon'ble Judges : Tapash Mookherjee, J; Nishita Mhatre, J

Bench : Division Bench

Advocate : Amal Baran Chatterjee, Mr. Prabir Kumar Chaudhuri and Ms. Ipsita Choudhuri, Advocate for the Appellant; Tapan Kumar Mukherjee and Ms. Mun Mun Tewari, Advocate for the Respondent

Final Decision : Allowed

Judgement

Nishita Nirmal Mhatre, J.—The issues which arise for determination in this petition are (i) whether the temporary service rendered initially by an employee should be reckoned for the purpose of qualifying service for payment of pension if it is followed immediately by permanent service and (ii) whether the Government as a matter of course must condone the shortfall in the qualifying service of such an employee for the purposes of payment of pension and other retiral benefits.

2. The Petitioners in this case were employed on different dates as Seasonal Belders. They were paid a monthly remuneration in accordance with the Office Order issued appointing them in service. The Office Order indicates that they are entitled to payment of salary in the scale of pay of Rs. 220-5-260-6-308-7-364-8-388 plus the usual admissible allowances. All these persons were absorbed as permanent employees with effect from different dates in 1977. Their regularization of service was effected only after an interview and age verification and production of certain documents.

3. The Petitioners discharged the same duty continuously without any interruption or break in service from the time they were initially recruited as Seasonal Belders till they retired from service on attaining the age of sixty years. On retirement, the Petitioners received all their dues except pension, as they had not completed ten years of regular or permanent service as Annual Belders.

4. A representation was submitted to the Authorities for computing the qualifying service by including the service rendered by the Petitioners as Temporary Belders prior to their regularization in service. However, the Government did not concede to this demand. The Petitioners, therefore, preferred OA-1247 of 2009 which was decided by the West Bengal Administrative Tribunal. By the impugned order dated 1st July, 2010, the Tribunal held that since there was no sanctioned post when the Petitioners were recruited initially, the service rendered by them as Seasonal Belders need not be included for computing the qualifying service in order to ascertain whether the Petitioners were entitled to pension. The Tribunal referred to the judgment of the Supreme Court in the Secretary, State of Karnataka and Others Vs. Umadevi and Others, . The Tribunal dismissed the application at the stage of admission.

5. Aggrieved by the decision of the Tribunal, the Petitioners have filed the present writ petition under Article 226 of the Constitution of India.

6. Mr. Chatterjee, the learned Counsel appearing for the Petitioners, has submitted that the Petitioners must be deemed to be regular employees from the date they were initially appointed. He pointed out that Office Order issued appointing the Petitioners in service as Seasonal Belders indicates that they were extended a regular pay-scale which a casual employee would not be paid. He further submitted that in view of Rules 18 and 22 of the West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971 (hereinafter referred to as the DCRB Rules) the service rendered by the petitioners as temporary employees should be included for computing the qualifying service in order to secure pension from the State. The learned Counsel emphasized that while rendering service as temporary employees, the Petitioners were given the benefits of permanent employees and therefore, they would be entitled to the relief claimed by them. The learned Counsel then pointed out the judgment of a Division Bench of this Court in Nirmal Kumar Basuli Vs. Union of India, . The learned Counsel has also relied on the judgments in the cases of Punjab State Electricity Board and Another Vs. Narata Singh and Another, and Kesar Chand Vs. State of Punjab and Others, besides the judgment of the Division Bench of this Court in Haradhan Mahato Vs. The State of West Bengal and Another .

7. On the other hand, Mr. Mukherjee, the learned Counsel appearing for the State, has submitted that the regularization of the Petitioners in service was effected under the Notification, issued by the State Government, being 100 EMP. According to him, this Notification was made applicable only for absorption of casual employees and, therefore, the Petitioners cannot claim to have been employed as temporary employees before they were regularised in service. They

were, according to Mr. Mukherjee, employed as casual employees and as such, were not entitled to reckon the period rendered by them as casual employees for computation of qualifying service. He submitted that the Petitioners did not ever challenge the order regularising them in service on the basis of Notification 100 EMP and thus they were not entitled to the benefit of Rule 22 of the DCRB Rules. The learned Counsel then relied on the judgment of the Supreme Court in the case of State of Bihar Vs. Upendra Narayan Singh and Others, . He submitted that the judgment of the Division Bench of this High Court in Haradhan Mahato Vs. The State of West Bengal and Another does not take into account the provisions of the DCRB Rules. He pointed out that the judgment of the Division Bench in that case was complied by the State under the threat of contempt. However, according to him, the Petitioners here cannot get the benefit of the aforesaid judgment which he urged is per incuriam. The learned Counsel has relied on the decision of the Supreme Court in the case of M/s. Faridabad Ct. Scan center Vs. D.G. Health Services and others, in support of this contention. According to him, the question of equality or discrimination in the case of the Petitioners does not arise when they have based their claim on a judgment which has not considered the law which is applicable to them.

8. Before proceeding to consider the rival submissions of the learned Advocates, it would be appropriate to consider certain provisions of the DCRB Rules.

9. Rule 17 of the DCRB Rules defines qualifying service and stipulates that it shall commence from the date a Government servant takes charge of the office to which he is first appointed either substantially or in an officiating or temporary capacity.

10. Rule 18 of the DCRB Rules reads thus:

Service of an officer does not qualify for pension unless it conforms to the following condition to the following conditions, namely:

(a) the service must be under Government;

(b) the employment must be-

i) substantive and permanent or

ii) of permanent status, or quasi-permanent,

(c) the service must be paid by Government,

11. The condition of Rule 18(b) stands relaxed as the Memo No. 2255 F issued by the Finance Department on 22.03.1973, which stipulates that a Government servant who has worked continuously as a temporary employee for ten years or more would be granted pension and gratuity as admissible to permanent Government employees under the normal rules.

12. Rule 22(1) reads as under:

22(1) Any temporary or officiating service under Government followed with out

interruption by confirmation or by declaration as quasi-permanent or permanent in status in the same or another post shall however count in full as qualifying service except that shall however count in full as qualifying service except that-

(a) the period of temporary or officiating service in an establishment where contributory provident fund benefits are allowed shall not count unless the Government contribution including interest is refunded in full to Government;

(b) the period of service paid from contingencies shall not count.

13. A bare perusal of the aforesaid Rules, in our opinion, leaves no manner of doubt that the service rendered by an employee on a temporary basis must be taken into account in computing qualifying service if it is followed immediately, without a break, by permanent or regular service. In fact, Rule 17 speaks about qualifying service being calculated from the date of initial appointment in service, even in a temporary capacity. The condition for payment of pension is that the person should have rendered qualifying service of ten years for the grant of pension. It is not possible to accept the submission on behalf of the State that service rendered by an employee during the period spent on temporary service should be excluded for the purpose of reckoning the qualifying service. In the present case, there is no doubt that there was no interruption in service. All the employees worked continuously, without a break, since their respective dates of recruitment in service.

14. It has been argued on behalf of the Government that unless the Petitioners were appointed temporarily on sanctioned posts, the question of paying pension to them does not arise. It has been urged further that there can be no temporary service of an employee in a post unless that post is sanctioned. This submission on behalf of the government is, in our opinion, untenable. An employee is appointed on a temporary basis depending on the exigencies of work. The Petitioners in this case, though appointed on a temporary basis as Seasonal Belders, were accorded a regular scale of pay and all allowances and benefits applicable. These Petitioners were employed continuously in the Irrigation Department of the Government of West Bengal. Some of them have rendered continuous service for more than thirty years. The DCRB Rules do not in any manner exclude the entitlement of temporary employees to pension, provided their temporary service is followed immediately, without a break, by permanent service. Therefore, it is not possible to accept the submission made on behalf of the Government. The argument that the Petitioners ought to have rendered service in sanctioned posts is also untenable as temporary employees are recruited depending upon the exigencies of work. It would be inequitable to exclude the period rendered by the Petitioners as temporary employees for the computation of qualifying service and consequently pension, when the Rules do not exclude this period. In fact, the Rules and the Memo dated 22.03.1973 issued by the Finance Department specifically include the period rendered by an employee as a temporary employee for the purpose of counting the qualifying service, except where the temporary service is rendered in an establishment

where Contributory Provident Fund benefits are paid. However, this exception does not become effective if the Government's contribution to the Fund and the interest thereon is refunded to the Government.

15. In the case of Kesar Chand (supra) the full Bench of the Punjab and Haryana High Court held that temporary or officiating service under the State Government has to be reckoned for determining the qualifying service. The Court observed that it was illogical that the period of service spent by an employee on a work-charged establishment before his regularisation was not to be taken into consideration for determining the qualifying service. The Court observed that the classification sought to be made out amongst Government servants who were eligible for pension and those who commence service as work-charged and were later regularised was not based on any intelligible criteria and, therefore, was not sustainable in law.

16. In the case of Punjab State Electricity Board and Another (supra) the Supreme Court confirmed the view of the full Bench of the Punjab and Haryana High Court in Kesar Chand's case (supra). Rule 3.17 of the Punjab Civil Service Rules which was considered by the Full Bench of the Punjab & Haryana High Court as well as the Supreme Court is *pari materia* with Rule 22 of the DCRB Rules. Therefore, in our opinion, the contentions raised on behalf of the State before us are without merit.

17. The judgment of the Division Bench of this Court in Haradhan Mahato Vs. The State of West Bengal and Another no doubt, does not reflect specifically that the DCRB Rules have been considered by the Court. However, it is not possible for us to presume that these Rules were not brought to the notice of the Court when the judgment was delivered, as the State was represented before the Court.

18. The submission on behalf of the State that the judgment of the Division Bench in Haradhan Mahato Vs. The State of West Bengal and Another is *per incuriam* and *sub silentio* is unacceptable. There can be no dispute about the proposition of law expounded in the judgments in Faridabad CT. Scan Centre (supra) and State of Bihar vs. Upendra Narayan Singh & Others (supra) that a benefit given to one set of persons wrongly, cannot be extended to others by invoking Article 14 of the Constitution of India. However these judgments are not relevant in the facts of this case. We have considered the DCRB Rule independently and in our opinion the period of service rendered by a Government Servant on a temporary basis must be reckoned for the purpose of qualifying service and consequently payment of pension, provided, that service is followed immediately and without a break by permanent service.

19. This petition is allowed.

20. However, where the Petitioners have not rendered ten years qualifying service even after reckoning the period of service rendered by them as temporary employees they would not be entitled to pension as a matter of right. In such cases the Government will apply Rule 36 of the DCRB Rules under which

it is vested with the power to condone the deficiency in the qualifying service up to six months. An employee may also apply to the Governor of the State of West Bengal for the relaxation of the Rules under Rule 4 of the DCRB Rules.

21. All arrears of pension shall be paid to the Petitioners by 30th July, 2014 and pension will be paid to them every month hereafter.

22. There shall be no order as to costs.

23. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.