

(2010) 09 OHC CK 0034
In the Orissa High Court
Case No : Writ Petition (C) No. 8702 of 2008

Purna Chandra Das

APPELLANT

Vs

The Board of Governors and Another

RESPONDENT

Date of Decision : 27-09-2010

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 19
Constitution of India, 1950 — Article 226

Citation : (2011) 111 CLT 332 : (2011) 1 OLR 814 Supp

Hon'ble Judges : S.K. Mishra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.K. Mishra, J.—Petitioner seeks direction of the Court to convert his C.P.F. account to G.P.F./Pension scheme.

Petitioner is an ex-serviceman. After his retirement from Indian Army, he competed the test and was appointed as Nursing Assistant/Compounder w.e.f. 01.08.1990 in the Sainik School, Bhubaneswar. At the time there was no pension scheme for Sainik School employees, and they were on CPF (Contributory Provident Fund) scheme. However, in pursuance of the order of the Hon'ble Apex Court, the employees of Sainik Schools became eligible to get pension w.e.f. 01.04.1988 to on Purna Chandra Das v. Board of Governors S.K. MISHRA, J. the pattern of the Central Government Pension Scheme as provided under the Central Civil Service (Pension) Rules, 1972. Accordingly, the opposite party No. 1, as per letter dated 08.02.1989 (Annexure-2) issued clarification regarding the extension of pension scheme to Sainik School employees. Petitioner claimed that in the said letter it was stipulated that ex-servicemen-employed in the Sainik Schools and who are drawing pension from the Central Government, will not be granted pension for their service in Sainik Schools. These employees, however, continued to enjoy the benefit of the existing C.P.F. It was further stipulated in the said letter that the employees who were in service on 01.04.1988 may be

allowed to exercise their option in the prescribed pro forma by 28.02.1989 either for continuing in the existing CPF scheme or to switch over to pension scheme. Petitioner further pleaded that as per the provisions of CCS Pension Rules, 1972, an ex-serviceman re-employed with the Central Government is eligible to get second pension on superannuation. The Sainik Schools employees became eligible to get pension from 01.04.1988. Hence, the ex-servicemen re-employed in the Sainik Schools on superannuation shall get pension w.e.f 01.04.1988. But, it was wrongly mentioned in paragraph 1.2 (c) of the letter of the opposite party No. 1 under Annexure-2 that the ex-servicemen re-employed in Sainik Schools are not eligible to get pension and they continued to enjoy the benefit of C.P.F. scheme. Subsequently, the opposite party No. 1 came to know the illegality/ wrong and rectified the same. The Board of Governor (BOG), vide its circular No. P.C. 37(4)/92/SSC dated 14.09.1992 had specifically deleted the stipulation contained in para 1.2 (c) of the BOG circular No. P.C.10 (4)/87/SSC dated 08.02.1989, Annexure-2, wherein pension/GPF scheme was denied to exservicemen. The said position stood clarified by the opposite party No. 1 vide its letter dated 11.12.1992 (Annexure-3).

2. Thus, after deletion of the restriction as aforesaid prescribed the ex-servicemen re-employed in the Sainik Schools became entitled to get pension and GPF w.e.f. 01.04.1988. As per para-3 of Annexure-2, they were allowed to exercise their option in the prescribed pro forma in 1989 either for continuing with the existing C.P.F. scheme or to switch over to pension scheme along with G.P.F. As regards the employees, who were employed on or after 01.04.1988, were to be governed by the pension and G.P.F. scheme. It is further pleaded by the Petitioner that since he was appointed in the year 1990, he would be governed by the pension and G.P.F. scheme but the opposite party No. 2 most illegally and without application of mind had kept the Petitioner under the C.P.F. scheme.

3. The circular issued by the BOG were not circulated among the employees by the opposite parties. Hence, the Petitioner could not know about his entitlement to pension and GPF scheme. He came to know later INDIAN LAW REPORTS, CUTTACK SERIES [2010] on and immediately on 31.07.1995 he made representation to the opposite party No. 2 requesting him to change his CPF account to G.P.F. scheme. Thereafter, he made several representations to opposite party No. 2 in this respect. The last representation was given on 11.12.2006. All his representations remained unheard at the level of the opposite party No. 2. Thereafter, he made representation to opposite party No. 1 on 20.07.2008. But no action has been taken as yet on the same.

4. It is contended by the Petitioner that he will suffer financial loss after retirement. He contends that since he joined in the Sainik School on 01.08.1990, no option is required to be exercised by him. It is the duty of the opposite parties to invite option but no option has been invited from the Petitioner by the opposite parties in any manner whatsoever. He contends that his employment in

the Sainik School is governed under Rule-19 of the C.C.S. Pension Rules, 1972. It is submitted that he has already retired in the year 2010. Finding no other speedy and efficacious remedy he filed this writ petition with the aforesaid prayer.

5. The opposite party No. 2 filed counter affidavit, inter alia, pleading that there are two categories of employees working in the establishment, viz., i. Ex-serviceman re-employed in the Sainik School, and ii Civilians. Before implementation of pension/GPF scheme all were governed by the CPF scheme. The Sainik School Society Rules and Regulations at Clause 6.13 provide that employees of the Sainik Schools shall be entitled to benefits of pension/CPF, family pension, Dearness Relief on pension/Deathcum-retirement Gratuity/GPF, LTC etc. on the same pattern as admissible to Central Government employees. The CCS Rules, 1972 prescribes the 314 manner and conditions for grant of pension to the ex-servicemen reemployed in civil post after rendering qualifying services in military and in receipt of pension from and out of the retirement from the military services. Therefore, pension/GPF scheme for the employees of the Sainik School when made applicable w.e.f. 01.04.1988 necessity to comply the condition prescribed in CCS Rules arose. So far as the ex-servicemen are concerned, exercise of option to accept one scheme, i.e. CPF or GPF was inevitable as the condition precedent to admit an ex-serviceman to 2nd and civil pension scheme to comply Rule-19 of CCS Pension Rules, 1972. Therefore, the exercise of option by the ex-serviceman is indispensable. The Petitioner being an ex-serviceman has received gratuity and receiving pension out of the previous military employment. Although he joined in the year 1990 but being an ex-serviceman he was to choose whether to continue with CPF or to GPF. By the time he was appointed although Pension/GPF was implemented. However, it was limited to the civil employees. Therefore, the Sainik School Society being an independent body not to extend the benefit to the ex-servicemen as such in view of the Purna Chandra Das v. Board of Governors [S.K. MISHRA, J.] notification dated 08.02.1989, the ex-servicemen were excluded from the scheme and continued under the existing CPF scheme as such no option was asked. The Petitioner after his joining also did not agitate the matter and accepted the CPF scheme by then operative.

6. The BOG as per circulated dated 11.12.1992 (Annexure-3) lifted the restriction contained in 1.2 (c) of the circulated dated 08.02.1989 (Annexure-3) in respect of pensionary benefit to the ex-servicemen. Therefore, in due official process exercise of option was invited from the employees of the School, who were ex-servicemen. The Petitioner being aware of the fact did not exercise his option for change of his pension scheme within the period allowed in the Sainik School Society. The opposite parties further pleaded that Petitioner being aware of the said notification never opted for change of pension scheme as per the stipulation of the circular, and therefore, he is not entitled to switch over from CPF to GPF scheme.

7. The opposite parties further pleaded that the Petitioner's representation dated

31.07.1995 was replied by the School on 19.08.1995. In response to the letter dated 20.07.2007 to the Honorary Secretary, he was appraised about the standing instruction. The opposite parties claimed that the Petitioner should not be allowed to blame them for his own laches and omissions, and therefore, they prayed to dismiss the writ petition.

98. The Petitioner filed a rejoinder to the counter affidavit filed by the opposite parties and the opposite parties have also filed an additional counter affidavit. The parties further illustrated the pleas already taken by them in the writ petition as well as in the counter affidavit. 315 10.

9. In course of hearing, learned Counsel for the Petitioner submitted that since he was appointed on 01.08.1990 as an ex-serviceman employee of the Sainik School became eligible to get pension w.e.f. 01.04.1988, it was not his duty to prefer an option. Rather, it was duty of the employer to offer him the said option. Since he made several representations which have gone unheeded, this writ petition has been filed well in time. Learned Counsel for the opposite party No. 2, on the other hand, contended that as per the standing order, it was the duty of the Petitioner to exercise option on or before 28.02.1989 regarding his choice of CPF/GPF scheme. He having not done so, the writ petition has filed at a very belated stage, after about 15 years and the same is devoid of any merit.

10. The Hon"ble Supreme Court in All India Sainik Schools Employees Association v. The Defence Minister-cum-Chairman, Board of Governors, Sainik School Society, New Delhi and Ors. AIR 1989 SC 88 has held that the Sainik School Employees are not treated as Central Government employees. Thus, the CCS Rules, 1972 is not applicable to the employees of the Sainik Schools. However, for the purpose of consideration of the argument advanced by the learned Counsel for the INDIAN LAW REPORTS, CUTTACK SERIES [2010] Petitioner it is appropriate to take note of Rules-19 of the C.C.S. (Pension) Rules 1972. It reads as follows:

19. Counting of military service rendered before civil employment

(1) A Government servant who is re-employed in a civil service or post before attaining the age of superannuation and who, before such re-employment, had rendered military service, may, on his confirmation in a civil service or post, opt either -

(a) to continue to draw the military pension or retain gratuity received on discharge from military service, in which case his former military services shall not count as qualifying service; or

(b) to cease to draw his pension and refund -

(i) the pension already drawn, and

(ii) the value received for the commutation of a part of military pension, and

(iii) the amount of [retirement gratuity] including service gratuity, if any,

and count previous military service as qualifying service, in which case the service so allowed to count shall be restricted to a service within or outside the employee's unit or department in India or 316 elsewhere which is paid from the Consolidated Fund of India or for which pensionary contribution has been received by the Government:

Provided that -

(i) the pension drawn prior to the date of re-employment shall not be required to be refunded,

(ii) the element of pension which was ignored for fixation of his pay including the element of pension which was not taken into account for fixation of pay on re-employment shall be refunded by him.

(iii) The element of pension equivalent of gratuity including the element of commuted part of pension, if any, which was taken into account for fixation of pay shall be set off against the amount of retirement gratuity and the commuted value of pension and the balance, if any, shall be refunded by him.

EXPLANATION - In this clause, the expression "which was taken into account" means the amount of pension including the pension PURNA CHANDRA DAS v. BOARD OF GOVERNORS [S.K. MISHRA, J.] equivalent of gratuity by which the pay of the Government servant was reduced on initial re-employment, and the expression "which was not taken into account" shall be construed accordingly.

(2) (a) The authority issuing the order of substantive appointment to a civil service or post as is referred to in Sub-rule (1) shall along with such order require in writing the Government servant to exercise the option under that sub-rule within three months of date of issue of such order, if he is on leave on that day, within three months of his return from leave, whichever is later and also bring to his notice the provisions of Clause (b).

(b) If no option is exercised within the period referred to in Clause (a), the Government servant shall be deemed to have opted for Clause (a) of Sub-rule (1).

(3) (a) A Government servant, who opts for Clause (b) or Sub-rule (1) shall be required to refund the pension, bonus or gratuity received in respect of his earlier military service, in monthly installments not exceeding thirty-six in number, the first installment beginning from the month following the month in which he exercised the option.

(b) The right to count previous service as qualifying service shall not revive until the whole amount has been refunded.

(4) In the case of a Government servant, who, having elected to refund the pension, bonus or gratuity, dies before the entire amount is refunded, the unrefunded amount of pension or gratuity shall be adjusted against the [death gratuity] which may become payable to his family.

(5) When an order is passed under this rule allowing previous military service to count as part of the service qualifying for civil pension, the order shall be deemed to include the condonation of interruption in service, if any, in the military service and between the military and civil services.

11. From the above rule, it is crystal clear that the ex-servicemen being re-employed in a civil service or post before attaining the age of superannuation may on his confirmation in the civil service or post opt to continue to draw the military pension or retain gratuity received or to refund the pension already drawn along with value received for the commutation any part of military pension and the retirement gratuity. If he opts for the first option, then his services in the military pension shall not be taken into INDIAN LAW REPORTS, CUTTACK SERIES [2010] consideration along with the civil employment for the purpose of calculating the pension. However, if he opts for the second option, then he is to refund the benefit received from the military services. This Rule, though strictly not applicable to the employees of the Sainik Schools, illustrates the duty cast on the ex-serviceman is concerned regarding exercise of an option either to continue the military pension or to add the services rendered in the qualifying service of the civil service or post. Similar situation is found in this case also.

12. As per Annexure-2, i.e. notification issued on 08.02.1989 the ex-servicemen, who were re-employed in Sainik Schools and who were drawing pension from the Central Government were excluded from the pension/GPF scheme. However, they were to continue to enjoy the benefit of the existing CPF scheme. This clause namely 1.2(c) was deleted by paragraph-3 of Annexure-3, i.e. notification dated 11.12.1992, thereby making the ex-servicemen, who joins employment with the Sainik School to GPF/Pension scheme. However, there is a rider, in the sense that, they had to exercise an option for being governed by either one of two schemes. It is profitable to take note of the exact words of the relevant paragraph of the notification, Annexure-3. It reads as follows:

4. In view of the above, an opportunity is hereby given to the ex-servicemen re-employed in Sainik Schools who are serving or who have retired after 1/4/1988 to opt for Pension/GPF scheme in lieu of the CPF scheme. This option must be exercised by 28 February 1993. In case no such option is exercised by this date it will be presumed that they have opted to continue the CPF scheme.

In interpreting this clause the learned Counsel for the Petitioner submitted that he has been appointed after 01.04.1988 and therefore there is no choice but to grant him the GPF/Pension scheme. Such interpretation of the clause is against the natural meaning of the clause. This paragraph only means any person, who is still in service (i.e. on 11.12.1992, the date of notification) or who has retired after 01.04.1988 has to give an option before 28.02.1993. This option is necessary because there is also an ancillary aspect of refund of the pension and gratuity received from the military, as is seen from the Rule-19 of the C.C.S. (Pension) Rules, 1972. Petitioner can not be given double benefits, in the sense that, he was received pension as well as gratuity from the Central Government

and shall be given the pension and GPF for his employment under the Sainik School. Thus, the Petitioner has to exercise his option in this regard. He cannot receive the benefits from both the accounts. PURNA CHANDRA DAS v. BOARD OF GOVERNORS [S.K. MISHRA, J.]

13. Another aspect, which arises in this case, is that the last date of exercising option was 28.02.1989. The Petitioner, however, did not exercise his option. In 1995, he made a representation. His representation was rejected. He slept over the matter and only in the year 2008 filed this writ petition. It is clear that the writ petition has been filed thirteen years after cause of action arose. In *Virender Choudhury v. Bharat Pastroleum Corporation and Ors.* 2009 (1) CLR (SC) 294, the Hon"ble Apex Court has held that though there is no period of limitation provided for filing a writ petition, it should be filed within a reasonable time. The discretionary jurisdiction under Article 226 of the Constitution of India need not be exercised if the writ Petitioner is guilty of laches. The said ratio is squarely applicable to this case. Thus, in view of the above, this Court is not inclined to grant relief prayed for by the Petitioner and hence, the writ petition is dismissed as devoid of any merit. No costs.