

(2013) 08 P&H CK 0012
In the Punjab And Haryana At Chandigarh
Case No : CWP No. 11213 of 2008

Rakesh Mittal

APPELLANT

Vs

The State of Punjab and Others

RESPONDENT

Date of Decision : 16-08-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2013) 08 P&H CK 0012

Hon'ble Judges : Augustine George Masih, J

Bench : Single Bench

Advocate : J.S. Maanipur, for the petitioner in CWP No. 11213 of 2008, Mr. J.P. Rana, for Mr. Sanjiv Bansal, for the petitioners in CWP No. 13214 of 2008, Mr. Jainainder Saini, for the petitioners in CWP Nos. 15295 of 2008, 904 and 2423 of 2009, Mr. Tarun Singla, for Mr. Rajinder Kumar Singla, for the petitioner in CWP No. 19436 of 2008, Mr. S.K. Sharma, for the petitioner in CWP No. 10126 of 2009 and None for the petitioners in CWP Nos. 8295, 15253 of 2008, 54 of 2009, 10598 and 17166 of 2010, for the Appellant; Monica Chhibbar Sharma, DAG, Punjab, for the State, Mr. P.K. Mutneja, Advocate, for respondent Nos. 3 and 4 (in CWP No. 8295, 19436 of 2008 and 54 of 2009), Mr. Karminder Singh, Advocate, for respondent Nos. 2 and 3 (in CWP No. 13214, 15295 of 2008, 904, 2423, 10126 of 2009) and for respondent Nos. 3 and 4 (in CWP No. 15253 of 2008), Mr. Ashish Bhardwaj, Advocate, for respondent Nos. 3 and 4 (in CWP No. 10598 of 2010 and Mr. Deepak Sibal, Advocate, for respondent Nos. 3 and 4 (in CWP No. 17166 of 2010)., for the Respondent

Final Decision : Allowed

Judgement

Augustine George Masih, J.—By this common order, I propose to dispose of Civil Writ Petition Nos. 11213, 8295, 13214, 15253, 15295, 19436 of 2008, 54, 904, 2423, 10126 of 2009, 10598 and 17166 of 2010 with the consent of counsel for the parties as common questions of facts and law are involved in these writ petitions. The facts, in general when stated in brief, are that the petitioners in the present writ petitions were initially appointed on different posts in District Courts by the concerned District & Sessions Judge on adhoc/temporary basis and

continued as such. Some of the petitioners in these writ petitions sought transfer from their parent districts to Sessions Division, Patiala foregoing their claim for seniority and joined after due permission at Patiala and continued as such. As per Rule 13.4 of the Punjab Civil Services Rules Vol. II (for short "Service Rules"), the petitioners were issued General Provident Fund Account numbers (for short "GPF number") by the District & Sessions Judge and accordingly regular subscription towards the G.P. Fund was being deducted from their monthly salary.

2. Due to the withdrawal of the courts in the Sessions Division, Patiala, petitioners were rendered surplus. Some of the petitioners were retrenched/removed/terminated from service prior to 01.01.2004 while others thereafter. They have been appointed again on the same designation and posts which they held prior to their retrenchment. Termination of the services of the petitioners was only on the basis of the fact that because of the withdrawal of the courts, the posts ceased to exist on which the petitioners were working leading to their removal from service.

3. High Court of Punjab and Haryana issued instructions dated 15.03.2003 and 22.03.2004, wherein it was mentioned that the retrenched staff which is rendered surplus as a result of withdrawal/dispensation of the Courts of Civil Judges (Junior Division)-cum-Judicial Magistrate or otherwise be absorbed against the posts which are created for the Courts amongst these employees. There was no necessity for holding any test and this absorption was to be done on priority basis even against new posts which are to be created in other Sessions Divisions. Petitioners were appointed in accordance with these instructions. The petitioners being appointed on regular basis were issued the same GPF Account numbers which were previously issued to them prior to their retrenchment as they had not withdrawn the earlier deducted fund. Their Provident Fund was being regularly deducted from their salaries every month.

4. This process continued till a circular dated 14.03.2008 was issued by the State Government, Finance Department Internal Audit Organization (Mal), wherein it was clarified that the Government has taken a decision that the deduction from the salary of month of March of the officials and employees who were recruited on 01.01.2004 or thereafter, which will be payable in April should be started as per Para 10(B) of the New Defined Contributory Pension Scheme (for short "NDC Pension Scheme"), which has come into force w.e.f. 01.01.2004 and was applicable to the employees recruited on 01.01.2004 or thereafter. In pursuance to these instructions, respondent No. 3-District and Sessions Judge, Patiala directed the stoppage of deduction of GPF subscription of the retrenched employees, who were re-appointed on or after 01.01.2004. He further directed the employees to apply for allotment of account numbers under the NDC Pension Scheme and that they should apply for final payment of G.P. Fund lying in their accounts on the prescribed proforma. No further interest was to be allowed after 31.03.2008. Since the petitioners did not apply as per the directions of respondent No. 3, their salaries were stopped. It is at this stage that the

petitioners approached this Court by filing these writ petitions challenging the action of the respondents in stopping the GPF deduction with a prayer that direction may be issued to the respondents to continue the deduction under the General Provident Fund Scheme (hereinafter referred to as "GPF Scheme") and to hold that they are governed by the said Scheme and not the NDC Pension Scheme.

5. To elucidate the factual matrix in these cases, specific facts are being taken from CWP No. 11213 of 2008 (Rakesh Mittal Versus The State of Punjab & others) to demonstrate the claim of the petitioners. The petitioner in this writ petition asserts that he was regularly selected and appointed as a Clerk by the District and Sessions Judge, Gurdaspur vide order dated 22.02.1995. He was medically examined by the Medical Board and was issued the Medical Fitness Certificate dated 02.03.1995 required for first entry into Government service under the Rules. He submitted his joining report on 24.02.1995 forenoon and was allotted GPF Account No. 144 vide office order dated 16.02.1996 issued by the District and Sessions Judge, Gurdaspur. Request was submitted by the petitioner to the Punjab and Haryana High Court for his transfer from Sessions Division, Gurdaspur to Patiala, which request of his was accepted by the High Court vide letter dated 04.09.2001 and he was posted at Patiala Sessions Division. Petitioner joined at Patiala on 14.09.2001 (forenoon) and was allotted GPF Account No. PB Sessions Patiala-350 by the District and Sessions Judge, Patiala vide letter dated 16.05.2001. He continued serving the place of his posting when his services were terminated vide order dated 12.03.2004 issued by the District and Sessions Judge, Patiala-respondent No. 3 on the ground that one of the courts at the Sessions Division stood withdrawn leading to the withdrawal of the post held by the petitioners and they along with others being the junior most in their respective cadres, were retrenched. Instructions dated 15.03.2003 and 22.03.2004 were issued by the High Court dealing with appointment of staff rendered surplus as a result of withdrawal/dispensation of certain courts. In the said instructions, it was specified that instead of making fresh recruitment, staff rendered surplus may be absorbed against the posts as and when created for the Courts so shifted or created and for absorption of retrenched employees in another Sessions Division. It was also said that there is no necessity for holding any test.

6. Since the services of the petitioners were terminated on withdrawal of Court resulting in there being no post, he was again appointed by respondent No. 3 vide order dated 10.06.2004 when post was available. In pursuance to this appointment letter, petitioner joined on 14.06.2004. Respondent No. 3 vide order dated 21.09.2004, giving benefit of his previous service under Rule 4.4(b) (2) read with Rule 4.9 and Note 4 below Rule 4.9-A of the Punjab Civil Services Rules Volume II, Part I, fixed the pay of the petitioner granting him the benefit of past service w.e.f. 24.02.1995 till the date of rejoining in the year 2004. This specific order was passed on 31.03.2006. After his re-appointment, petitioner was allotted his previous G.P. Fund Account Number, i.e., PB. Sessions

Patiala-350 vide letter dated 21.07.2005, which had been issued to him prior to his termination. The G.P. Fund which was being deducted every month from his pay by respondent No. 3 was abruptly stopped in pursuance to the circular/instructions issued by the Department of Finance dated 14.03.2008, according to which the petitioner was not to be covered under the GPF Scheme but would be covered under the NDC Pension Scheme on the ground that the petitioner had been appointed after 01.01.2004.

7. Reply to the writ petition has been filed, wherein the plea taken is that the petitioner had been appointed against temporary vacancy sanction of which was obtained on year-to-year basis from the Department of Finance. According to the appointment letter, his services were liable to be terminated at any time without any notice. The factum of the petitioner having applied for transfer from Gurdaspur to Sessions Division Patiala, acceptance thereof and his joining and another subsequent fact rendering him surplus and thereafter appointment stands admitted. The only plea which has been taken for denying the claim of the petitioner is that he has been appointed after 01.01.2004 on regular basis and, therefore, he is not eligible for admission to the GPF Scheme, instead his case would be covered under the NDC Pension Scheme. It has been stated that the petitioner was earlier issued the G.P. Fund Account number in compliance with Rule 13.4 of the Service Rules. Since he continued in service as a temporary Government employee, the deductions under the GPF Scheme were continued with. After his termination vide order dated 12.03.2004, he ceased to be an employee of the Government of Punjab. He was again appointed on a regular post on 10.06.2004 and, therefore, on his now appointment, he would be covered under the NDC Pension Scheme, which has come into effect w.e.f. 01.01.2004 and is applicable to those Government employees, who are appointed on or after 01.01.2004. As regards the fixation of the salary of the petitioner and for granting him the benefit of his earlier service rendered prior to his re-appointment and counting it towards the grant of increments only, it is said to be in accordance with Sub Rule (b)(2) to Rule 4.4 read with Rule 4.9 and Note 4 below Rule 4.9-A of the Punjab Civil Services Rules Volume I, Part I. Since no order has been passed by the Appointing Authority to count the previous service rendered by the petitioner towards pensionary benefits, as such the petitioner is not entitled to count his previous service towards pensionary benefits. As regards the benefit of the instructions issued by the Punjab and Haryana High Court dated 15.03.2003 and 22.03.2004, it has been stated that the same would not confer any right upon the petitioner to entitle him to be governed by the GPF Scheme as his appointment is subsequent to 01.01.2004.

8. In Civil Writ Petition No. 15253 of 2008 (Baljit Singh & another Versus The State of Punjab & others), an additional plea has been taken that keeping in view the fact that the petitioners had been serving the respondents prior or beyond 01.01.2004 till their retrenchment/removal and thereafter have been re-appointed on regular basis, the break period is condonable under Rule 4.23 of the Service Rules Vol. II Part I. Under this Rule, in the absence of the specific

indication to the contrary in the service record an interruption between two spells of service rendered under the State Government shall be treated as automatically condoned and the pre-interruption service shall be treated as qualifying for pension purposes. Since the services of the petitioners were not interrupted due to resignation/dismissal or removal from service or due to participation in strike, the period of interruption deserves to be condoned. The plea of discrimination in this regard has also been raised vis-à-vis one Smt. Tarvinder Kaur, who was initially appointed as a Steno Typist in the office of District and Sessions Judge, Patiala and was terminated from service on abolition of the post held by her on 09.06.2003. She was again appointed on 16.07.2004, which resulted in a break of 373 days. Her services were again terminated on the ground of her being rendered surplus on 28.02.2005, but she was re-appointed on 15.05.2005 resulting in a break of 76 days. She was appointed by way of transfer thereafter in the Internal Audit Organization, Department of Finance, Punjab where she has been granted the benefit of General Provident Fund by condoning the break in service of 449 days vide order dated 03.08.2007 passed by the Special Secretary Finance-cum-Director (T & A), Finance Department giving benefit of Rule 3.17-A(3) and Rule 4.23 of the Service Rules. In response to this plea of the petitioners, the facts as narrated qua Smt. Tarvinder Kaur are admitted. However, it has been stated that the petitioners are not entitled to the benefit of Rule 4.23 of the Service Rules as they have been removed from service and, therefore, the interruption between the two spells of service rendered by the petitioners is not condonable.

9. Counsel for the petitioners have submitted that since the petitioners have served the respondents may be on temporary basis in different spells of time and have been issued the G.P. Fund Account numbers and the funds have been deducted from their salaries regularly while they were in service would entitle them to continuation under the GPF Scheme on their appointment on regular basis after 01.01.2004. It has been submitted that in some of the cases, the termination has come into effect after 01.01.2004 and that too because of the withdrawal of the Courts, which act cannot be attributed to the petitioners as they have been rendered surplus and, therefore, period of break between the service deserves to be condoned under Rule 4.23 of the Service Rules. Support with regard to the temporary service rendered by the petitioners prior to 01.01.2004 and their entitlement for the benefit of the said GPF Scheme irrespective of their regular appointment subsequent to 01.01.2004, reliance has been placed upon the Division Bench judgment of this Court in Harbans Lal Versus The State of Punjab and others, 2012(3) SCT 362, wherein it has been held that employees who have been initially appointed on daily wage basis and their services were regularised after 01.01.2004 cannot be treated as new entrants in service and, therefore, would be covered by the GPF Scheme and not the NDC Pension Scheme, which has come into effect w.e.f. 01.01.2004 and is applicable to new entrants in service. Discrimination has also been pointed out in the action of the respondents in condoning the breaks in the case of Smt.

Tarvinder Kaur and treating her to be covered under the GPF Scheme, while denying the petitioners of the same benefit when they are similarly placed. Prayer has, thus, been made for allowing the present writ petitions.

10. On the other hand, counsel for the respondents submit that the petitioners are not entitled to the benefit as has been claimed in the present writ petitions. It has been asserted that the petitioners having been terminated from service and on they being issued appointment letters again and the said appointment being subsequent to 01.01.2004 will not be eligible under the GPF Scheme but would be covered under the NDC Pension Scheme which has come into effect from 01.01.2004 and is applicable to such employees who have been appointed on or after 01.01.2004. However, no explanation and distinction could be given by the counsel for the respondents with regard to the case of the petitioners vis-?-vis Smt. Tarvinder Kaur except that she had been appointed by way of transfer, whereas the petitioners have been appointed on regular basis after 01.01.2004.

11. I have considered the submissions made by the learned counsel for the parties and with their assistance have gone through the records of the case.

12. The plea of the respondents that the petitioners were earlier serving on temporary basis prior to their regular appointment and, therefore, would not be entitled to the benefit of the earlier service rendered by them and the said service would not be countable as qualifying service for pension is no more res-integra in the light of the Division Bench judgment of this Court in Harbans Lai's case (supra) in which SLP preferred by the State of Punjab also stands dismissed. According to the said judgment, services rendered by an employee on temporary, work charge and daily wage basis prior to 01.01.2004 although their services have been regularised after the said date of 01.01.2004 would be entitled to the benefit of GPF Scheme and the said service rendered by them is countable towards qualifying service for pension. It has been held that such employees will continue to be governed by the GPF Scheme and held entitled to receive pensionary benefits as are applicable to the employees recruited in Punjab Government service prior to 01.01.2004.

13. In the present case, the admitted position is that all the petitioners were appointed in accordance with law as their mode of appointment is not disputed and had been rendering services with respondent No. 3 much prior to 01.01.2004. They have been granted G.P. Fund Account numbers and deductions were also made regularly from their salaries. Their services were retrenched due to withdrawal of the courts, which consequently meant the non-availability of the posts on which they were working either earlier to 01.01.2004 or subsequent thereafter but prior to retrenchment. It needs to be added here that those employees, whose services have been terminated subsequent to 01.01.2004, gives them an edge over the employees who have been retrenched prior to 01.01.2004 as on this date, which is even admitted by the respondents, these petitioners were in service and were governed by the GPF Scheme. The stand of

the respondents is that irrespective of the date of termination of the petitioners, once their services have been terminated either prior to 01.01.2004 or subsequent thereto, their present appointment is after 01.01.2004 which would make them ineligible to be governed by the GPF Scheme, but instead would now be covered under the NDC Pension Scheme, which has come into effect from 01.01.2004 and is applicable to the employees recruited on 01.01.2004 or thereafter.

14. Keeping in view the Division Bench judgment of this Court in Harbans Lal's case (supra), it would not be open to the respondents to take the plea that the petitioners merely because they were working on temporary basis would not be entitled to the benefit of the said service towards qualifying service for pension provided their claim is covered by the G.P. Fund Scheme. The question, thus, arises is whether the petitioners in the light of Rule 4.23 read with Rule 3.17A(3) of the Service Rules would be entitled to the benefit of these rules giving them the benefit of condoning the break period in their service as has been granted to Smt. Tarvinder Kaur and holding her to be covered by the GPF Scheme, who was similarly placed as the petitioners as there is no distinguishing features between them.

Rule 4.23 of the Service Rules reads as follows:-

4.23 In the absence of a specific indication to the contrary in the service record, an interruption between two spells of service rendered under the State Government shall be treated as automatically condoned, and the pre-interruption service shall be treated as qualifying service for pension purposes, except where the interruption has been caused by resignation, dismissal or removal from service or due to participation in a strike, but the period of interruption itself shall, under no circumstances, be reckoned as qualifying service for pension purposes.

15. A perusal of the above would indicate that interruption between two spells of service rendered by Government employee under the State Government shall be treated as automatically condoned and the pre-interruption service treated as qualifying service for pension purposes provided there is absence of any specific indication to the contrary in the service record. There is no denial on the part of the respondents that the service records of the petitioners do not indicate anything which would specify a condition which would not work in favour of the petitioners as has been provided in this Rule. The only proviso attached to this is where interruption has been caused by resignation, dismissal or removal from service or due to participation in strike. The cases in hand are not of resignation or dismissal or participation in strike but is that of removal. In this regard, Rule 3.17-A of the Service Rules becomes significant which reads as follows:-

3.17-A(1) Subject to the provisions of rule 4.23 and other rules and except in the cases mentioned below, all service rendered on establishment, interrupted or continuous, shall count as qualifying service:-

(i) Service rendered in work-charged establishment.

(ii) Service paid from contingencies;

Provided that after the 1st January, 1973 half of the service paid from contingencies will be allowed to count towards pension at the time of absorption in regular employment subject to the following conditions:-

(a) Service paid from contingencies should have been in a job involving whole time employment (and not part-time or for a portion of the day).

(b) Service paid from concerned should have been in a type of work or job for which regular post could have been sanctioned, e.g. Malis, Chowkidars, Khalasis, etc.

(c) The service should have been one for which the payment is made either on monthly or daily rates computed and paid on a monthly basis and which though not analogous to the regular scale of pay should bear some relation in the matter of pay to those being paid for similar jobs being performed by staff in regular establishment.

(d) The service paid from contingencies should have been continuous and followed by absorption in regular employment without a break.

(iii) Casual or daily rated service.

(iv) Suspension adjudged as a specific penalty;

Note:- In cases where an officer dies or is permitted to retire while under suspension will not be treated as an interruption.

(v) Service preceding resignation except where such resignation is allowed to be withdrawn in public interest by the appointing authority as provided in the relevant rules or where such resignation has been submitted to take up, with proper permission, another appointed whether temporary or permanent under the Government where service qualifies for pension.

(iv) Joining time for which no allowances are admissible under rules 9.1 and 9.15 of CSR, Volume 1, Part 1.

(vii) if any unauthorised leave of absence occurs in continuation of authorised leave of absence and if the post of the absentee has been substantively filled up, the past service of the absentee is forfeited.

(viii) Transfer to a non-qualifying service in an establishment not under Government control or if such transfer is not made the competent authority and transfer to service in grant-in-aid school.

(A Government employee, who voluntarily resigns qualifying service, cannot claim the benefit under this clause).

(ix) Removal from public service for misconduct, insolvency, inefficiency not due

to age, or failure to pass an examination will entail forfeiture of past service.

(2) An interruption in the service of a Government employee caused by willful absence from duty or unauthorised absence without leave, shall entail forfeiture of the past service.

(3) Wilful abstinence from performing duties by a Government employee by resort to pen down strike shall be deemed to be willful absence from duty and shall also entail forfeiture of the past service.

Note:- In the case of a Central Government employee who is permanently transferred to the Punjab Government and becomes subject to these rules, the pensionary benefits admissible for service under Central Government would be that admissible under the Government of India rules and the liability for such benefits shall be allocated in accordance with the prevalent orders.

Clarification (1).- Even after the introduction of rule 3.17 (a) and deletion of rule 4.21, the following cases do not entail forfeiture of past service:-

(a) authorised leave of absence;

(b) abolition of post or loss of appointment owing to reduction in establishment.

("Post" or "appointment" means a post or appointment service in which qualifies for pension).

2. While counting such qualifying service for working out aggregate service, the period of break in service shall be omitted.

16. A perusal of Rule 3.17-A (1) Clause (ix) would show that the same deals with disentitlement of an employee for removal from public service for misconduct, insolvency, inefficiency not due to age, or failure to pass an examination which would entail forfeiture of past service. None of these exceptions would cover the case of the petitioners, rather their case would be covered in their favour by Rule 3.17-A (3) Clarification (1)(b) and (2).

17. The stand of the respondents, thus, denying them benefit of Rule 4.23 read with Rule 3.17-A is not sustainable, rather it indicates hostile discrimination between the petitioners and a similarly placed employee Smt. Tarvinder Kaur. It needs to be highlighted here that Smt. Tarvinder Kaur was also an employee of the Sessions Division, Patiala, who was appointed as a Steno Typist in the year 2000. Her services were terminated on abolition of post on 09.06.2003 and was re-employed on 16.07.2004 entailing a break of 373 days. Her services were again terminated on 28.02.2005 when she was re-appointed on 15.05.2005, resulting in break in service of 76 days. Thereafter she was appointed by transfer in the office of Internal Audit Organization (R), Finance Department, Punjab at Patiala and submitted her joining report on 25.07.2006. The Special Secretary Finance-cum-Director (T & A), Finance Department vide order dated 03.08.2007 condoned the break in service of total 449 days by giving her the benefit of Rule 4.23 read with Rule 3.17-A(3) Clarification (1) of the Service Rules, resulting in

granting her benefit of continuity in the GPF Scheme, which was deducted prior to her termination from service and had not been withdrawn by her. A fact that she has already been granted the benefit of past service towards salary in the form of increments by the District and Sessions Judge, as in the case of petitioners, has also been taken into consideration.

18. Case of the present petitioners is identical to that of Smt. Tarvinder Kaur, who was also working along with the petitioners when she was also terminated prior to 01.01.2004 having been rendered surplus and thereafter re-appointed in July, 2004 when she was again terminated on 28.02.2005 and later on again appointed on 15.05.2005 in the office of District and Sessions Judge. She thereafter was appointed by transfer in the Internal Audit Organization(R). As a matter of fact, the petitioners have a better case as they, after their termination, are being re-appointed on regular basis in the same office from where their service were terminated. This is a clear case of discrimination violating Articles 14 and 16 of the Constitution of India, thus, rendering the action of the respondents unsustainable.

19. In view of the above, it is held that the impugned order dated 14.03.2008 issued by the Department of Finance would not be applicable to the petitioners. As such, the consequential impugned order dated 28.03.2008 passed by the District and Sessions Judge, Patiala-respondent No. 3 directing stoppage or deduction of the General Provident Fund subscription of the petitioners and directing them to apply for allotment of new G.P. Fund Account numbers under the NDC Pension Scheme stands hereby quashed.

20. Petitioners are declared eligible under the GPF Scheme and they will continue to be governed by the said Scheme and entitled to receive pensionary benefits as are applicable to the employees recruited in the Punjab Government and governed by the GPF Scheme. Direction is issued to the competent authority to consider the cases of the petitioners in the light of Rule 4.23 read with Rule 3.17-A(3) Clarification (1) of the Punjab Civil Services Rules, Volume II, Part I and pass appropriate orders in accordance with law as in the case of Smt. Tarvinder Kaur within a period of one month from the date of receipt of certified copy of the order. Writ petitions stand allowed in these terms.