(2009) 07 JH CK 0125

In the Jharkhand High Court

State Bank of India APPELLANT

Vs

Nagendra Choudhary and Others RESPONDENT

Date of Decision : 07-07-2009

Acts Referred:

Citation : (2009) 07 JH CK 0125

Hon'ble Judges : Gyan Sudha Mishra, C.J;Dilip kumar sinha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This appeal has been preferred against the judgment and order dated 11.12.2008 passed in W.P.(S) No. 5184/2005 by which the learned Single Judge, after assigning reasons, allowed the writ petition, but on the request of the counsel for the respondent-Bank/appellant herein praying for a week''s time to seek instruction to settle the matter without inviting any adverse order, adjourned the matter. In view of his request, the learned Single Judge, though had allowed the writ petition, was pleased to grant two weeks further time to the appellant-Bank to come out with instructions. When the writ petition was listed again on 21.1.2009, the appellant-Bank, instead of informing the Court regarding the instruction, reiterated the argument, which was not permitted by the learned Single Judge, for the sole reason that the final order had already been passed earlier but was kept in abeyance at the request of the counsel of the appellant Bank that they will settle the matter before the next date of hearing instead of inviting any adverse order. The learned Single Judge, therefore, finally allowed the writ petition on 21.1.2009, as a result of which the prayer of the petitioner/ respondent herein for quashing the letter dated 27.4.2005, by which the appellant Bank communicated to the petitioner/respondent herein that he is not entitled to pensionary benefit as he had not completed 20 years of pensionable service, obviously stood allowed and the letter dated 27.4.2005 also stood quashed and set aside. Further the retiral dues of the petitioner, which included gratuity, provident fund, leave encashment etc., were allowed to be availed by

the respondent employee, as per the order of the appellant Bank itself.

2. The relevant details giving rise to this appeal may be briefly recorded herein for the purpose of appreciation of the controversy involved herein.

The respondent was serving as a Cashier in the category of Class -III and an enquiry was initiated against him after serving a memorandum of charges which alleged that he had defalcated a sum of Rs. sixteen thousand and odd by removing the currency notes from different packets of the denomination of Rs. 100/-. The memorandum of charges further alleged that he had taken L.T.C. advance for himself and for his family members but did not undertake the journey and used the amount for some other purpose. An enquiry thereafter was held against the respondent-employee and the enquiry report was submitted. Though the charge of defalcation of removing currency notes from different packets was not proved, the charge of misuse of the L.T.C. amount; meaning thereby that he had taken the L.T.C. amount for himself and his family members without undertaking the journey, was held to have been proved. It may be relevant to state that in the meantime, after issuance of the chargesheet, the respondent-employee was put under suspension from 4.4.1994 upto the date of his removal, i.e. 23.3.1998. An order of punishment was, therefore, imposed on the respondent employee dismissing him from service. But the respondent-delinquent employee preferred an appeal against the order of his dismissal before the appellate authority, which considered the matter and finally was pleased to convert the order of dismissal into an order of removal from service. The appellate authority, however, allowed the superannuation benefit but was pleased to record on 8.11.1999 that the period of suspension will not be treated as the period spent on duty.

The respondent-delinquent employee assailed the order of removal from service by filing a writ petition before this Court in the year 1999 bearing CWJC No. 3323/1999, but the writ petition was dismissed against which the appeal was preferred but the appeal also stood dismissed. However, it was observed therein that the respondent employee would be entitled to retiral benefits which, in fact, had already been granted by the appellate authority itself, as indicated hereinbefore. The respondent employee thereafter received the retiral benefits which included the amount towards his provident fund, gratuity and leave encashment. However, an order was passed on 27.4.2005 communicating to the respondent employee that he would not be entitled to pensionary benefit since he had not completed 20 years of service, which would have held him entitled to pension, prior to his removal from service. This obviously gave rise to a fresh cause of action to the respondent employee by filing a writ petition, which he did by filing the writ petition bearing W.P.(S) No. 5184/2005 out of which the present appeal arises. He had, therefore, assailed the order dated 27.4.2005 by which the pensionary benefit was denied to him.

The counsel for the respondent Bank/appellant herein vehemently contested the matter and submitted that the petitioner/respondent herein could not be held entitled to pensionary benefit, as prior to his removal from service he was put under suspension and he remained under suspension for a period from 4.4.1994 to 23.3.1998, which was the date of his removal. The appellant, therefore, had submitted before the learned Single Judge that the period during which the respondent employee remained under suspension could not be counted as the period on duty and if that period is deducted, then the respondent employee does not possess the qualifying service of 20 years which could hold him entitled to pensionary benefit. Prior to this, the respondent employee admittedly had completed 19 years and 2 months of service and thereafter an enquiry was initiated against him, which compelled him to remain away as he was put under suspension.

As already stated, the learned Single Judge, after hearing the counsel for the parties and after duly assigning reasons, was pleased to allow the writ petition on 11.12.2008, but on the request of the counsel for the appellant Bank, which submitted that matter may be settled without inviting any adverse order against the Bank, adjourned the matter and thereafter the matter was taken up on 21.1.2009, on which date the counsel for the appellant Bank, instead of apprising the Court regarding the instruction sought by him, went on contesting the matter on merit which the learned Single Judge refused to permit as the order had already been passed but was kept in abeyance only to grant last opportunity to the appellant Bank to apprise the Court regarding the outcome of the settlement, which had failed. The writ petition, therefore, was finally allowed by the order dated 21.1.2009.

3. Counsel for the appellant reiterated his argument which was submitted before the learned Single Judge, but in addition, it was submitted that the writ petition ought to have been treated as barred by constructive res judicata as the petitioner/respondent herein although had got an observation in his favour by the Division Bench while his appeal was being dismissed and order of removal confirmed, wherein it was held that he would be entitled to retiral benefit. According to the submission of the counsel for the appellant, it was the duty of the respondent employee to have raised the claim of pensionary benefit also before the learned Single Judge as that was an off-shoot of the same dispute and a fresh writ petition on that count could not have been entertained subsequently by the learned Single Judge.

4. However, we do not find any force in the contention of the counsel for the appellant bank, in view of the reasons assigned by the learned Single Judge. We also noticed that the question of denial of the pensionary benefit, first of all, arose when the appellant bank issued an order on 27.4.2005 communicating to the respondent employee that he is not entitled to pensionary benefit as he has failed to earn 20 years of qualifying service so as to claim pensionary benefit. However, the question of pensionary benefit was never an issue in the earlier writ petition as in the previous writ petition, the appellant had merely challenged the order of his removal of service which was dismissed by the learned Single Judge

against which an appeal was preferred before the Division Bench and the Division Bench, while dismissing the letters patent appeal, had merely observed against the removal that the appellant/respondent herein would be entitled to retiral benefit, which, in fact, was reiteration of the order which was passed by the appellant Bank themselves, which had allowed the retiral benefits in favour of the respondent employee and therefore, the observation of the Division Bench allowing the retiral benefits was merely in the nature of persuasive value.

5. The question as to whether the respondent employee could be held entitled to pensionary benefit, first of all, gave rise to a fresh cause of action in the year 2005, when a categorical order was passed by the appellant Bank on 27.4.2005 that he would not be entitled to pensionary benefit as he had failed to earn qualifying service of 20 years since he had not discharged duties for a period of four years, when he was put under suspension. The appellant Bank, therefore, raised an issue for the first time in the year 2005 that the period during which the respondent employee was under suspension was not fit to be counted as the period of service and therefore he would not be entitled to pensionary benefit for lack of qualifying service. Thus, the appellant Bank, for the first time, gave rise to a fresh cause of action as to whether the respondent employee would be held entitled to the benefit of service which he was deprived on account of his suspension during the period, but the appellant Bank had been paying subsistence allowance to the respondent employee during this period and finally when the order of removal was passed after enquiry, the appellant Bank had failed to prove the charge of misappropriation of Rs. sixteen thousand and odd against the respondent employee as the appellate authority had not accepted the finding of the Enquiry Officer that he had defalcated. The respondent employee, therefore, Was held guilty of the charge of misuse of L.T.C. amount only and for this, he has already suffered the punishment of removal from service. When the order of removal of service was issued against the respondent employee, he was having 10 years of service to his credit and as a result of the order of removal, he has been deprived of 10 years of service to which he was otherwise entitled. On the top of it, the appellant Bank had passed a fresh order in the year 2005 on 27.4.2005 that he is not entitled to pensionary benefit.

6. In so far as the plea of constructive res judicata is concerned, which had also been raised before the learned Single Judge, it has already been dealt with hereinbefore, as we have stated that the fresh cause of action was raised in the year 2005 when the appellant Bank passed an order on 27.4.2005 and prior to this, the writ petition was filed by the respondent employee in the year 1999 and as such, the respondent employee could not have possibly raised the issue of denial of pensionary benefit in the year 1999 as the order passed in the year 2005 was not in existence at all and therefore, the question of raising the issue of denial of pensionary benefit could not have been raised in the earlier writ petition.

7. In so far as the question of qualifying service is concerned, the counsel for the

appellant Bank has submitted that the period, which was spent without duty on account of the order of suspension, ought not to be treated as the period on duty for the purpose of pensionary benefit and this submission of the counsel for the appellant is not sustainable in our view for if an employee was under suspension, obviously he did not discharge duty since the enquiry was pending against him; nevertheless he was receiving subsistence allowance during this period and subsistence allowance was granted to him not by way of charity but on account of legal consequence and thus, the employee obviously could not be treated dismissed during this period of service and if he was drawing subsistence allowance, then he cannot be treated as dismissed from service in the eye of law. Even as per the order of the appellant Bank, the order of dismissal was passed against him in the year 1998 and by that time, the respondent employee had already completed 20 years of service; so the respondent employee could not have been deprived of the pensionary benefit on account of the fact that he had not completed 20 years of qualifying service. Besides this, in a recent judgment, this Court has already held that if an employee on account of dismissal of service is deprived of the balance period of his service to which he would have been otherwise entitled and thereafter if he is also deprived of the pensionary benefit, it would amount to dual punishment on him, and especially in the instant matter, when the respondent employee had 10 years of service to his credit and has been dismissed from service on the charge of misuse of L.T.C. amount and thereafter is also deprived of the pensionary benefit in spite of having discharged duties for a period of 19 years, if the period of his suspension is deducted from the period of his service, he could not be deprived of the pensionary benefit on account of the charge of misuse of L.T.C. amount. In our view, deprivation of 10 years of service to the respondent employee and deprivation of the pensionary benefit also is clearly disproportionate to the charge levelled against him, for which he has already been punished. For this reason, we cannot uphold the order passed by the appellant Bank depriving the respondent employee of the pensionary benefit.

8. Above everything, we have also taken notice of the fact that in a catena of decisions, the Supreme Court, even in cases of dismissal of low paid employees, which includes class III employees also, have converted the order of dismissal into an order of compulsory retirement merely to save the employees from starvation and pecuniary distress on account of deprivation of pensionary benefit. In the instant matter, the case of the respondent employee claiming pensionary benefit is much higher than conversion of the order of dismissal into compulsory retirement. Conversion is not required in the instant matter as the respondent employee has already earned 20 years of qualifying service for the pensionary benefit if his period of suspension is treated as the period on duty and that ought to be treated as the period on duty, for the reasons assigned hereinbefore. The appeal, thus, has no substance and hence it is dismissed at the admission stage itself. However, under the circumstance, there shall be no order as to costs.

