

(2014) 05 JH CK 0060
In the Jharkhand High Court
Case No : L.P.A. No. 238 of 2009

The State of Jharkhand

APPELLANT

Vs

Ajamber Ahir

RESPONDENT

Date of Decision : 13-05-2014

Acts Referred:

Citation : (2014) 3 JLJR 383

Hon'ble Judges : R. Banumathi, C.J.; S. Chandrashekhar, J

Bench : Division Bench

Advocate : Sunil Singh, JC to SC II, Advocate for the Appellant; Mukesh Kumar Sinha and Jai Prakash Sahu, Advocate for the Respondent

Judgement

R. Banumathi, C.J.—This LPA is preferred against the order passed in W.P.(S) No. 6514/2005, by which the writ court directed the State of Jharkhand to consider the payment of pension along with other retiral dues to the respondents by taking into account the date of initial appointment and the temporary service rendered by the writ petitioner, Ajamber Ahir. It is the case of the writ petitioner-1st respondent that he was appointed as Choukidar on 3.1.1958 in the temporary beat No. 3/1 in the Tamar Circle, District Ranchi, and since then he served the Government as a temporary employee on a lower salary. After repeated demands, the Government vide letter dated 5.5.1992 declared Choukidars as Class IV employee with effect from 1.1.1990 in the scale of pay of Rs. 750-12-870-14-940/- in the regular post and the said decision was entered in the service book of the writ petitioner-1st respondent. The petitioner respondent retired from service on 31.12.1997. Even though the 1st respondent was regularized with effect from 1.1.1990, the 1st respondent served the Government since his appointment on 3.1.1958 and the 1st respondent retired from service on completion of 40 years of his service as Choukidar Class IV Government employee, he was not paid pension.

2. The case of the writ petitioner-1st respondent is that he served the Government for 40 years and in view of the 1st respondent's 40 years of service

he was entitled to pension, gratuity and benefits of revised pay with time bound scale, besides other benefits, group insurance, leave encashment and provident fund. Stating that his representation has not been disposed of and service benefits are not paid, the 1st respondent filed W.P.(S) No. 6514/2005 for issuance of direction to the respondents (appellants herein) to make payment of the service benefits to the 1st respondent who served as Class IV employee-Choukidar.

3. The State of Jharkhand filed counter contending that the service of Choukidar were regularized with effect from 1.1.1990 and Choukidar of the State would be entitled to get pension only after completion of 10 years of service with effect from 1.1.1990, i.e. date of declaration as Government servant. The writ petitioner-1st respondent became Government Servant on 1.1.1990 and superannuated on 13.12.1997 and therefore, completed only 8 years of service and the 1st respondent does not have the qualifying pensionable service and he is not entitled to get pension.

4. Observing that as per Rule 63 of Bihar Pension Rules regularization will relate back to the date of initial appointment and the temporary service has to be taken into account for calculating the pension and other service benefits, learned Single Judge directed the respondent State of Jharkhand to consider payment of pension along with other retiral dues to the writ petitioner in accordance with law within a period of two months from the date of receipt of that order.

5. The learned counsel for the appellant contended that the learned Single Judge failed to appreciate that Rule 63 of the Bihar Pension Rules applies only in a case where a person is appointed, though temporarily on a substantive or officiating post as a Government servant. It was further submitted that the respondent - writ petitioner became the Government servant only with effect from 1.1.1990 and retired on 31.12.1997 and thus his substantive service comes to eight years and since the respondent did not complete the qualifying service of 10 years, the respondent is not entitled to pension and the learned Single Judge erred in directing the appellant to take into account the past service rendered by the appellant as temporary employee.

6. Learned counsel for the 1st respondent submitted that in January, 1958, the respondent was engaged as Chowkidar and worked for more than thirty years from the date of engagement and in the year 1992, Government of Bihar took a decision to treat all Chowkidars and Wafadars as Class IV Government employees. It was further submitted that after twenty years from the issuance of the letter by the Government of Bihar (dated 5.5.1992), the State of Jharkhand came up with another letter dated 4.11.2003 stating that one must have completed ten years of service after 1.1.1990 for the purpose of getting pension. Learned counsel submitted that for the benefit of the petitioner-1st respondent and other similarly situated person - Chowkidars and Wafadars, the State of Bihar took the decision in 1992 declaring and treating them as Class IV Government employees and therefore, for the purpose of computing pension as

per Rule 63 of the Bihar Pension Rules, the service rendered by the writ petitioner-1st respondent prior to taking of the decision should also be taken into account. It was contended that the respondent fulfills all the conditions for grant of pension under Rule 63 of the Bihar Pension Rules and the learned Single Judge rightly directed the appellant to consider payment of pension by taking into account the date of initial appointment and the temporary service rendered by the respondent.

7. We have carefully considered the rival submissions and perused the impugned order and the materials on record.

8. The respondent was appointed as Chowkidar on 3.1.1958 as a temporary employee in the temporary beat No. 3/1 in the Tamar Circle, District Ranchi. The State Government vide letter No. 998 dated 5.5.1992 has declared Chowkidar as Class-IV Government employee with effect from 1.1.1990 in the scale of pay of Rs. 750-12-870-14-940/-. Prior to 1.1.1990, Chowkidars were not the Government employees. The State of Jharkhand came out with a Government Order No. 2991 dated 11.10.2003 whereunder the services of Chowkidars were regularized with effect from 1.1.1990. As per the instruction contained in Letter No. 5262 dated 4.11.2003 (Annexure-2) the Chowkidars of the State would be entitled to get pension after completion of ten years of service with effect from 1.1.1990. In the said letter dated 4.11.2003 it is made clear that temporary services rendered prior to 1.1.1990 will not be taken into account for calculating the pension. The said stipulation in the letter dated 4.11.2003 reads as under:

9. The 1st respondent retired from service on 31.12.1997. Calculating from 1.1.1990 on which date writ petitioner - 1st respondent entered in Government service and the date of superannuation i.e. 31.12.1997, the respondents had completed eight years of service. If it is calculated from 1.1.1990, the respondent is not entitled to get pension.

10. To hold that the service rendered by the respondent as a temporary employee, the learned Single Judge referred to Rule 63, which reads as follows:

63. A Government servant transferred from a temporary to a permanent appointment can count his service in the temporary post, if though at first created experimentally or temporarily, it eventually becomes permanent.

Note.- This rule implies that when an isolated post unconnected with a cadre sanctioned temporarily or experimentally in the first instance is subsequently made permanent, the whole, temporary service of a Government servant or Government servant in, that post should count for pension provided that such a Government servant or Government servants are subsequently appointed substantively to a permanent post. The concession is admissible only to Government servants who render temporary service, substantive or officiating, while having no lien on a permanent post, and is admissible to a Government servant even though he no longer holds the temporary post when it is made permanent.

To obviate anomalies that may arise from a literal application of this rule in cases of a particular class, the following principles should be observed in applying the rule in such cases:-

(1) The holder of a temporary post supplementing a permanent cadre of posts of the same kind and carrying parallel duties, though actually employed on work properly pertaining to a permanent post in that cadre, should still be considered to have rendered service in the temporary post.

(2) When some of several temporary posts, supplementing a permanent cadre as in (1) above, are converted into permanent posts and permanent promotion to these posts is made according to seniority or by selection, the Government servants actually so promoted should be considered as the holders of the temporary posts which have been converted and should be allowed to count their temporary service rendered in the posts.

[Underlining Added]

11. By perusal of the aforesaid Rule 63 of Bihar Pension Rules, it is clear that Rule 63 applies only in a case where a person is appointed, though temporarily but at the substantive officiating post as Government servant. The 1st respondent was not appointed against any substantive post. But the 1st respondent was temporarily working as Chowkidar and such temporary employment was not on any substantive post. Since the 1st respondent was not appointed against any substantive post or officiating post, Rule 63 is not applicable to the 1st respondent.

12. Learned counsel for the 1st respondent submitted that the Government order No. 2991 dated 11.10.2003 cannot take away the right of the 1st respondent to get pension. It was submitted that such letter is not a statutory instrument and by virtue of the said letter, the State has no power to withhold the same. The above contention does not merit acceptance. As per Rule 86 of the Bihar Pension Rules, 1950, a Government servant can claim the benefit of Pension Rules only if his actual qualifying service at the time he quits the Government service is ten years and above. The letter dated 11.10.2003 only clarifies Rule 86 of the Bihar Pension Rules, in so far as the Chowkidars are concerned, who became Government servants with effect from 1.1.1990. The 1st respondent entered in Government service on 1.1.1990 and superannuated on 31.12.2007 and therefore, he completed eight years of service only and he does not have the qualifying service to get pension.

13. In a similar case, before the Patna High Court, reported in 2003 (3) BLJR, 2388 (Charitra Paswan Vs. State of Bihar and ors.), where Chowkidar prayed to count his past service prior to 1.1.1990, rejecting the plea, the Patna High Court held that the petitioner thereon was not entitled to count his past service and having superannuated from service after rendering less than ten years of service the petitioner cannot claim pension. The Patna High Court in para 8 of the aforesaid judgment held as under:-

8. Under Rule 58 of the Pension Rules the service of a Government servant does not qualify for pension unless it conforms to three conditions:- (a) the service must be under Government, (b) the employment must be substantive and permanent and (c) the service must be paid by Government. In the case of village Choukidar prior to 1-1-1990, the second condition was clearly absent as the employment was not a substantive employment like one made a sanctioned post. Though the post of village Choukidar has been in existence since time immemorial, and as a matter of fact there are statutes, viz. the Village Choukidari Act, 1870 and the Bihar and Orissa Administrative Act, 1922, besides Choukidari Manual a compendium of Government orders and circulars containing provisions for appointment etc. on the post, the nature of employment was quite different. If that were not so, what else the Choukidars were clamouring for all these years prior to 1990? They wanted regular post so that could come at par with other Government servants and it was only in deference to their demand that the Government decided to make the post a regular Class IV post.

14. As regards computation of qualifying service for the purpose of grant of pension to an employee retired from the Government service is concerned, it is regulated by the specific provision as contained in Rule 58 of the Bihar Pension Rule which is as follows:-

The service of a Government servant does not qualify for pension unless it conforms to the following three conditions:-

- (i) The service must be under the Government;
- (ii) The employment must be substantive and permanent;
- (iii) The service must be paid by the Government.

15. The respondent was appointed on the post of Chowkidar only with effect from 1.1.1990. Prior to 1.1.1990 the Chowkidar was not governed by Bihar Service Code and, therefore the 1st respondent cannot seek to count his past service for the purpose of pension. If the respondent is not entitled to count his past service, having superannuated from service on 31.12.1997 after rendering eight years of service, the respondent cannot claim pension. As pointed out earlier, as per Rule 86 of the Bihar Pension Rules, to get the benefit of pension, the Government servant should have actual qualifying service of not less than ten years, but the 1st respondent is not having the qualifying ten years of service to get the benefit of pension. Learned Single Judge did not keep in view that the 1st respondent had become Government servant only with effect from 1.1.1990 and previously he was not working against any substantive or officiating post. The impugned order dated 17.12.2008 passed in W.P.(S) No. 6514/2005 is liable to be set aside. In the result the order dated 17.12.2008 passed in W.P.(S) No. 6514/2005 is set aside and this Letters Patent Appeal is allowed.