

(2014) 02 BOM CK 0212
In the Bombay High Court
Case No : Writ Petition No. 673 of 2005

Union of India General Manager, Central Railway and
Divisional Railway Manager

APPELLANT

Vs

J.S. Kharat

RESPONDENT

Date of Decision : 04-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 2 ABR 374 : (2014) 5 ALLMR 319 : (2014) 2 MhLj 667

Hon'ble Judges : V.M. Kanade, J; Girish S. Kulkarni, J

Bench : Division Bench

Advocate : Suresh Kumar, for the Appellant; Rahul Nerlekar, for the Respondent

Final Decision : Dismissed

Judgement

Girish S. Kulkarni, J

1. By this Petition under Article 226 of the Constitution of India the Petitioner-Union of India assails the Judgment and order dated 2.12.2004 of the Central Administrative Tribunal, Mumbai Bench in Original Application No. 189 of 2004. By the impugned Judgment, the Central Administrative Tribunal has partly allowed the Original Application filed by the respondent to the extent that the period of suspension of the respondent has been directed to be treated as qualifying service for the purpose of computation of pensionary and other pension benefits. The issue which arises for consideration in the present petition is as to whether under Rule 37 and Rule 50 of the Railway Service (Pension) Rule 1993 an employee who was under suspension and ultimately was compulsorily retired would be entitled for availing of the period of suspension to be taken into consideration for the purpose of determining the qualifying service for the purpose of pension and other pensionary benefits.

2. The conspectus of facts arising in the present proceedings is as under:

The respondent was in the service of the Central Railway since the year 1964 and

at the relevant time was working on the post of Driver "C" grade. On 25.12.1985 the respondent was placed under suspension as being involved in a train collusion. On 7.1.1986 a charge sheet was served on the respondent for a major penalty to be inflicted. A disciplinary inquiry was conducted against the respondent and by an order dated 4.6.1986 the respondent was removed from service.

3. The respondent being aggrieved by the order dated 4.6.1986 removing him from service, approached the Central Administrative Tribunal by filing Original Application No. 662 of 1989. By an order dated 26.11.2004 the Central Administrative Tribunal quashed and set aside the order of removal passed by the disciplinary authority and directed the petitioners to appoint a new Enquiry Officer and conduct an inquiry from the stage of cross-examination of witness no. 7. After completion of the disciplinary proceedings from that stage, an order dated 8.1.1996 was passed by the petitioners imposing penalty of compulsory retirement. The Respondent had remained under suspension for the period between 25.11.1985 till 18.1.1996 almost for a period of more than 10 years.

4. The respondent thereafter approached the Central Administrative Tribunal by filing Original Application No. 506 of 1996 seeking a direction for payment of subsistence allowance from 25.11.1985 till 18.1.1996 on the basis of the revised pay-scales as the respondent was kept under suspension for the period 20.11.1985 to 18.1.1996. The Central Administrative Tribunal by its Full Bench judgment dated 13.1.2003 directed the petitioners to pay the respondent subsistence allowance on the basis of the revised pay scales. The orders of the Central Administrative Tribunal were implemented and accordingly a sum of Rs. 1,60,468/- was paid to the respondent.

5. The respondent having being compulsorily retired became entitled for pension and hence had approached the petitioners for appropriate fixation of pension. The respondent had requested the petitioners to fix the pension as per IVth and Vth pay commission pay scales after taking into consideration the period of suspension from 1.1.1986 to 17.1.1996.

6. By a communication dated 26.12.2003 passed by Senior D.P.O. Mumbai, C.S.T.M. the respondent was informed that as regards fixing of pension as per pay scales of the 4th and 5th Pay Commission the respondent being placed under suspension for the period from 1.1.1986 to 17.1.1996 before he was compulsorily retired, the respondent was not eligible for fixation of pay in the Railway Service (Pension) Rules, 1993. The respondent therefore challenged the said communication dated 26.12.2003 by approaching the Central Administrative Tribunal in Original Application No. 189 of 2004. After hearing the parties the Central Administrative Tribunal by its impugned Judgment and order has partly allowed the said Original Application by directing the petitioners that the period of suspension be treated as qualifying service for the purpose of computation of pension and other pensionary benefits.

7. We have heard Mr. Suresh Kumar learned counsel for the petitioners and Mr. Rahul Nerlekar learned counsel for the respondent.

8. The learned counsel for the petitioner has contended that the Central Administrative Tribunal has erred in interpreting Rule 37 and Rule 50 of the Railway Service (Pension) Rule, 1993 in as much as the respondent could not have been held to be eligible for counting of the period of suspension as a qualifying service for pensionary benefits. It was submitted that the disciplinary authority while passing the order dated 26.7.1996 by which the penalty of compulsorily retirement was imposed, has not exonerated the respondent nor the disciplinary authority has held that the suspension was fully unjustified. It was also contended that the disciplinary authority has not specifically ordered that the period of suspension shall count for qualifying service or being a period spent on duty for any purpose whatsoever. It was therefore submitted that as per Rule 37 the respondent was debarred for pensionary benefits in respect of suspension period. The learned counsel for the petitioners would submit that the respondent could have been entitled for the period of suspension to be treated as qualifying service only if an express order was to be passed by the disciplinary authority to take into consideration the period of suspension for qualifying service. The learned counsel has relied on the judgment of the Supreme Court in the case of R.P. Kapur Vs. Union of India and Others, .

9. The learned counsel for the respondent on the other hand has submitted that the Judgment and order of the Central Administrative Tribunal appropriately considers the application of Rule 37 and Rule 50 and the Tribunal has rightly granted the respondent the benefit of the period of suspension to be counted for the purpose of qualifying service for pensionary benefits. The learned counsel for the respondent has relied on the Judgment of the Supreme Court in the case of Bibhuti Bhushan Chaudhary v. Union of India and Others, (1997) 11 SCC 373 .

10. Having considered the rival submissions of the parties, it is necessary to consider the legal position as falling under Railway Service (Pension) Rule 1993 namely Rule 37 and Rule 50 which read as under:

37. Counting periods of suspension:

Where a railway servant is kept under suspension pending inquiry into his conduct the period of such suspension shall count as qualifying service only where on conclusion of such inquiry, he has been fully exonerated or the suspension is held to be wholly unjustified and in other cases the period of such suspension shall not count unless the authority competent to pass orders under the rule governing such cases expressly declare that it shall count to such extent as that authority may declare. Where the authority reinstating the railway servant had not passed order as to the treatment of the period of suspension for the purpose of qualifying service for pensionary benefits the period of suspension shall qualify only if it had been treated as duty or leave due, as the case may

50. Average Emoluments

Average emoluments shall be determined with reference to the emoluments drawn by a railway servant during the last ten months of his service.

Note: 1. If during the last ten months of his service a railway servant had been absent from the duty on leave of which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn, had he not been absent from duty or suspended shall be taken into account for determining the average emoluments:

Provided that any increase in pay (other than the increment referred to in Note 3) which is not actually drawn shall not form part of his emoluments.

Note 2: If, during the last ten months of his service, a railway servant had been absent from duty on extraordinary leave, or had been under suspension the period whereof does not count as service, the aforesaid period of leave or suspension shall be disregarded in the calculation of the average emoluments and equal period before the ten months shall be included.

Note 3: In the case of a railway servant who was on earned leave during the last ten months of his service and earned an increment which was not withheld, such increment though not actually drawn shall be included in the average emoluments:

Provided that the increment was earned during the currency of the earned leave not exceeding one hundred and twenty days, or during the first one hundred and twenty days of earned leave where such leave was for more than one hundred and twenty days.

(Emphasis supplied)

11. On a plain reading of Rule 37, it is apparent that the period of suspension would be counted as qualifying service in the following situations:

- 1) If an employee is fully exonerated;
- 2) In other cases the period of suspension shall not count unless the authority competent to pass orders under rules governing such cases expressly declares that it shall count to such an extent that the authority may declare;
- 3) where the authority reinstating the railway servant had not passed an order treating the period of suspension for the purpose of qualifying service for pensionary benefits, the period of suspension shall qualify if it had been treated as duty or leave due, as the case may be.

12. It is therefore clear that the case where an employee has been compulsorily retired would fall in situation No. (2) above. In the present case, the respondent was compulsorily retired. Furthermore, in pursuance of the Full Bench Judgment of the Central Administrative Tribunal in O.A. No. 560 of 1996 the petitioners were directed to grant to the respondent subsistence allowance in respect of the suspension period on the basis of the revised pay-scales and the same has been

granted. This shows that the respondent has been granted the benefit of revised pay-scales during the period of suspension by payment of subsistence allowance. Once the benefit of the revised pay scale has been granted by the competent authority for calculating the subsistence allowance for the period of suspension, in our considered opinion situation No. 2 under Rule 37 (supra) would cover such an eventuality and the employee would be entitled for counting of the period of suspension as qualifying service for the pensionary benefits. If this logical consequence is not accepted an incongruous position would necessarily arise, in as much as on one hand benefit of revised pay scale during the suspension period would stand granted and on the other hand such period would not be taken into consideration for the purpose of pensionary benefits. Mere suspension does not sever the relationship of an employer and employee.

13. It is noteworthy that the respondent has been granted the benefit of revised pay-scales in regard to the suspension period. This benefit as granted to the respondent also becomes relevant in the light of Rule 50 which provides for "average emoluments." Rule 50 contemplates that the average emoluments shall be determined with reference to the emoluments drawn by a railway servant during the last 10 months of his service. Note 2 of Rule 50 clearly provides that if during the last 10 months of service a railway servant had been under suspension and the period of suspension does not count as service the said period of suspension shall be disregarded in the calculation of average emoluments and equal period before 10 months shall be included. In the present case, the petitioners have already granted to the respondent benefit of the revised pay-scales for the suspension period to calculate the subsistence allowance which postulates that the subsistence allowance as paid during the suspension period in the revised pay scales would be considered for the purpose of fixing average emoluments under Rule 50. This being so, the petitioners would not be justified in contending that the period of suspension ought not be taken into consideration to include in counting the qualifying service for the purpose of computation of pensionary benefits.

14. The issue as to whether the period of suspension during which subsistence allowance was paid to an employee would be taken into consideration as qualifying service was considered by the Supreme Court in the case of *Bibhuti Bhushan Chaudhary v. Union of India and Others*, (1997) 11 SCC 373 . This case pertains to a station Master in the service of the railways who was placed under suspension by an order dated 19.1.1962 on account of his failure to join duty at the place of transfer. The order of suspension was continued in operation till 8.5.1970 when he was allowed to join duty. Thereafter, the said employee had attained the age of superannuation on 31.1.1980. In the said context, the Supreme Court has observed as under:

3. The learned counsel for the petitioner has confined his submissions to the computation of the pension payable to the petitioner and has urged that although the subsistence allowance has been paid to the petitioner for the period of

suspension the said period has been excluded from the qualifying service of the petitioner for the purpose of computing the pension payable to him. Having regard to the fact that the petitioner has been paid the subsistence allowance for the period of suspension, the said period of suspension could not be excluded from the qualifying service for the purpose of computing pension of the petitioner and the pension payable to the petitioner should be calculated by taking into account the said period of suspension as part of his qualifying service. It is therefore, directed that the petitioner is entitled to count the period of suspension as part of his qualifying service for the purpose of computing the pension payable to him. The amount of pension payable to the petitioner should be reassessed on that basis and the amount of arrears fund payable to the petitioner as a result of such reassessment shall be paid to the petitioner within a period of three months. The writ petition is disposed of accordingly. No order as to costs.

15. Learned counsel for the respondent has also placed reliance on the Division Bench Judgment of this Court in Writ Petition No. 2815 of 1999 wherein this Court following the law laid down by the Supreme Court in BIBHUTI BHUSHAN CHOUDHARY's case supra held that the period of suspension shall not be excluded for the purpose of qualifying service for the purpose of pension.

16. The learned counsel for the petitioners has relied on the Judgment of the Supreme Court in the case of R.P. Kapur Vs. Union of India and Others, wherein the Supreme Court has taken into consideration Rule 37 and Rule 50. This was a case where a railway employee was placed under suspension on 21.1.1982 and was compulsorily retired by way of penalty with effect from 25.11.1982. In the order of penalty, it was specifically stated as follows

The President has therefore decided to impose on R.P. Kapur a penalty of compulsory retirement from service with condition that while payment during the entire period of suspension from 21.1.1982 to the date of service of this order will be restricted to the subsistence allowance drawn. This period may be allowed to be count as qualifying service for pension but for no other purpose.

It is therefore clear that this was a case where the order of compulsory retirement itself granted benefit of the entire period of suspension to be counted as qualifying service for pension and for no other purpose. In the present case, though no such order has been passed, however, the benefit of revision of pay-scales for the purpose of payment of subsistence allowance has been granted to the respondent by the petitioners in pursuance of the directions of the Full Bench Judgment of the Central Administrative Tribunal in O.A. No. 560 of 1996. In fact, in this Judgment the Supreme Court after taking into consideration the provisions of Rule 50 in the facts of that case has considered the period of receipt of the revised subsistence allowance, for the purpose of determination of average emoluments for the purpose of pension. This Judgment of the Supreme Court is therefore of no avail to the petitioners in regard to the proposition being canvassed that the period of suspension of the respondent cannot be taken into

consideration as to determine the qualifying service.

17. The Central Administrative Tribunal has partially allowed the Original Application filed by the respondent following the mandate of the Judgment of the Supreme Court in BIBHUTI BHUSHAN CHOUDHARY's case (supra) and has held that the respondent's period of suspension be treated as qualifying service for the purpose of computation of pension and other pensionary benefits. In view of the above discussion, we see no infirmity or perversity in the findings of the Central Administrative Tribunal so as to interfere in exercise of the jurisdiction of this Court under Article 226 of the Constitution of India. We are therefore, of the considered view that the respondent is entitled to the benefit of the period of suspension to be counted for the purpose of qualifying service for pensionary benefits. Writ Petition accordingly fails and is rejected. Rule is discharged. No order as to costs.