

(2010) 09 DEL CK 0140

In the Delhi High Court

Case No : Writ Petition (C) 742 of 2009

Union of India (UOI) and Others

APPELLANT

Vs

Pramod Kumar Pandey

RESPONDENT

Date of Decision : 29-09-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Railway Services (Pension) Rules, 1993 — Rule 106, 107, 41, 41(2)

Citation : (2010) 09 DEL CK 0140

Hon'ble Judges : Pradeep Nandrajog, J; Mool Chand Garg, J

Bench : Division Bench

Advocate : Jitendra Kr. Singh, for the Appellant; A.K. Trivedi, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J.—This writ petition has been filed by Union of India assailing the order passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as "the Tribunal") dated 14.08.2008 passed in O.A. No. 356/2008 whereby the Tribunal has been pleased to allow the application filed by the respondent for granting pro-rata pension to the respondent for the service rendered by him with Indian Railways w.e.f. 09.10.1990 till he resigned from service of Indian Railways on 02.11.2004 which was accepted w.e.f. 01.12.2004. By that time, the respondent served Indian Railways for a period of more than 10 years.

2. Briefly stating, the facts of the case are that while working as Senior Engineer with Indian Railways, the respondent had applied to his competent authority for a No Objection Certificate to be issued to appear in an interview for employment in RITES Ltd. (hereinafter referred to as "RITES") on 20.08.2004. The application for NOC was not decided till 06.09.2004 which was the date fixed for holding the interview by RITES, accordingly without waiting for the orders to be passed by the petitioners the respondent participated in the interview by taking a casual leave. Later on, the application of the petitioner for issuance of NOC was rejected

vide order dated 10.09.2004. In the meanwhile, the respondent, who was selected by RITES submitted his resignation which was accepted by the petitioners vide order dated 01.12.2004.

3. After his retirement from RITES, the respondent approached the petitioners to give pro rata pension in relation to the services rendered by him in Indian Railways prior to his joining RITES which was rejected by the petitioners in terms of Rule 41(2) of Railway Service (Pension) Rules, 1993, on the plea that the respondent applied to RITES without prior permission and later submitted his resignation and thus, forfeited his past service with the Railways. In addition to the aforesaid provisions, it was also pleaded that the benefits of pro rata pension could not have been provided to the respondent also in terms of O.M. dated 31.01.1986 issued by Ministry of Personnel, Grievances and Pension and para 311 of Manual of Railway Pension Rules, 1950.

4. Aforesaid pleas were also taken by the petitioners before the Tribunal but the same did not find favour with the Tribunal as reflected in the impugned order dated 14.08.2008, allowing the Original Application. The relevant paragraphs of the impugned order passed by the Tribunal are reproduced for the sake of reference:

10. On careful consideration of the rival contentions of the parties and on perusal of the records, rules are clear. In order to be granted on resignation benefit of past service as per Rule 41 of the Pension Rules, resignation if tendered with a view to take up with proper permission another appointment shall qualify the service as qualifying for grant of pension if one joins either on permanent absorption or direct recruitment in Government of India's Undertaking or Corporation in the instant case the applicant has admittedly not sought prior permission or had also not applied through proper channel for the post of Manager (Civil Design) in RITES, his subsequent conduct of seeking permission before interview when refused NOC, it cannot be said that applicant has applied for the post through proper channel. However, when applicant tendered his resignation he has clearly mentioned that he is resigning from the post to join RITES Ltd. a letter written to the General Manager (P) by the CEO on 3.11.2004 has clearly mentioned that applicant had applied for the post directly in RITES Ltd. and has moved technical resignation to join RITES Ltd. Accordingly, the resignation was accepted on the basis of the Note put up by CEO on 3.11.2004. However, the aforesaid order does not show that the resignation being technical, would not entail forfeiture of past service, as per Rule 41 (2). The contention put forth by the applicant that for pro rata pension to the government servants on joining public sector undertakings as per CAG circular dated 20.1.2004 the conditions are only 10 years of qualifying service and holding of a permanent post but this 10 years of qualifying service would have to be viewed in the context of valid qualifying service in case appointment to public undertaking is sought without proper channel and when NOC is rejected, there has to be forfeiture of past service.

11. Another aspect of the matter, which is to be looked into is that whereas in the same department, i.e., construction one Naveed working as Junior Engineer (Works) whereas the applicant, working as Sectional Engineer when Mr. Naveed had tendered his resignation the NOC was issued to him and in the same grade whereas for the applicant shortage of technical staff was an impediment for refusing NOC. The applicant is challenging the aforesaid action of the respondents. It is trite that when as a model employer Railway should not make invidious discrimination when persons are identically situated, granting of NOC to Naveed and refusing in the case of applicant is certainly violative of Articles 14 and 16 of the Constitution of India.

12. Rule 106 of the Pension Rules in case of doubt in interpretation of the rules, Department of Pension and Pensioners Welfare is to be consulted. Though CAG circular would have no direct applicability in the present case, but as I find that applicant though ineligible, as per his qualification for the post notified by the RITES, yet when applied had sought for NOC before the process was over at the time of interview, which was delayed and by the time selection process was over permission was refused. The service rendered by the applicant with the Railways was terminated on the side of the applicant with a valid permission to take up employment. The only impediment of applying for direct recruitment through proper channel may not be there but the valid requirement of resigning the service on acceptance thereof, taking cognizance of joining RITES by the competent authority, undue hardship has certainly been caused to the applicant and as per Rule 107 of the Railway Pension Rules, in such an event in consultation with DoP&T and Department of Pension and Pensioners Welfare, one has to be redeemed from hardship.

13. In the result, for the foregoing reasons, this OA stands disposed of with a direction to respondents to refer the claim of applicant, on undue hardship, to the Railway Board for dispensing with the requirements of Rule 41 (2) and thereafter to count, on approval, the erstwhile service of applicant for pro rata pension. In such an event, he shall be entitled to all consequences in law. The respondents shall carry out this exercise within a period of three months from the date of receipt of a copy of this order. No costs.

5. Reflecting upon the reasoning of the Tribunal it may be noted that the petitioners were predicating their case under Rule 41 of the Pension Rules applicable to Railway employees which reads as under:

41. Forfeiture of service on resignation-(1) Resignation by a Railway servant from a service or a post, unless it is allowed to be withdrawn in the public interest by the appointing authority shall lead to forfeiture of his past service.

(2) A resignation shall not lead to forfeiture of past service if it has been submitted to take up with proper permission, another appointment, whether temporary or permanent under the Government where service qualifies for pension.

6. Additionally, the petitioners placed reliance upon a compendium of circulars issued by the Indian Railways, which includes a circular dated 16.04.1986 which reads as under:

12. Pro rata pension/gratuity and other benefits to a railway servant who joins Public Sector Undertaking on "immediate" absorption were allowed irrespective the appointment was in public interest or otherwise provided that the employee had applied through proper channel and released only after obtaining his resignation. The absorbed employee is eligible for encashment of LAP at his credit but the half pay leave will however stand forfeited.

7. It is, thus, urged that since the respondent was not granted prior permission and it was not treated as a case of public interest, he would not be entitled to any benefit of service rendered under the Railways.

8. The respondent on the other hand places reliance upon a Railway Board letter No. F(E)III/86/PN-1/5 dated 16.04.1986 which reads as under:

Sub: Grant of pro-rata retirement benefits to Railway employees on immediate absorption basis in P.S.E.

A copy each of Department of Public Enterprises (BPE)'s O.M. No. 3(2)/85/BPE-S&A Cell dated 9.1.1986 and O.M. No. DOP & T's 28016/5/85 Estt.(C) dated 31.1.1986 regarding terms and conditions and the retirement benefits admissible to the Govt. employees on their immediate absorption in Central Public enterprises are enclosed herewith for information and guidance.

2. Orders contained in the above O.M. will apply mutatis mutandis to the Railway employees also. These orders are effective from 6-3-1985 but the cases already settled on and after 6.3.1985 will not be reopened.

3. Orders corresponding to BPE's O.M. No. 5/25/83BPE(PSEB) dated 6-3-1985 referred in the above office Memorandums dated 9-1-1983/DE1/1 dated 25-3-

Copy of letter No. 3(2) /85/BPE-S& A Cell dt. 9th Jan, 1986 from min of Industry deptt. of public enterprises (Bureau of Public Enterprises) S&A Cell.

Sub: Pro-rata pension/gratuity and other retirement benefits of Govt. servants who join Central PS Es on immediate absorption basis clarification regarding.

The undersigned is directed to referent to the BPE's O.M. No. 5(25)/83 BPE(PESB) dated the 6th March, 1985 banning deputation of Central Government employees, save exceptions made therein, to Central PS Es and to say that a doubt has been raised as to whether the liberalised pro-rata retirement benefits which are, at present, admissible to those Central Government employees who, while on deputation to Central PS Es, opt for permanent absorption in the Undertakings, can be allowed to the Government servants who join Central PS Es on immediate absorption basis. It is hereby clarified that the Central Government employees who join Central PS Es on "immediate absorption" basis are entitled to same pensionary benefits as are admissible to deputationist Central

Government officers who opt for permanent absorption, irrespective of the fact that appointment of some of these employees in the Public Enterprises may be on probation for a given period. In other words, the immediate absorption" is to be treated as "permanent absorption" so far as pensionary benefits to Central Government employees are concerned.

The stipulation of immediate absorption will apply to all appointments of Central Government servants in the Central Public Enterprises, irrespective of the level of appointment and whether the appointment is in public interest or otherwise, provided they had applied through proper channel and that they had been released only after obtaining and accepting their resignation from the Government service.

9. It is apparent that the railway is adopting circulars issued by DOPT.

10. The aforesaid Railway Board circular dated 16.4.1986 has to be understood with reference to another Railway Board circular dated 23.06.1986 which reads as under:

The Ministry of Industry, in their OM dt. 9-1-1986, have clarified that the Central Government employees who join Central PS Es on immediate absorption basis are entitled to the same pensionary benefits as are admissible to deputationist Central Government Officers who opt for Permanent absorption, irrespective of the fact that appointment of some of those employees in the Public Enterprises may be on probation for a given period. In other words, the immediate absorption is to be treated as "Permanent absorption" so far as pensionary benefits to Central Government Employees are concerned.

11. In the aforesaid circular, there is no mention that the beneficiary should apply with prior approval of the parent department.

12. In view of the aforesaid the issue as to whether the petitioner applied through proper channel or not becomes irrelevant.

13. The Tribunal has dealt with Rule 41 in para 10 of the impugned order (supra) and has observed that the said Rule provides that resignation shall not lead to forfeiture of past service, if it has been submitted to take up the employment with proper permission. Since the resignation tendered by the respondent was accepted, merely because his request for NOC to appear for an interview was rejected subsequent to holding of interview, signifies the acceptance of the petitioners regarding joining of services in RITES by the petitioner and in a way waives off the requirement of forwarding of the application formally through them.

14. Moreover, circulars issued by DoPT makes no mention that the appointment in the PSU ought to have to be obtained with prior permission of the department where the employee was serving. The condition which was imposed earlier such as appointment in public interest or being on deputation or having not taken appointment of his own volition stands deleted. It seems that the Railways

circulars were based upon prior circulars issued by DoPT but the change regarding deletion of essential requirements such as the appointment being in public interest or being in deputation or having taken on his own volition have not been considered by the petitioners and they harp upon the circulars which were issued earlier.

15. At this juncture, we may also take note of two judgments delivered by co-ordinate benches of this Court. In the decision reported as *Shri K.K. Dhir Vs. Union of India (UOI) and Others*, one of the issues which has been discussed in that judgment was absorption of a government employee in a PSU without having been sent on deputation or on transfer but on his own volition and even though such appointment was not in public interest and even though such appointment was not in public interest. The Division Bench was made the following observations:

13. The issue with regard to grant of prorata pension to those Government servants who had joined a PSU after rendering more than 10 years of Government service is a matter which has seen widening of the door from time-to-time, either by the Government itself or by judicial pronouncements. Initially such benefit was sought to be restricted by fixing a cut-off date and by stipulating that the movement from Government service to a PSU should be a transfer or deputation as opposed to a move by the Government servant of his own volition. An additional condition was added that the move should have been declared by the Government to be in the public interest. These requirements had their roots in F Rs 26 and 37. So far as the cut-off dates fixed by the Government are concerned, following *D.S. Nakara (supra)* and *Thiruvengadam (supra)*, it stands concluded that such classification on the basis of a cut-off date which is fixed without any rationale would be arbitrary. Therefore, merely because the petitioners' case pertains to 1965/1966, he cannot be denied prorata pension, if otherwise he fulfills the requirements for grant of this benefit. So far as the twin conditions that, (i) the Government servant should have been first transferred/deputed to the PSU and thereafter got absorbed in the PSU, as opposed to his movement of his own volition; and (ii) his movement to the PSU should have been declared in public interest, is concerned, the same have also been relaxed by the Government from time-to-time, as would appear from the Government O Ms of 1968, 1972, 1977 and 1991. Once these conditions have been relaxed, it does not stand to reason that these relaxations should be only from and after a cut-off date, which has no rational basis. The relocation would be applicable to all such Government servants who join PSUs even before such arbitrarily fixed cut-off dates. Consequently, in our opinion, all Government servants, who had 10 years or more of qualifying service before they moved to PSUs, either on transfer/deputation, or of their own volition, and in respect of whom there was a declaration of their move being in Public Interest or not, would be entitled to prorata pension. Pension, it has been held is not a bounty payable on the sweet will and pleasure of the Government. The right to receive pension is a valuable right vesting in a Government servant. It is not an ex gratia

payment. It is a payment for the past services rendered. [Reference may be made to Deokinandan Prasad Vs. The State of Bihar and Others, and Subrata Sen and Others Vs. Union of India and Others,

16. Consequently, the said petition was allowed whereby directions were given to the Government to grant benefits of pro rata pension to the petitioner along with arrears and interest.

17. Relevant would it be to note that the Division Bench noted that from time to time the circulars issued widened the doors for counting past service rendered upon absorption of a Government servant in a public sector undertaking, commencing from the narrow right where absorption in the PSU had to be with the prior approval and in public interest, which narrow view had its roots in FR 26 and 37 and with the passage of time the right being extended to joining/being absorbed in PS Us without a declaration of the same being in public interest. The Division Bench found that post 1967, various O Ms issued in the year 1968, 1972, 1977 and 1991 did away with the move being in public interest as a qua non for entitlement to pro rata pension.

18. Another co-ordinate bench of this Court took a similar view in W.P.(C) 6464/2008 titled as Union of India and Ors. v. V.K. Puri decided on 30.07.2010.

19. Taking all these facts into consideration, we have no hesitation in holding that in the present case, once the resignation of the respondent was accepted and he was allowed to work in RITES by the petitioners, the question of forfeiting his earlier service in the Indian Railways does not arise as the government itself has liberalized joining of an employee in the Government in a PSU even if he joins such service of his own volition and even though such services may not be in the public interest so as to protect his interest for pro rata pension for his past services subject to the condition that he had to his credit qualified service i.e. service of more than 10 years which in this case the respondent had before joining RITES.

20. Accordingly, the writ petition is dismissed with no order as to costs.