
(2014) 06 DEL CK 0015
In the Delhi High Court
Case No : W.P. (C) Nos. 3367-68/2006

U.O.I. and Others

APPELLANT

Vs

B.S. Chhabra

RESPONDENT

Date of Decision : 13-06-2014

Acts Referred:

Citation : (2014) 06 DEL CK 0015

Hon'ble Judges : Gita Mittal, J;Deepa Sharma, J

Bench : Division Bench

Advocate : Jyoti Singh, Sr. Advocate and Vaibhav Kalra, Advocates for the Appellant; A.K. Behera, Advocates for the Respondent

Judgement

Gita Mittal, J.—The writ petitioner assails the order dated 2nd August, 2005 passed by the Central Administrative Tribunal, Principal Bench in C.P. No.474/2004 in O.A. No.3147/2001 inter alia on the ground that while exercising the contempt jurisdiction, it was not open to the Tribunal to grant relief which had not been granted even under the order, violation whereof was contended by the respondent.

2. We may briefly note the facts giving rise to the present writ petition.

3. Major B.S. Chhabra, (respondent herein) was commissioned in the Indian Army in September, 1963 as an Emergency Commissioned Officer. He worked till 1967 whereafter he was granted whole time commission (temporary) in the NCC with effect from 18th October, 1967.

4. It is undisputed that so far as tenure in the NCC is concerned, it was initially subjected to yearly later for three years, grant of extension of tenure in terms of the Government of India letter No. 5431/NCC.PERS(D)/776-III/D(GS.III) dated 21st December, 1963. The last extension granted to the petitioner was with effect from 18th October, 1978 to 17th October, 1981 at 9 Assam Bn. NCC Jorhat.

5. On 4th April, 1979, the respondent proceeded on annual leave from his unit

and did not report back. Consequently, the officer was served with a show cause notice calling upon him to explain the reasons for his unauthorised absence from duty. On 5th June, 1979, the court of inquiry held to look into the absence of the respondent declared his over stay of leave unauthorised.

6. Based on this court of inquiry, on 14th December, 1979, a memorandum was issued to the respondent wherein it was mentioned that he was absent from duty with effect from 4th April, 1979 without proper leave and required him to explain as to why disciplinary proceedings be not taken against him for unauthorized absence and disobedience of orders. The services of the respondent were thereafter struck off from the strength of the NCC with effect from 18th October, 1981.

7. The respondent filed an application being O.A. No. 3147/2001 before the Central Administrative Tribunal, Principal Bench complaining that he was communicated the order of striking off with effect from 18th October, 1981 only by the order dated 18th January, 1994. He sought an order from the Tribunal that such order be quashed and set aside; that a direction be issued to deem the applicant/respondent as on service till 17th October, 1992 which he claimed to be his date of superannuation and to grant arrears of pay and allowances with effect from August, 1979 till the date of his retirement. The respondent however, prayed for pro rata pensionary benefits with interest on his monetary claim. This petition was contested by the Director General of the NCC.

8. O.A. No. 3647/2001 was decided by the Tribunal by an order dated 23rd May, 2003 partly granting the prayer made by the respondent. The Tribunal held that there was nothing on record which show that the respondent was given any extension with the NCC beyond October, 1981 and held that he had been in service from 1967 when he joined NCC till October, 1981 when the last three year extension in the NCC expired. The relevant portion of the order dated 23rd May, 2003 in this regard requires to be extracted for the reason that the entire claim of the respondent turns on the same. The same reads as follows:

"At the same time nothing emerges on record showing that the applicant was given any extension beyond October, 1981. It would, therefore, be seen that the applicant had been in service from October, 1969 when he joined NCC till October, 1981 from his last three year extension in the NCC expired. He would be entitled to draw pay and allowances from April, 1979 to October, 1981 and to grant of pensionary benefits keeping the above qualifying period. The applicant's plea for treating him as having continued in service till the attainment of age of Superannuation on 17.10.1992 has no basis in law and is accordingly replied. His letter dated 29.4.1985 seeking premature retirement is also of no avail to him as his services stood terminated much earlier in October, 1981 on 19.10.1981, when his last extension expired and was not extended further. Applicant is entitled for terminal benefits in law upto that period. His leave for the period upto May, 1979 should be sanctioned and the period from that date till his date of retirement shall be treated as leave as admissible. He would also be entitled

for some costs for the inconvenience and difficulties which he had been subjected to.

In the result, the O.A. succeeds partly and is accordingly disposed of. Respondents shall treat the applicant as having been in service till 17.10.1981 and pay him salary upto that date and pension as well as pensionary benefits admissible in law. They shall also pay his arrears from November, 1981 to date with simple interest @ 9% from November, 1981 till the date of actual disbursement. Respondent shall also pay to the applicant the cost of the litigation quantified at Rs.3000/- (Rupees three thousand only). This exercise shall be completed within three months from the date of receipt of a copy of this order."

9. The petitioner would emphasize before this court that the Tribunal had not held that the respondent was entitled to grant of pensionary benefits but had required the petitioner to pay the same, if the pensionary benefits were admissible in law. It appears that by an order passed on 12th July, 2004, the petitioner directed as follows:

"(a) Regularization of period of absence from 4th April 1979 to 17th October 1981 as EOL without pay may be sanctioned since no other leave has been found left to the credit of the officer;

(b) Counting of above EOL i.e., from 4th April, 1979 to 17th October 1981 towards the petitioner's qualifying service for the purpose of pension may be approved;

(c) Payment of arrear of salary, if any, with interest to petitioner may be sanctioned;"

10. In the meantime, the respondent filed contempt petition which was registered as C.P. No. 156/2004 before the Central Administrative Tribunal complaining violation of the judgment dated 23rd May, 2003 by the petitioner. The petitioners took the stand that the order dated 23rd May, 2003 had been implemented by the petitioners vide its letter dated 12th July, 2004, which for the purposes of convenience is extracted hereunder:

"Sub : IMPLEMENTATION OF THE JUDGEMENT OF HONOURABLE CAT DELHI IN THE CASE OF NCC/PC/11567/MAJ BS CHHABRA (RETD) V/S UNION OF INDIA DATED 23 MAY 2003 IN O.A.NO.3147/2001.

1. In view of the above judgment, the sanction of President of India is hereby accorded to treat Major BS Chhabra in service by regularizing the period of his absence from 04 Apr 79 to 17 Oct 81 as Extra Ordinary Leave (EOL)

2. The officer is entitled to draw arrears of pay and allowances upto 17 Oct 1981 as admissible with simple interest of 9% with effect from November 1981 till date of actual payment.

3. DSOP Fund balance in the name of the officer also be paid to the officer with interest applicable CDA(O), Pune will intimate the exact amount to enable us

issue allotment of funds charged expenditure.

4. Cost of litigation of Rs.3000/- be paid to the officer, as awarded by CAT, Delhi.

5. The entire period of absence shall be counted towards terminal pensionary benefits. The pensionary benefits will, however, be admissible as per the provisions of CCS/(Pension) Rule 1972 as amended from time to time after taking cognizance of his length of service.

6. The PCDA(P) are requested to work out the details of amount of benefits, if any, in respect of above named officer and intimate the same to enable us to issue allotment of funds under charged expenditure.

7. This issue with concurrence of Min of Defence (Finance) vide I.D. No.972/GS/04 dated 17/5/04."

11. So far as pensionary benefits was concerned, the petitioner informed the Tribunal that the same would be required to be considered under the provisions of the CCS (Pension) Rules after taking into account the length of the respondent's service. The contempt petition being C.P. No. 156/2004 was disposed of by the Tribunal directing the petitioner to issue pension payment order (PPO) in terms of the order dated 12th July, 2004.

12. The petitioners were of the view that under the CCS (Pension) Rules, the respondent was not entitled to any pension benefit for the reason that he had not completed 20 years of qualifying service. Aggrieved by the non-issuance of the PPO and non-payment of interest on the claimed pensionary benefits, the respondents filed the second contempt petitioner which was registered as C.P. No. 474/2004. The petitioner contends that a detailed affidavit was filed in response to the notice to show cause enclosing the aforementioned letter dated 12th July, 2004. The petitioner took the stand that in the original order dated 23rd May, 2003 of the Tribunal, it was clearly stated that only such pension as is admissible in law was to be paid. The Tribunal had not returned a finding that petitioner was entitled to payment of pension.

13. So far as service of the petitioner is concerned, in view of the order dated 23rd May, 2003, the tenure of the petitioner with the NCC expired by 17th of March, 1981. Therefore, counting his service with the NCC 18th October, 1967 to 17th October, 1981, the petitioner had completed only 18 years of service. The petitioner stated before the Tribunal that under the CCS (Pension) Rules, pension can be granted only on completion of 20 years and, since the respondent had completed only 18 years of service he was not entitled for the same. The Tribunal was also informed that this position was notified to the respondent by letters dated 3rd August, 2004 and 30th November, 2004.

14. We may note that to support the above stand, the petitioner had placed before the Tribunal a communication from the Ministry of Defence dated 1st October, 1986 written to the Director General NCC stating as follows:

"I am directed to convey the sanction of the President to the extension of pensionary benefits to NCC Whole Time commissioned officers who have not been accepted for grant of permanent commission in National Cadet Corps but have completed 20 years of service before retirement in terms of Government of India, Department of Personnel A.R. OM No. 3n(16)- Pension Unit/no dated 30 Dec 1980. This will be subject to refund of gratuity with interest, if any, for NCC service or previous military/civil service.

The provisions of this letter will be effective from 30 Dec 1980."

15. The above communication bears out that pension become payable to whole time commissioned officer only pursuant to the order dated 1st October, 1986 which mandated completion of 20 years of service before retirement.

16. The Tribunal rejected the contention of the writ petitioner by its order dated 2nd August, 2005 holding that the respondent having completed 10 years of service prior to voluntary retirement from Defence Ministry, is entitled to pro rata pension on completion of 10 years of service and that the bar of 20 years of service and prospective effect given to Rule 49 of the Pension Rules with effect from 1st January, 1986 is misconceived. A direction was made to the Government to issue the pension payment order and take the necessary steps to disburse the same with interest to the respondent within two weeks of the receipt of the order. Aggrieved by the directions made in the order dated 2nd August, 2005, the petitioner has filed the present petition.

17. We have heard learned counsel for the parties at length. First and foremost, there is nothing on record to support the finding of the Tribunal that the respondent had completed 10 years of service before he sought voluntary retirement from the Defence Ministry. The respondent was unfortunately absent from duties and his services were terminated. However, the Tribunal struck down the termination of the respondent herein directing that the tenure has come to an end only on expiry of the last extension of his tenure in October, 1981.

18. Mr. A.K. Behera, learned counsel for the respondent has vehemently contended that the respondent is entitled to relief under the letter dated 23rd September, 1988 issued by the Ministry of Defence. According to him, by virtue of the government order, officers who have rendered temporary service of not less than 10 years would be eligible for grant of superannuation invalid pension retirement gratuity and family pension at the same scale as is admissible to permanent employee under the CCS (Pension) Rules, 1972 subject to refund of gratuity, if any, with interest for NCC service or previous military /civil service. This submission fails to note the fact that this letter applied only to the "NCC whole time officers retired or superannuated or are declared permanent in capacity for further government service by the appropriate medical authority." The government clearly states in para 2 of this letter that the provision would apply only to such officers who have not been granted permanent commission but were in service on 1st January, 1986.

So far as the service of the petitioner are concerned, it came to an end on expiry of the tenure in terms of the Tribunal order. He neither superannuated nor was declared incapacitated for further service. He was also not in service on 1st January, 1986. Reliance on the circular of 23rd September, 1986, therefore, is wholly misconceived.

19. We may note the stand of the respondent in the affidavit dated 13th April, 2005 filed by him in contempt proceedings which has been placed on record. In para 9 of this affidavit, while referring to the letter dated 12th July, 2004, the respondent has himself stated that according to the petitioner the period of his absence shall not be counted towards terminal pensionary benefits and that pensionary benefits would be only as is admissible as per rule 49(2)(b) of the CCS (Pension) Rules. In para 11 the respondent challenged the applicability of the Government Order contained in the communication dated 1st October, 1986. He claimed that he having completed more than 10 years of service was entitled to pro rata pension.

20. Before us, so far as his claim for pro rata pension is concerned, the respondent has placed reliance on Rule 49 of the CCS (Pension) Rules which reads as follows:-

"49. Amount of Pension

(1) In the case of Government servant retiring in accordance with the provisions of these rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month's emoluments for every completed six monthly period of qualifying service."

(2)(b) In the case of a government servant retiring in accordance with the provisions of these Rules before completing qualifying service of thirty-three years, but after completing qualifying service of ten years, the amount of pension shall be proportionate to the amount of pension admissible under clause (a) and in no case the amount of pension shall be less than rupees three hundred and seventy-five per mensem."

21. This rule clearly applies only to a government servant retiring in accordance with the provision of the Rules.

22. Our attention is drawn by Ms.Jyoti Singh, Senior Advocate to the scheme of the CCS (Pension) Rules. It is pointed out that so far as pension is concerned, it is governed by Chapter 5 of the CCS (Pension) Rules which is titled as "Classes of pension and conditions governing their grant". Rule 35 refers to superannuation pension which is granted to a government servant who is retired on attaining the age of compulsory retirement. Under Rule 36, retiring pension is admissible to a government servant who retires, or is retired in advance of the age of compulsory retirement in accordance with the provision of Rule 48 or 48-A of the CCS (Pension) Rules or Rule 56 of the Fundamental Rules or Article 459 of the Civil Service Regulation. It is also admissible to the government servant who, on

being declared surplus, opts for voluntary retirement in accordance with the rule 29 of these rules.

23. So far as computation of the amount of the pension is concerned, the same is provided in Chapter 7 titled "Regulation of Amounts of Pensions". Rule 48 (1) enables the government servant who has completed 30 years of qualifying service to retire from service or may be required by the Appointing Authority to retire him in public interest. Sub Rule (1)(a) of the Rule 48 enables the government servant to elect for voluntary retirement while Rule 48 (a) is concerned with voluntary retirement on completion of 20 years of qualifying service.

24. Learned counsel for the petitioner has placed before this court the pronouncement of the Supreme Court reported at Union of India and Others Vs. Rakesh Kumar etc., wherein a similar contention raised by the respondent was rejected. The observations of the Supreme Court on the applicability of the clause (2)(b) of Rule 49 may usefully be extracted in extenso and reads as follows:

"On the basis of Rule 49, it has been contended that qualifying service for getting pension would be ten years. In our view, this submission is without any basis. Qualifying service is defined under Rule 3(q) to mean service rendered while on duty or otherwise which shall be taken into account for the purpose of pensions and gratuities admissible under these rules. Rule 13 provides that qualifying service by a government servant commences from the date from which he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. This rule nowhere provides that qualifying service for getting pension is 10 years. On the contrary, there is specific provision that if a government servant retires before completing qualifying service of 10 years because of his attaining the age of compulsory retirement, he would not get pension but would get the amount of service gratuity calculated at the rate of half months emoluments for every completed six monthly period of qualifying service. In these appeals, we are not required to consider other conditions prescribed for qualifying service as it is admitted that respondent-members of the BSF have completed more than 10 years of qualifying service. Further clause 2(a) of Rule 49 specifically provides for grant of pension if a government servant retires after completing qualifying service of not less than 33 years. The amount of pension is to be calculated fifty per cent of average emoluments subject to maximum provided therein. Clause 2(b) upon which much reliance is placed indicates that in case of a government servant retiring in accordance with the provisions of the Rules before completing qualifying service of 33 years, but after completing qualifying service of ten years, the pension shall be proportionate to the amount of pension admissible under clause (a) and in no case, the amount of pension shall be less than Rs.375/- per month. This would only mean that in case where government servant retires on superannuation i.e. the age of compulsory retirement as per service conditions or

in accordance with the CCS (Pension) Rules, after completing 10 years of qualifying service, he would get pension which is to be calculated and quantified as provided under clause (2) of Rule 49. This clause would cover cases of retirement under Rules 35 and 36, that is, voluntary retirement after 20 years of qualifying service, compulsory retirement after prescribed age and such other cases as provided under the Rules. However, this has nothing to do with the quitting of service after tendering resignation. It is also to be stated that Rule 26 of CCS (Pension) Rules specifically provides that resignation from a service or post entails forfeiture of past service unless resignation is submitted to take up, with proper permission, another appointment under the government where service qualifies. Hence, on the basis of Rule 49 member of BSF who has resigned from his post after completing more than 10 years of qualifying service but less than 20 years would not be eligible to get pensionary benefit. There is no other provision in the CCS (Pension) Rules giving such benefit to such government servants."

25. We may also refer to the recent pronouncement of the Supreme Court reported at C. Jacob Vs. Director of Geology and Mining Indus. Est. and Another, . The Supreme Court was considering entitlement under the Pension Rules framed by the Tamil Nadu and the Central Government. The Court observed that the scheme of the rules framed by the Government of Tamil Nadu was identical to that of the CCS (Pension) Rules. So far as Sub-rule 2(b) of Rule 49 in Chapter 7 of the CCS (Pension) Rules (referred to as CCSP Rules in the judgment) is concerned, the same related to Rule 43(2) of the Tamil Nadu Pension Rules ("the TNP Rules" for short).

The Supreme Court has categorically laid down that Rule 42 (b) of the CCS (Pension) Rules does not relate to the entitlement of pension nor does it prescribe the condition for eligibility. The following observations of the Supreme Court clearly apply to the present consideration:

"18. The appellant relied on Rule 43(2) of the Tamil Nadu Pension Rules, 1978 ('TNP Rules' for short) to contend that on completion of 10 years of service, a government servant is entitled to pension. Relevant portion of the said rule is extracted below:

"43. (2) In the case of a government servant, retiring in accordance with the provisions of these rules after completing qualifying service of not less than 10 years, the amount of pension shall be appropriate amount as set out below namely:"

(emphasis supplied)

As similar contention is frequently raised under the corresponding Rule 49(2)(b) of CCS Pension Rules ('CCSP Rules' for short), we will for convenience refer to the corresponding provisions of CSSP Rules also.

19. Rule 43(2) relied on by the petitioner falls under Chapter VI of TNP Rules

(corresponding to Rule 49(2)(b) in chapter VII of CCSP Rules) dealing with 'Regulation of amount of pension'. The said rule relates to quantum and lays down how the pension of a retired government servant should be calculated if he is entitled to pension. Entitlement to pension is governed by Chapter V of the said Rules, which enumerates the classes of pension and conditions for entitlement. The enumerated classes of pension are :

20. A government servant, whose case does not fall under any of the classes of pensions enumerated in Chapter V, is not entitled to pension. If a government servant is not able to make out entitlement to any class of pension specified in chapter V of the pension Rules, there is no question of having recourse to the rules in the chapter dealing with regulation of amount of pension (chapter VI of TNP Rules or chapter VII of CCSP Rules) for determining the quantum of pension.

21. Admittedly the petitioner was not 'superannuated'; nor was he absorbed in any corporation/company/body owned by state/central government; nor did he retire on account of any infirmity which incapacitated him for service; nor was he discharged on abolition of his post. Nor is he claiming compassionate allowance (on being dismissed/removed after putting in service of an extent which would entitle him to pension but for the dismissal/removal). The only other categories of pension are compulsory retirement pension and the retiring pension. A government servant compulsorily retired from service as a penalty, may be granted by the authority competent to impose such penalty, pension at a rate not less than two-third admissible to him on the date of his compulsory retirement. If a government servant is not otherwise admissible to pension, he cannot obviously be granted pension on compulsory retirement. There is no such grant in this case. That leaves us with retiring pension.

22. Rule 33 of TNP Rules provides that a retiring pension shall be granted to a government servant who retires, or is retired, in accordance with the provisions of Rule 42 of the said Rules. Rule 42 of TNP Rules provides that a government servant, who under fundamental Rule 56(d), retires voluntarily or is required by the appointing authority to retire in public interest shall be entitled to a retiring pension. (corresponding Rule 36 of CCSP Rules which provides that a retiring pension shall be granted to a Government servant who retires, or is retired, in advance of the age of compulsory retirement in accordance with the provisions of Rules 48 or 48-A of those Rules or Rule 56 of the Fundamental Rules or Article 459 of the Civil Service Regulations and to a Government servant who on being declared surplus, opts for voluntary retirement in accordance with Rule 29 of those Rules). The provision relating to retiring pension makes it clear that a minimum of 20 years qualifying service is required for retiring pension. It does not entitle a government servant to retiring pension on completion of ten years service. Therefore, the petitioner is not entitled to retiring pension.

23. The petitioner contends that if the minimum service for entitlement to retiring pension was 20 years and not 10 years, Rule 43(2) would not have stated "qualifying service of not less than 10 years". He contended that as Rule

43(2) of the TNP Rules (Rule 49(2)(b) of CCSP Rules) refers to "not less than 10 years service", any government servant who has put in service of 10 years or more is entitled to retiring pension. The said contention is misconceived. As stated earlier, the said rule does not relate to 'entitlement' of pension nor does it prescribe the conditions for eligibility, but only provides how the amount of pension should be calculated in cases where the retiring Government servant is entitled to pension under the chapter V of the pension rules. The said Rule regulates the 'amount' of pension not only in case of retiring pension, but in case of all classes of pension. Under Chapter V, in certain situations, a Government servant may be eligible for pension even where the service is less than ten years. Rules 32, 36, and 38 of TNP Rules (Rules 35, 38 and 39 of CCSP Rules) do not prescribe any minimum service for being entitled to pension, where the cessation of service is on account of superannuation, or on account of bodily or mental infirmity or on account of abolition of his post. When Rule 43(2) of TNP Rules (Rule 49(2)(2) of CCSP Rules) refers to payment of pension to a person who has a qualifying service of not less than 10 years, it does not mean that the minimum period of service prescribed for retirement pension is reduced to 10 years or that government servants who are dismissed/removed/compulsorily retired by way of punishment, or those who voluntarily retire before reaching the age of superannuation with less than 20 years of qualifying service, become entitled to pension. Rule 43(2) of TNP Rules (Rule 49(2)(b) of CCSP Rules), as noticed earlier, comes into play only when the Government servant is entitled to any of the classes of pension enumerated under Chapter V of the Pension Rules. Therefore, when Rule 43(2) of TNP Rules (or Rule 49(2)(b) of CCSP Rule) dealing with the quantum of pension refers to a government servant retiring in accordance with the said rules after completing qualifying service of not less than 10 years, it does not mean that pension is payable to persons who have not completed the required minimum number of years (20 years) of service or to persons who have forfeited their service on dismissal/removal from service. Therefore, the appellant is not entitled to pension."

26. The respondent had set up a stand before the Central Administrative Tribunal in O.A. No.3147/2001 that he had superannuated in 1992 which submission was not accepted by the Tribunal in its order dated 23rd May, 2003. It had been held that the respondents services came to an end on expiry of the period of last extension in October, 1981.

This finding was never challenged by the respondent and has attained finality.

27. The respondent has never claimed that the pension was admissible on completion of 10 years of service.

28. A bare reading of Sub Rule (2)(b) of Rule 49 shows that it applies only to the government servant who retires in accordance with the provisions of these rules.

The respondent has not retired in accordance with the provision of CCS Rules.

On application of the principles laid down by the Supreme Court, Rule 49(2)(b) of

the CCS (Pension) Rules is not attracted and the respondent was disentitled to any amount as pension.

29. The above factual narration shows that by order dated 23rd May, 2003, claimed entitlement of the respondent had not been adjudicated upon by the Tribunal. Therefore, the submission of learned Senior Counsel for the petitioner that the Tribunal has exceeded its jurisdiction in passing the order dated 2nd August, 2005 to issue the pension payments order to the petitioner in contempt jurisdiction has substance. This direction was completely without jurisdiction as well.

30. For all these reasons, the order dated 2nd August, 2005 passed in C.P. No.474/2004 in O.A. No.3145/2001 is not sustainable and is hereby set aside and quashed.

This appeal is allowed in the above terms.