

**\*IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 16.11.2009

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**W.P.(C) NO. 9449/2009**

RAJESH KUMAR ..... Petitioner  
Through: Ms.Lily Thomas, Advocate.

versus

DIRECTOR GENERAL (BSF) & ORS. .... Respondents  
Through: Mr.Pankaj Batra, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**

**HON'BLE MR. JUSTICE SURESH KAIT**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

**PRADEEP NANDRAJOG, J.** (ORAL)

1. Petitioner Rajesh Kumar is aggrieved by the fact that a penalty of removal from service with pensionary benefits has been inflicted upon him. He desires that the respondents be directed to treat him as having voluntarily retired and pension be paid to him accordingly.

2. As we understand, the difference in the two situations i.e. the petitioner being treated as removed from

service with benefit of pension vis-à-vis he being treated as voluntarily retired with benefit of pension would entail a difference in the pension payable.

3. If treated as removed from service, the pension payable is 2/3<sup>rd</sup> vis-à-vis the pension which he would receive if he is treated as having voluntarily retired.

4. Prayer made in the petition is to quash the order dated 18.08.2005 directing that being guilty of desertion, the petitioner be removed from service with pensionary benefits. Further prayer made is that it be treated that pursuant to the application dated 01.11.2002, the petitioner be treated as voluntarily retired and pension be paid according to the rules applicable.

5. As per counter-affidavit filed, the writ petitioner is indulging in voyagerism, in that, he had earlier on filed a WP(C) No.4122/2008 which was dismissed vide order dated 28.05.2008.

6. While dismissing the writ petition, it was noted that the petitioner had not challenged the order dated 18.08.2005 under which, on account of unauthorized absence, he was removed from service with pensionary benefits.

7. We note that the petitioner submitted an application

seeking voluntary retirement on 01.11.2002, which if accepted, would have resulted in cessation of service w.e.f.01.02.2003.

8. The said application was never accepted by the respondents and inspite thereof the petitioner chose to absent himself from duty with the result the penalty of dismissal from service was passed against him. On an application dated 30.05.2005 being filed, on humanitarian ground, the order of dismissal was converted to an order of removal from service with pensionary benefits as applicable.

9. It may be noted that the instant petition has been filed in the name of Rajesh Kumar through his wife.

10. Reason why wife of the petitioner is suing as his next friend is that the petitioner, as per the wife, is suffering from Schizophrenia.

11. Learned counsel for the petitioner could not overcome a basic objection as to why, inspite of the application seeking voluntary retirement not being accepted, did the petitioner abscond and not report for duty.

12. It is settled law that mere filing of an application seeking voluntary retirement is meaningless unless the same is accepted by the competent authority.

13. It appears that the petitioner is Schizophrenic and

off and on does crazy things.

14. Under these circumstances, his wife, who is prosecuting the instant petition, could have followed-up the matter with the authorities concerned.

15. There are further problems which have to be overcome by the petitioner. The first is the bar of constructive *res judicata*.

16. It is settled law that with respect to a cause of action and a challenge to an alleged wrong, all pleas available, as per law, have to be urged when suit or writ petition is filed and having not so done, a second petition on the same cause with fresh pleadings would be barred on the principles of constructive *res judicata*.

17. It is in this connection that the filing of the earlier writ petition and its dismissal assumes significance.

18. The record of the said writ petition shows that inspite of an objection taken that the petitioner had not challenged the order dated 18.08.2005, the petitioner took no steps to amend the writ petition filed by him and preferred to argue the same. The said writ petition was dismissed.

19. Claim in the writ petition was predicated on the strength of the voluntarily retirement application dated

01.11.2002 i.e. the foundation of the cause in the earlier petition was the same as the instant petition.

20. Relief prayed in the said writ petition was to declare the petitioner as having voluntarily retired and consequently the payment of pension as per the rules applicable pertaining to the employees of the respondents who are voluntarily retired.

21. Thus, looking at the various hurdles in the way of the petitioner, we are left with no option but to dismiss the instant writ petition.

22. The writ petition is dismissed.

23. No costs.

**PRADEEP NANDRAJOG, J.**

**SURESH KAIT, J.**

**NOVEMBER 16, 2009**  
**sb**