

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

LPA No.89 OF 2012
LPA No.191 OF 2012
LPA No.174 OF 2012

%

Judgment Reserved on: 20.4.2012
Judgment Delivered on: 11.5.2012.

LPA 89 OF 2012

DELHI TRANSPORT CORPORATION

Through :

... APPELLANT

Mrs. Avnish Ahlawat with Ms.
Urvashi Malhotra and Mr. Nitish
Kumar, Advocates.

VERSUS

RAMESH CHAND

Through:

... RESPONDENT

Ms. Rashmi B. Singh, Advocate.

LPA 191 OF 2012

DELHI TRANSPORT CORPORATION

Through :

... APPELLANT

Mrs. Avnish Ahlawat with Ms.
Urvashi Malhotra and Mr. Nitish
Kumar, Advocates.

VERSUS

RAMESH CHANDER

Through:

... RESPONDENT

Ms. Rashmi B. Singh, Advocate.

LPA 174 OF 2012

DELHI TRANSPORT CORPORATION

... APPELLANT

LPAs No.89/2012 , 191/2012, 174/ 2012

Page 1 of 15

9

Through : Mr. Anand Nandan, Advocate.

VERSUS

SURESH CHAND

... RESPONDENT

Through: Mr. N.K. Jha, Advocate.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. All these appeals raise a common question of law, which is quite important as this issue keeps recurring. The issue is:

(1) What is the age of retirement of a driver working in Delhi Transport Corporation (DTC)?

Incidental question would be as to whether a driver who is dismissed from service and the dismissal is held to be unjustified and illegal by the Labour Court/Industrial Tribunal and against that Award a writ petition is pending, how the case of extension of service would be determined having regard to the provision relating to the age of retirement?

2. All these cases pertain to drivers whose services were terminated by the appellant (hereinafter referred to as the DTC). In all these cases Awards have been passed in favour of these drivers holding the termination bad in law and challenging those Awards, writ petitions filed by the DTC are pending. The applications were preferred by the workmen under Section 17B of the Act in

10

their respective writ petitions in which orders under Section 17B of the Act have been passed. It is the common case of the parties that the age of superannuation is governed by DRTA (Conditions of Appointment & Service) Regulations, 1952.

(2) For the sake of convenience, we take note of facts in LPA 89 of 2012.

(3) In this case, Award dated 12.8.2005 was passed by the Industrial Tribunal-II granting reinstatement in service with full back wages, continuity of service and consequential benefits to the workman. Challenging this Award, the DTC has filed Writ Petition (C) 16788/2006. During the pendency of this writ petition the workman filed application under Section 17B of the Act in which orders dated 13.8.2010 were passed allowing that application and directing the DTC to pay to the workman the last drawn wages/minimum wages, whichever is higher on or before 10th of every month. The DTC was directed to pay the arrears of wages to the workman from the date of passing of the Award up to the date of disposal of the application under Section 17B of the Act, within four weeks.

(4) On 7.11.2010 the DTC moved application for modification of the order stating that the workman had already attained the age of 55 years on

4.10.2006, which according to the DTC is age of superannuation for drivers. It was contended that the workmen was not entitled to any benefit of wages under Section 17B of the Act after 4.10.2006. Modification was thus sought of the earlier order dated 13.10.2010 by contending that the workmen could get the wages from 12.8.2005 to 4.10.2006 when he attained the age of 55 years which according to the DTC is the age of superannuation. The normal age of retirement of employees of DTC earlier was 55 years which was raised to 58 years subject to certain conditions. However, in case of drivers, it was decided that the drivers of DTC shall get the benefit of the enhanced retirement age subject to their being found fit in every respect after a thorough medical examination by the Medical Officers/Officers of the DTC every year after they had attained the age of 55 years. Further, as per Regulation 10 of DRTA, Regulations, 1952, the competent authority at its discretion could authorize by a general or special order and subject to such conditions as it may specify, the extension in service of any employee or class of employees up to the age of 60 years subject to the condition that the extension shall be from year to year. Office Order No. PLD-1-3(102)/63/11528 dated 4/7-10-1963 was issued in this behalf which explains the aforesaid provision and operative portion thereof is as under:-

“DELHI TRANSPORT UNDERTAKING
(OF THE MUNICIPAL CORPORATION OF DELHI)
SCINDIA HOUSE, NEW DELHI.

No. PLD-1-3(102)/63/11528

Dated:4/7-10-1963

Office Order No.99

“In accordance with the provisions of Regulation 10 of the D.R.T.A. (Conditions of Appointment & Service) Regulation 1952 as framed by the erstwhile D.R.T.A. which are still in force in terms of Section 516 (2) (a) of the D.M.C. Act, the employees of this Undertaking are to retire on attaining the age of 55 years provided their services are not otherwise terminated earlier. The Municipal Corporation of Delhi, vide its resolution No. 450 of its meeting held on 05.09.1963 has raised the age of superannuation from 55 years to 58 years in respect of the employees of the Undertaking subject to the following terms and conditions.

- (a).....
- (b).....
- ©.....
- (d).....
- (e).....

(f) The drivers of the D.T.U. shall get the benefit of the enhanced retirement age subject to their being found fit in every respect after a thorough medical examination by the Medical Officer/Officers of the D.T.U. every year after they have attained the age of 55 years. The first examination shall be carried out immediately after or before they have attained the age of 55 years. If as a result of such medical examination they are found unfit for further service, they would be retired from the service of the Undertaking without any notice.

Regulation 10 of the D.R.T.A (Conditions of Appointment & Service) Regulations, 1952 referred to above provides that competent authority at its discretion could authorize by a general or special order and subject to such conditions as he may specify the retention in service of any employee or class of employees upto the age of 60 years subject to the condition that the extension shall be from year to year. In view of the above decision, the appointing authority shall now be

13

competent to authorize the retention in service of any officer or employee upto the age of 60 years after he has attained the age of 58 years subject to his being found fit after through medical examination. The extension shall be from year to year or for such shorter period as may be determined by the appointing authority. The existing provision for premature retirement of employees and officers on medical grounds before they attain the normal age of retirement will remain unaltered."

(5) Based on the aforesaid provisions the stand taken by the DTC is that the age of superannuation is 55 years and thereafter a driver can continue only if he is medically found fit and in order to determine that a medical examination is to be conducted every year and on the basis of medical examination, yearly extension upto the age of 58 years is granted. Beyond 58 years, it is left to the discretion of the competent authority to extend the age of superannuation, which action has to be on the basis of his medical fitness. It was thus argued that a driver does not have any right to go beyond 55 years and in these cases when the workmen had attained the age of 55 years they were out of service. Because of this reason, no medical examination was conducted and for the purpose of Section 17B of the Act, it is only upto the age of 55 years, that the benefit can be granted and not beyond. Reference was made to certain judgments of this Court, which we shall discuss at the appropriate stage. Submission of the respondents workmen, on the other hand was that they had right to go up to the age of 60

years and if the DTC had not conducted medical examination it was not their fault. It was further submitted that as per the plain language of Section 17B of the Act, the orders passed in such application would enure to the benefit of workman till the pendency of the writ petition irrespective of the fact that an employee had attained the age of superannuation in the meantime and therefore, as to what was the age of retirement would be of no significance.

(6) We have given our due consideration to the aforesaid submission of the learned counsel for DTC as well as counsel who appeared for these workmen.

(7) The question which arises in these cases has been formulated in the beginning of this judgment itself. We would now like to answer the same.

Re: Age of Superannuation of a Driver of DTC

(8) We have already reproduced the provision regarding the age of superannuation. It is clear from the above that vide resolution 450 passed by the MCD on 5.9.1963 (at the time when the DTC was known as Delhi Transport Undertaking and was under the MCD), the age of superannuation of all these employees was raised from 55 to 58 years. These employees

would include drivers as well. However, in case of drivers, a condition was imposed that they will get the benefit of enhanced retirement age subject to their being found medically fit after a thorough medical examination by the Medical Officer/Officer of the DTC every year, after they have attained the age of 55 years. Thus, there would be an examination at the stage when a driver attains the age of 55 years and if he is found medically fit, he will be allowed to continue for another year till the age of 56 year. When he attains the age of 56 year, there would be another examination and on finding him medically fit, he would be allowed to work for another year again when he attains the age of 57 years he would be subjected to medical examination and once he is found medically fit in every respect, such driver will be allowed to work up to the age of 58 years.

What follows from the above:

The age of retirement is not 55 years. It is 58 years. Though, in case of a driver such age of retirement comes with the condition of his being found medical fit in every respect. To put it otherwise, a driver has right to continue up to the age of 55 years and thereafter, he would get the benefit of enhanced age of superannuation from 55 years to 58 years subject to fulfillment of the conditions of medical fitness for which examination can be

conducted every year. Therefore, it is not that the age of superannuation is 55 years which was in fact raised to 58 years vide Resolution dated 5.9.1963 but this benefit of enhanced age of superannuation is to be given on fulfillment of the aforesaid conditions. As a corollary what follows is that in case he is found medically fit in every respect, the benefit of raised age of superannuation from 55 to 58 years cannot be denied.

(9) Beyond 58 years a driver of DTC or any other employee, has no right to seek extension. It is the discretion of the competent authority which may exercise it by a general or special order and subject to such conditions as the competent authority may specify for retention of service of any employee or class of any employee up to the age of 60 years and the extension is on an yearly basis. Therefore, from 58 to 60 years, there is no right of any such extension.

(10) The aforesaid discussion lead us to the conclusion that the age of superannuation of a driver is 58 years. We say at the cost of repetition that vide resolution no. 450, this age of superannuation was raised from 55 to 58 years. It is not that the age of superannuation was maintained as 55 years in case of drivers but extension was to be given in specific cases. On the

17

contrary, age was increased to 58 years and benefit was subject to the fulfillment of the condition that the driver is medically fit.

With this, we come to the incident question namely what would be position in the instant cases where medical examination has not been conducted? As already noted from the facts of LPA 89 of 2012, that when the Industrial Tribunal rendered its Award dated 12.8.2005 the workman was less than 55 years of age. He attained the age of 55 on 4.10.2006. Though as per the Award of the Labour Court he was entitled to reinstatement in service with full back wages, continuity of service and consequential benefits, the DTC thus, did not accept this Award and challenged this Award by filing writ petition. In the said writ petition stay of reinstatement was granted. Because of this reason the workman could not get back to his job. However, the DTC very well knew the existence of provision of Section 17B of the Act as per which during the pendency of the writ petition the workman could get the wages in terms of the said provision in case he is unemployed. It was, therefore, for the DTC to conduct medical examination, in case the DTC found doubt in the medical health of the respondent workman which could have determined as to whether as on 4.10.2006 and thereafter on 4.10.2007 and 4.10.2008 the respondent workman was medically fit or not.

18

This medical examination is to be done by the Medical Officer/Officer of the DTC. Therefore, it was for the DTC to call upon the workman to undergo this medical examination. If it is not done, the workman cannot be blamed therefor and there cannot be any presumption against the workman to the effect that he was not medically fit in every respect. For the non-action of the DTC in doing so would amount to giving advantage to the workman by the DTC for its own lapse/inaction. Therefore, in these cases, we have to presume that the workmen were enjoying robust health which could have given them the benefit of raised age of superannuation of 58 years.

(11) We may also point out that once the Award is passed by the Industrial Tribunal holding that dismissal from service was unjustified or illegal the workmen would be deemed to be in service. It is only because of the stay order passed by the High Court in the writ petition that he is precluded from getting the benefit of the Award and from performing his duties as a driver.

(12) We thus answer the question holding that the age of superannuation of the workmen would be 58 years.

(13) Learned counsel for the DTC had referred to few judgments which may not be of any help to the DTC in the instant case. First judgment is of a

Division Bench judgment of this Court dated 9.1.2009 in batch of LPAs and Writ Petition with lead case as *Delhi Transport Corporation Vs. Shri Dharam Pal*, Ex. Driver, LPA 1214/2007. In these cases, the age of superannuation of the workman is held as 55 years holding that their further extension in service to 60 years is not a matter of right but subject to their medical fitness for a job of driver on year to year basis. However, this judgment was rendered in the context of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1955. In all those cases the driver had suffered serious physical disability even before reaching the age of 55 years. In normal course because of such disability when they were not in a position to perform the duties of a driver they could have been medically ceased out from the service. However, because of Section 47 of the Disability Act, they were continued in service as this provision mandates the employer to continue even such an employee in service by providing another suitable job in which such an incapacitated employee can perform depending upon his disability. So much so, this provision goes to the extent that even if the disability suffered by an employee during his service is such that he is in a position to perform any duty till he is continued in service and is to be paid salary in the same pay

20

scale which he was enjoying as driver. For such drivers, no medical examination on attaining their age of 55 years was even necessary. In as much as, they were declared medically unfit to perform the duties of driver even before they attained the age of 55 years. Those cases, therefore, did not pose any problem as they were not entitled to enhance the age of superannuation to 55 to 58 years at all.

(14) It is trite law that a judgment must not be read as a statute it must be understood in the context of facts involved therein and points required to be decided. The aforesaid judgment, therefore would not be of any avail to the DTC.

(15) Another Division Bench decision dated 23.9.2008 in LPA 256/2008 titled *DTC Vs. Yashpal, ex driver*, was pressed by the learned counsel for the DTC. That was a case under Section 17B of the I.D. Act. The Court held that the said workman had attained the age of 55 years on 19th July, 2003 and no relief under Section 17 B of the I.D. Act could be granted to him beyond that date. Interestingly, in that case Award was passed on 6.10.2004 whereas before passing of the said Award the workman had attained the age of 55 years on 19th July, 2002 as the Award came to be passed later, the question of him being medically examined on 19.7.2003 did not arise in as much as

on that date he was out of service and the case was still pending before the Labour Court. Moreover, he was asked to appear before the Medical Board sometime in March, 2008 and on 21.3.2008 he was held to be unfit for duty. It was in these circumstances, while denying the benefit of Section 17 B of the Act the court observed that he can avail his remedy by institution of appropriate proceeding. As is clear from the following:

“5. The fact of the matter is that as on the date of Award, i.e. 6th October, 2004, the respondent was no longer in service. He had superannuated on 19th July, 2003. While it is open to the respondent to institute appropriate proceedings questioning the decision of the DTC dated 21st March, 2008 not to continue him in service, it is clear that no relief could have been granted to the respondent under Section 17B ID Act.”

(16) We would also like to comment that in brief order of two pages passed in the said LPA the Court did not go into the question as to what was the age of superannuation and proceeded on the assumption that the age of superannuation was 55 years. This position was accepted by the counsel for the workman as well and therefore, the Court proceeded on that basis and for this reason, there is no reference to the provision regarding the age of superannuation which we have discussed in detail in this order. Therefore,

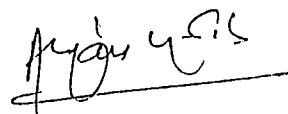
22

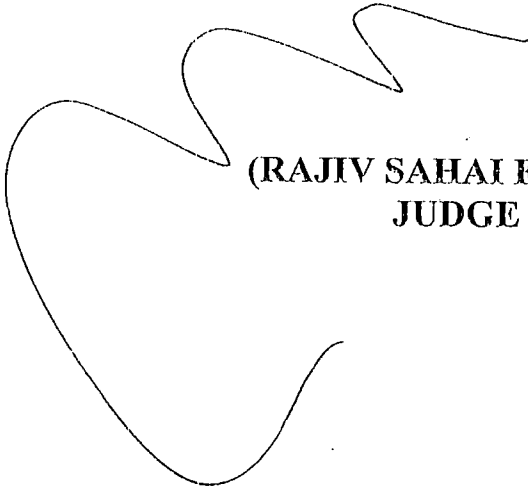
this decision cannot be treated as an authority on the issue namely what would be the age of superannuation having regard to the provisions of DRTA Act.

(17) To sum up, the workmen in these appeals shall be entitled to the benefit of Section 17B of the I.D. Act till they attained the age of 58 years. The benefit of Section 17B orders passed in their cases shall be extended to them up to that date.

(18) Since in LPA 89/2012 that is precisely the view taken by the learned Single Judge, we uphold that order and dismiss the said LPA. In other two LPAs, benefit given by the learned Single Judge is even beyond the age of 58 years, to that extent those orders are set aside and these appeals are partly allowed.

(19) There shall be no order as to costs.


ACTING CHIEF JUSTICE


**(RAJIV SAHAI ENDLAW)
JUDGE**

MAY 11, 2012
skb