

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

+ W.P. (C) No. 9757/2009

% Judgment pronounced on 23rd November, 2015.

UNION OF INDIA & ORS. ... Petitioners

Through: Mr.R.V. Sinha, Adv.

versus

DR. DEEPAK NATRAJAN ...Respondent

Through: Mr.Ashwin Vaish, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S. SISTANI, J.

1. By this petition filed under Articles 226 of the Constitution of India, the petitioners seeks a direction to quash the order dated 18th December, 2008 passed by the learned Central Administrative Tribunal, Principal Bench, New Delhi in O.A. being No. 690/2007 preferred by the respondent and consequently dismiss the O.A. referred to herein.
2. To appreciate the controversy at hand, it would be necessary to give a brief gist of the facts.
3. The respondent was appointed as a cardiologist on adhoc basis on 10.02.1986 in R.M.L. Hospital. Subsequently he was appointed as a special Grade-11 physician (Cardiologist) on regular basis w.e.f. 25.02.1987. The respondent herein was on extraordinary leave which did not qualify for service for pension.
4. The respondent served a notice to the petitioners on 16.10.2000 seeking pre-mature retirement on personal grounds. Thereafter vide letter dated 20.11.2000 the respondent requested that his letter dated 16.10.2000 of

voluntary retirement be treated as his resignation from service. The respondent thereafter submitted letter dated 19.01.2001 and discontinued to discharge his duties w.e.f. 20.01.2001. Vide order dated 14.03.2001 the resignation of the petitioner was accepted and the period from 20.01.2001 to 14.03.2001 was treated as dies-non.

5. The request of the respondent was rejected for grant of benefits of added years of service under Rule 30 of CCS Pension Rules, 1972 and grant of pension was rejected.
6. The respondent filed O.A. No.3073/02 before the Central Administrative Tribunal (hereinafter referred to as the '*Tribunal*') and the same was disposed of with a direction to the petitioner to submit a representation to the respondent for consideration thereof by the petitioners herein. The learned Tribunal on 4.7.2006 disposed of the O.A. No. 2975/04 filed by the respondent challenging the order dated 29.06.2004 where in the order dated 20.06.2004 passed by the petitioner herein was quashed and a direction was issued to the petitioner herein to re-examine the same and pass a speaking order. In compliance of aforesaid direction, the petitioner passed an order dated 16.01.2007. Aggrieved by the said order the petitioner filed an application under Section 19 of Administrative Tribunal Act, 1985. The learned Tribunal vide order/judgment dated 18.12.2008 set aside the impugned order in the O.A. and allowed the O.A. with a direction to the petitioners.
7. The Counsel for the petitioners submits that the respondent has served for 17 years 10 months and 1 day service where as for the benefits of pension the service should have been 20 years as per the Rule 30 of the CCS Pension Rules, 1972. Moreover it is submitted that the respondent has not resigned from the service to join any Government service or PSU in public interest but has resigned from the Government service to join a

private hospital. Mr.Sinha, Advocate, further submits the direction of the Tribunal is contrary to the pension rules and is contrary to the law laid down by the Apex Court in *UOI & Ors. v. Rakesh Kumar reported in (2001) 4 SCC 309*.

“16. The learned counsel for the respondents however relied upon the G.O. dated 27.12.1995 issued by the Government and submitted that on the basis of the aforesaid G.O., the competent authority has passed an order granting pension and therefore, the High Court was right in giving direction to the Government to release the pension. It is further submitted that after interpreting Rule 19 of the BSF Rules, 19 of the BSF Rules, the Government has power to grant pension to the member of BSF who is permitted to resign because of special circumstances. Special circumstances may be that the member might have become invalid to render service, so his resignation is accepted.”

“21. In the result, there is no substance in the contention of the learned counsel for respondents that on the basis of Rule 49 of the CCS (Pension) Rules or on the basis of G.O., the respondents who have retired after completing qualifying service of 10 years but before completing qualifying service of 20 years by voluntary retirement, are entitled to get pensionary benefits. Respondents who were permitted to resign from service under Rule 19 of the BSF Rules before the attainment of the age of retirement or before putting such number of years of service, as may be necessary under the Rules, to be eligible for retirement are not entitled to get any pension under any of the provisions under CCS (Pension) Rules. Rule 49 only prescribes the procedure for calculation and quantification of pension amount. The G.O. dated 27.12.1995 does not confer any additional right of pension on the BSF employees.”

8. The Counsel for the petitioner further submits that the learned Tribunal failed to exercise its power of judicial review and has acted as an appellate authority without any just, cause or reason and its exercise of power judicial review is contrary to the law laid down by the Apex Court

in *Ekta Shakti Foundation v. Govt of Delhi* reported in AIR 2006 SC 2609.

“... The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or is violative of the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court it cannot interfere. The correctness of the reasons which prompted the Government in decision making, taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

11. The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown Courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government.

13. It was submitted that in some other cases, a departure has been made. No definite material has been placed in that regard. In any event, Article 14 has no application or justification to legitimize an illegal and illegitimate action. Article 14 proceeds on the premise that a citizen has legal and valid right enforceable at law and persons having similar right and persons similarly circumstanced, cannot be denied of the benefit thereof. Such person cannot be discriminated to deny the similar benefit. The rational relationship and legal back up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some person derived benefit by illegality and had escaped from the clutches of law, similar persons cannot plead nor court can countenance that benefit had from infraction of law and must be allowed to be retained. Can one illegality be compounded by permitting similar illegal or illegitimate or ultra vires acts? Answer is obviously no.”

9. The Counsel for the respondent argued that the respondent has served the petitioner-hospital for eighteen years and had an unblemished service record. Counsel further submits that after putting his eighteen years, in case pension is not awarded to the respondent, he would suffer acute hardship in his old age and this fact was taken into consideration by the Tribunal and should also be considered by this Court. The Counsel for the Respondent further relies upon a judgment of this Court in ***UOI & Ors v. Shakuntala reported in [W.P. (C) 18694-96/2006]***.

“...Ram Mehar had 15 years, 7 months and 13 days’ service, is an important consideration which cannot be ignored at all. Whilst the plain terms of the Rules, no doubt, did not entitle the respondent, as a matter of fact, to claim family pension, the rigors of a strict application of the Rules are sought to be relieved by Rule 88 which authorizes the competent authority to relax the Rules in case of undue hardship...”

10. The counsel for the respondent submits that the general purpose of the Pension Scheme is to grant pensionary benefits to the employees, who had rendered service in the Government sector and had retired after putting in the qualifying service. As in the present case the respondent has rendered his services for approximately 18 years and merely because respondent left his employment 2 years before the completion of 20 years, the rejection of his request for pension by the appropriate authorities is not appropriate. The Counsel further submits that the present case is an appropriate case for the relaxation under the Rule 88 of the CCS Pension Rules, 1972.
11. We have heard learned counsel for the parties and considered their rival submissions.
12. The basic facts are not in dispute that the respondent was appointed as a Cardiologist on *ad hoc* basis on 10.02.1986 in Dr. Ram Manohar Lohia

Hospital. Subsequently, he was appointed a Special Grade II Physician(Cardiologist) on regular basis w.e.f. 25.02.1987. The respondent served a notice to the petitioners on 16.10.2000 for pre-mature retirement on personal grounds. Thereafter, vide letter dated 20.11.2000 the respondent requested that his letter dated 16.10.2000 seeking voluntary retirement be treated as his resignation from service. He again submitted a letter on 19.01.2001 and discontinued to discharge his duties w.e.f. 20.01.2001. His resignation was accepted on 14.03.2001 and the period from 20.01.2001 to 14.03.2001 was treated as dies non. His request for grant of pension was rejected.

13. The first OA No.3073/2002 filed by the respondent was disposed of by the Tribunal by an order of 17.02.2004. It would be useful to extract paras 18 to 21 of this order, which read as under:

“18. Rule 88 of the Rules ibid provide relaxation of any of the rules by the Ministry concerned on the approval of the DOPT if it is not found that operation of the Rules had caused undue hardship in a particular case the same is to be done by reasons to be recorded dispensing the requirement.

19. In our considered view the case falls in undue hardship category. Applicant who had completed 18 years service there is a provision for operation of Rule 30 in the Recruitment Rules only because he has not superannuated and keeping in light the proviso to Rule 30 the power of relaxation can be considered in the case of applicant.

20. OA stands disposed of with a direction that in the event the applicant within 2 weeks from the date of receipt of a copy of this order, prefers a representation to the Ministry seeking relaxation of Rule 30 the same would be considered by the respondents in consultation with DOPT having due regard to the observation made above. As a consequence respondents shall pass an order within 8 weeks from receipt of the representation of the applicant.

21. *In the event the relaxation is accorded, applicant be made entitled to all retiral benefits deeming him to be retired voluntarily. No costs.*

(Emphasis added)”

14. Based on the direction issued by the Tribunal in its order of 17.02.2004, the claim of the respondent was rejected by the petitioners by an order of 26.06.2004 observing that the case of the respondent was not a fit case to invoke Rule 88 of CCS(Pension) Rules as there was no hardship as viewed by the Hon'ble Central Administrative Tribunal. This led to the filing of an OA.No.2975/2001 by the respondent. It would be useful to reproduce the observations of the Tribunal in paras 12, 13 and 14 of the order dated 04.07.2006, which read as under:

“12. From the perusal of the order passed in compliance of our directions we find that the DoP&T on consideration summed up by observing that the present case is not a fit case to invoke Rule 88 of the Rules ibid as there is no hardship as viewed by Hon'ble CAT. We are sorry to state and rather shocked to see that whereas the Tribunal in its earlier order observed that the present case was a fit case which would fall under undue hardship, a contrary view has been taken by the DoP&T and there is no whisper as to consideration of the observations made by the Tribunal in the body of the order, which is paramount and mandated to be considered as without consideration of the aforesaid, the decision of the DoP&T under Rule 88 would not be a judicious exercise of the discretion vested in them.

13. We are also aware of the fact that once a thing is to be done in a particular manner, the same has to be done in that manner only. The only difference which a judicial scrutiny of the administrative order makes is to see the fairness in the order and discretion exercised and the manner in which it has considered the aspect of the matter. There is no hesitation to

hold that the order passed by the respondents lacks application of mind and discretion has been exercised de-hors the findings of the Tribunal and in a most non-judicious manner.

14. *The only remedy left is to remit back this case to the respondents to re-examine it in the light of the directions passed by the Tribunal and the observations made therein. Accordingly, O.A. is partly allowed. Impugned order is set aside. Matter is remitted back to the respondents to be re-examined and as a consideration thereof a speaking order shall be passed within a period of three months from the date of receipt of a copy of this order. No costs.”*
15. The purpose of reproducing the operative portions of the orders passed by the Tribunal on 17.02.2004 and 04.07.2006 is to show that the Tribunal was convinced that the case of the respondent falls under the category of undue hardship. Once in both the orders a specific finding was rendered by the Tribunal that the case of the respondent is a fit case under the category of undue hardship, it left little or no choice with the petitioners to render a finding that it was not a case of undue hardship. We say so for the reason that when the first order dated 17.02.2004 was passed and a finding was returned in para 19 of the order that the case of the respondent herein falls in the undue hardship category and, in the subsequent order dated 04.07.2006 the observations made in para 12 to the same effect have attained finality as the petitioners did not assail the same. In our view, in case the petitioners were aggrieved by the observation of the Tribunal, the orders should have been assailed or else accepted and implemented.
16. In the third round of litigation *i.e.* in the OA. No.690/2007, the Tribunal again reiterated the facts in its order dated 18.12.2008 and in paras 22 and 24, the Tribunal observed as under:

“22. In the above view of the matter the hardship caused to the applicant is that despite having worked excellently with the Government for 18 years his right to get pension, which was even admissible to one who quits service after 10 years once denied to him constitutes an invidious discrimination and without any reasonable and fair basis. Right to claim pension is a fundamental right guaranteed to a government servant/retiree but is also subjected to rules. Accordingly, the embargo of completion of 20 years and 30 years of service to be accorded pension cannot be denied to a person who quits service even before entering 10 years and in such an event the proviso to Rule 30, a non-obstante provision makes it clear as an exception to the rules allows even adding of service of those who have completed 10 years of service. In such an event, applicant who has completed 18 years of service and the background when on seeking benefit of voluntary retirement after 18 years of service a request made when not responded to, the applicant got puzzled and confused with a condition got his request accepted as a resignation, which when not revoked, the power to relax under Rule 88 of the Pension Rules relaxes operation of any of the Rule or even dispenses with the requirement. As such, to clarify that a person who retired before completion of 20 years of service can be allowed pension and even the services of a government servant, who has resigned would be added, applying the provision of Rule 88 shall be treated as qualifying service. If the added service benefit is accorded to applicant and the Tribunal’s order gives a welfare orientation reasonable interpretation to Rule 30, applicant would have complete 20 years of service, which would have entitled him to be accorded voluntary retirement and in such an event pension would have been admissible to him. However, dispensation of 20 years of service to claim pension and dispensation of requirement of rule on relaxation is within the permissible limit, as laid down under Rule 88 of the Pension Rules.

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24. When a judicial order records, in the backdrop of respondents’ order that no undue hardship is caused, that

the case falls under the category of “undue hardship” is of consideration in law after going into all the relevant facts and parameters and a definite finding as to undue hardship caused to the applicant. Basically the hardship is non-grant of pension, which is a continued till one dies, is not a bounty but a legal fundamental right of the government servant for upkeep of himself, family and for sustenance. At this juncture, respondents infiltrated into the observations of the Tribunal and took a contrary view to arrive at their satisfaction under Rule 88 of the Pension Rules that the applicant had left the service to join a more lucrative assignment in a private hospital for which a news item has been relied upon. To our dismay and shock, the trite law is that a newspaper cutting is no piece of evidence to be taken cognizance of by the Court in judicial review. Moreover, if the intention of the respondents that the applicant, if after resigning, had not worked anywhere, there would have been “undue hardship” is basically a proposition in violation of guaranteed fundamental rules under Article 19 of the Constitution of India. It has no logic, rationale or objects sought to be achieved. “Undue hardship” has been negated only on the ground that the applicant has taken up a more lucrative assignment in a private hospital oblivious of his own right of getting retiral dues on relaxation and an economic loss in the matter of pay and allowances to him. Applicant might not have been entitled to pension on non-completion of 20 years of service, but with the added service under Rule 30 of the Pension Rules, which has applicability to the applicant, Rule 88 would have been pressed for relaxation of dispensation of the provisions of the Rule, to mitigate “undue hardship” caused to the applicant.”

17. In our view, in this backdrop this Court is to consider whether the Tribunal has fallen in error by issuing a direction in the impugned order dated 18.12.2008 or not. Rule 88 is read hereinbelow:

“88. Power to relax

Where any Ministry or Department of the Government is satisfied that the operation of any of these rules, causes undue hardship in any particular case, that Ministry or Department, as the case may be, may, by order for reasons to be recorded in writing, dispense with or relax the requirements of that rule to such extent and subject to such exceptions and conditions as it may consider necessary for dealing with the case in a just and equitable manner:

Provided that no such order shall be made except with the concurrence of the¹[Department of Pension & Pensioner's Welfare].”

18. In ***Sudhir Chandra Sarkar v. Tata Iron and Steel Co. Ltd.*** reported in ***AIR 1984 SC 1064*** the Hon’ble Supreme Court laid down that:-

“...Pension and gratuity are both retiral benefits ensuring that the workman who has spent his useful span of life in rendering service and who never got a living wage, which would have enabled him to save for a rainy day, should not be reduced to destitution and penury in his old age. As a return of long service he should be assured social security to some extent in the form of either pension, gratuity or provident fund whichever retiral benefit is operative in the industrial establishment. It must not be forgotten that it is not a gratuitous payment, it has to be earned by long and continuous service.

18. For centuries the courts swung in favour of the view that pension is either a bounty or a gratuitous payment for local service rendered depending upon the sweet will or grace of the employer not claimable as a right and therefore, no right to pension can be enforced through court. This view held the field and a suit to recover pension was held not maintainable. With the modern notions of social justice and social security, concept of pension underwent a radical change and it is now well-settled that pension is a right and payment of it does not depend upon the discretion of the employer, nor can it be denied at the sweet will or fancy of the employer...”

19. The respondent while working as Head of Department (Cardiology), requested for senior residency period from 13.12.1982 to 09.02.1986 to be counted for the purpose of pensionary and other benefits as per Rule. When no response was received vide letter dated 16.10.2000 respondent sought voluntary retirement stating that:-

“I would like to take premature retirement for personal reasons. Kindly relieve me as soon as possible.”

20. Thereafter on no response to the letter dated 16.10.2000 respondent wrote another letter dated 23.10.2000 stating that:-

“In continuation of my letter dated 16.10.2000 seeking premature voluntary retirement, kindly clarify whether I will merit pension and other benefits.”

21. Thereafter again no response was received, the respondent wrote another letter dated 20.11.2000 stating that:-

“In case I do not qualify for pension benefits, my original application dated 16th October, 2000 may kindly be considered as a request for acceptance of my resignation from government service. I may be relieved as soon as possible.”

22. Accordingly on 14.03.2001, while considering the voluntary retirement of applicant, his request for resignation was accepted, without giving an opportunity to the applicant and without paying the retiral dues. Thereafter Tribunal wide order dated 17.04.2004 laid down that:-

“In our considered view the case falls in undue hardship category. Applicant who had completed 18 years service there is a provision for operation of Rule 30 in the Recruitment Rules only because he has not superannuated and keeping in light the proviso to Rule 88 the power of relaxation can be considered in the case of applicant.”

23. It is further noticed that the Tribunal's order dated 17.02.2004 gives a clear cut finding as to applicant's case covered under hardship under Rule 88 and on completion of 18 years service, applicant is entitled to pension, yet the petitioner oblivious of such observation, without any justification and basis and taking into consideration extraneous material, rejected the claim of applicant.
24. "Undue hardship" as in legal parlance as per Concise Oxford Dictionary, Revised 10th Edition, is:

"Something more than severe suffering from privation."

25. The Apex Court in ***S. Vasudeva v. State of Karnataka reported in (1993) 3 SCC 467*** defined the undue hardship with the following observations:

"Under Indian conditions expression "undue hardship" is normally related to economic hardship."

26. In ***Benara Valves Ltd. v. Commissioner of Central Excise and another, reported in (2006) 13 SCC 347*** again undue hardship has been defined as under:

"12. As noted above there are two important expressions in Section 35F. One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva v. State of Karnataka and Ors. [1993] 2 SCR 715 that under Indian conditions expression "Undue hardship" is normally related to economic hardship. "Undue" which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

13. For a hardship to be 'undue' it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word "undue" adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant."

27. In view of above observation the ratio laid down and the definition explained "undue hardship" generally relates to economic hardship. "Undue hardship" is caused when the hardship is not warranted by the circumstances. The word "undue" qualifies hardship within the circumstances warranted.
28. The hardship caused to the respondent is that despite having worked in a Government hospital for 18 years his right to get pension was waved-off merely on the ground that the right is only admissible to one who quits service after 20 years. Right to claim pension is a fundamental right guaranteed to a government servant/ retiree but is also subjected to rules. In such an event, applicant who has completed 18 years of service and the background when on seeking benefit of voluntary retirement after 18 years of service a request made when not responded to, the respondent it seems got puzzled and confused with a condition got his request accepted as a resignation, which when not revoked, the power to relax under Rule 88 of the Pension Rules relaxes operation of any of the Rule or even dispenses if required. As such, to clarify that a person who retired before completion of 20 years of service can be allowed pension and even the services of a government servant, who has resigned would be added, applying the provision of Rule 88 shall be treated as qualifying service. If the added service benefit is accorded to applicant and the Tribunal's order gives a welfare orientation reasonable interpretation to Rule 30, applicant would have completed 20 years of service which would have entitled

him to be accorded voluntary retirement and in such an event pension would have been admissible to him. However, dispensation of 20 years of service to claim pension and dispensation of requirement of Rule on relaxation in within the permissible limit, as laid down under rule 88 of the Pension Rules.

29. This Court can take judicial notice of the fact with regard to the working condition in Government hospitals like Dr.Ram Manohar Lohia Hospital. The respondent has given best part of his life by serving in the said Government hospital and looking after poor patients in difficult conditions of service. Keeping the aforesaid factors in mind and having regard to the repeated orders passed by the Tribunal, where a categorical finding has been rendered that the case of the respondent falls in “undue hardships’ category, the aforesaid orders not having been assailed by the petitioners, at this stage, it would not be open for the petitioners to challenge the same.
30. While considering the facts and circumstances of the present case, we are of the view that the decision taken by the learned Tribunal is correct and the present case is a fit case for providing the relaxation to the Respondent for the hardship caused to him. The Petitioners shall treat the present case as undue hardship and shall grant him retrial benefits with arrears, within a period of three months from the receipt of this order.
31. The Writ Petition is accordingly dismissed.

G.S. SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

NOVEMBER 23, 2015 sc/pst/msr