

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

WVMP.No.1075 of 2012 in WPMP.No.2764 of 2012

in

WP.No.2221 of 2012

and

WP.No.2221 of 2012

COMMON ORDER :

The petitioner was appointed as Record Assistant in the 4th respondent-College on 10.03.1972. The said post was admitted into grant-in-aid on 01.07.1977.

2. After rendering 29 years of service, the petitioner made application to 4th respondent on 01.06.2001 to permit him to go on voluntary retirement as per Rule 43 of the Andhra Pradesh Revised Pension Rules, 1980 (for short, 'the Rules'). The said Rules contemplate that an employee would have an option to take voluntary retirement.

3. This was forwarded on 28.07.2001 by 4th respondent to 2nd respondent. The 2nd respondent did not pass any order either accepting or rejecting petitioner's request for voluntary retirement within (90) days from the date of submission of petitioner's voluntary retirement request letter dt.01.06.2001. Since there was no reply from the 2nd respondent, the 4th respondent asked the petitioner to join on 10.09.2001 and report to duty.

4. In the meantime on 28.07.2001, the 4th respondent also wrote to the Director of Intermediate Education for granting permission for petitioner's retirement. The Joint Director of Intermediate Education issued proceedings on 28.07.2001 to send no-dues and no-allegation certificate in relation to petitioner. This was forwarded to the Regional Joint Director of Intermediate Education by 4th respondent on 17.07.2004.

5. The petitioner contends that thereafter, the 2nd respondent again directed petitioner to forward a fresh application on the ground that they misplaced his earlier application seeking voluntary retirement and that the petitioner again forwarded the same on 19.07.2007; that nothing happened thereafter till 16.11.2010 when a notice was given to petitioner to answer certain queries; and ultimately, a show-cause notice dt.16.5.2011 was issued by 4th respondent to petitioner alleging that petitioner was unauthorizedly absent from 01.09.2001, and to show-cause why his services should not be terminated with effect from 01.09.2001 on the said ground.

6. Thereafter, the impugned order was passed on 4.6.2011 stating that since permission was not granted by the Director of Intermediate Education for the request of petitioner seeking voluntary retirement, he should have attended the 4th respondent-Institution from 01.09.2001, but he remained absent unauthorizedly and his services are therefore terminated with effect from 01.09.2001.

7. Challenging the same, the present Writ Petition is filed.
8. Heard the counsel for petitioner, and the learned Government Pleader for Education (Telangana), for respondent nos.1 to 3.
9. The counsel for petitioner contended that the impugned proceeding is in violation of Section 79(1) of the Andhra Pradesh Education Act, 1982 and that it was not approved by the competent authority. It is further contended that it is obligatory on the part of respondents to reject or grant permission to the request of petitioner seeking voluntary retirement within (90) days as per proviso to Rule 43(4) of the Rules, and without doing so, after ten years the 4th respondent cannot issue the impugned order.
10. On 22.02.2012 in WPMP.No.2764 of 2012, this Court held that no order had been communicated to petitioner on his request to permit him to retire voluntarily with effect from 01.09.2001 and so it has to be deemed that his request was accepted from that date and that the action of 4th respondent in subsequently asking him to join duty and its initiating disciplinary proceedings is null and void, and the respondents were directed to release 50% of the voluntary benefits and also arrears of pensionary benefits, if any, within a period of three (03) months.
11. WVMP.No.1075 of 2012 is filed by respondent nos.1 to 3 to vacate the said order.

12. The stand taken by respondent nos.1 to 3 is that sub-Rule (4) of Rule 43 requires acceptance of the request of petitioner specifically by the competent authority; without such acceptance, the petitioner cannot be said to have voluntarily retired from service; and he is obligated to attend the College till permission is accorded by the competent authority. The action taken by 4th respondent terminating petitioner's services is supported by respondent nos.1 to 3.

13. The 4th respondent also filed a counter-affidavit stating that the termination of petitioner is valid and it was the responsibility of respondent nos.1 to 3 to take a decision on petitioner's request for voluntary retirement when the said request of petitioner had been forwarded to them. It is stated that the petitioner was asked to re-join duty through a letter dt.10.09.2001 and since he replied on 13.09.2001 that he was unwell and did not work thereafter, proceedings for termination of his service was initiated and the impugned order was passed.

14. In the reply-affidavit filed by petitioner, the petitioner reiterated his contention that since no orders have been passed on his application seeking voluntary retirement it is deemed to be accepted and there cannot be any termination of his services through the impugned order subsequently.

15. In view of the respective contentions of the parties, the following question arises for consideration:

“whether the petitioner’s request for voluntary retirement required to be accepted at all by respondent nos.1 to 3 and whether the termination of services of petitioner was valid?”.

16. The Andhra Pradesh Revised Pension Rules, 1980 were framed vide G.O.No.88 Finance and Planning dt.26.03.1980. They came into effect from 29.10.1979.

17. Rule 43 of the said Rules states :

“43. Retirement on completion of 20 years of qualifying service : -

(1) A Government servant shall have the option to retire from service voluntarily after he has put in not less than twenty years of qualifying service :

Provided that he gives a notice in writing of his intention to retire voluntarily of at least three months to the authority which has power to make a substantive appointment to the post from which he retires :

Provided further that subject to approval of Government, a notice of less than three months may also be accepted by the competent authority.

Provided also that, notwithstanding anything in Rule 21, extraordinary leave availed on any ground other than for prosecuting higher studies within the State/outside the State/country without receiving any payment except stipends during the period of such leave from any source, but including on medical certificate, shall not be reckoned as qualifying service for purposes of arriving at the qualifying service of twenty years referred to in this rule.

(G.O.Ms.No.147 Finance (Person-I) Department, dated 11th May, 1982 with retrospective effect from 31.12.81 and further amended in G.O.Ms.No.32 Finance (Pension-I) dated 6th February, 1984.)

Note : - A Government servant who has elected to retire under this rule and has given the necessary intimation to that effect to the appointing authority, shall be precluded from withdrawing his election subsequently except with the specific approval of such authority :

(2) *A Government servant retiring under sub-rule (1) shall be entitled to a retiring pension :*

Provided that such retiring pension shall be subject to the provisions of the Rules, 6, 8 and 9.

(3) *Where a Government servant opts to retire under sub-rule (1) while on leave not due, the retirement in such cases shall take effect from the date when the leave not due commenced and the employee shall refund the leave salary paid in respect of such leave not due availed of by the employee.*

(4) *A Government servant opting for retirement under sub-rule (1) shall not retire unless the notice given by him as per proviso to sub-rule (1) is accepted by the competent authority :*

Provided that the competent authority shall issue an order before the expiry of the notice period accepted or rejection of the notice.

(5) *Government servants opting for retirement under sub-rule (1) shall be entitled to addition of service for purpose of pension, a service equal to the difference between the qualifying service actually put in by him and the service he would have put in on the date of superannuation had he continued in service or the difference between such qualifying service and thirty three years, whichever is less, subject to the condition that such addition shall be limited to the maximum of five years.*

(G.O.Ms.No.42 Finance (Pension-I) Department, dated 15-3-1983)

Note : - The word "Thirty three years" is inserted as per G.O.612 (Pension-I) dated 16th June, 1986.

Provided further that such Government servant shall not be eligible for weightage under Rule 29 of these rules.

(6) *The option under sub-rule (1) shall not be admissible to a Government servant on deputation to autonomous bodies/corporate/companies/public sector undertakings or institutions wholly or substantially owned by Government who get absorbed in such public undertakings/autonomous bodies or institutions, as the case may be.*

(7) *A Government servant retiring voluntarily under sub-rule (1) of this rule shall be subject to Rule 10 of these rules.*

Note : - Order permitting/requiring a Government servant to retire after completion of twenty years qualifying service should, as a rule, not be issued until the fact that the officer has indeed completed qualifying service for twenty years has been verified in consultation with Pay and Accounts Office Hyderabad/Head of Department/Head of Office as the case may be, who maintains service Particulars/Book of the Government servant concerned.” (emphasis supplied)

18. A reading of the above rule suggests that a Government servant was given the option to retire from service voluntarily if he had put in minimum 20 years of qualifying service, but to avail this benefit he should give a notice in writing on his intention to retire voluntarily of at least three (03) months to the authority which has power to make a substantive appointment to the post from which he retires. Sub-Rule (4) states that if such option is given for voluntary retirement by a Government servant, he shall not retire unless the notice given by him is accepted by the competent authority. Proviso to sub-Rule (4) states that the competent authority shall issue an order before the expiry of the notice period accepting or rejecting the notice of voluntary retirement given by the Government servant.

19. A study of the cases relating to voluntary retirement show that *depending on the wording of the statutory rule or regulation* which deals with the said subject, they fall in three categories :

(a) where voluntary retirement is automatic and comes into force on the expiry of notice period;

(b) where voluntary retirement comes into force on the expiry of notice period unless an order is passed within the notice period withholding permission to retire; and

(c) where voluntary retirement does not come into force unless permission to this effect is specifically granted by the controlling authority.

20. While the petitioner contends that the present case falls in category (b), the learned Government Pleader for Education contends that the petitioner's case falls in category (c).

21. **Dinesh Chandra Sangma v. State of Assam**¹ is a case illustrating category (a). Fundamental Rule 56 permits the Government servant to retire voluntarily on attaining the age of 55 or on completion of 25 years by giving three months' notice in writing. It reads:

"F. Rule 56. (a) The date of compulsory retirement of a Government servant is the date on which he attains the age of 55 years. He may be retained in service after this age with sanction

¹ 1977 (4) SCC 441

of the State Government on public grounds which must be recorded in writing, and proposals for the retention of a Government servant in service after this age should not be made except in very special circumstances.

(b) Notwithstanding anything contained in these rules the appropriate authority may, if he is of the opinion that it is in the public interest to do so, retire government servant by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice, after he has attained fifty years of age or has completed 25 years of service, whichever is earlier.

(c) Any government servant may, by giving notice of not less than three months in writing to the appropriate authority, retire from service after he has attained the age of fifty years or has completed 25 years of service, whichever is earlier.

(emphasis supplied)

Here the Rule did not require in clause (c), the approval or consent of the Government for the employee to retire voluntarily if he otherwise fulfilled the conditions in the said clause.

The Court held that consent of Government was not necessary to give legal effect to the voluntary retirement of the appellant under Fundamental Rule 56(c) and since the condition of Fundamental Rule 56(c) is fulfilled, the appellant must be held to have voluntarily retired as notified by him with effect from 02.08.1976, and the permission accorded by the Government to retire and the consequent order revoking it made by Government are invalid.

22. B.J. Shelat v. State of Gujarat² and Union of India v. Sayed Muzaffar Mir³ are cases which fall in category (b). Under the rules

² 1978 (2) SCC 202

³ 1995 Supp (1) SCC 76

applicable therein, the authority concerned is empowered to withhold permission to retire if certain conditions exist, i.e., in case the employee is under suspension or in case a departmental enquiry is pending or contemplated. In these type of cases, the authority concerned is required to pass a positive order withholding permission to retire and must also communicate the same to the employee before the expiry of the notice period. In such cases, there is no requirement of an order of acceptance and the notice to be communicated to the employee nor can it be said that non-communication of acceptance should be treated as amounting to withholding of permission.

23. In **B.J. Shelat** (2 supra), Rule 161 (2) of the Bombay Civil Service Rules provided for retirement of Government servant voluntarily by giving notice of three months after he attained the age of 55 years, *but the proviso to the said clause provided that the appointing authority can withhold permission to retire to a Government servant who is under suspension, or against whom departmental proceedings are pending or contemplated, and who seeks to retire under this sub-clause.* Thus, but for the proviso, a Government servant would be at liberty to retire by giving not less than three months' notice in writing to the appointing authority on attaining the prescribed age.

24. In the said case, admittedly, the appellant was not under suspension on the date when he attained the age of 55 years and no

departmental proceedings were pending or contemplated against him as required under the proviso.

25. It was contended for the appellant that in any event, the appointing authority had not chosen to withhold permission to retire before the date of superannuation, but the respondent contended that the Government servant cannot retire without the specific permission of the appointing authority, and since no permission was granted it should be held that the appointing authority withheld permission to the Government servant to retire according to the proviso. This contention was rejected by the Supreme Court.

26. It held that the proviso contemplates a positive action by the appointing authority and that the words “it shall be open to the appointing authority to withhold permission” would indicate that the appointing authority has got an option to withhold permission and that could be exercised by communicating its intention to withhold permission to the Government servant.

27. It held that *for the proviso to become operative, it is necessary that the Government should not only take a decision, but communicate it to the Government servant.* It held that the word “withhold” would not mean that absence of a communication would amount to withholding of permission.

28. Since in that case, disciplinary proceedings had been initiated against a Judicial Officer to whom the Bombay Civil Services Rule

applied after he gave notice dt.09.11.1970 of voluntary retirement stating that he intended to retire on 10.05.1971, the Court held that the appointing authority had no jurisdiction to do so since he had effectively retired.

29. In my opinion, as explained below, the instant case falls in this category.

30. The decision in **Paudbidri Damodar Shenoy v. Indian Airlines Ltd. and another**⁴, cited by the learned Government Pleader would come under category (c).

31. In that case, Regulation 12 of the Service Regulations of Employees (Other than those in the Flying Crew and those in the aircraft Engineering departments) of the Airports Authority of India Act, 1955 dealt with the voluntary retirement of employees covered by the said regulations. It stated:

“12. An employee shall retire from the service of the Company on attaining the age of 58 years provided that the competent authority may ask an employee to retire after he attains the age of 55 years on giving three months’ notice without assigning any reason.

An employee:

(a) On attaining the age of 55 years;

or

(b) On the completion of 20 years of continuous service may by giving three months’ notice voluntarily retire from the service:

Provided that the voluntary retirement under clause (b) shall be subject to approval of the competent authority:

⁴ AIR 2009 SC (Supp) 1971

Provided further, notwithstanding anything contained in Regulation 12 the services of an employee may at the option of the Managing Director and the employee being found medically fit, be extended by one year at a time beyond the age of retirement of 58 years for an aggregate period not exceeding two years.”

(emphasis supplied)

32. The Court noted that the appellant issued a notice of voluntary retirement under Regulation 12(b) on 30-9-2005. The notice period was to expire on 31-12-2005. It was an admitted position that the competent authority neither gave an approval nor indicated disapproval to the appellant within the notice period of three months. The employee never treated that there has been cessation of employment on the expiry of three months' notice period inasmuch as he continued to attend his duties after 31-12-2005 until 30-6-2006. It is only by his letter dated 8-6-2006 that the appellant requested the respondent to relieve him in terms of his notice dated 30-9-2005 by 30-6-2006 and he stopped attending work from 1-7-2006. The letter dated 8-6-2006 does not make any material difference as the fact of the matter is that after the expiry of the notice period, the appellant continued to attend his duties for many months thereafter. By the letter dated 15-9-2006 the respondent communicated to the appellant that his application for voluntary retirement under Service Regulation 12(b) has not been acceded to by the competent authority. Since the notice for voluntary retirement by an employee who has not attained 55 years but has completed 20 years of continuous service, under the proviso appended to Regulation 12(b), *is subject to approval by the*

competent authority and that approval was not granted, the Court held that voluntary retirement of the appellant never came into effect.

33. In the instant case, sub-Rule (4) of Rule 43 no doubt states that a Government servant opting for retirement under sub-Rule (1) shall not retire unless the notice given by him as per proviso to sub-Rule (1) is accepted by the competent authority. The proviso thereto however mandates that the competent authority shall issue an order before the expiry of the notice period accepting / rejecting the notice. Thus, a plain reading of the rule requires that the competent authority has to take a positive action accepting / rejecting the notice of voluntary retirement issued by the employee *before the expiry of the notice period*.

34. There is no dispute that the petitioner's application to the 4th respondent to permit him to go on voluntary retirement was made on 01.06.2001. This was forwarded to the competent authority by the 4th respondent on 28.07.2001. Within the period of three months prescribed in the proviso to sub-Rule (4) of Rule 43, it was incumbent on the competent authority to pass an order accepting / rejecting petitioner's request for voluntary retirement. Admittedly, no order was passed by the competent authority before the expiry of three months from 28.07.2001, i.e., on or before 27.10.2001 accepting / rejecting petitioner's request of voluntary retirement. In the absence of passing of an order by the competent authority before the expiry of 3 month period rejecting the request of the petitioner to retire

voluntarily, I am of the opinion that the retirement of the petitioner would become effective from the date of expiry of the said period. This is because a positive action by the competent authority was required and the respondent nos.1 to 3 cannot be allowed to contend that since no permission was granted to the petitioner, there is a deemed rejection of his request or that absence of communication must be understood as withholding of permission. As held in **B.J. Shelat** (2 supra) even where notice of voluntary retirement given by a Government servant requires acceptance by the appointing authority, the Government servant giving notice may presume acceptance and the retirement shall be effective in terms of the notice unless the competent authority issues an order to the contrary *before the expiry of the period of notice*.

35. The decision in **Paudbidri Damodar Shenoy** (4 supra) would not apply to the instant case since Rule 12 of the Service Regulations therein did not prescribe any requirement as in proviso to sub-Rule (4) of Rule 43 of the Revised Pension Rules, 1980 that the competent authority would have to grant approval to the voluntary retirement request of the employee *before the expiry of the notice period*.

36. In view of the above legal position, I am of the considered opinion that the petitioner ought to be treated as having voluntarily retired from service on the expiry of three (03) months from the date on which the petitioner made a request for voluntary retirement, i.e., 31.08.2001; and once the petitioner's voluntary retirement has come

into operation on that day on account of non-communication by respondents of their decision to reject his request for voluntary retirement, no disciplinary proceedings could have been initiated by the 4th respondent against the petitioner; consequently, the very initiation of proceedings by the 4th respondent as well as the impugned order of termination passed against the petitioner are null and void.

37. The petitioner shall accordingly be released all the retirement benefits by the respondents which he is entitled to treating his date of voluntary retirement as 31.08.2001 within a period of three (03) months from the date of receipt of a copy of this order.

38. Accordingly, the Writ Petition is allowed. Consequently, WVMP.No.1075 of 2012 is dismissed. No order as to costs.

39. As a sequel, miscellaneous petitions pending if any in this Writ Petition, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 08-12-2016

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