

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

+ **W.P.(C) No. 3147/2003**

% **21st March, 2017**

GHANSHYAM CHAND SHARMA Petitioner

Through: Mr. S.C. Malhotra, Advocate.

versus

DELHI POWER COMPANY AND ANR. Respondents

Through: Mr. Sandeep Prabhakar and Mr. Amit
Kumar, Advocates for BSES.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. By this writ petition under Article 226 of the Constitution of India, the petitioner seeks the relief of being granted pension. Petitioner's claim for pension has been denied by the respondents firstly on the ground that petitioner has not voluntarily retired but had sought and was allowed to resign, and the second ground is that even if petitioner is taken to have voluntarily retired, thus making him eligible for pension, yet petitioner did not have the qualifying period of 20 years of service for being granted pension. These are the two issues which have to be examined for deciding the present case.

2. The facts of the present case are that the petitioner was appointed as a work charged daily rated mazdoor by the respondent on 9.7.1968. Petitioner thereafter was regularized to the post of Peon by the respondent on 22.12.1971. Petitioner's services came to an end in terms of the letter dated 7.7.1990 of the respondent accepting the resignation of the petitioner with effect from 10.7.1990. This letter dated 7.7.1990 reads as under:-

"DELHI ELECTRIC SUPPLY UNDERTAKING

No. E/A.O./P-6/723

Shakti Bhawan,
Nehru Place,
New Delhi -110019.
Dated: 07.07.1990
Registry Receipt

Shri Ghanshyam Chand,
Employee No. 10420,
S/o Late Shri Prabhu Dayal,
H.No.112, Natwar Nagar,
Near Dhauli Pyau,
Mathura, U.P.

Memorandum.

Shri Ghanshyam Chand Sharma who has been working on the post of peon in the office of Assistant Finance Officer (Division) Shankar Road, Office and resigned by giving one month notice dated 11.06.1990 and his resignation has been accepted w.e.f. 10.07.1990 afternoon. In this regard the amount are recoverable from him to the Institute shall be recovered from the amount payable to him by the Institute.

This has been issued with the permission of Additional Chief Executive Officer, (Exe-2).

Sd/-
(S.K. Sarawat)
Assistant Executive Officer (Exe)
23.07.1990

Seal
25.07.1990"

3. It is therefore seen that petitioner's regular services commenced from 22.12.1971 and ended on 10.7.1990. Petitioner, however, had prior employment with the respondent from 9.7.1968 to 22.12.1971 as a work charged mazdoor.

4. I may note that it is a common case of both the parties that parties are governed by the CCS (Pension) Rules.

5. On the aspect that whether the petitioner had 20 years of qualifying service, the issue is to be examined that whether the period from 9.7.1968 to 22.12.1971 when the petitioner had only casual employment with the respondent, should or should not be added to the period of regular service of the petitioner with the respondent from 22.12.1971 till 10.7.1990. To determine this issue it will be relevant to refer to Rules 2 and 13 of the CCS (Pension) Rules as also certain OMs which were issued by the Government under the CCS (Pension) Rules.

6. Petitioner has in his writ petition relied upon the OMs of the year 1968 to plead that half the period of service as casual labour has to be added for calculating the total qualifying years of service. These Government of India's decisions as pleaded in the writ petition read as under:-

“GOVERNMENT OF INDIA'S DECISION

(1) Counting of service paid from contingencies with regular service.— Under Article 368 of the C.S.R's (Rules 14) periods of service paid from contingencies do not count as qualifying service for pension. In some cases, employees paid from contingencies employed in types of work requiring services of whole-time workers and are paid on monthly rates of pay or daily rates computed and paid on monthly basis and on being found fit brought on to regular establishment. The question whether in such cases service paid from contingencies should be allowed to count for pension and if so, the what extent has considered in the National Council and in pursuance of the recommendation of the council, it has been decided that half the service paid from contingencies will be allowed to count towards pension at the time of absorption in regular employment subject to the following conditions, viz.,-

(a) Service paid from contingencies should have been in a job involving whole-time employment (and no part-time for a portion of the day).

(b) Service paid from contingencies should be in a type of work of job for which regular posts could have been sanctioned, e.g., malis, chowkidars, khalasis, etc.

(c) The service should have been one for which the payment is made either on monthly or daily rates computed and paid on a monthly basis and which thought not analogous to the regular scale of pay should bear some relation in the matter of pay to those being paid for similar jobs being performed by staffs in regular establishments.

(d) The service paid from contingencies should have been continuous and followed by absorption in regular employment without a break.

(e) Subject to the above conditions being fulfilled, the weightage for past service paid from contingencies will be limited to the period after 1st January, 1961 for which authentic records of service may be available.

(G.I. M.F., O.M. No.12(1)-E.V/68, dated the 14th May, 1968).

(2) Counting of service paid from contingencies with regular service for purpose of benefit of terminal gratuity admissible under the C.C.S. (T.S.) Rules, 1965.-The undersigned is directed to refer to the Ministry of Finance O.M. No.F.12(1).E.V./68, dated 14.5.1968 (supra) allowing the benefit of counting half of the service paid out of contingencies as qualifying service towards persons at the time of absorption in regular employment, subject to the conditions laid down therein. A question has been counted for the purpose of terminal gratuity admissible under the C.C.S. (T.S.) Rules, 1965 where the staff paid from contingencies is subsequently appointed on regular basis."

7. In addition to the aforesaid circulars let us also refer to Rules 2 and 13 as also the further OMs of the Government in this regard and these

Rules along with the relevant OM's with respect to pension are contained in Swamy's Pension Compilation, Publication 2012 as under:-

“2. Application

Save as otherwise provided in these rules, these rules shall apply to Government servants appointed on or before the 31st day of December, 2003 including civilian Government servants in the Defence services, appointed substantively to civil services and posts in connection with the affairs of the Union which are borne on pensionable establishments, but shall not apply to-

- (a) railway servants;
- (b) persons in casual and daily-rated employment;
- (c) persons paid from contingencies;
- (d) persons entitled to the benefit of a Contributory Provident Fund;
- (e) members of the All India Services;
- (f) persons locally recruited for service in diplomatic, consular or other Indian establishments in foreign countries;
- (g) persons employed on contract except when the contract provides otherwise; and
- (h) persons whose terms and conditions of service are regulated by or under the provisions of the Constitution or any other law for the time being in force.

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13. Commencement of qualifying service

Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity:

Provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post:

Provided further that-

- (a) in the case of a Government servant in a Group 'D' service or post who held a lien or a suspended lien on a permanent pensionable post prior to the 17th April, 1950, service rendered before attaining the age of sixteen years shall not count for any purpose, and
- (b) in the case of a Government servant not covered by Clause (a), service rendered before attaining the age of eighteen years shall not count, except for compensation gratuity.
- (c) the provisions of Clause (b) shall not be applicable in the cases of counting of military service for civil pension under Rule 19.

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GOVERNMENT OF INDIA'S DECISIONS

(1) **Benefit of service rendered under Government in respect of scientific employees.-** See Paragraphs 20 to 24 of Appendix-7.

(2) **Counting half of the service paid from contingencies with regular service.**- Under Article 368 of the CSRs (Rule 14), periods of service paid from

contingencies do not count as qualifying service for pension. In some cases, employees paid from contingencies are employed in types of work requiring service of whole-time workers and are paid on monthly rates of pay or daily rates computed and paid on monthly basis and on being found fit brought on to regular establishment. The question whether in such cases service paid from contingencies should be allowed to count for pension and if so, to what extent has been considered in the National Council and in pursuance of the recommendation of the Council, it has been decided that half the service paid from contingencies will be allowed to count towards pension at the time of absorption in regular employment subject to the following conditions, viz:-

(a) Service paid from contingencies should have been in a job involving whole-time employment (and not part time for a portion of the day).

(b) Service paid from contingencies should be in a type of work or job for which regular posts could have been sanctioned, e.g., malis, chowkidars, Khalasis, etc.

(c) The service should have been one for which the payment is made either on monthly or daily rates computed and paid on a monthly basis and which though not analogous to the regular scale of pay should bear some relation in the matter of pay to those being paid for similar jobs being performed by staffs in regular establishments.

(d) The service paid from contingencies should have been continuous and followed by absorption in regular employment without a break.

(e) Subject to the above conditions being fulfilled, the weightage for past service paid from contingencies will be limited to the period after 1st January, 1961, for which authentic records of service may be available.

It has been decided that half the service paid from contingencies will be allowed to be counted for the purpose of terminal gratuity as admissible under the CCS(TS) Rules, 1965, where the staff paid from contingencies is subsequently appointed on regular basis. The benefit will be subject to the conditions laid down in OM dated the 14th May, 1968, above.

(2-A) Casual Labourers with temporary status- Clarification regarding contribution to GPF and Pension under the old pension scheme.—Undersigned is directed to refer to this Department's O.M.No.51016/2/90-Estt.(C), dated the 10th September, 1993 vide which a scheme for grant of temporary status to the casual employees was framed. The scheme applied to those casual labourers who were in employment on the date of the issue of the OM and had rendered one year of continued service in Central Government Offices, which meant that they must have been engaged for a period of at least 240 days (206 days in the case of offices observing 5 days week). The scheme did not apply to Departments of Telecom and Posts and Ministry of Railways.

2. As per the scheme, after rendering three years' continuous service after conferment of temporary status, the casual labourers were to be treated at par with temporary Group 'D' employees for the purpose of contribution to the General Provident Fund. Further, after their regularization, 50% of the service rendered under temporary status would be counted for the purpose of retirement benefits.

3. As per Para.8 of the scheme, two out of every three vacancies in Group 'D' cadres in respective offices where the casual labourers have been working would be filled up as per extant Recruitment Rules and in accordance with the instructions issued by Department of Personnel and Training from amongst casual workers with temporary status. However, regular Group 'D' staff rendered surplus for any reason will have prior claim for absorption against existing/future vacancies. In case of illiterate casual labourers or those who fail to fulfil the minimum qualification prescribed for post, regularization will be considered only against those posts in respect of which literacy or lack of minimum qualification will not be a requisite qualification. They would be allowed age relaxation equivalent to the period for which they have worked continuously as casual labourer.

4. Vide the O.M. No. 49014/1/2004-Estt. (C), dated the 26th April, 2004, the above scheme was reviewed in the light of introduction of New Pension Scheme in respect of persons appointed to the Central Government service on or after 1-1-2004 as under:-

(i) As the new pension scheme is based on defined contributions, the length of qualifying service for the purpose of retirement benefits has lost its relevance, no credit of casual service, as specified in Para.5 (v), shall be available to the casual labourers on their regularization against Group 'D' posts on or after 1-1-2004.

(ii) ***

2.The existing guidelines contained in this Department's O.M.No. 49014/2/86-Estt.(C), dated 7-6-1998 may continue to be followed in the matter of engagement of casual workers in the Central Government Offices.

5. The OM, dated the 26th April, 2004 has been quashed by various benches of CAT/High Courts who have decided that the scheme could not be modified retrospectively. The SLPs filed in the Hon'ble Supreme Court have been dismissed by the Apex Court in *UoI and others v. Rameshwar Singh*[CC 1829 of 2014], *UoI and others v. Ramsaran and others* [SLP (C) No. 25360-25362 of 2008, SLP 17358 of 2008, SLP 25360-62 of 2009], *Union of India etc. v Ajay Kumar and others* [SLP No. 19673-19678 of 2009].

6. ***

7. **50% of the service rendered under temporary status would be counted for the purpose of retirement benefits in respect of those casual labourers who have been regularized in terms of Para. 8 of the OM, dated 10-9-1993.**

8. It is emphasized that the benefit of temporary status is available only to those casual labourers who were in employment on the date of the issue of the OM, dated the 10th September, 1993 and were otherwise eligible for it. No grant of temporary status is permissible after that date. The employees erroneously granted temporary status between 10-9-1993 and the date of Hon'ble Supreme Court judgment in *Union of India and another v Mohan Pal* [2002(3) SCR 613], delivered on 29th April, 2002, will however be deemed to have been covered under the scheme of 10-9-1993.

9. Ministries/Departments are also requested to indentify cases where temporary status has been granted wrongly to those not covered under the OM, dated 10-9-1993 and fix responsibility for the same.

[GI., Dept. of Per & Trg., O.M. No. 49014/2/2014-Estt. (C), dated the 26th February, 2016]” (emphasis added)

8. Though Rule 2 seems to suggest that persons who are in casual/daily rated employment and persons who are paid from contingencies would not be included in the pension rules, however, this Rule 2 has to be read with Rule 13 as also the Government of India OM's on the subject reproduced above and which show that 50% of the period of casual service of an employee has to be included to the regular period of service of an employee for determining qualifying years of service for the purpose of pension provided the casual employment merges into a regular service employment.

9. I therefore hold that half of the service period of the petitioner with the respondent from 9.7.1968 to 22.12.1971 i.e a period of one year 10 months and about eight days have to be included to the period of service of the petitioner with the respondent from 22.12.1971 to 10.7.1990. Once, 50% of the period from 9.7.1968 to 22.12.1971 is added to the period of service of the petitioner with the respondent from 22.12.1971 to 10.7.1990 then, admittedly, the petitioner has more than 20 years of service with the

respondent and therefore petitioner complies with the requirement of 20 years of qualifying service for the purpose of grant of pension as per Rule 48-A of the CCS (Pension) Rules. I, therefore, hold that petitioner had 20 years of service and hence had the qualifying years of service for grant of pension.

10. The next aspect to be considered is whether the petitioner who has resigned is entitled to pension. No doubt, ordinarily a person who has resigned will not be entitled to pension in view of Rule 26 of the CCS (Pension) Rules which provides forfeiture of services on resignation, however, the issue is no longer *res integra* as Supreme Court in its judgment in the case of *Asger Ibrahim Amin Vs. Life Insurance Corporation of India 2015 (10) SCALE 639* has held that if a person has completed qualifying years for grant of pension then even if such person in his application has used the term resignation yet such a person should be taken to have voluntarily retired. This is stated by the Supreme Court in paragraphs 13 to 16 of the judgment in the case of *Asger Ibrahim Amin (supra)*, and these paras read as under:-

“13. **The Appellant ought not to be deprived of pension benefits merely because he styled his termination of services as "resignation" or because there was no provision to retire voluntarily at that time.** The commendable objective of the Pension Rule is to extend benefits to a class of people to tide over the crisis and vicissitudes of old age, and if there are some inconsistencies between the statutory provisions and the avowed objective of the statute so as to

discriminate between the beneficiaries within the class, the end of justice obligates us to palliate the differences between the two and reconcile them as far as possible. We would be failing in our duty, if we go by the letter and not by the laudatory spirit of statutory provisions and the fundamental rights guaranteed Under Article 14 of the Constitution of India.

14. *Reserve Bank of India v. Cecil Dennis Solomon* relied upon by the Respondent, although distinguishable on facts, has ventured to distinguish "voluntary retirement" from "resignation" in the following terms:

10. In service jurisprudence, the expressions "superannuation", "voluntary retirement", "compulsory retirement" and "resignation" convey different connotations. *Voluntary retirement and resignation involve voluntary acts on the part of the employee to leave service. Though both involve voluntary acts, they operate differently. One of the basic distinctions is that in case of resignation it can be tendered at any time, but in the case of voluntary retirement, it can only be sought for after rendering prescribed period of qualifying service. Other fundamental distinction is that in case of the former, normally retiral benefits are denied but in case of the latter, the same is not denied. In case of the former, permission or notice is not mandated, while in case of the latter, permission of the employer concerned is a requisite condition.* Though resignation is a bilateral concept, and becomes effective on acceptance by the competent authority, yet the general rule can be displaced by express provisions to the contrary. In *Punjab National Bank v. P.K. Mittal* on interpretation of Regulation 20(2) of the Punjab National Bank Regulations, it was held that resignation would automatically take effect from the date specified in the notice as there was no provision for any acceptance or rejection of the resignation by the employer. In *Union of India v. Gopal Chandra Misra* it was held in the case of a judge of the High Court having regard to Article 217 of the Constitution that he has a unilateral right or privilege to resign his office and his resignation becomes effective from the date which he, of his own volition, chooses. But where there is a provision empowering the employer not to accept the resignation, on certain circumstances e.g. pendency of disciplinary proceedings, the employer can exercise the power. (Emphasis is ours)

The legal position deducible from the above observations further amplifies that the so-called resignation tendered by the Appellant was after satisfactorily serving the period of 20 years ordinarily qualifying or enabling voluntary retirement. Furthermore, while there was no compulsion to do so, a waiver of the three months notice period was granted by the Respondent Corporation. The State being a model employer should construe the provisions of a beneficial legislation in a way that extends the benefit to its employees, instead of curtailing it.

15. The cases of *Shyam Babu Verma v. Union of India*, *State of M.P. v. Yogendra Shrivastava*, *M.R. Prabhakar v. Canara Bank*, *National Insurance Co. Ltd. v. Kirpal Singh*, *UCO Bank v. Sanwar Mal* relied upon by the parties are distinguishable on facts from the present case.

16. We thus hold that the termination of services of the Appellant, in essence, was voluntary retirement within the ambit of Rule 31 of the Pension Rules of 1995. The Appellant is entitled for pension, provided he fulfils the condition of refunding of the entire amount of the Corporation's contribution to the Provident Fund along with interest accrued thereon as provided in the Pension Rules of 1995. Considering the huge delay, not explained by proper reasons, on part of the Appellant in approaching the Court, we limit the benefits of arrears of pension payable to the Appellant to three years preceding the date of the petition filed before the High Court. These arrears of pension should be paid to the Appellant in one instalment within four weeks from the date of refund of the entire amount payable by the Appellant in accordance of the Pension Rules of 1995. In the alternative, the Appellant may opt to get the amount of refund adjusted against the arrears of pension. In the latter case, if the amount of arrear is more than the amount of refund required, then the remaining amount shall be paid within two weeks from the date of such request made by the Appellant. However, if the amount of arrears is less than the amount of refund required, then the pension shall be payable on monthly basis after the date on which the amount of refund is entirely adjusted.” (emphasis added)

11. In view of the above, it is held that merely because petitioner had styled his application as that seeking resignation, yet the same cannot mean that the petitioner cannot ask that the same be treated instead as an application for voluntary retirement and not resignation. I, therefore, hold that petitioner's application for resignation should be treated as one for voluntarily retirement and the application instead of being called as one seeking 'resignation' will now be read therefore as seeking 'voluntary retirement' in view of the fact that petitioner has served the respondent for the number of years of service and which period/years amounts to qualifying service for the purpose of grant of pension.

12. In view of the above, this writ petition is allowed and the petitioner will be granted pensionary benefits and other terminal benefits as if the petitioner voluntarily retired from the respondent with effect from 10.7.1990.

13. Since there was a genuine doubt with respect to entitlement of the petitioner to pension, and which has now been clarified by the judgment of the Supreme Court in the case of *Asger Ibrahim Amin (supra)*, though respondent will pay terminal benefits including pensionary benefits to the petitioner within three months from today, petitioner, however, will not be entitled to interest. In case, however, respondent does not pay the terminal benefits including pension to the petitioner, within a period of three months from today then thereafter petitioner will be entitled to interest after three months at the rate of 12% per annum simple till the date of payment.

14. The writ petition is accordingly allowed and disposed of in terms of the aforesaid observations, leaving the parties to bear their own costs.

MARCH 21, 2017
ib/AM

VALMIKI J. MEHTA, J