

\$~R-1 & 2

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

% *Date of Judgment: 17th January, 2017*

+ **W.P. (C) 8585/2004**

UNION OF INDIA & ORS. Petitioners
Through: Mr.R.V. Sinha, Adv. with Mr.R.N.
Singh and Mr.A.S. Singh, Adv.

versus

SAROJ MOHAN Respondent
Through: Mr.Satya Mitra Garg, Adv. with
Ms.Manju Aggarwal, Adv.

+ **W.P. (C) 782/2003**

UNION OF INDIA & ORS. Petitioners
Through: Mr.R.V. Sinha, Adv. with Mr.R.N.
Singh and Mr.A.S. Singh, Adv.

versus

DR. A.K. KAPOOR Respondent
Through: Mr.Satya Mitra Garg, Adv. with
Ms.Manju Aggarwal, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. Rule DB in W.P. (C) 782/2003 was issued on 21st February, 2005 and in W.P. (C) 8585/2004 was issued on 8th May, 2006.
2. Arguments in both the matters have been heard together. Counsel for

the parties submit that both the writ petitions can be disposed of by a common order as the point of law involved in both the matters is identical. For the sake of convenience, the facts in Writ Petition (C) No.782/2003 (in the case of Dr.A.K. Kapoor) shall be noticed. For ease of reference, the respondent in W.P. (C) No.782/2003 shall be referred to as 'Dr.Kapoor' and the respondent in W.P. (C) No.8585/2004 shall be referred to as 'Mohan'.

3. Challenge in these writ petitions is to the orders dated 28th May, 2002 and 8th January, 2004 passed by the Central Administrative Tribunal (in short the '*Tribunal*') in O.A. No. 3251/2001 filed by Dr.Kapoor and O.A. No. 3151/2002 filed by Mohan respectively. The application filed by Mohan was allowed by a short order relying upon the order passed in the OA filed by Dr.Kapoor.

4. Dr.Kapoor was working as 'Sr. Research Officer' (SRO) in the Department of Micro-biology at Lady Hardinge Medical College and Hospital ('LHMCH'), in the ICMR Centre for 'Laboratory Studies in Streptococcal Diseases', since 01st August, 1974; while Mohan was employed in an ICMR-WHO-UNICEF sponsored project as 'Laboratory Technician' on 18th September, 1974. In 1992, the Government took a decision to terminate the project and dispense with the services of 18 personnel including Dr.Kapoor and Mohan. Aggrieved, both Dr.Kapoor and Mohan filed applications before the Tribunal.

5. By an order dated 4th December, 1992, the Tribunal ordered that Dr.Kapoor and Mohan and other similarly placed persons be placed in appropriate posts in the Central Government under the scheme of deployment of surplus staff or in accordance with any other appropriate scheme. Aggrieved by the orders of the Tribunal, the Government filed a

Special Leave Petition before the Supreme Court, which was dismissed vide order dated 3rd September, 1993.

6. Post the dismissal of the SLP by the Supreme Court, both Dr.Kapoor and Mohan were absorbed in the regular establishment of Kalavati Saran Children's Hospital, an associate hospital of LHMCH, as 'Senior Bio Chemist' and 'Laboratory Technician' on 1st October, 1996 and 7th August, 1997 respectively.

7. Prior to retirement, both Dr.Kapoor and Mohan made representations for counting their past services for all purposes, especially for the purpose of pension and other retiral benefits. Representation of Dr.Kapoor was rejected on 1st November, 2001, while that of Mohan was still under consideration, which led to the filing of the applications [OA 3251/2001 and OA 3151/2002] before the Tribunal. By separate orders dated 28th May, 2002 in the case of Dr.Kapoor and 8th January, 2004 in the case of Mohan, both OAs were allowed and the service of both the respondents in the ICMR project prior to its termination was directed to be counted for the purpose of pension, which led to the filing of the present writ petitions.

8. Mr.Sinha, learned counsel for the petitioners, has reiterated the submissions made before the Tribunal. He submits that the OAs filed by Dr.Kapoor and Mohan are barred by the principles of limitation as the respondents are attempting to get their services regularized from the year 1974, while they had made representations in the year 1996 and should not have waited till the year 2001 to approach the Tribunal. He also submits that the Tribunal failed to appreciate that the OAs are barred by the principle of *res judicata* as the issues raised in the OAs have been previously decided and implemented.

9. Learned Counsel also contends that since neither Dr.Kapoor and nor Mohan contributed to the Contributory Provident Fund Scheme of ICMR, they cannot be given benefit of the pension scheme. It is contended by Mr.Sinha that since during the period between 1974 to 1996, Dr.Kapoor and Mohan were contractual employees, such period could not have been counted for the purposes of grant of pension in accordance with Rule 2 (g) and Rule 17 of the CCS (Pension) Rules, 1972 and O.M. dated 1st May, 1987 of the Department of Pension & Pensioners Welfare, Govt. of India.

10. Counsel for the petitioners contends that the Tribunal failed to appreciate that in terms of Rule 17 of the CCS (Pension) Rules, 1972, the counting of past service of the employee was subject to certain conditions, i.e. past service rendered in autonomous body or government can only be counted subject to the condition that the past service was pensionable under the rules or the employee was contributing to CPF and further, in such cases, employee's/Government's contribution is taken back into the account of the Government.

11. Mr.Sinha next contends that the Tribunal has misdirected itself while directing the petitioners to grant relaxation in terms of Rule 88 of the CCS (Pension) Rules, 1972 as regards extension of period for option in as much as it failed to appreciate that the respondents were not contributing to CPF and thus there was no question of granting extension

12. Mr.Sinha has relied upon a case of *Union of India and others v. M.K.Sarkar*, (2010) 2 SCC 59, wherein the Apex Court had declined to extend the time for a a railway employee who had declined to exercise his option from Provident Fund to Pension Scheme.

13. Per contra, Mr.Garg, learned counsel for the respondents, submits that

there is no infirmity in the order passed by the Tribunal which would require interference in proceedings under Article 226 of the Constitution of India. Mr.Garg submits that the Tribunal has rightly analysed the issue and correctly applied the law to the facts of the present case.

14. Learned counsel for the respondent further submits that as per the order of the Tribunal dated 4th December, 1992, it has categorically been held that the respondents were employees of the Central Government from the date of their joining, i.e. 1st August, 1974 in the case of Dr.Kapoor and 18th September, 1974 in the case of Mohan. Learned counsel has drawn the attention of the Court to the observations made by the Tribunal in the order dated 4th December, 1992, whereby the tribunal directed Dr. Kapoor, Mohan and other similarly placed persons to be placed in appropriate posts in the Central Government, particularly paragraphs 16 and 18, which read as under:

“16. On a perusal of the records placed before us, we are of the opinion that the applicants who had worked in the project, were the employees of the Lady Hardinge Medical College. The respondents had relied upon the language used in the offers of appointment issued to the applicants in which the reference has been made to the project in question and the ICMR in various clauses. For instance, it has been stipulated in clause (iii) that the Council reserves the right to terminate the services of the employees. In Clause (iv), it has been stated that benefits of the Council’s Contributory Provident Fund are allowed subject to rules in force. Clause (ix) states that the service rendered outside the Council will not count for the purpose of leave, etc. Clause (xi) states that the employee will not be permitted to apply for appointment elsewhere before completing one-year service under the Council. Clause (xii) states, inter alia, that appropriate permission of the Council is to be obtained for publication of the papers etc. The offer of appointment has been signed by the Professor of Microbiology and Officer in-charge, ICMR/WHO Streptococcal Diseases Reference Laboratory, Microbiology

Department, Lady Hardinge Medical Hospital, New Delhi. Shri A.K. Sikri, appearing for the ICMR, however, contended that according to the terms and conditions of the grant made to the project concerned “the staff employed on the research scheme will not be treated as employees of the Council and the deployment of such staff at the time of completion or termination of the project, will not be the concern/responsibility of the Council. They will be subjected to the administrative control of the institution and will be appointed generally in accordance with the normal recruitment rules and procedure of the Institute.”

...

18. It would, thus, be seen that the applicants who have worked in the ICMR Project at the Lady Hardinge Medical College, were not the employees of the ICMR and they were the employees of the Lady Hardinge Medical College.”

(Emphasis Supplied)

15. Mr.Garg submits that this order of the Tribunal has attained finality since the Special Leave Petition filed by the Union of India has been dismissed by the Supreme Court. He further submits that once a categorical finding has been returned that the respondents were to be treated as employees of the Lady Hardinge Medical College, the submission of the petitioners would be misplaced.

16. Learned counsel further submits that there is also no merit in the submission of Mr.Sinha that a contractual employee who is subsequently absorbed is not entitled to pension. He submits that a reading of Rule 17 (1) (a) & (b) by itself would show that the submission of Mr.Sinha is without any force. Mr.Garg also contends that it was not brought to the notice of the respondents that they had an option either to contribute in the CPF Scheme or in the Pension Scheme and since the respondents were not aware of the same, they could not contribute and cannot be blamed for the same.

Mr.Garg contends that the judgments relied upon by the Tribunal in the cases of ***R. Subramaniam v. Chief Personnel Officer, Central Railway*, (1996) 10 SCC 72**; ***Union of India and others v. D.R.R.Sastri*, (1997) 1 SCC 514** and ***V.K. Ramamurthy v. Union of India and Anr.*, (1996) 10 SCC 73** are fully applicable to the facts of the present case.

17. He submits that the arguments of Mr.Sinha that the OAs were barred by the principle of *res judicata* or were beyond the period of limitation, are baseless as in the earlier OAs the primary prayer was against the illegal termination of the services of the respondents and at that stage, the question of counting of past service did not arise. Therefore, such an issue was not urged and thus, it cannot be said that the second OAs filed by the respondents were barred by the principles of *res judicata*.

18. It is also contended that the arguments of Mr.Sinha that the claim of the respondents was barred by limitation are also not sustainable, as the representations were made at the time of retirement of the respondents when their pension was to be calculated and the respondents prayed that their past service be counted. Even otherwise, it is contended that the case of the respondents would be covered by a decision rendered by this Court in the case of ***T.S.R. Prasada Rao v. Council for Scientific and Industrial Research*, MANU/DE/3453/2016** wherein a Division Bench of which one of us (G.S. Sistani, J.) was a member, considered the judgment of the Supreme Court in the case of ***UOI v. Tarsem Singh*, (2008) 8 SCC 648** and the effect of limitation is such cases. Mr.Garg submits that the present case is also a case of continuing wrong. He disputes that there was any delay, but submits that even otherwise, in case the relief is granted, no other person would be affected and would not have a bearing upon the other persons who are

serving.

19. We have heard the learned counsel for the parties and given our thoughtful consideration to the submissions made by them.

20. The undisputed facts which emerge in the present writ petitions are that Dr.Kapoor was recruited against the ICMR sponsored project in August, 1974 while Mohan was recruited under ICMR-WHO-UNICEF sponsored project on 18th September, 1974. In 1992, their services were sought to be terminated which led to the filing of the respective OAs before the Tribunal, which were allowed. By an order dated 4th December, 1992, the Tribunal directed that the applicants be placed in appropriate posts in the Central Government. It is also not in dispute that the subsequent SLP filed by the Government was dismissed. Thereafter on 1st October, 1996 and 7th August, 1997 respectively, Dr.Kapoor and Mohan were absorbed in the regular establishment of Kalavati Saran Children's Hospital, an associate hospital of LHMC.

21. Both Dr.Kapoor and Mohan made representations for counting past services rendered at ICMR project as services for the purposes of computing pension and volunteered to deposit their shares to the Contributory Provident Fund with interest. Both the representations were not acceded to.

22. The first submission of the learned counsel for the petitioners is that the second OAs filed by the respondents herein are barred by the principles of *res judicata*. We find no merit in this submission, as the issue raised in the subsequent OAs was with respect to the counting of the service rendered by the respondents in the ICMR Project in LHMC for the purposes of grant of pensionary benefits, while the first OAs were filed being aggrieved by the contemplated action of termination. Since both the reliefs were separate and

distinct and, in fact, the question of counting past service did not arise when the first OAs were filed by the respective respondents, the argument that the second OAs are barred by the principles of *res judicata* is without any force and is liable to be rejected.

23. The second submission of Mr.Sinha is with regard to the OAs being blatantly barred by limitation. This submission of Mr.Sinha is also without any force, as both the respondents had made representations at the relevant time when their retirement was nearing and even otherwise, it has been held in the case of ***T.S.R. Prasada Rao (supra)*** that the relief of grant of pension is a continuing cause of action. Moreover, in the present case, the OAs were filed soon after the retirement. In the case of ***Tarsem Singh (supra)***, the Supreme Court had recognised that issues relating to pension are a continuing wrong. Relevant paras, read as under:

“7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as

the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

8. In this case, the delay of 16 years would affect the consequential claim for arrears. The High Court was not justified in directing payment of arrears relating to 16 years, and that too with interest. It ought to have restricted the relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser. It ought not to have granted interest on arrears in such circumstances.”

(Emphasis Supplied)

24. On merits, Mr.Sinha has submitted that since the respondents did not contribute to the CPF Scheme during the period of employment with the ICMR, they cannot be permitted to join the pension scheme at this belated stage. It would be worthwhile to notice that both the respondents in their respective representations made prior to their retirement agreed to deposit their shares of CPF with 6% interest, but their offer was not accepted. Closely connected to this argument is the contention of Mr.Sinha that being contractual employees they would not be entitled to the benefit of either CPF Scheme or the Pension Scheme. In our view, the submissions of the learned counsel for the petitioners are without any force.

25. A reading of Rule 17 of the CCS (Pension) Rules, 1972 would show that a person who is initially engaged by the Government on a contract for a specified period and is subsequently appointed to the same or another post in a substantive capacity in a pensionable establishment without interruption of duty, may opt either to retain the Government contribution in the Contributory Provident Fund with interest or agree to refund to the

Government the monetary benefits and count, in lieu thereof, the service for which the aforesaid monetary benefits may have been payable. From Rule 17(1) (a) & (b), it is clear that a person engaged by the Government on contract on being subsequently appointed, as in the present case, may opt either to the Contributory Provident Fund Scheme or to the Pension Scheme, provided the amount received is refunded with interest.

26. In the present case, although the respondents were appointed subsequently and as per the order of the Tribunal, relevant portion of which has been extracted above, the respondents were deemed to be employees of LHMC from their respective dates of joining on contract with ICMR, neither of the respondents contributed to the CPF Scheme which was applicable to the employees of the ICMR. The explanation rendered by the respondents is that they were not made aware about such a scheme. Having regard to the fact that the respondents had initially joined on contract, their submission seems to be honest and plausible, as persons who join on contract in their beginning of their career may not be aware or have not been made aware or what would be the requirement of post-retirement. I am fortified by the judgment in ***D.R.R. Sastri (supra)***, wherein the Supreme Court upheld the order of the Tribunal granting option to shift to pension scheme introduced in 1974 in 1993 when he came to know about the option. The Supreme Court had *inter alia* allowed the shift as the employee was not made aware of the Letter dated 23rd July, 1974 of the Railway Board.

27. Further, the judgment of the Apex Court in ***M.K.Sarkar (supra)*** relied upon by the petitioner, in our view, is not applicable to the facts of the present case, as in the said case, the employee was given 8 chances to opt for the Pension Scheme but he did not choose to derive the benefit thereof and in

this background, relief was declined by the Supreme Court. That is not so in the present petitions.

28. Accordingly, we find no infirmity in the orders of the Tribunal. Resultantly, the writ petitions are dismissed as devoid of any merit. No cost.

G. S. SISTANI, J.

JANUARY 17, 2017
// Jitender/ka

VINOD GOEL, J.

