

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

Reserved on: 20.07.2017
Pronounced on: 04.08.2017

+ **W.P.(C) 1133/2010**

SHRI D.N. KADIAN

..... Petitioner

Through: Ms. Tamali Wad with Sh. P. Anthony,
Advocates.

versus

LIEUTENANT GOVERNOR, GOVT. OF NCT OF DELHI AND
ORS. Respondents

Through: Sh. Viraj. R. Datar, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT

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1. The writ petitioner, in these proceedings, under Article 226 of the Constitution of India, seeks a direction to quash the impugned communication dated 03.11.2009 of the Respondent No.2; the decision of the Full Court dated 22.10.2009; and seeks regularization of his period of suspension as well as finalization of payment of pension.

2. The Petitioner was a member of Delhi Judicial Service (DJS) and at the relevant time was posted as Civil Judge, First Class at Tis Hazari Courts, Delhi. The Central Bureau of Investigation (CBI) registered a criminal case (RC No.7/1985) on the basis of a litigant's complaint, which was considered

by the then Chief Justice of this Court on 27.01.1985 and then forwarded to the Chief Secretary, Delhi Administration. A trap was laid in the wake of CBI's FIR resulting in a chargesheet before the Court of Special Judge, Delhi for the petitioner's prosecution on allegations of demand and acceptance of illegal gratification.

3. The case registered as CC No.27/96 was tried on charges of commission of offences under Section 161, IPC and Section 5(2) read with Section 5(1)(d) of the *Prevention of Corruption Act, 1947*. The Petitioner was placed under suspension w.e.f. 29.01.1985 under orders of the Lt. Governor (Appointing Authority). In view of the criminal prosecution against him, no departmental proceedings were initiated. The trial into the criminal charges resulted in judgment, dated 20.12.1997 of the Special Judge, Delhi. It is pertinent to note here that in the course of the said Judgment the Special Judge on the basis of evidence led before him recorded certain findings as under:-

“60.The initial demand, therefore, stands fully established, and there is no reason to disbelieve the complainant or to hold that the accused could not have made the demand or that he did not make the demand, as alleged.”

“81. The initial demand made on 14th Jan., 1985, the demand for the balance amount made at the time of trap and acceptance of Rs.2,000/- by the accused at the time of trap, therefore, stand proved beyond any doubt from the testimony of PW 4 S.C. Malik and from the recorded conversation, transcript of which is Ex. PW8/C and which has also been reproduced in the statement of PW4.”

4. The Special Judge, further held that sanction for prosecution accorded by the then Lt. Governor (Administrator of Delhi) on 18.10.1985 was not a valid sanction for the petitioner's prosecution because there was an absence of consultation with the High Court. Based on this finding, the Court held that the cognizance of the offences taken by it was without jurisdiction. The petitioner was, consequently discharged.

5. On 05.02.1998, the Full Court considered whether the petitioner ought to be permitted to continue in service, beyond the age of superannuation i.e. 58 years and decided as follows:

“....It was further decided that Mr. D.N. Kadian be not given the benefit of extended superannuation age and he be retired at the age of 58 years and that the payment of retiral benefits would be subject to provisions of Rule 69 of CCS (Pension) Rules, 1972. It was further decided that the matter regarding disciplinary action against Mr. D.N. Kadian and his pay and allowances during the period of his suspension will be considered separately.”

6. The Petitioner was, therefore, retired upon attaining the age of 58 years w.e.f. 31.03.1998. In the meanwhile, the correctness of the judgment dated 20.12.1997 of the Special Judge had been questioned in Cr. RP No.157/98, by the State. When the matter was laid before the Full Court in the meeting held on 14.05.1999, it was resolved as under:-

“It was decided that a copy of the judgment dated 20.12.1997 passed by Mr. Dinesh Dayal, Additional Sessions Judge, Tis Hazari, in a sessions case pertaining to RC No.7 of 1985, titled “CBI Vs. D.N. Kadiyan” be forwarded to the Lt. Governor (Appointing Authority) for information. It was further decided that awaiting the decision in the Criminal Revision pending in

the matter, the matter regarding disciplinary action to be taken against the officer be deferred.”

7. The Cr. RP. No.157/98 was dismissed by order dated 26.02.2004, the relevant part of which is extracted below:

“With the assistance of learned counsel for the parties, I have gone through the record of the case and the judgment under challenge. I am satisfied that the judgment under challenge suffers from no infirmity, perversity, impropriety, illegality or jurisdictional error.”

8. The Petitioner had requested payment of arrears and terminal benefits. This application was placed before the Full Court in its meeting held on 21.05.2005. The Full Court referred the issue to a Committee of Judges. The committee, eventually, in its report, dated 11.02.2008 after considering the effect of *Fundamental and Supplementary Rules (FRSR) 54B* and Rule 9 of the *Central Civil Services (Pension) Rules, 1972*, recommended as follows:

“In our considered view, having regard to the findings recorded by the Special Judge on the question of demand and acceptance of illegal gratification, it cannot be said that the applicant has been honourably acquitted or discharged of the criminal charge against him. In this view, it cannot also be said that the suspension undergone by him was “wholly unjustified”. The order of discharge in the criminal prosecution was purely on technical considerations and not on merits of the case.

The applicant was paid subsistence allowance during the period of his suspension. In these facts and circumstances, we are of the view that the pay and allowance of the applicant, for the period of his suspension, be restricted to the subsistence allowance already paid to him and the period of his suspension be treated as “period not spent on duty”.

We are conscious that a decision in this regard could and should have been taken earlier. Be that as it may, since the

applicant raked up the issue only after the decision in the criminal revision petition by this court, a decision needs to be taken now.

In these circumstances, we would recommend to the Full Court that a notice for show cause against the action proposed as above be issued to the applicant under FR 54-B (5) calling upon him to submit a representation, if any desired, within a period of 60 days from the date on which the notice is served.”

9. Based on the above decision and recommendations, the Full Court passed the following resolution:

“Considered. The reply dated 20.8.2008 submitted by Mr. D.N. Kadian, ex-member of Delhi Judicial Service, to the show cause notice dated 2.6.2008 issued to him under FR 54-B(5) was considered and found unsatisfactory. It was resolved that the pay and allowances for the period of his suspension from 29.1.1985 to 31.3.1998 be restricted to the subsistence allowance already paid to him and the period of his suspension be treated as “period not spent on duty”.

His representations dated 20.10.2008 and 14.11.2008 for fixation/revision of pension and payment of arrears thereof were also considered and rejected.

The District Judge-I & Sessions Judge, Delhi, and the officer concerned be informed accordingly.”

10. The petitioner urges- and his counsel, Ms. Tamali Wad, submits, that the impugned decision, accepting the report, is arbitrary. It was argued that the decision to treat the period spent during suspension as not having spent on duty, is arbitrary. Counsel underlined the fact that the petitioner was never charged with misconduct; the administration of the Court preferred to place him under suspension and await the outcome of the criminal trial. The outcome did not result in an indictment of the petitioner; on the contrary he

was discharged. Nevertheless, he was not taken back and assigned duties; instead, the Full Court proceeded to not continue the petitioners' services after he attained the age of 58 years. At the time of his superannuation, too, there was no legal proceeding pending; the State's revision petition was subsequently rejected. Thus, at all material and relevant times, the Court had no material which could be legitimately used against him. In effect, there was no valid finding that the petitioner was guilty of any crime or misconduct, which entitled the respondents to deny him full pensionary and terminal benefits.

11. Learned counsel relied on the judgments reported as *Baij Nath Prasad Tripathi v. State of Bhopal and another* AIR 1957 SC 494, where it was observed as follows:

“....to appreciate how any Court can try the petitioners of these cases in the absence of a sanction in view of the mandatory provisions of S. 6 of the Prevention of Corruption Act, 1947. If no Court can take cognizance of the offences in question without a legal sanction, it is obvious that no Court can be said to be a Court of competent jurisdiction to try those offences and that any trial in the absence of such sanction must be null and void, and the sections of the Code on which learned counsel for the petitioners relied have really no bearing on the matter. Section 530 of the Code is really against the contention of learned counsel, for it states, inter alia, that if any Magistrate not being empowered by law to try an offender, tries him, then the proceedings shall be void.”

12. Ms. Wad also relied on the judgment reported in *State of Karnataka through C.B.I. v. C. Nagarajaswamy* AIR 2005 SC 4308, where it was held that:

“26. In view of the aforementioned authoritative pronouncements, it is not possible to agree with the decision of the High Court that the Trial Court was bound to record either a judgment of conviction or acquittal, even after holding that the sanction was not valid. We have noticed hereinbefore that even if a judgment of conviction or acquittal was recorded, the same would not make any distinction for the purpose of invoking the provisions of Section 300 of the Code as even then, it would be held to have been rendered illegally and without jurisdiction.”

13. Learned counsel emphasized that once the charge was not framed, the resultant trial was to be treated as a nullity in law. There was in fact no basis for the Full Court to conclude that the petitioner should be denied his full terminal benefits and pension and should, instead receive only provisional pension. It was also argued that the Full Court or the administration of this Court cannot indefinitely deny the petitioner his legitimate terminal dues, in the absence of any finding rendered by a competent court or tribunal, after following some prescribed procedure in accordance with law.

14. It was urged that the fact that no departmental inquiry was initiated against the petitioner immediately on his retirement or within the period of four years thereafter, *ipso facto* establishes that his suspension was unjustified and bad in law in terms of FRSR 54 (2) and the Court should have regularized the entire period of suspension undergone by the petitioner by treating it as period spent on duty. Furthermore, submitted counsel, the inaction by the Court is actionable because of inordinate delay. The Petitioner was placed under suspension on 30.01.1985; he was discharged in the criminal case on 20.12.1997 and thereafter retired on 31.03.1998. The decision to treat the period of suspension as not having served on duty was

taken after almost 11 years, by the High Court. It is also urged that the petitioner's suspension was wrongly continued despite his retirement. Even till date he receives provisional pension. Therefore the petitioner's representation dated 16.09.2004 for regularization for his period of suspension and payment of pay and allowances ought to have been considered favorably. Under no circumstance was the show cause notice issued to the petitioner on 02.06.2008 by the second respondent maintainable in law. The petitioner otherwise had completed more than 28 years of service but is not given full pension, which is arbitrary.

15. Mr. Viraj Datar, learned counsel for the Court, argues that this Court should not interfere in the order made pursuant to the Full Court's decision. It was argued that the position in Rule 54B leaves the administrative department or authority with little choice or elbow room in regard to treatment of the suspension period. Counsel argued that the petitioner had no right to be continued in service after he attained the age of 58. Learned counsel cited *Ranchhodji Chaturji Thakore v. The Superintendent Engineer, Gujarat Electricity Board, Himmatnagar (Gujarat) & Anr* 1996 (11) SCC 603, where it was held as follows:

“....The only question is; whether he is entitled to back wages? It was his conduct of involving himself in the crime that was taken into account for his not being in service of the respondent. Consequent upon his acquittal, he is entitled to reinstatement for the reason that his service was terminated on the basis of the conviction by operation of proviso to the statutory rules applicable to the situation. The question of back wages would be considered only if the respondents have taken action by way of disciplinary proceedings and the action was found to be unsustainable in law and he was unlawfully

prevented from discharging the duties. In that context, his conduct becomes relevant. Each case requires to be considered in his own backdrops. In this case, since the petitioner had involved himself in a crime, though he was later acquitted, he had disabled himself from rendering the service on account of conviction and incarceration in jail. Under these circumstances, the petitioner is not entitled to payment of back wages. The learned single Judge and the Division Bench have not committed any error of law warranting interference.”

16. It was argued that there was no impediment in relying upon the material which the High Court had gathered to say that the petitioner should not be continued in services since those were facts that could be gone into for deciding whether to continue the petitioner in service after 58 or not. Counsel submitted that as far as judicial proceedings are concerned, the petitioner is facing fresh charges, in view of the discharge order having been rendered on technical grounds and not on the merits of the prosecution case.

17. The relevant rules for deciding this case are Rules 9 and 69 of the CCS (Pension) Rules, 1972 (“the Pension Rules”) and Rule 54B of the FRSR. They are extracted below: Rule 9(1) of the Pension Rules, is as follows:

“The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement.

Provided that the Union Public Service Commission shall be consulted before any final orders are passed.

Provided further that where a part of pension is withheld or withdrawn, the amount of such pensions shall not be reduced below the amount of rupees three hundred and seventy five (Rupees One thousand two hundred and seventy five from 01.01.1996 – see GID below Rule 49 per mensem) ”.

18. Rule 69 of the Pension Rules, reads as follows:

“69. Provisional pension where departmental or judicial proceedings may be pending

(1) (a) In respect of a Government servant referred to in sub-rule (4) of Rule 9, the Accounts Officer shall authorize the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.

(b) The provisional pension shall be authorized by the Accounts Officer during the period commencing from the date of retirement up to and including the date on which, after the conclusion of departmental or judicial proceedings, final orders are passed by the competent authority.

(c) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon :

(1) Provided that where departmental proceedings have been instituted under Rule 16 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, for imposing any of the penalties specified in Clauses (i), (ii) and (iv) of Rule 11 of the said rules, the payment of gratuity shall be authorized to be paid to the Government servant.

(2) Payment of provisional pension made under sub-rule (1) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings

but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period.”

19. FR 54-B is as follows:

“F.R. 54-B. (1) When a Government servant who has been suspended is reinstated or would have been so reinstated but for his retirement (including premature retirement) while under suspension, the authority competent to order reinstatement shall consider and make a specific order--

(a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with reinstatement or the date of his retirement (including premature retirement), as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) X X X X X X X

(3) Where the authority competent to order reinstatement is of the opinion that the suspension was wholly unjustified, the Government servant shall, subject to the provisions of sub-rule (8) be paid the full pay and allowances to which he would have been entitled, had he not been suspended:

Provided that where such authority is of the opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing, that the Government servant shall be paid for the period of such delay only such amount (not being the whole) of such pay and allowances as it may determine.

(4) In a case falling under sub-rule (3) the period of suspension shall be treated as a period spent on duty for all purposes.

(5) In cases other than those falling under sub-rules(2) and (3) the Government servant shall, subject to the provisions of sub-rules (8) and (9) be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.

(6) X X X X X

(7) In a case falling under sub-rule (5), the period of suspension shall not be treated as a period spent on duty unless the competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that, if the Government servant so desires such authority may order that the period of suspension shall be converted into leave of any kind due and admissible to the Government servant.

(8) The payment of allowances under sub-rule (2), sub-rule (3) or sub-rule (5) shall be subject to all other conditions under which such allowances are admissible.

(9) The amount determined under the proviso to sub-rule (3) or under sub-rule (5) shall not be less than the subsistence allowances and other allowances admissible under Rule 53.

(emphasis supplied)

20. Thus, under Rule 9 of the Pension Rules, the competent authority is empowered to withhold pension if “*in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence*

during the period of service”. Rule 69 mandates that the government “shall authorize the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.” There is statutory basis, therefore, for not only withholding, but not fixing final pension, till judicial proceedings are pending. Rule 54B of FRs however, operates in a different field inasmuch as clause (1) requires that if a government servant “would have been so reinstated but for his retirement (including pre-mature retirement)” a separate order has to be made deciding whether to treat the period during suspension as period spent on duty. Rule 54 (3) and (4) deal with a situation where the competent authority determines that the suspension was not justified; in such case, the period should be treated as having spent on duty. However, when that is not the case, Rules 54B (5) and (7) require or mandate that the period “shall not be treated as a period spent on duty unless the competent authority specifically directs that it shall be so treated for any specified purpose..” In the present case, there was no determination that the period spent on suspension was unjustified. Therefore, the second eventuality, i.e that the period could not be said to have been spent on duty, applied. In *Hira Lal v Delhi Development Authority* 1995 (34) DRJ 30, the two eventualities were discussed, by a Division Bench of this Court. The Court’s observations, in the judgment are extracted below:

“In this background, there is need to examine other provisions of the FR 54B. According to sub-rule (3) thereof if the competent authority comes to the conclusion that the

suspension of the employee was legally unjustified, in that event he has to be paid full pay and allowances for the period he remained under suspension, to which he would have been entitled, had he not been suspended. In other words, normally when the suspension is without justification, the employee cannot be denied any portion of his pay and allowance for the period of suspension and under sub-rule (4) the period of suspension has to be treated as one spent on duty but this is subject to sub rule (8) and to the exception appended as a proviso to the sub-rule (3), which empowers the competent authority to determine an amount less than the whole amount of pay and allowances payable to the employee on his reinstatement after revocation of his suspension, even in a case of unjustified suspension if it comes to be conclusion that the termination of disciplinary proceedings was delayed by him.

7. Cases which do not fall in sub-rules (2) and (3) are governed by sub-rule (5) under which the competent authority may determine the extent of salary and allowances which may be paid to the employee for the period spent on suspension. Therefore, where sub-rule (5) is applicable, the employee can be deprived of such portion of his salary or allowances for the period of his suspension as the competent authority may determine. But such a decision cannot be taken unless the employee has been given notice in regard to the amount proposed to be paid to him and his representation has been considered in that regard. It is significant to note that sub-rules (3) and (5) apply to a case of an employee whose suspension is revoked after finalization of disciplinary proceedings.”

21. Rule 69 of the Pension Rules deals with the entitlement of a public servant to provisional pension, pending inquiry pursuant to exercise of Rule 9. Discussing the interplay between these two rules, a Division Bench of this Court, in *Lakhminder Singh Brar v Union of India* 2010 (173) DLT 421 observed as follows:

“12. Taking note of the aforesaid provisions, the Tribunal

rightly observed that in a case where any departmental or judicial proceedings are pending against a Government servant, he would be entitled to provisional pension only to be adjusted under Sub-rule (2) of the Rule 69. The competent authority is required to pass order for regular pension only upon conclusion of these proceedings. It is, no doubt, true that the order of acquittal is final unless it is reversed in appeal. Nevertheless, an appeal against the order of acquittal would be in continuation of the judicial proceedings pending against the Government servant within the contemplation of Rule 9 of Pension Rules. It cannot be said that the pendency of the criminal appeal against the order of acquittal of the petitioner would not amount to judicial proceeding under Rule 69 read with Rule 9 of Pension Rules, notwithstanding the fact that an order of acquittal is effective and final until it is reversed in appeal. The consideration that matter in the case of suspension are different from those that may be relevant in the matter of grant of pension, be it provisional or a regular one. Grant of pension is regulated by relevant rules. As such, the cases relating to suspension as are relied upon by the petitioner's Counsel are distinguishable and are not of any help insofar grant of pension is concerned.”

22. Therefore, a conjoint reading of Rules 9 and 69 of the Pension Rules with FR 54-B, in the opinion of the Court, means that the employer (in this case, the High Court) had the discretion to treat the period that the petitioner was under suspension, as not having been spent on duty; indeed, a plain reading of Rule 54B (5) and (7) reveal that without a finding that the suspension was unjustified, the period cannot be treated as having been spent on duty. Rule 9 (1) read with Rule 69 of the Pension Rules, enables only fixation of provisional pension and the authority has to await the outcome of judicial proceedings pending in the criminal charges alleged against the petitioner.

23. To some extent, the petitioner is right in contending that the lack of any finality in the proceeding has resulted in his being deprived of his pension and terminal benefits. The Court observes that inherent in the nature of charges leveled and having regard to the procedural history of the case, delay was inevitable. The consequence of this hardship cannot mean that the petitioner, by default can claim as an entitlement the right to full pension fixation, with terminal benefits, which he is in law, and under the relevant rules, clearly not entitled to.

24. For the foregoing reasons, it is held that the petitioner's claim, in this writ petition has to fail; it is dismissed, without any order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P. GARG
(JUDGE)**

AUGUST 4, 2017