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

\+ LPA 408/2017

BSES YAMUNA POWER LTD ..... Appellant

Through: Mr Sandeep Prabhakar and Mr Vikas Mehta, Advs.

versus

GHANSHYAM CHAND SHARMA & ANR ..... Respondents

Through: Mr Sumeet Pushkarna, Standing Counsel and Mr Siddhartha Nagpal for R-2 (Pension Trust)

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE NAJMI WAZIRI

O R D E R

% 26.05.2017

The appellant has preferred the present appeal to assail the judgment dated 21.03.2017 passed in W.P.(C.) No.3147/2003. By the impugned judgment, the learned Single Judge has allowed the claim made by respondent no.1 for grant of pension which had been denied to him on two counts, namely, that he had not rendered the qualifying service of 20 years to be entitled to grant of pension and, secondly, that he had tendered his resignation and not sought voluntary retirement. On both the counts, the learned Single Judge has held in favour of the respondent no.1.

The respondent no.1 earlier worked as a daily rated mazdoor between 09.07.1968 and 22.12.1971. On the said date, he was regularized to the post of peon. The services of respondent no.1 came to an end in terms of the letter dated 07.07.1990 of the employer, accepting his resignation with effect from 10.07.1990. Pension was denied to respondent no.1 on the basis that he did not have 20 years qualifying regular service between the period 22.12.1971 and 10.07.1990. It was contended by the appellant and respondent no.2 herein, that the period during which the respondent no.1 had worked as a mazdoor – when he was paid out of the contingency fund (i.e. between 09.07.1968 to 28.12.1971), could not be counted as qualifying service for determining the eligibility of respondent no.1 for entitlement to pension.

The learned Single Judge negated this submission by placing reliance on the governmental decision of the year 1968 which, inter alia, provides that half the period of service, for which the employee was paid from contingencies, will be allowed to count towards qualifying service for purposes of pension at the time of absorption in regular employment, subject to certain conditions. The governmental decision contained in the Govt. of India, Ministry of Finance O.M. No.F.12(1)-E.V. 68 dated 14.05.1968 reads as follows:

> "*(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 analogus 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." (emphasis supplied)

It is not the case of either the appellant or respondent no.2 that respondent no.1 did not fulfil the aforesaid conditions. Consequently, the learned Single Judge computed half of the service rendered by respondent no.1 as daily rated mazdoor (when he was paid from the contingency fund), and upon so adding half the service rendered to the regular service by respondent no.1, he was found to be clearly qualified to receive pension as the qualifying service exceeded 20 years.

The submission of counsel for the appellant is that reliance placed on the OM dated 14.05.1968 was erroneous. Mr. Prabhakar submits that Rule 89 of the CCS Pension Rules (the Rules), provides that upon the enforcement of the said Rules, the pre-existing rules, regulations and orders – including office memorandum, stood repealed and ceased to operate. He submits that the OM dated 14.05.1968, therefore, ceased to operate after the enforcement of the Rules in 1972. He has also sought to place reliance on the decision of a Full Bench of the Allahabad High Court in Writ A No.60352/2015, ***Babu @ Babu Ram v. State of U.P. & 3 Others***, decided on 18.02.2016.

In our view, this submission of counsel for the appellant is misconceived. This is for the reason that even before the enforcement of the Rules, respondent no.1 had already been regularized to the post of peon on 22.12.1971. At the relevant point of time when respondent no.1 rendered the service as a daily rated mazdoor, the office memorandum of 1968 was in force and applicable to him. On the day when respondent no.1 was regularized i.e. 22.12.1971, he already earned qualifying regular service of 50% of the period he had spent as a daily rated mazdoor, which comes to 1 year 10 months and 8 days, as computed by the learned Single Judge in the impugned judgment. Pertinently, the office memorandum dated 14.05.1968 provides that half the service paid from contingencies will be allowed to count towards pension "*at the time of absorption in regular employment*", which happened on 22.12.1971. The purport of Rule 89 of the Rules is not, and could not have been, to repeal the pre-existing office memorandum retrospectively.

In these circumstances, the decision in ***Babu @ Babu Ram*** (supra) has no application to the facts of the present case.

The next submission of counsel for the appellant is that the liability would fall on respondent no.2 and not on the appellant. We notice that this aspect was not raised before the learned Single Judge and does not find consideration in the impugned judgment. The learned Single Judge has only determined the eligibility of the respondent no.1 to seek pension. We are, therefore, not inclined to go into the said issue which, in any event, does not concern respondent No.1.

We do not find any merit in the present appeal and, therefore, dismiss the same.

VIPIN SANGHI, J

NAJMI WAZIRI, J

MAY 26, 2017
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