

\$~43

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

+ W.P.(C) 709/2018 & C.M. Nos. 3043-44/2018

RAJA RAM

..... Petitioner

Through: Mr. Atul T.N., Advocate.

versus

DELHI TRANSPORT CORPORATION

..... Respondent

Through: None.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE REKHA PALLI

ORDER

%

24.01.2018

1. The petitioner is aggrieved by the judgment dated 03.11.2017 whereby the Central Administrative Tribunal (CAT) has dismissed his O.A. No.347/2016.

2. A brief glance at the relevant facts of the case is considered necessary. The petitioner had joined the respondent/DTC on 03.2.1977, as a Conductor. On issuance of a charge sheet to him for embezzlement of funds and after holding an inquiry against him, the services of the petitioner were terminated vide order dated 28.10.1992. Aggrieved by the said termination order, the petitioner had raised an industrial dispute which was referred to the Industrial Tribunal. The Industrial Tribunal passed an order dated 27.1.2003, setting aside the petitioner's removal order and directing his reinstatement with full back wages and continuity of service. Aggrieved by the said order, the respondent/DTC approached the High Court by filing

WP(C) No. 5339/2003. During the pendency of the said petition, the parties were referred to mediation and in the course of the said mediation, they arrived at a settlement that was reduced into writing, vide Settlement Agreement dated 9.2.2010. Para 6 of the Settlement Agreement that encapsulates the terms and conditions of settlement between the parties is reproduced herein below for easy reference:-

“6. After much discussion, the parties have reconciled their differences and hence arrived at the following settlement:

a) That the Respondent, DTC shall reinstate the respondent immediately provided that is found medically fit by DTC Medical Board and he is in possession of valid conductor license.

b) It is further agreed between the parties that respondent shall not entitled for any back wages for the intervening period i.e. from the date of termination i.e. 28.10.1992 till the date of reinstatement; the said intervening period shall be treated as break in service of the respondent and shall not be counted for any service benefits.

(c) It is further agreed between the parties that the gratuity amount and DTC's share of respondent's PF withdrawn by the respondent will have to be returned by the respondent to the petitioner with interest rate of 12% per annum failing which same shall be adjusted from the dues payable to the respondent to the respondent at the time of his retirement with the same rate of interest i.e. 12% per annum.

d) It is further agreed between the parties that after the reinstatement of the respondent with the petitioner department, the respondent shall withdraw I.D. case No.297/96 and any other case pending before any Court related to the present dispute and simultaneously the petitioner shall also withdraw W.P. (C) No. 5339/2009.”

3. The above Settlement Agreement was taken on record and vide order dated 17.5.2010, the respondent/DTC's writ petition was disposed of. On 12.7.2010, the respondent/DTC asked the petitioner to report for duty, which he did with effect from 24.7.2010.

4. The petitioner claims that after reporting for duty, he had written letters dated 9.8.2011, 21.9.2011, 07.7.2014 to the respondent/DTC opting for the Pension Scheme, as applicable to Central Govt. employees but he did not receive any response.

5. On 16.1.2015, the petitioner was promoted from the post of Conductor to the post of Assistant Traffic Inspector. Vide letter dated 10.3.2015, the respondent/DTC informed the petitioner that he shall superannuate on 31.5.2015. He was also intimated that he had not opted for the Pension Scheme. On 25.3.2015, the petitioner submitted a representation to the respondent/DTC stating *inter alia* that he had opted for the Pension Scheme. He also submitted that his services were terminated on 28.10.1992 and at the time of termination, he had been paid gratuity and provident fund and he was willing to return the same but had not received any response from the respondent/DTC. The respondent/DTC replied to the petitioner's representation vide letter dated 14.5.2015 declining his request and stating *inter alia* that he had been removed from service w.e.f. 28.10.1992, which was before the commencement of the DTC Pension Scheme, that was introduced on 27.11.1992 and he was reinstated in service only in the year 2010, when the Pension Scheme was not in existence. The respondent/DTC had also referred to the Circular dated 13.5.2008, wherein it was stated that as the Central Govt. had amended the C.C.S. (Pension) Rules, 1972 and the benefits of the provisions of the said Rules were confined to Govt. servants

appointed on or before 31.12.2003 only, the new Restructured Defined Contribution Pension Scheme has been introduced by the Central Govt. for those of the Govt. servants, who were appointed on or after 01.1.2004. As per the said Circular, *“the DTC Board had decided that new recruits in the DTC should remain with the RPFC Pension Scheme i.e., EPS-95, which shall apply to all those newly recruited Drivers and all the employees recruited/appointed in the DTC on or after 01.01.2004”*.

6. When successive representations made by the petitioner for the same relief were turned down by the respondent/DTC, for the very same reason, he approached the Tribunal by filing the Original Application.

7. The respondent/DTC opposed the Original Application and stated in its counter affidavit that the petitioner had failed to disclose that DTC had released his gratuity amount and employee's share along with employer's share of Contributory Provident Fund (in short '**the CPF**') vide Office Memos dated 21.5.2015 and 26.6.2015 respectively, and he had accepted the said amount without any protest or demur; that services of the petitioner were terminated on 28.10.1992 whereas, the DTC Pension Scheme was introduced thereafter, vide office order dated 27.11.1992 and that the petitioner was not a DTC Pension Scheme optee but was a member of EPS-95, which was the only pension scheme operating in the respondent/DTC when he had been reinstated in the year 2010.

8. It was argued on behalf of the respondent/DTC that after a Settlement Agreement was executed by the petitioner and the DTC before the High Court, he was reinstated on 22.7.2010 and in terms of the said Agreement, the parties had agreed that the petitioner would not be entitled to any back wages for the intervening period i.e., from the date of his termination, till the

date of his reinstatement, which shall be treated as a '*break in service*' and the same shall not be counted for any service benefits. The respondent/DTC therefore justified the non-inclusion of the petitioner under the Old Pension Scheme and stated that once he was reinstated, the only Pension Scheme available was the EPS-95 Scheme and monthly deductions were made from the petitioner's pay, till he had superannuated.

9. On examining the pleadings of the parties and the documents filed by them, particularly the Settlement Agreement dated 09.2.2010, the Circular dated 13.5.2008 issued by the DTC and the Office Order No. 16 dated 27.11.1992 that had introduced the Pension Scheme for employees of the DTC, the Tribunal arrived at the conclusion that as the petitioner was not in the employment of the respondent/DTC on the date of introduction of the Old Pension Scheme, the same could not have applied to him and nor could he claim any benefits under the said Scheme. The Tribunal further held that the petitioner has been reinstated in service only in the year 2010 by which date, the Old Pension Scheme had been wound up and a decision was taken by the respondent/DTC not to shift all the employees from the Defined Benefits Pension Scheme to the New Restructured Defined Contribution of Pension Scheme, with effect from 01.01.2004, as had been done by the Central Govt. for its employees. Instead, vide Circular dated 13.5.2008, the RPFC Pension Scheme i.e., EPS-1995 was made applicable to all employees of the DTC, who were recruited or appointed on or after 01.01.2004.

10. The Tribunal noted that the petitioner's service in the DTC could be divided into two phases, the first one commencing from the date of his joining in the year 1977 till 28.10.1992, when his services were terminated and the second one from the date of his reinstatement i.e., from 24.7.2010,

till he had superannuated on 31.5.2015. In view of the Settlement Agreement between the parties, wherein the period from the date of his termination i.e., from 28.10.1992 till the date of his reinstatement in the year 2010, was agreed to be treated as a '*break in service*', the Tribunal rejected the petitioner's argument that the New Pension Scheme made effective from the year 2004, could not have been extended to him. The impugned judgment further records that the petitioner did not deny the fact that after his reinstatement, the respondent/DTC had been making deductions from his pay by applying the RPFC Pension Scheme i.e., EPS-95, till he had superannuated, but he did not raise any objection to the same or seek legal recourse. It was observed that even though the petitioner had made representations for extension of the benefits of the Old Pension Scheme prior to his retirement, the said request had been turned down by the respondent/DTC on 14.5.2015 whereafter, the petitioner had accepted payments from the DTC under the EPS-95, without lodging any protest. Only after receiving his entire retiral benefits, did the petitioner approach the Tribunal for relief. Aggrieved by the aforesaid decision, the petitioner has filed the present petition.

11. Mr. Atul T.N., learned counsel for the petitioner submits that reinstatement in service amounts to continuity in service and the Tribunal has erred in interpreting the term '*break in service*' by treating the subsequent period of service rendered by the petitioner with the respondent/DTC as a new service. He contends that the Tribunal overlooked the representations submitted by the petitioner in the years 2011-14, informing the respondent/DTC that he had opted for the Old Pension Scheme and urges that the Office Order dated 27.11.1992 had been

misinterpreted and the Tribunal has wrongly held that the petitioner is not covered by the said Pension Scheme.

12. We have gone through the records and carefully examined the impugned judgment in the light of the pleadings of the parties. We have also perused the relevant Circular and the Office Orders. There is no quarrel on the facts of the case. The dispute hinges on which of the two Pension Schemes would govern the petitioner, i.e., the DTC Pension Scheme as applicable to Central Govt. Employees, introduced in terms of Office Order dated 27.11.1992, or the RPFC Pension Scheme, i.e., EPS-95 extended by the DTC to all its employees recruited or appointed on or after 01.01.2004, in terms of the Circular dated 13.5.2008.

13. In para 7 of the impugned judgment, the learned Tribunal has carefully analysed the terms and conditions of the Office Order dated 27.11.1992, in particular, Conditions No.1,2,3,4 and 9 that have a bearing on the present case and observed that the said Pension Scheme though introduced on 27.11.1992, was made effective from 03.08.1981. However, taking note of Condition No.3, the Tribunal concluded that the Pension Scheme could not have applied to the petitioner. For the purpose of ready reference, Conditions No.1,2,3,4 and 9 are reproduced below:-

(1) The Pension Scheme would be operated by the LIC on behalf of DTC

(2) The date of effect of pension scheme would be 3.8.1981.

(3) All the existing employees including those retired w.e.f. 3.8.1981 onwards would have the option to opt for the Pension Scheme or the Employees Contributory Provident Fund as at present, within 30 days from the date of issue of this O.O. for the implementation of the Pension Scheme as approved by the Govt of India.

(4) The Pension Scheme would be compulsory for all the new employees joining DTC w.e.f. 23.11.1992 the date of sanctioned of the scheme.

xxx

xxx

xxx

(9) If any of the employee of DTC who does not exercise any option within the prescribed period of 30 days or quit service or dies without exercising an option or whose option is incomplete or conditional or ambiguous he shall be deemed to have opted the Pension Scheme Benefits.”

14. As can be seen from the above, condition No. 3 of the Office Order dated 27.11.1992 gives an option to the existing employees including those who had retired with effect from 03.8.1981 onwards, to opt for the Pension Scheme or the Employees Contributory Provident Fund within 30 days from the date of issuance of the said order. Condition No.4 stipulates that the Scheme would be compulsory for the new employees joining DTC on 23.11.1992, the date the Scheme was sanctioned. The petitioner has relied on Condition No.9, which states that even if an employee of the DTC does not exercise any option within the prescribed period of 30 days, he shall be deemed to have opted for the Pension Scheme Benefits. The petitioner claims that though he was not in the employment of the DTC when the Scheme had been introduced on 27.11.1992, but in view of the stipulation contained in Condition No.2, that had made the Scheme operative from 03.8.1981, since he had joined the services of the DTC in the year 1977, the DTC Pension Scheme would apply to him irrespective of the fact that his services were terminated on 28.10.1992. Further, the petitioner has taken a

stand that Condition No.9 would also come to his aid as it states that if the employee does not exercise any option within 30 days, he shall be deemed to have opted for the Pension Scheme benefits and it would automatically apply in his case.

15. We are of the opinion that the petitioner cannot be heard to argue that simply because the Office Order dated 27.11.1992 had introduced the DTC Pension Scheme, as applicable to the Central Govt. Employees and it was made effective from 03.08.1981, would be a ground to cover him under the said Scheme, when Condition No.3 of the said Office Order states in so many words that it would apply only to existing employees including those who had retired from 03.8.1981 onwards. As on the date of issuance of the said Office Order, the petitioner was neither an existing employee, nor could he be treated as having retired on 03.08.1981, for him to claim any benefit under the said Scheme. The services of the petitioner had been terminated by the respondent/DTC on 28.10.1992 whereas, the Office Order introducing the DTC Pension Scheme was issued exactly one month thereafter. Therefore, we find merit in the observations made by the Tribunal that since the petitioner was not in the employment of the DTC on the introduction of the Scheme, it could not have applied to him.

16. It is relevant to note that only after the date the services of the petitioner were terminated, i.e., 28.10.1992, was the Office Order dated 27.11.1992 introduced. At that point in time, the petitioner was covered by the Employee Contributory Provident Fund Scheme and his terminal benefits included the payments made to him by the respondent/DTC on account of gratuity and the employee's share along with employer's share of the CPF.

17. One of the terms of the Settlement Agreement dated 09.2.2010 executed between the petitioner and the respondent/DTC during the pendency of the writ petition filed by the DTC against the order dated 27.1.2003 passed by the Industrial Tribunal, was that the petitioner shall return the gratuity amount and employee's and employer's share of the CPF to the DTC alongwith interest and on his failure to do so, the said amount shall be adjusted from dues payable at the time of his superannuation with the same rate of interest.

18. Admittedly, the petitioner did not return the aforesaid amounts. Instead, he kept on writing to the respondent/DTC professing his willingness to do so. In the meantime, on his reinstatement in the year 2010, the respondent/DTC extended the EPS-1995 to the petitioner wherein, pension was to be paid under the RPFC Pension Scheme. As a result, monthly contributions were deducted from the petitioner's salary from the date of his reinstatement, till his retirement. Given the above position, it cannot be urged by the petitioner that he was unaware of the deductions being made by the respondent/DTC from his monthly wages and feign ignorance as to the Pension Scheme under which he was covered. Two weeks before his superannuation, the respondent/DTC had passed an order dated 14.5.2015, rejecting the petitioner's application dated 25.3.2015 regarding "*deemed to have opted for Pension Scheme*" and informed him that the Circular dated 13.5.2008 would extend to him since he was reinstated in service only in the year 2010 and the said Scheme had been extended to all new recruited Drivers and all employees recruited or appointed on or after 01.01.2004.

19. Moreover, once the petitioner did not receive his retiral benefits including gratuity and the employee's and employer's share of the CPF

under protest, the inference is that he had waived his right to challenge the decision dated 14.5.2015 taken by the respondent/DTC informing him that he would be covered under the RPFC Pension Scheme. Even otherwise, the Settlement Agreement had made it clear that the petitioner would not be entitled to payment of back wages for the period between his termination, i.e., 28.10.1992, till his reinstatement in the year 2010 and the said period shall be treated as a '*break in service*' and it would not be counted for any service benefit. This being the position, when the petitioner was reinstated, the only Pension Scheme that was available was the RPFC Pension Scheme, i.e., EPS-95 and the respondent/DTC has rightly covered him under the said Scheme.

20. In the present case, the date on which the DTC Pension Scheme had come into operation cannot be treated as a determinative consideration. The deciding factor is whether the person claiming benefit under the said Scheme, was an existing employee of the respondent/DTC, as on 27.11.1992. The petitioner most certainly was not an employee of the DTC on that date. We do not find any error in the findings returned by the Tribunal on this aspect. Merely because the petitioner had been reinstated in the year 2010, the entire period of his service cannot be treated as a '*continuity in service*'. Once the parties had arrived at a settlement whereunder the petitioner had agreed that the period from the date of his termination of service till the date of his reinstatement, i.e., from 28.10.1992 to 24.7.2010 shall be treated as a '*break in service*', no such arguments can be permitted to be raised by the petitioner.

21. Immediately upon his reinstatement in the year 2010, the respondent/DTC had covered the petitioner under the RPFC Pension

Scheme i.e., EPS-95 and he was well aware of the fact that deductions were being made from his salary on a monthly basis towards his contribution under the said Scheme but he opted not to seek any legal recourse against the said decision. In fact, the petitioner remained silent even at the time of his superannuation or, for that matter, when the respondent/DTC released his gratuity and the employee/employer's share of contribution of provident fund in May, 2015. The petitioner had admittedly accepted the said amount without lodging any protest at that time; nor did he refuse to accept the said amount and seek legal recourse at that stage. Only after receiving the entire retiral benefits, did the petitioner approach the Tribunal, sometime in the year 2016.

22. Given the aforesaid facts and circumstances, we are of the opinion that the Tribunal has passed a well reasoned order, which does not warrant any interference. Accordingly, the present petition is dismissed as devoid of merits, along with the pending applications.

HIMA KOHLI, J

REKHA PALLI, J

JANUARY 24, 2018

ap/rkb/na