

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

+ Reserved on: 17th December, 2018
Pronounced on: 18th January, 2019

LPA 656/2015

P.C. SEKHAR

..... Appellant

Through: Mr. P.C. Sekhar, Appellant-in-person.

versus

THE NEW INDIA ASSURANCE COMPANY LIMITED & ORS.

.... Respondents

Through: Mr. Saurabh Prakash with Mr. Utsav Jain, Advocates for New India Assurance Co.

And

LPA 657/2015

THE NEW INDIA ASSURANCE CO. LTD.

..... Appellant

Through: Mr. Saurabh Prakash with Mr. Utsav Jain, Advocates for New India Assurance Co.

versus

P.C. SEKHAR

.... Respondent

Through: Mr. P.C. Sekhar, Respondent-in-person.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE SANJEEV NARULA**

J U D G M E N T

SANJEEV NARULA J.:

1. The present appeals under clause X of Letters patent appeal are directed against the common judgment dated 29th July, 2015 whereby the learned Single Judge disposed of Writ Petitions No. 3416/2002 and 10209/2009.

2. Shri. P.C. Sekhar, the Appellant in LPA No. 656/2015 (hereinafter referred to as 'the Appellant') has succeeded in both the writ petitions and the learned Single Judge has quashed the charge sheet issued against him and allowed the Appellant to voluntary retire with effect from 12th September, 2005 along with consequential benefits with effect from the said date. Thus, in LPA No. 656/2015, the Appellant has a limited challenge. He is seeking directions against the Respondent-the New India Assurance Company Limited (hereinafter referred to as 'NIACL'), for grant of retirement benefits under Special Voluntary Retirement Scheme 2004 (hereinafter referred to as 'SVRS') up till the date of his illegal removal; consequential benefits; and claim of counting of his past services. The NIACL, on the other hand, in LPA No. 657/2015 seeks the setting aside of the impugned judgment dated 29th July, 2015.

Background Facts

3. It would be apposite to note the facts in detail, since the present case has a long and chequered history.

4. On account of the death of the father of the Appellant, the Ministry of

Commerce, Government of India (Respondent no. 3 in LPA 656/2015) by order dated 7th August, 1979 gave him compassionate appointment in the Central Government as an 'Investigator' in the pay scale of Rs. 425-700/- along with allowances. He was appointed on substantive basis on 13th January, 1982.

5. The Appellant is a qualified chartered accountant. While serving in the Ministry of Commerce, on an opportunity being available, he applied for the post of Assistant Administrative Officer (AAO) in the pay scale of Rs. 530-1050/- with NIACL, a subsidiary of General Insurance Corporation of India. He was successful and got appointed with NIACL on 12th March, 1986 on probation for a period of one year. The Appellant submitted a technical resignation in the Ministry of Commerce (Government of India) on 10th March, 1986. He did not receive any retirement benefits for the service by him rendered with the Government of India up to the date of submission of his technical resignation i.e. 10th March, 1986.

6. Till 12th March, 1986, the date of appointment with NIACL, there was no pension scheme in NIACL. Later, on 28th June, 1995, NIACL introduced the General Insurance (Employees') Pension Scheme (hereinafter, referred to as the Pension Scheme 1995).

7. The Appellant's service was confirmed with NIACL as Assistant Administrative Officer (AAO). On 22nd August, 1996, he made a representation to NIACL for counting of his past service rendered with Ministry of Commerce, Government of India. The representations were rejected by NIACL by letter dated 17th April, 1998 stating that the

appointment of the Appellant in the services of NIACL was through open competition and not by way of transfer by Government of India on permanent absorption basis and therefore it was not possible to consider his request. Dissatisfied with the rejection of his request, the Appellant made a further representation dated 12th May, 1998 to NIACL with a request that the same be forwarded to Ministry of Personnel, Public Grievances and Pensions. No response was received to the aforesaid representation.

8. In the meantime, on 9th January, 1999, the Appellant sought voluntary retirement from NIACL under the Pension Scheme, 1995 on the ground that he had completed 20 years of service. This was followed by another request on 8th February, 1999. This request was rejected by NIACL by letter dated 11th May, 1999. Since there was no provision in the Pension Scheme, 1995 to add the benefit of the past service rendered with the Ministry of Commerce, Government of India, NIACL maintained its stand and, on 20th December, 2001, another communication was sent to the Appellant on similar lines.

9. Aggrieved with the decisions of NIACL, the Appellant filed Writ Petition No. 3416/2002 in this Court challenging aforesaid the orders dated 17th April, 1998, 11th May, 1999 and 28th December, 2001.

10. During the pendency of the above writ petition, on 1st January, 2004, NIACL introduced a Special Voluntary Retirement Scheme (SVRS), 2004. The Appellant applied under the aforesaid scheme. According to him upon getting all the requisite clearances, the Chairman and Managing Director (CMD) of NIACL approved his request/ application for voluntary

retirement under SVRS, 2004. On 8th July, 2004, the Appellant sent a reminder to the authorities to expedite his request for SRVS at the earliest. The said letter also stated that his request be considered, and in case additional benefits arise in the Writ Petition No. 3416/2002, the same be settled subject to the outcome.

11. On 6th October, 2004, during the hearing before the learned Single Judge in W.P.(C) No. 3416/2002, the Appellant brought to the notice of the Court that he had submitted an application under the SVRS Scheme which was pending consideration before NIACL. The Court called upon the learned counsel for NIACL to take instructions on the said request. On 28th February, 2006, the writ petition was further heard at length when the Appellant made a statement that inclusion of his past service in the Central Government would not be pressed if NIACL accepts his request and relieves him under SVRS. He also relied upon a letter dated 28th December, 2004 (hereinafter, referred to as “the Letter”) issued by NIACL wherein it was stated that the competent authority was willing to consider the Appellant’s application under SVRS 2004 without taking into account his previous service with Government of India for the purpose of calculating the terminal dues including pension, without prejudice to the stand taken by him in W.P.(C) No. 3416/2002.

12. On 22nd March, 2006, a letter was addressed by NIACL to the counsel for the Appellant concerning the SVRS application. In the said letter, the pending status of his SVRS application was admitted and it was stated that it is not possible to accept the application as departmental proceedings were contemplated against him. On 23rd March, 2006, when the matter was

heard by the learned Single Judge, a statement was made by learned counsel for NIACL that it was not possible for his client to accede to the Appellant's request for being relieved under SVRS. Learned counsel appearing on behalf of the Appellant, taking note of the aforesaid stand of NIACL, then stated that the Appellant would be approaching NIACL for seeking voluntary retirement in terms of Pension Scheme, 1995, since the Appellant had put in 20 years of qualifying service and was therefore eligible to seek voluntary retirement from the service. Since as on that date, the Appellant had put in only 19 ½ years of service, he relied upon Regulation 18 of the Pension Scheme 1995 and claimed that he was entitled to the benefit of rounding off of the services for the broken period of service in excess of six months. Accordingly, learned Single Judge directed the Appellant to approach NIACL with an application under Regulation 30, within a period of two weeks. It was directed that NIACL would consider such request within a period of two weeks from receipt of such an application and pass appropriate orders. In terms of the aforesaid directions, the Appellant submitted an application on 3rd April, 2006.

13. It is pertinent to note that, in the meantime, on 11th August, 2005, the Appellant was transferred to Mumbai and was called upon to take new assignment on or before 10th September, 2005. On receipt of the communication dated 11th August, 2005, the Appellant made a representation dated 18th August, 2005 requesting for cancellation of transfer order on account of his mother's illness. He stated that it would be difficult for him to move out of the station at regular intervals and that would severely affect his mother's health, as she would not be in a position

to take care of her health in his absence. He further highlighted that he had opted for voluntary retirement under the SVRS Scheme in January 2004. He thus requested that, in the event it was not possible for NIACL to cancel the transfer order, then he be relieved by accepting his voluntary retirement. The aforesaid request was rejected on 9th September, 2005.

14. In spite of the Court's order directing NIACL to pass an appropriate order on the Appellant's request for VRS, NIACL instead chose to issue a charge sheet to the Appellant on 3rd May, 2006, on the ground that he remained unauthorisedly absent without prior approval of the competent authority and had neglected to abide by the orders of the superiors conveyed to him by letter dated 11th August, 2005. NIACL further alleged that such unauthorised absence exhibited indiscipline and the Appellant's conduct was unbecoming of a public servant.

15. Pursuant to Appellant's CM Nos. 660-661/2006, further proceedings were held before the learned Single Judge on 16th May, 2006, when a statement was made on behalf of NIACL that the Appellant's request for VRS could not be acceded to in view of the proposed disciplinary proceedings on account of the charge sheet having been issued to him on 3rd May, 2006.

16. On 1st June, 2006, during the proceedings before the learned Single Judge, a statement was made by the counsel for NIACL that efforts were being made to settle the matter amicably to the satisfaction of the Appellant and failing which, the counter affidavit would be filed in the writ petition.

17. In the meantime, on 29th May, 2006, the Appellant filed detailed reply to the charge sheet denying all the charges levelled against him. On 22nd June, 2006, the Appellant received a letter from NIACL stating that the enquiry proceedings would be conducted against him, as he had denied all the charges levelled against him. Preliminary enquiry proceedings were held on 14th May, 2008 and the same stood concluded on 29th May, 2008. The Appellant submitted his written brief to the Enquiry Officer, who after considering the same, submitted his report on 21st July, 2008. On 18th August, 2008, the Appellant submitted a representation to the disciplinary authority on the adverse enquiry report. The same was considered, but rejected. Consequently, on 11th September, 2008, NIACL issued an order removing Appellant No. 1 from the service.

18. On 3rd October, 2008, the Appellant preferred an appeal before the Appellate Authority (AA). By an order dated 26th February 2009, the AA confirmed the order of removal dated 11th September 2008. The said order was conveyed to the Appellant on 21st March, 2009. The aforesaid orders of the disciplinary authority as well as the AA were impugned by the Appellant in Writ Petition No. 10209/2009.

Impugned order of Single Judge

19. The aforesaid writ petitions were heard and decided by learned Single Judge by way of the common judgment, impugned in the present appeals. The learned Single Judge after consideration of the rival submissions of the parties has held that Appellant No. 2 ought to have accepted the VRS application of Appellant No. 1. The charge sheet leading to disciplinary action and consequent order of removal forfeiting his past service of 21

years was also held to be illegal.

Submissions of the Appellant

20. Shri. P.C. Sekhar, appearing in person, submitted that the NIACL was not justified in rejecting his claim for inclusion of his past service with the Central Government for the purpose of granting him benefits under the Pension Scheme 1995 on a flimsy ground that he had joined the services of NIACL through open competitive recruitment exercise and not by way of transfer to Government of India on permanent absorption basis. He submitted that this aspect of the matter has not been considered by the learned Single Judge in the impugned judgment. He submitted that the learned Single Judge has not considered the directions contained in the Government orders issued in pursuance to Rule 37 (3) of Central Civil Services (Pension) Rules, 1972 (hereinafter referred to as 'Pension Rules'), which according to him conferred a statutory right on the Appellant for counting his past service in accordance with the Government orders.

21. He further relied upon para 55 of the Pension Scheme, 1995 and urged that the provision relating to counting of past services, contained in the CCS Pension Rules has been incorporated into the Pension Scheme 1995 by way of para 55, which reads as under:-

“55. Residuary provisions – Matters relating to pension and other benefits in respect of which no express provision has been made in this scheme shall be governed by the corresponding provisions contained in the Central Civil Services (Pension) Rules, 1972 or the Central Civil Services (Commutation of Pension) Rules, 1981,

applicable for Central Government employees.”

22. The Appellant further submitted that the application for retirement under SVRS 2004 had to be considered in the light of paras 3,6, 8 and 9 of the concerned scheme which confers an enforceable right in his favour for processing his retirement application in light of the judgment of the Supreme Court in the case of ***Bank of India v. OP Swarnakar, (2003) 2 SCC 721***. He also submitted that the action of NIACL of rejecting his application under SVRS, was in violation of the aforesaid provisions of the Pension Scheme, 1995 inasmuch as the same are on the pretext of initiating disciplinary proceedings on account of alleged non-compliance of transfer order issued after a period of 20 months from the date of making the application for retirement. He submits that the disciplinary proceedings were mala fide and were initiated with the objective to deny him the benefit of SVRS. Notwithstanding the disciplinary proceedings, his request for voluntary retirement ought to have been accepted, since the action was allegedly initiated after submission of his application for VRS.

23. The Appellant submitted that his dismissal/removal from service is in contravention of the statutory provisions. The order relieving the Appellant from Delhi was illegal, inasmuch as there was no substantive ‘Audit Incharge’ posted in place of the Appellant in terms of NIACL’s own Regulation dated 4th March, 2004. He submitted that the actions of NIACL are untenable and tainted and, therefore, the learned Single Judge rightly set aside/quashed his termination. The Appellant, however, submitted that the learned Single Judge erred in fixing the cut-off date for calculation of period of service with NIACL as at 12th September, 2005, the date when

the Appellant was relieved from Delhi to join the services at Mumbai. According to the Appellant, he enjoyed a statutory status of being in employment, as the removal was in contravention of the statutory provisions and, therefore, he was entitled to the benefit of his service up till 11th September, 2008. The Appellant submitted that the fresh application for VRS was issued on account of the directions given by the Court. Thus, the same should be treated as having been given under duress. Therefore, on this account, the jural relationship between him and NIACL continued. He submitted that on this aspect, the learned Single Judge has not considered the judgment of the Supreme Court in the case of *State of Haryana. v. S.K. Singhal (1999) 4 SCC 293* and *Dinesh Sharma Sagma v. State of Assam (1977) 4 SCC 441*.

24. Lastly, the Appellant submitted that NIACL has concealed the fact from the Court that the Appellant's retirement under SVRS 2004 stood approved by the competent authority as early as on 9th March, 2004. The Appellant's relieving order from Delhi under SVRS could not have been legally effected till September 2006 despite approval on 9th March, 2004 due to non-availability of substitute 'Audit Incharge' in terms of NIACL's company's own Regulation dated 4th March, 2004. He submitted that he is entitled to be relieved under SVRS and also entitled to a declaration of being in employment till his relieving order in view of the judgment of the Supreme Court in the case of *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi , AIR 1975 SC 1331*.

Submissions on behalf of NIACL

25. Mr. Saurabh Prakash, learned counsel appearing on behalf of NIACL, on the other hand, argued that the Appellant's application under SVRS 2004 was not unconditional and thus not maintainable. He submitted that it was a requirement under the aforesaid scheme that the application made by an employee should be without fetters. The Appellant's initial letter dated 28th May, 2004 was not accepted as he had imposed the condition of counting of past service. The subsequent unconditional application was made beyond the prescribed period and thus, could not be considered. He also submitted that the learned Single Judge has erred in granting the relief to the Appellant by observing that the Appellant's application for SVRS ought to have been accepted by NIACL. He further submitted that the Appellant did not challenge the transfer order and since there was no stay on the transfer order, the Appellant was under obligation to report at his new place of posting at Mumbai. Since he did not do so, NIACL was justified in issuing the charge sheet and proceeding against the Appellant.

26. Mr. Prakash further submitted that the transfer order was passed in view of Transfer and Mobility Policy, that transferred all Officers who had been at one place for 18 years or longer. It affected 70 Officers and all such Officers, except the Appellant, had joined the respective places of posting. The Appellant had been at Delhi for 19 ½ years and could not contend that the transfer was by way of punishment or a vindictive action. He also submitted that Appellant was given an option of resignation without prejudice to the contentions raised in the petition. However, the Appellant insisted that he be relieved by accepting his voluntary retirement as an interim measure and he would carry on seeking counting of service.

The Appellant was claiming salary for the entire period even though he had not joined at Mumbai without any reasonable cause.

27. On the aspect of entitlement under the Pension Scheme, 1995, the learned counsel for NIACL submitted that there was no decision of any Court directing that 19 ½ years of service be counted as 20 years, at the time and therefore the decision not to consider the request of the Appellant was uniform and applicable to all. He submitted that the judgment of Supreme Court in *State Bank of Patiala Vs. Pritam Singh Bedi and Ors.* reported as **2014 (3) LAJ 513 (SC)** and the decision of Karnataka High Court in the case of *New India Assurance Co. Ltd Vs. G.S.Kamath, Writ Appeal No. 1721/2006 (S-R)* decided on December 6, 2006, does not deal with the aforesaid question of rounding off of the years of service for the purpose of giving benefit under the Pension Scheme. He submitted that learned Single Judge did not specifically answer the aforesaid question. He further submitted that even if there was a decision later in time that holds that 19 ½ years of service should be counted as 20 years, it would not inure to the benefit of the Appellant, as he had refused to report at Mumbai and the same amounted to misconduct.

28. He submitted that the observations of the learned Single Judge in respect of the acceptance of VRS were erroneous and incorrect. On the issue relating to counting of past service, the learned counsel for the NIACL submitted that the Appellant was not liable to get the benefit of counting of his past service, since NIACL was not receiving any amount from Central Government towards such service. NIACL did not purchase

any annuities profit for such liability. He further submitted that a pre-requisite for counting of service rendered with Central Government was that both the organisations must have pension schemes in place. When the Appellant joined NIACL's service, there was no pension scheme in operation and the same was adopted in 1995. Hence, in 1987, there was no question of any sum being paid by the Central Government towards the services. Even later, no such transfer was made. He submitted that OM dated 30th May, 1995 also clarifies the above position.

Analysis and Findings

VOLUNTARY RETIREMENT: WHETHER THE APPELLANT IS ENTITLED TO THE BENEFIT UNDER SPECIAL VOLUNTARY RETIREMENT SCHEME, 2004? IF SO, FOR WHAT PERIOD.

29. The SVRS Scheme was introduced on 1st January, 2004 giving option to employees who had put in 10 years of regular service to seek voluntary retirement. The Appellant applied under the Scheme on 14th January, 2004. In terms of Section 2 (d) of the Scheme, the CMD is the competent authority. The eligibility is provided in Clause 3 of the Scheme, which reads as under:-

"(1) All permanent full time officers will be eligible to seek voluntary retirement under this scheme provided they have attained the age of 40 years and completed 10 years of qualifying service as on the date of notification.

(2) An officer who is under suspension or against whom disciplinary proceedings are pending or contemplated shall not be eligible to opt for the scheme;

Provided that the case of an officer who is under suspension or against whom disciplinary proceedings is pending or contemplated may be considered by the Board of the company concerned having regard to the facts and circumstances of each case and the decision taken by the Board shall be final.

(3) Officers who are posted abroad or on deputation abroad shall not be eligible for the Scheme."

30. In terms of Clause 8 (vii), the competent authority has been given the absolute discretion either to accept or reject the application of an Officer under the Scheme. It however mandates the competent authority to record the reasons for rejection of his/her application in writing. The acceptance or rejection of the application has to be communicated in writing. The said Clause reads as under:-

"The competent authority shall have absolute discretion either to accept or reject the application of an officer under this Scheme. The competent authority shall record the reasons for rejection of his or her application in writing. Acceptance or rejection of an application of an Officer for voluntary retirement under the Scheme shall be communicated to him in writing."

31. In the instant case, the following letter dated 12th June, 2008 has been brought to our notice, which reads as under:-

"12.06.2008

Mr. P.K. Sinha,
Chief Manager,
RTI Cell,
Head office, Mumbai.

**Re: Information Required Under Right To Information Act
2005 Ale Mrs.P. Tirunagavalli, C/26/X-4, Dilshad Garden,**

Delhi-110 095. (Mr. P.C. Sekhar) Compliance of Appellate Authority Order No. 0008/2008 dated 09.04.2008 In respect of application dated 21.01.2008.

.....
This has reference to our letter ref. CPI CELL/2008 dated 10.06.2008 In connection with the aforesaid matter.

Point No.4 Application Dated 21.01.2008.

HRM had placed the note on 09th March 2004 before the Competent Authority for acceptance.

Please Acknowledge

Sd/-
(ATUL SAHAI)
Chief Manager”

32. From the aforesaid, it appears that a note of 9th March, 2004 was prepared to be placed before the competent authority for acceptance. The Appellant was not given any intimation with respect to the decision taken by the competent authority as required under Section 8 (vii) of the SVRS 2004 despite filing of RTI Applications. The applications under the RTI Act and the response given by the Respondent have been brought on record. It therefore clearly emerges that there was no communication by NIACL giving its decision on the Appellant’s application under the SVRS. The aspect of communication of acceptance or rejection of the application in writing is significant, as highlighted in the case of **OP Swarnakar** (*supra*):

“Acceptance or otherwise of the request of an employee seeking voluntary retirement is required to be communicated to him in writing. This clause is crucial in view of the fact that therein the acceptance or rejection of such request has been provided. The decision of the authority rejecting the request is applicable to the Appellate authority. The application made by an employee as an offer as well as the decision of the bank thereupon would be

communicated to the respective General Managers. The decisions making process shall take place at various levels of the banks."

33. There is no dispute that the Appellant fulfilled the eligibility criteria for taking the benefit under SVRS 2004. On 28th December, 2004, by "the Letter", NIACL stated that the competent authority was willing to consider the SVRS application without taking into account his previous service with the Central Government and also without prejudice to the stand in the proceedings before this Court. This averment was not acted upon. The said letter reads as under:-

"This has a reference to your letter dated 03.12.2004 enclosing an opinion dated 02.12.2004 of Advocate Mr S Prakash regarding the order passed by the Hon.'ble High Court on 06.10.2004.

We would like to inform you that the case of Mr. PC Sekhar as also the order dated 06.10.2004 were placed before the Competent Authorities.

The Competent Authority is willing to consider the application under SVRS of Mr. PC Sekhar without taking his previous service with Government of India into consideration for the purpose of terminal dues including pension, without prejudice to the stand taken in the writ Petition No. 3416/2002.

Kindly examine to whether the following points was argued before the Hon'ble Court.

For releasing pension to an eligible officer, depending upon the quantum to be released as pension (which again is based on the number of years of service rendered) we have to purchase annuities from LIC. In the instant case since no contribution is possible from the Government of India in respect of service rendered by an officer with them; if we count: this Service also, then we have to additionally buy annuities which will be an additional burden to our company.

These points may be clarified to the Hon'ble High Court. Please keep us informed of the developments in this matter."

34. It is also to be noted that the Appellant's application for voluntary retirement under Pension Scheme 1995 was also under consideration with NIACL. However, instead of taking the decisions in right earnest, NIACL proceeded to transfer the Appellant to Mumbai. The Appellant brought to the notice of NIACL, the pending retirement application and requested for reconsideration of transfer orders on account of his inability to comply with the directions of transfer. At this stage, two options were available to NIACL. Either, they could have considered his application for VRS by rounding off the years of regular service from 19 ½ to 20 years in order to give him the benefit of voluntary retirement under the Pension Scheme, 1995. In the alternative, they could have also considered his request for SVRS. But, NIACL, instead of considering the applications for VRS or SVRS, had an ingenious approach that most definitely reflects an unreasonable and arbitrary attitude towards an employee, who had put in nearly 20 years of service. NIACL believed that better course of action would be by disallowing him to retire; and asking him to move to Mumbai. Although, NIACL has contended before the Court that the transfer was a routine matter and the same did not single out the Appellant, however, we have to examine the action of NIACL by applying the test of reasonableness. We have no hesitation to hold that in our view, the action of NIACL, fails this test. The decision of the Company in the given facts and circumstances of the case, is wholly arbitrary. NIACL issued the transfer orders on specious grounds, and such a decision is *prima facie*

vexatious and mala fide, to say the least. The Appellant's transfer to Mumbai can, therefore not be termed to be a routine transfer.

35. It is also to be noted that in "the Letter", NIACL, in fact, expressed their willingness to consider the SVRS application. Subsequently, as noted in the proceedings held on 23rd March, 2006, NIACL declined to accede to the request of the Appellant and to relieve him under SVRS. This approach of NIACL also shows highhandedness and compounds the vindictive approach shown by NIACL. The matter, in fact, does not end here, as the transfer order of Mumbai was predicatively converted into a disciplinary action on the ground of misconduct that ultimately ended in an order of removal of the Appellant from the services of NIACL. On account of this, the Appellant has been litigating before this Court since 17th May, 2002.

36. We are unable to understand as to what message NIACL intends to give out to its employees. NIACL's approach in the present matter perhaps is aimed to send a strong message to its employees, in order to dissuade them from standing up in the Court to exercise their legal rights. Transfer; charge of misconduct; disciplinary proceeding; and the order of removal from service are on implausible grounds and the explanations attempted by NIACL are far from convincing. Surely, an employee, who is requesting to be relieved from his employment under the retirement schemes, cannot be browbeaten into accepting the stand of NIACL. The entire sequence of events from the issuance of transfer order, followed by the charge sheet and the disciplinary action, compels us to observe that NIACL has acted in an unreasonable and arbitrary manner and has constrained the Appellant to

litigate to secure his rights, which ought to have been granted by NIACL as a matter of course.

37. This is also evident from the statements being made by NIACL during the proceedings before this Court. No convincing explanation has been offered as to why the request of the Appellant for SVRS was not acceded to. The request for VRS was made when the matter was pending before the Court. In fact, as noted above, in its letter dated 28th December, 2004, the competent authority of NIACL expressed its willingness to accept the application for SVRS without prejudice to the contentions in the writ petition. A weak attempt has been made by stating that the application made on 14th January, 2004 was a conditional one and the same was therefore not in consonance with the scheme. However, we are unable to find force in the said explanation. We are unable to understand as to how in absence of any express written rejection, NIACL can now raise flimsy and non-existent grounds. There is no justifiable reason for NIACL to take a hyper-technical plea and deny the benefit of the SVRS Scheme to the Appellant.

38. The entire purpose of the voluntary retirement scheme would be defeated if NIACL is permitted to deny its benefit to its employees, who desire to retire from the company. NIACL ought to have taken note of the fact that the Appellant was undergoing difficult times and wanted certainty in his life. A certain amount of flexibility should have been exercised by NIACL in considering the Appellant's application for voluntary retirement. By exhibiting such flexibility, NIACL would not have been prejudiced in

any manner. Allowing the Appellant to retire would not have jeopardized its administration in any way. NIACL ought to have been graceful enough to respond to the request with a positive attitude and allowed him to retire.

39. It is also noteworthy that the Division Bench of Karnataka High Court in *New India Assurance Co. Ltd Vs. G.S.Kamath, Writ Appeal No. 1721/2006 (S-R)* decided on December 6, 2006, while interpreting regulation 18 of Pension Scheme 1995, held that the benefit of rounding off may be granted to an employee who had only completed 19 years 8 months and 6 days of qualifying service (falling short of the requisite 20 years) and the employee was deemed to have completed 20 years of the requisite qualifying service. A Special Leave Petition, preferred against the aforesaid judgment, was dismissed by the Supreme Court.

40. It is also not in dispute that on the 12th September, 2005, when the Appellant was relieved for joining at Mumbai, he had indeed completed 19 and ½ years. Therefore, at the time of being relieved from Delhi, the Appellant fulfilled the eligibility criteria for taking the benefit under both SVRS as well as VRS Scheme.

41. The action of NIACL of rejecting the applications ultimately leads to forfeiture of his past service of 20 years. Certainly, NIACL cannot be permitted to wash away the entire 20 years of service of the Appellant by taking such an action. The Appellant had a statutory right to seek retirement under the scheme which would be negated if NIACL is permitted to remove him in the manner it has done. Such an approach cannot be countenanced.

42. Learned Single Judge, after taking note of the facts of the case and the frivolous grounds urged by NIACL justifying the rejection of the application for VRS and SVRS, has rightly ordered that the Appellant is entitled to retirement. Learned Single Judge has held that the Appellant should be considered to have voluntarily retired w.e.f. 12th September, 2005. This cut-off date has been fixed on account of the fact that from the said date he was relieved from NIACL's Delhi Office to join at Mumbai. Learned Single Judge has also rightly quashed the charge sheet dated 3rd May, 2006 in the facts of the present case. We, however, while upholding the aforesaid decision of the Learned Single Judge, are going a step further.

43. In our considered opinion, the entire period for which the Appellant was prosecuted under the charge sheet on account of alleged misconduct for not joining the place of posting at Mumbai i.e. the period from 12th September, 2005 to 11th September, 2008, should be considered as the period in service. There cannot be any doubt in view of the settled position in law that during the period when the Appellant was being proceeded against departmentally, relationship of employer-employee continued. As per the stand of the Appellant, NIACL did not grant the Appellant the benefit of the VRS or the SVRS Scheme. On the contrary, they prosecuted him for misconduct and forfeited his entire service of 20 years. Since the aforesaid action has been held to be unlawful and illegal, we feel, in the facts and circumstance of the present case, NIACL should also be held liable for its consequences. This period should also be considered for the purpose of calculation of the retiral benefits. Since the charge sheet has

been quashed by the learned Single Judge, and the application for voluntary retirement has been allowed, we hold that the petitioner would be entitled to the benefit of being considered in service at least up to the date on which NIACL formally, though unlawfully severed its ties with the Appellant by unlawfully removing him from service i.e. up to 11th September, 2008.

Salary, Arrears and consequential benefits

44. On account of the reasons aforesaid, we also hold that the Appellant would be entitled to the salary for the period up to 11th September, 2008. The entire arrears shall be paid along with the interest at the rate of 8% per annum from the date when amount fell due till the date of payment. The Appellant's pensionary leave encashment and other consequential benefits would also be calculated and commensurate with his date of voluntary retirement to be treated as 11th September, 2008.

COUNTING OF PAST SERVICE: WHETHER THE APPELLANT IS ENTITLED TO BENEFIT OF HIS PAST SERVICE TO BE COUNTED FOR THE PURPOSE OF PENSIONARY BENEFITS.

45. The Appellant was serving with the Ministry of Commerce, Government of India as an 'Investigator', as noted above. He subsequently joined NIACL. He submitted that he had not received any retirement benefits from the Government for the service rendered up to 10th March, 1986. As per Chapter 2 of the Pension Scheme 1995 Scheme, the same is also applicable for the service rendered prior to 1st January, 1986. Thus there is no doubt that Appellant is covered under the Pension Scheme from

the date of his appointment with NIACL. The Appellant is seeking to count his past service for the purpose of calculating the benefits under the scheme. In this regard, he is relying on several OMs issued by the Central Government being OMs dated 29th August, 1984, 31st March, 1987 and 30th May, 1995.

46. The learned Single Judge after taking note of the aforesaid instructions has held that for counting of the past service, concurrence of the parent office i.e. Ministry of Commerce is mandatory as the said Ministry has to discharge its obligations of pensionary benefits for the period in question. Since the representations to the Ministry were pending, learned Single Judge has directed that the decision on the said representation be taken by the Ministry within a period of 4 weeks. During the course of the submissions, the Appellant pointed out that as per the impugned judgment an opportunity was given to him to make a further representation within two weeks from the date of the order. He has indeed made a further representation and the same is presently pending consideration and a decision is yet to be taken by the Ministry.

47. We may note that the NIACL's Pension Scheme, 1995 under Para 55 provides for Residuary provisions. It is provided therein that the matters not covered within the scheme are to be governed by the CCS (Pension) Rules, thus, including Rule 37 and 26 of CCS Pension Rules. The said para has been reproduced at paragraph 33 hereinabove.

48. The Appellant has relied upon the judgment of the Supreme Court in

TS Thiruvengadam v Secretary to Government of India, Ministry of Finance, Department of Expenditure, New Delhi and Ors., (1993) 2 SCC 174. In the said case, the Appellant who was serving in Audit Department, Defence Service of Government of India as substantive Upper Division Clerk joined a public sector undertaking. The question arose with respect to the terms and conditions of absorption in Central Public Sector Undertaking, that restricted the benefits only to those employees who were absorbed from prescribed cut-off date. The Court, while considering the said case, held that persons who fulfil the conditions under Rule 37 fall under a class and are entitled to be considered for absorption and no discrepancies can be permitted within the said class. The relevant portion of the said judgment reads as under:-

"11. We may examine the claim of the appellant under the Central Civil Services (Pension) Rules, 1972 (the Rules). Rule 37 of the Rules is as under:

"A Government servant who has been permitted to be absorbed in a service or post in or under a corporation or company wholly or substantially owned or controlled by the Government or in or under a body controlled or financed by the Government shall, if such absorption is declared by the Government to be in the public interest, be deemed to have retired from service from the date of such absorption and shall be eligible to receive retirement benefits which he may have elected or deemed to have elected, and from such date as may be determined, in accordance with the orders of the Government applicable to him:

Provided that no declaration regarding absorption in the public interest in a service or

post in or under such corporation, company or body shall be required in respect of a Government servant whom the Government may, by order declare to be a scientific employee."

12. Rule 37, thus, provides that a government servant who has been permitted to be absorbed in service in a Central Government public undertaking in public interest, be deemed to have retired from service from the date of such absorption and shall be eligible to receive retirement benefits in accordance with the orders of the Government applicable to him. It is not disputed that the appellant was permitted to be absorbed in the Central Government public undertaking in public interest. The appellant, as such, shall be deemed to have retired from government service from the date of his absorption and is eligible to receive the retirement benefits. It is no doubt correct that the retirement benefits envisaged under Rule 37 are to be determined in accordance with the government orders but the plain language of the Rule does not permit any classification while granting the retirement benefits. When the Rule specifically provides that all the persons who fulfil the pre-conditions prescribed therein shall be deemed to have retired from government service from the date of absorption and shall be eligible to receive retirement benefits then the government while granting benefits cannot deny the same to some of them on the basis of arbitrary classification. All those persons who fulfil the conditions under Rule 37 are a class by themselves and no discrimination can be permitted within the said class. The government action in restricting the benefits under the revised Memorandum dated June 16, 1967 only to those who are absorbed after that date goes contrary to the Rule and cannot be sustained."

49. Thus, there is merit in the contention of the Appellant to the effect that

Rule 37(3), gives him the option to count the services rendered by him under the Central Government for pension with NIACL or to receive the retirement benefits for the service so rendered with the Central Government and the aforesaid provision reads as under:-

“(3) Where there is a pension scheme in a body controlled or financed by the Central Government in which a Government servant is absorbed, he shall be entitled to exercise option either to count the service rendered under the Central Government in that body for pension or to receive [deleted]4 retirement benefits for the service rendered under the Central Government in accordance with the orders issued by the Central Government.”

50. The aforesaid provision, read with Rule 26(7) that stipulates “a resignation submitted for the purpose of Rule 37 shall not entail forfeiture of past service under the Government”, would come to the aid of the Appellant to exercise his right for counting his service with Central Government for the purpose of pensionary benefits with NIACL. We also find merit in his submission that he cannot be differentiated on the ground that he was not an employee absorbed on deputation. This is also evident from a letter dated 12th January, 2004 written by Minister of State for Finance (Expenditure, Banking & Insurance) to the Chairman of New India Assurance Company and the same reads as under:-

“Shri R Beri
Chairman And Managing Director,
New India Assurance Company Limited,
Head Office,
New India Assurance Building,
87, Mahatma Gandhi Marg, Fort,
Mumbai-400 001

January 12, 2004

Sir,

Ref: Retirement Benefits of Mr. PC Sekhar Based On Combined Services In The Ministry of Commerce And New India Assurance Company Limited.

Hon'ble Minister of State for Finance, Sh. Anandrao V. Adsul has received a representation on the above matter from Mr PC Sekhar who is presently working as Assistant Manager in Audit Department of New India Assurance Company Limited, Delhi. His request for granting of retirement benefits based on combined service in the Ministry of Commerce and New India Assurance Company Limited was refused to him by the company on the ground that he was recruited in the company through open competition exercise.

Mr PC Sekhar was working in substantive capacity in the Ministry of Commerce and had applied through the Ministry with **proper permission** for a post in New India assurance Company Limited. His resignation was accepted by the Ministry to **enable him to take up an appointment** in New India Assurance Company Limited.

Mr PC Sekhar is specifically covered within the purview of Government Orders 8/1/71-Ests(C) dated 21-04-72 of Cabinet Secretariat (Department Of Personnel), Office Memorandum No. 26(18)EV(B)/75 dated 08-04-76 of Department Of Personnel and Administrative Reforms and OM No. 280 16/SI8S·Estt(C) dated 31-0 I· 86 of Department Of Personnel and Training which has been referred by him at Annexures 'G', 'H' and 'I' of his enclosed representation. His mode of recruitment in the company and relieving from the Ministry fall within the scope of immediate permanent absorption. Being a permanent Government servant his appointment in the company based on his own application in response to newspaper advertisement should be treated at par with employees absorbed on deputation. As per the rules in force no discrimination should be made in respect of employees absorbed on deputation or

appointed otherwise in the company with proper permission of Government where he was earlier working.

As the 'Special Voluntary Retirement Scheme' has been introduced recently in nationalised insurance companies, I shall be grateful if you kindly look into the matter and do the needful at the earliest.

Yours faithfully,
Sd/-
(S.S. Babanagare)”

51. In fact, we also note that the learned Single Judge has also accepted the contention of the Appellant by referring to the three OM's reproduced in the impugned judgment and directed the Central Government to take a decision on this issue.

52. The Appellant however contends that learned Single Judge has erred by directing Central Government to take a decision, inasmuch as that there is a statutory right in his favour to seek the benefit of the service rendered with the Central Government.

53. In our considered opinion, the liability to discharge pro-rata pensionary benefit always lies with the parent organisation and this was the reason, the learned Single Judge issued the directions as noted in the impugned judgment.

54. On the other hand, NIACL has referred to an OM No. No.28/24/94-P&PW (B) dated 30th May, 1995 and submitted that the employees are not

entitled to count the service rendered in the Government for the purpose of pension with General Insurance Corporations and its subsidiaries. The said OM reads as under:-

**“No.28/24/94-P&PW (B)
Government of India
Department of Pension & Pensioners’ Welfare
.....**

New Delhi, the 30th May 1995.

OFFICE MEMORANDUM

Subject: Grant of Pro-rata retirement benefits to the permanent Central Government employees who are absorbed in the Nationalised Banks, General Insurance Corporation and its subsidiaries – Question regarding.

The undersigned is directed to refer to this Department’s OM Nos.4/8/84-P&PW dated 14th May, 1986 & No.4/23/87-P&PW dated 10th November, 1987 on the subject mentioned above and to say that inquiries have been made to the effect whether the benefit of counting of service for the purpose of pensionary benefits, as admissible in terms of this Department’s OM No.28/10/84-Pension Unit dated the 29th August, 1984, is to be allowed in the case of mobility of personnel from Government to Nationalised Banks and financial institutions like Life Insurance Corporation of India & General Insurance Corporation etc. and vice-versa.

2. The matter has been considered in the light of instructions issued by this Department in regard to mobility of personnel between Government and non-Government Organisations including Public Sector Undertakings and Autonomous Bodies. The orders contained in this Department’s OM No.4/8/84-P&PW dated 14th May, 1986 and OM No.4/23/87-P&PW dated the 10th November, 1987, stated that the Nationalised Banks including the Reserve Bank of India and the State Bank of India and its subsidiaries, the General Insurance Corporation of India and its four subsidiaries are to be treated as Autonomous Bodies for the purpose of grant of pro-rata retirement benefits to the permanent Central Government employees who are absorbed by these Bodies on the terms and conditions envisaged in Ministry of Finance, Department of Expenditure OM No.26/(18)/EV/75 dated 8th April, 1976, as amended from time to time. **It is clarified that such employees are not entitled to count the service rendered in Government for the purpose of pension on absorption in the Nationalised Banks including the Reserve Bank of India and the State Bank**

of India and its subsidiaries and other financial Institutions including Life Insurance Corporation of India, General Insurance Corporation and its subsidiaries as per our OM No.28/10/84-Pension Unit dated the 29th August, 1984 referred to above.

3. Central Government employees who have rendered service in the Nationalised Banks as well as other financial Institutions including Life Insurance Corporation of India/General Insurance Corporation. Prior to their appointment in the Central Government are also not entitled to count such service for the pensionary benefit 'under' the Central Government. They are, however, free to seek terminal benefits as admissible under the relevant rules from the concerned Nationalised Banks and such other institutions in which they had rendered service before being appointed in the Central Government.

4. Ministry of Defence, etc. are requested to clarify this position to all concerned authorities under their administrative control. The past cases decided otherwise than the procedure clarified above may be reviewed in case the concerned employees are still in service.

5. In so far as persons serving in the Indian Audit and Accounts Department are concerned, these orders are issued after consultation with the Comptroller and Auditor General of India.

Sd/-

(S.C. BATRA)

DY. SECRETARY TO THE GOVT. OF INDIA"

55. Since on the issue of pro-rata pension benefits, decision is to be taken by the parent organisation, the learned Single Judge is justified in giving such a direction. Since no decision has been taken in this regard, we issue a Mandamus to Ministry of Commerce, Government of India to decide the representation within a period of four weeks from the date of this order, after taking note of our observations noted above. The Appellant would have his independent remedy to challenge this decision, in case the same is adverse to him.

56. Mr. P.C. Sekhar pointed out that, in Appeal No. LPA 657/2015, his name has been wrongly spelt as 'P.C. Shekhar' instead of 'P.C. Sekhar'. The necessary correction be made in the cause list.

57. The LPA no. 656/2015 is allowed in the above terms with costs of Rs. 25,000/-.

58. LPA no. 657/2015 is dismissed.

SANJEEV NARULA, J

S. MURALIDHAR, J

JANUARY 18, 2019/ss