

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side**

Present :- Hon'ble Justice Amrita Sinha

WPA No. 14280 of 2015

Shri Srikumar Chattopadhyay

Vs.

The State of West Bengal & Ors.

For the writ petitioner	:-	Mr. Amalesh Ray. Adv. Ms. Mousumi Bhowal, Adv.
For WBSETCL	:-	Mr. L.K. Gupta, Sr. Adv. Mr. B. Mitra, Adv. Mr. R. M. Chattopadhyay, Adv.
Hearing concluded on	:-	04-02-2021
Judgment on	:-	12-03-2021

Amrita Sinha, J.:-

The petitioner is aggrieved by the Office Order nos. 205/2015 dated 28th April, 2015 and 264/2015 dated 27th May, 2015, both issued by the Director (HR), West Bengal State Electricity Transmission Company Limited, herein after referred to as 'WBSETCL' for the sake of brevity.

The petitioner is also aggrieved by the communication dated 2nd January, 2015 whereby the scale of pay of the petitioner has been re-fixed and revised.

The brief facts of the case are as follows:

The petitioner was serving as Company Secretary in the West Bengal State Seed Corporation Limited, herein after referred to as 'WBSSCL' for the sake of brevity. He was paid in the unrevised scale of pay and he was a member of the Contributory Provident Fund. His unrevised scale of pay was Rs.10,000/- to Rs.15,525/-.

An advertisement was published in the daily newspaper on 22nd May, 2007 inviting applications from Indian nationals for filling up the post of Company Secretary in the unrevised scale of pay of Rs.16,400/- to Rs. 20,450/- only and other admissible allowances of the WBSETCL. The said advertisement clearly mentioned that candidates working with government/semi-government public sector undertakings should send their applications through proper channel or otherwise submit 'no objection certificate' from their employer at the time of interview.

The petitioner expressed his intention to join WBSETCL. A no objection certificate was issued in his favour by his erstwhile employer WBSSCL. The petitioner was requested to attend the interview and on being successful he was appointed in the post of Company Secretary under the regular establishment of WBSETCL in the scale of pay of Rs.16,400/- to Rs. 20,450/- with initial grade pay of Rs.16,400/-.

The petitioner was released from the service of WBSSCL on 1st October, 2007 and on the self-same date he joined the office of WBSETCL.

The petitioner retired from service upon attaining his normal age of superannuation on 30th April, 2014.

The petitioner's grievance is that his retiral dues were not paid in accordance with the West Bengal State Electricity Board Employees' (Death-cum-Retirement Benefits) Regulations, 1985 hereinafter referred to as the DCRB Regulations, 1985 introduced on 4th May, 1985.

By notification No. 315-PO/O/C-IV/2E-01/2007 dated 2nd June, 2008 published in the Kolkata Gazette, Extraordinary on 14th July, 2008 it was notified that the Governor was pleased to approve the provisions of the DCRB Regulations, 1985 to apply *mutatis mutandis* to the employees and pensioners (including family pensioners) of WBSETCL for pension including family pension and gratuity benefits. The benefits shall apply to the employees, who have joined WBSETCL on or after 4th May, 1985 and to those who have exercised option for such benefits with retrospective effect from 1st April, 1981.

The petitioner applied for coming under the purview of Rule 7(1) of DCRB Regulations, 1985. In the aforesaid application the petitioner specifically mentioned his date of joining in WBSETCL and the date of release from his ex-employer WBSSCL. The period of service rendered by him under his ex-employer in regular establishment before his absorption in the WBSETCL was also clearly mentioned. The petitioner requested for counting his previous service rendered under his ex-employer as qualifying period for grant of pensionary benefits.

By a communication dated 4th November, 2008 the petitioner was intimated by the Director (HR), WBSETCL that his past service under WBSSCL for the period 25th January, 1999 to 30th September, 2007 followed by absorption in regular establishment in WBSETCL with effect

from 1st October, 2007 will be counted as qualifying service period towards pensionary benefits under Regulation 7(i) of DCRB Regulations, 1985, since adopted by WBSETCL, however, subject to deposition of terminal benefits; i.e. employer's share of CPF contribution and gratuity from the previous employer together with interest thereon, at the rate of 6% p.a. from the date of receipt of such terminal benefits by him to the date preceding the date of deposit of the same, within two weeks from the date of issue of the order or within two weeks from the date of receipt of payment of such terminal benefits by the incumbent.

In accordance with the aforesaid communication the petitioner deposited the terminal benefits, that is, the gratuity and the employer's share of Provident Fund along with interest on 2nd December, 2008.

On receipt of the aforesaid amount the General Manager (F&A) by a communication dated 14th February, 2009 intimated the Director (HR), WBSETCL that in pursuance of the Office Orders the past service rendered by the petitioner under WBSSCL will be counted as qualifying service towards pensionary benefits under Regulation 7(i) of DCRB Regulations, 1985, since adopted by WBSETCL.

The Director (HR), WBSETCL by an Office Order no. 162/2011 dated 16th March, 2011 ordered that the past service of the petitioner be allowed to be reckoned as qualifying service towards pensionary benefits under DCRB Regulations, 1985 as well as balance of earned leave of 216 days lying in the credit on 30th September, 2007 recorded in the service book of the petitioner as on 1st October, 2007. The said Office Order was issued with approval of the Chairman of WBSETCL.

By the impugned communication dated 2nd January, 2015 the General Manager (HR&A)/(Offtg.) intimated the petitioner that his pension in terms of DCRB Regulation, 1985 shall be released considering the revised initial pay in terms of Revision of Pay and Allowances Rules, 2009, herein after referred to as 'ROPA, 2009' for the sake of brevity.

By the impugned Office Order no. 205/2015 dated 28th April, 2015 the Director (HR), WBSETCL intimated the petitioner that his initial revised basic pay as on the date of joining WBSETCL in terms of Revision of Pay and Allowances Rules, 2009 shall be Rs.37,400/- in the pay band of Rs.37,400/-to 67,000/- with grade pay of Rs.8,900 being the corresponding pay to the unrevised initial basic pay of Rs.16,400/-. It was further intimated that there will be waiver on recovery of Rs.8,09,440/- on account of excess payment of salary and leave encashment made to him. Payment of gratuity will be made in terms of DCRB Regulations, 1985 after revision of pay fixation. He will be eligible for payment of retirement benefits pertaining to his service in WBSETCL in terms of Contributory Provident Fund only based on the assessment of the actuary, taking into account the benefit of indexation from his date of joining in WBSETCL, as his ex-employer WBSSCL has provided the pro rata share of CPF and also in view of the fact that he had not completed the qualifying service in the Company for being eligible for pension under DCRB Regulations, 1985. The said order was issued in partial modification of the earlier Office Order no. 162/2011 dated 16th March, 2011.

By a further Office Order no. 264/2015 dated 27th May, 2015 it was resolved that the payment of gratuity to the petitioner shall be made in terms of the provisions of the Payment of Gratuity Act, 1972 after revision of pay fixation in terms of Office Order no. 205/2015 dated 28th April, 2015.

The petitioner is aggrieved by the issuance of the aforesaid two Office Orders.

By the aforesaid Office Order the petitioner was paid a sum of Rs.4,46,815.38/- on account of gratuity under the Payment of Gratuity Act, 1972. The petitioner accepted the aforesaid payment with objection.

The primary contention of the petitioner is that he is eligible to receive his retiral benefits, including pension and gratuity, in terms of DCRB Regulations, 1985.

The petitioner is also aggrieved by the fixation of his pay which was made by the impugned Office Order dated 28th April, 2015.

The reason attributed for not granting the retirement benefits to the petitioner in terms of the DCRB Regulations, 1985 is that he had not completed ten years qualifying service in the Company for being eligible for pension under the said Regulations. Admittedly, the petitioner joined service in WBSETCL on 1st October, 2007 and he retired from service on 30th April, 2014. According to the petitioner the period of service that he rendered in WBSSCL ought to have been taken into consideration for the purpose of calculating his duration of service.

In support of his aforesaid submission the petitioner has relied upon Regulation 7(1) of the DCRB Regulations, 1985 wherein there is a provision for counting the previous continuous service rendered by an employee in a post in regular establishment under State Government/autonomous body/statutory body/undertaking etc. The petitioner submits that as he was serving in a Company of the Government of West Bengal for the period 25th January, 1999 to 30th September, 2007 and he joined WBSETCL on 1st October, 2007 without any break and served in the said Company till his retirement on 30th April, 2014, accordingly his entire service period starting from his date of initial appointment in WBSSCL i.e., 25th January, 1999 till his date of retirement on 30th April, 2014 ought to be taken into consideration for the purpose of calculating his qualifying period of service.

He further submits that if he comes within the purview of the DCRB Regulations, 1985 then he will automatically be entitled to receive the gratuity in terms of the said Regulation and not in terms of the provisions of the Payment of Gratuity Act, 1972.

The further contention of the petitioner is that he is entitled to the benefits of ROPA, 2009 applicable in respect of the employees of WBSETCL. Stress has been laid on the applicability clause of ROPA, 2009 wherein it has been mentioned that every employee of the Company shall be entitled to fixation of pay in the corresponding revised scale of pay as per Schedule-I with effect from 1st April, 2007 or if he enters the Company's service on or after 1st April, 2007, from the date of his joining the Company. In the instant case, the petitioner joined the

service of the Company on 1st October, 2007 and accordingly he claims to be covered under the provisions of ROPA, 2009.

By an Office Order dated 25th February, 2009 WBSETCL enunciated and published the WBSETCL Revision of Pay and Allowances Rule, 2009, effective from 1st April, 2007.

In Rule 5(ii) of ROPA, 2009 'existing scale' in relation to all employees is defined as, the present scale applicable to the post held by the employee as on 1st May, 2007 or as on the date of joining, whichever is later.

The criteria for fixation of initial pay in the revised pay structure have also been clearly mentioned in ROPA, 2009. It mentions that the initial pay of an employee, to be governed by the revised pay structure, shall be fixed on and from 1st April, 2007 or from the date of joining, whichever is later. New recruits will be allowed pay at the initial of the concerned pay band with respective grade pay.

Rule 7 of ROPA, 2009 deals with fixation of pay. It mentions that where the pay of an employee drawing pay at two or more consecutive stages in the existing scale gets bunched in the revised pay structure at the same stage in the pay band, then, for every two stages so bunched, benefit of one increment shall be given so as to avoid bunching of more than two stages in the revised running pay band. The petitioner submits that in view of his revision of pay his scale got bunched and as such he is entitled to extra increment for protection of pay and he ought to get the benefit of fitment in accordance with the fitment table applied uniformly in WBSETCL.

Rule 35 of ROPA, 2009 specifically mentions that employees retiring on or after 1st April, 2009 will be allowed payment of gratuity up to a maximum sum of Rs. 3,50,000/-. It has however been submitted in Court that presently the maximum limit of gratuity has since been enhanced from Rs.3,50,000/- to Rs.10,00,000/- only.

The petitioner refers and relies upon a Circular of WBSEDCL being Memo No. WBSEDCL/BC/Rev.P&A-2009/51/139(35) dated 26th February, 2009 issued by the Director (HR) WBSEDCL wherein Rule 22 of ROPA, 2009 has been clarified. It has been clearly mentioned therein that Contributory Provident Fund Scheme will be applicable to all future recruits after the issue of the Office Order dated 16th February, 2009.

The petitioner prays for re-fixation of his salary in terms of ROPA, 2009 with the fitment benefit and for payment of his pension and gratuity in terms of DCRB Regulations, 1985.

The petitioner relies upon the following decisions in support of his prayers:-

On the proposition that the expression “issuance of the order” and the phrase “giving effect to the rules” have to be read in plain and unambiguous manner the petitioner relied upon

1) ***Union of India & Anr. –vs- Hansoli Devi & Ors.; (2002) 7 SCC 273*** paragraph 9 wherein the Court was of the opinion that it is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be upon to the courts to

adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

2) ***Ansal Properties and Industries Limited –vs- State of Haryana & Anr. ; (2009) 3 SCC 553*** paragraph 39 wherein the Court held that it is well settled principle of law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is the determinative factor of legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute.

To counter the plea of legal fiction adopted by the respondents, the petitioner relies upon:

3) ***Gajraj Singh & Ors. –vs- State Transport Appellate Tribunal & Ors.; (1997) 1 SCC 650*** paragraph 22 where the court held that legal fiction is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect being that a position which otherwise would not obtain is deemed to obtain under the circumstances. In case of legal fiction the Court believes something to exist, which in reality does not exist. It is the presumption of the existence of the state of affairs which in actuality is non-existent.

4) ***Nandkishore Ganesh Joshi –vs- Commissioner, Municipal Corporation of Kalyan and Dombivali & Ors.; (2004) 11 SCC 417*** paragraph 19 wherein the court held that a legal fiction created cannot be given effect to in vacuum. It is to be applied having

regard to the legislative intent and a restricted meaning is to be attributed thereto.

5) The petitioner relies upon the decision delivered by the Full Bench of the Hon'ble Punjab and Haryana High Court in the matter of ***Kartar Singh & Ors. -vs- State of Punjab & Ors.*** reported in **1989 (2) ILR 252** paragraph 40 to emphasise the issue of absorption, wherein the court held that on absorption an employee becomes part and parcel of the department absorbing him and per-takes the same colour and character of the existing employees of the department. According to the petitioner as he was absorbed in the service of WBSETCL accordingly he is entitled to get all the benefits which the other similarly placed employees of WBSETCL are entitled to.

On the issue of purposive construction the petitioner relied upon:

6) ***Andhra Bank -vs- B. Satyanarayana & Ors.; (2004) 2 SCC 657*** paragraph 14 wherein the court held that a machinery provision, must be construed in such a manner so as to make it workable having regard to the doctrine '*ut res magis valeat quam pereat*'.

7) ***A.N. Sachdeva (dead) by legal representatives & Ors. - vs- Maharshi Dayanand University, Rohtak & Anr. ; (2015) 10 SCC 117*** paragraphs 1, 10, 11, 14, 15, 30 and 32 wherein the court held that considering the principles enunciated under Articles 14 and 16 of the Constitution and that the benefit is not an ex gratia payment but a payment in recognition of past service, discrimination could not have been made between those employees who have been absorbed/allocated and are entitled to count their services as qualifying service for the

purpose of pension and not those who have been appointed directly. The court was of the opinion that the appellants were entitled for the benefit of counting the services rendered in Punjab University/Kurukshetra University as qualifying service for the purpose of pension and in case the amount payable towards Contributory Provident Fund is less than the amount payable as pension, it would be adjusted by the respondent without insisting for its refund from the amount payable to the appellants.

On the issue of counting of past service for the purpose of pensionary benefit the petitioner relied upon:

8) ***P. Ramakrishnam Raju –vs- Union of India & Ors.;***
(2014) 12 SCC 1 paragraphs 19, 21, 22 and 23

9) ***State of West Bengal –vs- Haresh C. Banerjee & Ors. ;***
(2006) 7 SCC 651 paragraph 4 wherein the court held that pension is not a bounty payable on the sweet will and the pleasure of the government. To receive pension is a valuable right of a government servant.

8) ***Pepsu Road Transport Corporation Patiala –vs- Mangal Singh & Ors.;*** ***(2011) 11 SCC 702*** paragraph 49 wherein the court held that pension is earned for rendering long and satisfactory service. It is in the nature of deferred payment for the past service. It is a social security plan consistent with the socio-economic requirement of the Constitution when the employer is State within the meaning of Article 12 of the Constitution, rendering social justice to a superannuated

government servant. It is a right attached to the office and it cannot be arbitrarily denied.

On the issue that the right to receive pension is recognized as a right in “property”, the petitioner relied upon:

9) ***State of Jharkhand & Ors. -vs- Jitendra Kumar Srivastava & Anr. (2013) 12 SCC 210*** paragraphs 16 and 17 and

10) ***State of Himachal Pradesh & Ors. -vs- Rajesh Chander Sood & Ors. (2016) 10 SCC 77*** paragraphs 70, 80 and 95.

11) ***High Court Employees’ Welfare Association, Calcutta & Ors. -vs- State of West Bengal & Ors.; (2007) 3 SCC 637*** paragraph 26 wherein the court held that a revision of pay scale has to be followed by fitment in the revised pay scale, in the case of employees who have received pay under the old pay scales.

The respondents oppose the prayers of the petitioner.

It has been submitted that as the petitioner did not render qualifying service of ten years in WBSETCL he will not be entitled to receive his retirement benefits in terms of DCRB Regulations, 1985. It has further been submitted that the petitioner is entitled to receive gratuity in terms of Section 14 of the Payment of Gratuity Act, 1972 and not otherwise.

Reliance has been placed on Regulation 7 of the aforesaid Regulations. Rule 22 of ROPA, 2009 has also been relied upon, wherein it has been mentioned that the existing system of maintaining pension fund for those who opted for pension scheme under DCRB Regulations,

1985 will continue. In case of future recruits after issuance of the order, Contributory Provident Fund Scheme will be made applicable. An option for transfer from existing pension scheme under DCRB Regulations, 1985 to Contributory Provident Fund Scheme will be invited from the employees of the Company after examining all legal issues and on obtaining permission from statutory authorities, if required.

It has been submitted that the “existing system” indicated in Rule 22 of ROPA, 2009 relates to the employees who were in service prior to 1st April, 2007 i.e., the date from which ROPA was made effective. The expression “future recruits”, “after issuance of the order” implies the employees who joined the Company after 1st April, 2007. As the petitioner joined service in the Company on 1st October, 2007 the petitioner will fall under the category of future recruits and will be covered by the Contributory Provident Fund Scheme.

It has been contended that though ROPA, 2009 was enunciated on 25th February, 2009 and the petitioner was appointed prior to the said date, even then, in view of the fact that ROPA, 2009 was made applicable with retrospective effect from 1st April, 2007, accordingly the petitioner will not get the benefit of obtaining his retirement benefits in accordance with the DCRB Regulations, 1985 but will come under purview of the Contributory Provident Fund Scheme.

According to the respondents a legal fiction has been created in ROPA, 2009. As retrospective effect has been given from 1st April, 2007 the expression after ‘issuance of the order’ will relate back to the said date and not when ROPA, 2009 was published, unless of course, it is

specifically mentioned that the same will be applicable on and from the date of its publication.

The respondents have relied upon the judgment delivered by the Hon'ble Supreme Court in the matter of ***Ashok Leyland Ltd. -vs- State of Tamil Nadu and Anr.; 2004(1) SCR 306*** on the issue of legal fiction.

The respondents pray for dismissal of the writ petition.

I have heard and considered the submissions made on behalf of both the parties.

The petitioner claims that he is entitled to receive his retirement dues including pension and gratuity in terms of the DCRB Regulations, 1985. The DCRB Regulations, 1985 was applicable to all the employees of the West Bengal State Electricity Board with effect from 1st April, 1981. A scheme was introduced by the West Bengal State Electricity Board and was approved by the Finance Department, Government of West Bengal whereby the employees, irrespective of their date of appointment, were required to exercise option, in writing, in a prescribed form, within a period of six months, either for pension including family pension cum gratuity or for Contributory Provident fund cum gratuity. Option once exercised was final.

The service qualifying for pension as enumerated in Regulation 7B of the DCRB Regulations, 1985 mentions that temporary whole time employees rendering service for ten years or more will be granted

pension and gratuity as admissible to permanent employees under the Regulations.

Regulation 7(1) lays down that for the purpose of the Regulations, previous continuous service rendered by an employee in a post in regular establishment under State followed with or without break by absorption in a post in regular establishment in the Board shall be treated as qualifying service subject to fulfilment of certain conditions.

Regulation 7(i) mentions that previous employment will be counted for pensionary benefit only when the incumbent concerned apply through proper channel and with permission from the Competent Authority of the previous employer.

Regulation 7(ii) mentions that the pensionary liability shall be shared on service share basis between the ex-employer and the Board, i.e., the liability shall be shared on the basis of length of qualifying service rendered under each of the employers (the ex-employer and the Board).

Regulation 7(iii) mentions that the liability of the ex-employer shall have to be shared in the manner as prescribed.

Regulation 7(iii)(a) mentions that where the ex-employer is governed by Contributory Provident Fund/Gratuity scheme, the amount of the employer's share of CPF contribution (together with interest accrued thereon up to the date of eventual deposit to the Board) and gratuity, becoming due payable to the concerned employee in accordance with the Rules in force of the ex-employer by virtue of the

qualifying service for the purpose rendered there, shall have to be deposited by the ex-employer to the Board provided, however, that where the due amounts as mentioned herein above have already been paid to the concerned employee by the ex-employer, the related amounts shall have to be refunded by the employee to the Board, together with simple interest at the rate of 6% p.a., calculated from the date of receipt of the same, up to the end of the month preceding the same in which the amount is deposited with the Board.

Regulation 7(1)(iv) mentions that the Regulations shall apply to (d) those who will join the service under the Board from time to time hereafter, provided, however, that the employees shall have to exercise option in order to avail themselves of the benefit awarded under the said regulation at their convenient time but before the respective date of retirement. Option once exercised shall be final.

Note – 1(b) appended to Regulation 7 of the DCRB Regulations, 1985 mentions that pensionary liability as referred to in sub-regulation iii(b) shall be borne by the ex-employer for a period till absorption in Board's service and the same be deposited with the Board in due course.

Note – 2 of Regulation 7 mentions that in all cases covered by these Regulations the pensionary liability shall have to be borne by the concerned ex-employer in accordance with the rules in force there. The benefit may, however, be allowed where the ex-employer is unwilling to pay or is not in a position to pay up the dues in this regard, provided that pensionary contribution for the period of service in question is paid by the employee concerned.

The DCRB Regulations, 1985 further lays down that in addition to pension an employee shall also be entitled to retiring gratuity.

The Government of West Bengal published the Notification no. 315-PO/O/C-IV/2E-01/2007 dated 2nd June, 2008 in the Kolkata Gazette, Extraordinary on 14th July, 2008 notifying that the Governor has been pleased to accord approval to the provisions of the DCRB Regulations, 1985 which shall apply *mutatis mutandis* to the employees and pensioners of WBSETCL for pension including family pension and gratuity benefits.

WBSETCL by Office Order no. 28/2009 dated 25th February, 2009 published the revision of pay and allowances of employees of WBSETCL. The aforesaid ROPA, 2009 was deemed to have come into force on 1st April, 2007, unless otherwise specifically provided under the rules. The said ROPA was applicable to all the employees of the WBSETCL with effect from 1st April, 2007 or from the date of joining the Company.

The petitioner was serving WBSSCL since 29th January, 1999. Pursuant to an advertisement published by WBSETCL inviting applications for appointment in the post of Company Secretary the petitioner applied and was selected. The required 'no objection certificate' was submitted by the petitioner prior to his appointment. A formal letter of appointment was issued in favour of the petitioner by WBSETCL on 25th August, 2007 wherein the terms and conditions of his service was clearly enumerated. It mentioned that the appointment shall be governed by the prevailing practice and policy of the Company in

force or put in force from time to time and by the provisions of the WBSEB Employees' Service Regulations as adopted by WBSETCL.

The petitioner accepted the terms and conditions as mentioned in his letter of appointment and he joined the service of WBSETCL on 1st October, 2007. Immediately upon joining service in WBSETCL the petitioner clearly informed the Company that he was a member of the Employees' Provident Fund Scheme under his previous employer and he intended to continue with his membership under the said Scheme. By a further communication dated 12th March, 2008 the petitioner intimated the Director that though he had opted for continuing with the Provident Fund Scheme but he has been made to understand that the same was not possible without modification as the Employees' DCRB Regulations, 1985 of the Company was being applied to the employees of the Company. The petitioner accordingly exercised his option for being covered by the DCRB Regulations, 1985.

The petitioner thereafter made a formal application, as required, in the specified format for availing the benefit under the DCRB Regulations, 1985 for the purpose of calculating his previous service rendered under WBSSCL as qualifying period of service for the purpose of pensionary benefits. The petitioner worked for a total period of eight years, eight months and five days with WBSSCL. The said form for counting of previous service rendered under the ex-employer was countersigned by the Managing Director of WBSSCL.

WBSETCL accepted the prayer of the petitioner and by an Office Order dated 4th November, 2008 issued by the Director (HR) ordered

that the past service of the petitioner for the period 25th January, 1999 to 30th September, 2007 followed by absorption in regular establishment in WBSETCL with effect from 1st October, 2007 will be counted as qualifying service period towards his pensionary benefits under Regulation 7(i) of DCRB Regulations, 1985 since adopted by WBSETCL, subject to deposition of terminal benefits i.e., employer's share of CPF contribution and gratuity from the previous employer together with interest at the rate of 6% p.a. from the date of receipt of such terminal benefits to the date preceding the date of deposit.

The petitioner in terms of the aforesaid Office Order deposited the terminal benefits received by him on account of CPF contribution and gratuity from his ex-employer amounting to Rs.3,63,348/- only.

On receipt of the aforesaid amount the General Manager (F & A) intimated the Director (HR), WBSETCL that the past service of the petitioner shall be counted towards the pensionary benefits under Regulation 7(1) of the DCRB Regulations, 1985 since adopted by WBSETCL.

Office Order no. 162/2011 dated 16th March, 2011 of the Director (HR) mentions that the past service rendered by the petitioner will be allowed to be reckoned as qualifying service towards the pensionary benefits under DCRB Regulations, 1985 as well as the balance of earned leave of 216 days lying in his credit on 30th September, 2007 (last date of service in WBSSCL) be recorded in the service book of the petitioner. It was mentioned that the said Order had the approval of the Chairman of the Company.

The petitioner retired from service on attaining his normal age of superannuation on 30th April, 2014. After eight months of his retirement the General Manager (HR & A/Offtg.) by a communication dated 2nd January, 2015 sought to re-fix the pay scale of the petitioner. By a further Office Order no. 205/2015 dated 28th April, 2015 the Director (HR) intimates the petitioner that in view of detection of discrepancies in the pay fixation of the petitioner on account of ROPA, 2009 a proposal for settlement of outstanding dues was placed before the Board of Directors and the Board of Directors in the meeting held on 2nd April, 2015 after due consideration in line with the opinion dated 23rd March, 2015 of the Additional Chief Secretary, Department of Power and NES, Government of West Bengal has accorded approval for settlement of his outstanding dues in the manner as indicated in the said Office Order.

The initial revised basic pay of the petitioner has been revised. It was ordered that the gratuity would be paid to him in terms of the DCRB Regulations, 1985 after revision of pay fixation and it was further ordered that the petitioner would be eligible for payment of retirement benefits in terms of the CPF only based on assessment of the actuary taking into account the benefit indexation as his ex-employer provided the pro rata share of CPF only and also because the petitioner did not complete the qualifying service in the Company for being eligible for pension under the DCRB Regulations, 1985. It was mentioned that the said Office Order was issued in partial modification of the earlier Office Order no. 162/2011 dated 16th March, 2011.

By a further Office Order no. 264/2015 dated 27th May, 2015 it was ordered that the payment of gratuity to the petitioner shall be made

in terms of the provisions of the Payment of Gratuity Act, 1972 after revision of his pay fixation. The petitioner being aggrieved filed the instant writ petition.

A plain reading of the Office Orders and the communications made between the parties reveals that when the petitioner joined service of WBSETCL way back in the year 2007 the terms and conditions of his appointment were different. From the date of joining in the Company on 1st October, 2007 till his date of retirement on 30th April, 2014 the petitioner knew and was made to understand that he would be covered and he would come within the purview of the DCRB Regulations, 1985. The communications and the Office Orders made prior to the date of retirement univocally make it clear that the petitioner was covered by the provisions of the DCRB Regulations, 1985. The same implies that the petitioner would be entitled to receive his gratuity and pension in terms of the said Regulations. The Office Orders and the communicating letters of the Company in no uncertain terms make it clear that the past service of the petitioner has been taken into account for the purpose of calculation of his terminal benefits.

All on a sudden, eight months after the petitioner retired from service, he is being intimated that his past service will not be counted for the purpose of assessment of his terminal dues. More than a year after his retirement he is being intimated that he will not be entitled to receive gratuity in terms of the DCRB Regulations, 1985 but would receive the same in terms of the provisions of the Payment of Gratuity Act, 1972. The Office Order dated 28th April, 2015 mentions that there

has been partial modification of the earlier Office Order dated 16th March, 2011.

On careful reading it appears that there is a sea of change in between the Office Orders dated 16th March, 2011 and 28th April, 2015 read with Office Order dated 27th May, 2015. The same cannot be termed as a 'partial modification'. When the petitioner joined the Company he was made aware of the terms and conditions of his service. The same cannot be changed unilaterally, without any notice, long after his retirement from service, after putting in more than eight years and eight months of service in the Company.

The Company has a dedicated cell to look into HR and remuneration of the employees of the Company headed by a Director. The Company in its Board Meeting held on 28th June, 2008 resolved that till formation of HRD and Remuneration Committee separately for WBSETCL, recommendation of HRD and Remuneration Committee of WBSETCL, when implemented, on policies relating to HR matters and remuneration in respect of WBSEDCL employees, will be extended, wherever applicable, *mutatis mutandis*, to the regular employees including functional directors of WBSETCL with approval of Chairman of the Company.

In the instant case the Director (HR) by Office Order no. 162/2011 dated 16th March, 2011 ordered that the past service of the petitioner will be allowed to be reckoned as qualifying service towards pensionary benefits under the DCRB Regulations, 1985 and the same had the approval of the Chairman of the Company. When a decision is

taken at the highest level of the Company the same ought not to be changed by the successor in interest, without a just and valid reason, long after the employee retired from service.

The respondents have submitted that the said Office Order was issued wrongly. It cannot be accepted that such a wrong decision was taken by the officers at the highest echelons of the Company. That too, the error is detected long after the petitioner retired from service. It seems that the successor in office, in the year 2015, has simply undone the work which was done by the predecessor in office, in the year 2011. The same can never be a mistake of only one officer. Several officers were involved, starting from the Cash Officer, General Manager (F & A), General Manager (HR & A), Director (HR) and right up to the Chairman. The Office Order No. 162/2011 was issued by the Director (HR) wherein it was clearly mentioned that the same had the approval of the Chairman.

The respondents at such a late stage have fallen back on legal fiction to justify the decision passed in the subsequent Office Order in the year 2015. The respondents have strenuously tried to convince the Court that ROPA, 2009 though published on 25th February, 2009, was given retrospective effect from 1st April, 2007. As the petitioner joined service on 1st October, 2007 accordingly the petitioner will not be entitled to the benefit of receiving pension. The petitioner will be entitled to receive provident fund in terms of Rule 22 of the ROPA, 2009. Stress has been laid on Rule 22 of ROPA, 2009 wherein it has been mentioned that in case of future recruits, after issuance of the order, Contributory Provident Fund Scheme will be made applicable. It has been submitted

that the date of issuance of the order has to be taken as 1st April, 2007 and not 25th February, 2009 as ROPA has been made effect from 1st April, 2007.

For better appreciation of the case, Rule 22 of ROPA, 2009 is extracted herein below:

Rule 22. PROVIDENT FUND: Existing system of maintaining pension fund for those who opted for pension scheme under WBSEB Death Cum Retirement Benefit (DCRB) Regulations, 1985 will continue. In case of future recruits, after issuance of the order, Contributory Provident Fund Scheme will be made applicable. An option for transfer from existing pension scheme under DCRB Regulations, 1985 to Contributory Provident Fund Scheme will be invited from the employees of the Company after examining all legal issues and on obtaining permission from statutory authorities, if required.

The 'existing system' has been defined in the aforesaid Rule as, the system which was existing on the date the ROPA was published i.e. on 25th February, 2009. Admittedly, the petitioner had opted for coming within the purview of DCRB Regulations, 1985 prior to the publication of ROPA, 2009. The petitioner filed the application under Regulation 7(1) of DCRB Regulations, 1985 in April, 2008. The Office Order dated 4th November, 2008 followed by a communication of the General Manager (F & A) dated 14th February, 2009 clearly mentioned that the past service rendered by the petitioner shall be taken into consideration for the purpose of calculating his pensionary benefits in terms of the Regulation 7(i) of DCRB Regulations, 1985.

'In case of future recruits, after issuance of the order' in my opinion, means any recruitment after the publication of ROPA, 2009 on 25th February, 2009. The term 'future' and 'after issuance' read conjunctively implies prospective conduct. The same certainly does not relate back to 1st April, 2007. Had that been so, then the Rule would have mentioned that in case of recruits on and after the date of coming into effect of ROPA, 2009, CPF scheme will be applicable, but it is not so. Instead it mentions that in case of future recruits, after issuance of the order, Contributory Provident Fund Scheme will be made applicable.

The Rule goes on to mention that an option for transfer would be invited from employees after examining all legal issues and on obtaining permission from the statutory authorities. No document has been put forth to show that the option for transfer of option was invited from the petitioner. In fact, there was no scope for inviting option as the petitioner was all along considered to have come within the purview of the DCRB Regulations, 1985. It is only after the petitioner retired from service, the impugned Office Order has been passed unilaterally transferring the petitioner from the DCRB Regulations, 1985 to the Contributory Provident Fund Scheme. It does not appear that any permission from any statutory authority was sought prior to unilateral transfer of the petitioner from the pension scheme to the Provident Fund Scheme. The legal issues relating to such transfer was also not taken into consideration by the Company.

The fact that the petitioner was covered under the CPF Scheme prior to joining the Company and expressed his intention to continue in the said scheme after joining WBSETCL was overlooked at the time of

passing the impugned Office Orders. It is only after the Company did not permit the petitioner to continue with the CPF scheme was he directed to deposit the terminal benefits i.e., employer's share of CPF contribution and gratuity from the previous employer together with interest at the rate of 6% p.a. from the date of receipt of such terminal benefits to the date preceding the date of deposit, which he did, to come under the purview of the DCRB Regulations, 1985. It is too late in the day to retract from the same and forcefully impose the CPF scheme upon him.

Moreover, when the petitioner as per the direction of the Company exercised his option to come under the purview of the DCRB Regulations, 1985 and the same was accepted by the Company by issuing a formal Office Order, the same takes the flavour of a contract, there being an offer by the employee and acceptance thereof by the employer. The contract thereafter could not be unilaterally altered/modified/changed.

The circular dated 26th February, 2009 sets the issue at rest. Rule 22 has been clarified and it has been specifically mentioned that CPF scheme will be applicable to future recruits after 16th February, 2009. There is hardly any fiction in the said Rule.

Applying the ratio laid down by the Hon'ble Supreme Court in the matter of Hansoli Devi (supra) and Ansal Properties (supra) no other interpretation of the above expressions can be accepted.

This is not a case of rectification of erroneous fixation of pay but is a clear case of re-fixation of pay long after retirement. The same will not

be permissible as the petitioner has acted in terms of the conditions laid down in the DCRB Regulations, 1985 and have deposited the entire CPF money along with interest from his previous employer with the present employer and being satisfied the Company accepted the petitioner to be covered under the DCRB Regulations, 1985. The previous service period was also taken to be counted for the purpose of calculation of pensionary benefit. After retirement of the employee the Company ought not to show a volte face and refuse the benefits which the petitioner is entitled to as per law. The Company is estopped from taking an absolute contrary stand as the petitioner has accepted and acted in terms of the directions put forth by the Company to come under the DCRB Regulations, 1985. If the same is permitted, then the employer will get a chance to alter or vary the service condition(s) after retirement, to the disadvantage of the employee. After the end of the service career the employee will feel cheated, as during the service tenure the employee was made to understand that he was covered under a particular scheme and will be entitled to certain benefits, but after retirement he is informed that he would not be entitled to the benefit as promised, but would be guided by some other scheme. The subsequent scheme may not be as per the choice of the employee. It is akin to changing the rules of the game after the game is over.

The expression 'rectification of erroneous fixation of pay' used by the Company may be limited to correction of minor arithmetical mistakes, but in the garb of rectification, the formula adopted for making the said calculation cannot be changed. The same amounts to 're-fixation' and not 'rectification'.

Accordingly, the decision of the Company to pay gratuity to the petitioner in terms of the Payment of Gratuity Act, 1972 and for payment of Contributory Provident Fund to the petitioner cannot be accepted by the Court. The impugned Office Orders are accordingly set aside.

The respondent authorities are directed to release the terminal benefits including pension and gratuity of the petitioner in accordance with the DCRB Regulations, 1985 after fixation of his pay within a period of eight weeks from the date of communication of a copy of this order. As the petitioner was entitled to receive his terminal benefits immediately after his retirement from service in the year 2014 but the same has been illegally and arbitrarily held up by the respondent authorities, accordingly the petitioner will be entitled to receive his dues along with simple interest at the rate of 6% p.a. calculated on and from 1st May, 2014 till the date of actual payment. In the event the dues of the petitioner are not cleared within the time as specified herein above, the respondent authorities shall pay additional interest @ 2% p.a. (6%+2%) on and from 1st May, 2014 till the date of actual payment.

As regards the revision of basic pay of the petitioner the concerned respondent authority shall calculate and fix the same after giving the fitment benefit, which the petitioner is entitled to, in terms of the fitment table framed by WBSEDCL applicable to the employees of WBSETCL, within the time as specified herein above. An opportunity of hearing shall be provided to the petitioner at the time of fixation of his scale of pay.

WPA 14280 of 2015 is disposed of.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)

Later:

The prayer for stay made by the respondents is considered and in view of the fact that the matter relates to non-payment of retiral dues of a retired employee the same is rejected, more so because enough time has been granted for compliance of the order.

(Amrita Sinha, J.)