

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: November 08, 2021

+ W.P.(C) 3430/2021, CM No. 30961/2021

AVINASH SHARMA

..... Petitioner

Through: Mr. Amit Sahni, Ms. Indira Goswami,
Mr. Parth Sharma and Ms. Sonali
Tiwary, Advs.

versus

TATA POWER DELHI DISTRIBUTION LTD

..... Respondent

Through: Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Sujit Kumar Singh, Adv. R1
Mr. Sumeet Pushkarna and
Mr. Devanshu Lahiry, Advs. for R-2

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J (ORAL)

1. This petition has been filed by the petitioner with the following prayers:

"In the light of aforementioned facts and circumstances, it is most respectfully prayed to this Hon'ble Court that this Hon'ble Court may be pleased to: -

(i) Set aside Letter No. TPDDL/HR-ES/2020-21/201 dated 05-3-2021 passed by respondent thereby denying post retiral benefits to the petitioner holding the same to unlawful and illegal.

(ii) Issue further writ/order or direction to the

respondent thereby directing the respondent to provide all post retiral benefits to the petitioner including medical and pension etc.

Any other appropriate order or direction which this Hon'ble Court may deem fit in the given facts and circumstances of the present case.”

2. The respondents in this petition are Tata Power Delhi Distribution Ltd. and DVB Pension Trust, in terms of the amended memo of parties filed by the petitioner.

3. The challenge of the petitioner in this petition is primarily to the Order dated March 05, 2021 whereby the request of the petitioner for correction and updation of his service records and allowing consequential retiral benefits including pension and medical facilities was rejected, primarily on the ground that the petitioner has taken voluntary retirement in the year 2003/2004 and also that the service of the petitioner fall short of minimum requisite qualifying period of 20 years and therefore, he is not entitled to the pensionary and medical benefits.

4. Some of the facts as highlighted by Mr. Amit Sahni, learned counsel for the petitioner are that, the petitioner joined the erstwhile Delhi Electricity Supply Undertaking ('DESU', for short) on May 03, 1982 as a Work / CP Pump Operator. While

working on the said post, he applied against the departmental vacancy for the post of Instrument Repairer and Tester on January 28, 1983.

5. Between June 2001 to February 2002, the petitioner was put under suspension for a period of 257 days; he was later reinstated with all past benefits. According to Mr. Sahni, on July 01, 2002 the successor Company of the DESU, i.e., Delhi Vidyut Board was unbundled into six successor companies, which included North Delhi Power Ltd. The services of the petitioner came under the employment of North Delhi Power Ltd. Later, on the formation of Tata Power Delhi Distribution Limited ('TPDDL', for short), a joint venture between the Government of the National Capital Territory of Delhi and the Tata Power Company Ltd., which holds a 51% majority stake in the venture.

6. On November 29, 2003, a Voluntary Retirement Scheme was introduced by the erstwhile North Delhi Power Ltd. with a clear stipulation that any regular employee of North Delhi Power Ltd. who has completed ten years of service or reached the age of 40 years on the date of introduction of the Scheme may seek voluntary retirement under the said Scheme by making a request to the Competent Authority. The petitioner had applied under the

said Scheme for voluntary retirement. The request of the petitioner was accepted and he was accordingly retired on January 31, 2004.

7. It is noted that retiral benefits were denied to the petitioner on the ground that he had only put in 18 years, 11 months and 3 days of service. This stand of the respondents is contested by Mr. Sahni on the ground that the respondents have excluded the following periods of service: -

- (i) the period of work charged service (240 days in the present case)
- (ii) extraordinary leave without pay (508 days in the present case) and
- (iii) the period of suspension (*dies non*) (257 days in the present case)

8. It is his submission that the period of suspension which was treated as *dies non* (257 days) has never been communicated to the petitioner and no show cause notice was issued to the petitioner in that regard. Hence, the said period need to be counted for the purpose of qualifying service. Further, he stated that if the benefits as sought for by the petitioner in this case are granted, then the petitioner fulfils the qualifying service and therefore is entitled to the pensionary benefits and also medical

benefits as is being given to a retired employee.

9. On the other hand, Mr. Sudhir Nandrajog, learned Senior Counsel appearing for the respondent No.1 would contest the filing of the writ petition against the said respondent, inasmuch as it is the respondent No.2 which is the Authority to disburse the pension to erstwhile employees of DESU / DVB. He stated that on the retirement of the petitioner, his pensionary details were sent to the respondent No.2. However, respondent No.2 vide Note dated January 22, 2021 returned the same with the remarks that since the petitioner has not completed the requisite qualifying service, he is not eligible for pension. This fact was conveyed to the petitioner vide the impugned communication.

10. That apart, medical facilities were provided to the petitioner till age of superannuation i.e., January 31, 2021. However, post the age of superannuation, the same, if eligible has to be paid by the Pension Trust. That apart, he stated that between May 03, 1982 to January 27, 1983 during which period he rendered the services as a work-charged employee, cannot be taken into consideration. Similar is the position with regard to suspension period of 257 days as well as the period of 508 days during which he was on extraordinary leave without pay. He

stated that there is nothing in the Scheme that only those, who are otherwise eligible for pension upon attaining the age of superannuation can, apply. It is for the petitioner before opting for voluntary retirement to have ascertained his eligibility for pension. He seeks the dismissal of the writ petition.

11. Mr. Sumeet Pushkarna, learned counsel for the respondent No.2 / Trust would also make similar submissions that the petitioner is not entitled to the prayers as made in the petition. According to him, the payment of superannuation pension is subject to a person meeting the eligibility under the CCS (Pension) Rules, 1972. The Voluntary Retirement Scheme floated is a special exit contract which has taken place between the petitioner and the employer i.e. respondent No.1. In case the employee is eligible for the Voluntary Retirement Scheme having service over ten years, he can avail of that and get two gratuities (service gratuity and retirement gratuity) in case he is not entitled to pension. The provision regarding calculating the period of qualifying service is mentioned in Rules / Clause 3 of the CCS (Pension) Rules, 1972. The said Rules requires at least 20 years of qualifying service for being eligible for pension and the exclusion is clearly set out. The petitioner is not entitled to get the

period of work-charged service / extraordinary leave without pay / the period of suspension (*dies non*) counted for the purpose of qualifying service as per the CCS (Pension) Rules, 1972 and no relaxation *per se* is possible. He stated, even otherwise, the petitioner having less than 20 years of qualifying service is not entitled to pension.

12. In support of his submissions, Mr. Pushkarna has relied upon the judgment of this Court in the case of ***Govt. of Delhi & Ors. v. North Delhi Power Ltd. & Ors., LPA 677/2011*** and also of the Supreme Court in the case of ***North Delhi Power Ltd. v. Government of National Capital Territory of Delhi & Ors., (2010) 6 SCC 278***. He seeks the dismissal of the writ petition.

13. In his rejoinder submissions, Mr. Sahni, controverting the submissions made by Mr. Nandrajog and Mr. Pushkarna, reiterated his earlier submissions and also relied upon the judgments of the Supreme Court in ***Habib Khan v. State of Uttarakhand & Ors. (2019) 10 SCC 542*** and ***Punjab State Electricity Board & Anr. v. Narata Singh & Anr., (2010) 4 SCC 317***, to contend that work-charged service is to be counted as qualifying service.

14. Having heard the learned counsels for the parties and

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perused the record, the issue which arises for consideration is whether the petitioner is entitled to retiral benefits including pension, medical benefits etc. on having taken voluntary retirement in the year 2004.

15. The respondents had denied the benefit of pension to the petitioner on the ground that he does not have the qualifying service of 20 years in as much as his total service is 18 years, 11 months and 3 days and that the period of service reflected in para 7 above need to be excluded for the purpose of calculating the qualifying service. At this stage, I may state that one of the entitlements for an employee seeking voluntary retirement as per scheme floated is the grant of pensionary benefits as per Rules.

16. Now it is to be seen whether the reasoning given by the respondent No.1 in its impugned Order that the petitioner does not possess the qualifying service of 20 years is justified. The respondents have excluded the work-charged service, the suspension period and the extra ordinary leave without pay taken by the petitioner from the qualifying service. Insofar as work-charged service is concerned, the petitioner had worked as a work-charged employee for a period of 240 days between May 03, 1982 to January 27, 1983.

17. Though neither Mr. Sahni nor Mr. Nandrajog and Mr. Pushkarna have drawn my attention to any Rule which bars the counting of work-charged service for the purpose of pension, I may refer to Rule 13 of the CCS (Pension) Rules, 1972 which is reproduced as under: -

“13. Commencement of qualifying service

Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity :

Provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post :

Provided further that -

(a) in the case of a Government servant in a Group `D' service or post who held a lien or a suspended lien on a permanent pensionable post prior to the 17th April, 1950, service rendered before attaining the age of sixteen years shall not count for any purpose, and

(b) in the case of a Government servant not covered by clause (a), service rendered before attaining the age of eighteen years shall not count, except for compensation gratuity.

(c) the provisions of clause (b) shall not be applicable in the cases of counting of military service for civil pension under Rule 19”

18. The above rule contemplates if the officiating or temporary service is followed without interruption by a substantive appointment in the same or another service or post, then the same needs to be counted for the purpose of qualifying service. Similarly, Rule 17 of the CCS (Pension) Rules, 1972 also refers to counting of service put in by an employee on contract basis which is followed by a substantive appointment on the same or another post without interruption for the purpose of pension.

19. The Full Bench of the Punjab and Haryana High Court in the case of *Kesar Chand v. State of Punjab, 1988 SCC OnLine P&H 338*, struck down the validity of Rule 3.17 (ii) of the Punjab Civil Services Rules Vol. II which excluded, for the purpose of calculating qualifying service, the period of work-charged service of an employee whose services have been subsequently regularized. A Special Leave Petition was filed in appeal, which was dismissed by the Supreme Court, negating the challenge to the decision of the Full Court. A similar issue arose in *Punjab State Electricity Board (supra)* wherein the Supreme Court, in paragraph 25 of its opinion held that the Full Bench of the Punjab and Haryana High Court was justified in striking down Rule 3.17 (ii) of the Punjab Civil Services Rules Vol. II resulting in

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obliteration of the distinction made in the said Rules between *temporary* and *officiating* service and work-charged service. On that basis, the Supreme Court took a view that the period of work-charged service should be reckoned for purpose of computation of qualifying service for grant of pension. Paragraphs 25, 26, 27 and 40 of the judgment are reproduced as under: -

“25. In Kesar Chand v. State of Punjab [(1988) 5 SLR 27 (P&H)] the Full Bench held that Rule 3.17(ii) of the Punjab Civil Services Rules was violative of Article 14 of the Constitution of India. The Full Bench decision was challenged before this Court by filing a special leave petition which was dismissed. Thus, the ratio laid down by the Full Bench judgment that any rule which excludes the counting of work-charged service of an employee whose services have been regularised subsequently, must be held to be bad in law was not disturbed by this Court. The distinction made between an employee who was in temporary or officiating service and who was in work-charged service as mentioned in Rule 3.17(ii) of the Punjab Civil Services Rules disappeared when the said Rule was struck down by the Full Bench. The effect was that an employee holding substantively a permanent post on the date of his retirement was entitled to count in full as qualifying service the periods of service in work-charged establishments.

26. In view of this settled position, there is no manner of doubt that the work-charged service rendered by Respondent 1 under the Government of Punjab was qualified for grant of pension under the rules of the Government of Punjab and therefore, the Board was not correct in rejecting the claim of the respondent for inclusion of period of work-charged service rendered by him with the State Government for grant of pension, on

the ground that service rendered by him in the work-charged capacity outside PSEB and in the Departments of the State Government was a non-pensionable service.

27. The apprehension that acceptance of the case of Respondent 1 would result into conferring a status on them as that of employees of the State of Punjab has no factual basis. It is true that the State Government has power to frame rules governing services of its employees under Article 309 of the Constitution whereas the Board has power to prescribe conditions of service by framing regulations under Section 79(c) of the Electricity (Supply) Act, 1948. However, governance of a particular institution and issuance of instructions to fill up the gap in the fields where statutory provisions do not operate, is recognised as a valid mode of administration in modern times.

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40. So far as this argument is concerned, it is true that the Division Bench of the High Court has expressed the above opinion in the impugned judgment. However, the reference to Rule 3.17(ii) of the Punjab Civil Services Rules as well as the Full Bench decision of the Punjab and Haryana High Court in Kesar Chand v. State of Punjab [(1988) 5 SLR 27 (P&H)] and the speaking order dated 16-11-2005 passed by the Board rejecting the claim of Respondent 1 makes it abundantly clear that the High Court has directed the appellants to count the period of service rendered by Respondent 1 in work-charged capacity with the State Government for determining qualifying service for the purpose of pension. Further, Respondent 1 has been directed to deposit the amount of Employee's Contributory Fund which he had received from the appellants along with interest as per the directions of the Board before the pension is released to him."
(emphasis supplied)

20. In the case in hand, there is no dispute that the petitioner was appointed on substantive basis as Instrument Repairer and Tester immediately on the date following January 27, 1983 i.e.,

January 28, 1983, till when the petitioner was working as a work-charged employee. In that sense, the petitioner's temporary service was followed by a substantive appointment. Keeping in view the ratio of the judgment of the Supreme Court in ***Punjab State Electricity Board (supra)***, the distinction in Rule 13, which I have reproduced above, between an *officiating* or a *temporary* service and *work-charged service* stands obliterated and work-charged service followed by a substantive appointment must be read into Rule 13 of the CCS (Pension) Rules, 1972 and need to be counted for the purpose of qualifying service.

21. Mr. Sahni is justified in relying upon the judgment of the Supreme Court in ***Habib Khan (supra)*** wherein in paragraphs 6, 7 and 8 the Supreme Court, relying upon the Full Bench judgment of the Punjab & Haryana High Court in ***Kesar Chand (supra)*** and also its own judgment in ***Punjab State Electricity Board (supra)*** has held as under: -

“6. The pari materia provision contained in Rule 3.17(ii) of the Punjab Civil Services Rules had been struck down by a Full Bench decision of the Punjab and Haryana High Court in Kesar Chand v. State of Punjab [Kesar Chand v. State of Punjab, 1988 SCC OnLine P&H 338 : AIR 1988 P&H 265 : (1988) 5 SLR 27] . The challenge by the State against the aforesaid decision of the Full Bench of the Punjab and Haryana High Court was negatived [Dakshin Haryana Bijli Vitran Nigam v. Bachan Singh, (2009) 14

SCC 793 : (2010) 1 SCC (L&S) 463] by this Court. The matter came up for consideration before this Court, once again, in *Punjab SEB v. Narata Singh* [*Punjab SEB v. Narata Singh*, (2010) 4 SCC 317 : (2010) 1 SCC (L&S) 1025]. While dealing with the said question this Court in Para 25 of the report held that the Full Bench decision of the Punjab and Haryana High Court was perfectly justified in striking down Rule 3.17(ii) of the Punjab Civil Services Rules resulting in obliteration of the distinction made in the said Rules between “temporary and officiating service” and “work-charged service”. On the said basis, this Court took the view that the period of work-charged service should be reckoned for purposes of computation of “qualifying service” for grant of pension.

7. As already observed, the provisions of Regulation 370 of the Civil Services Regulations applicable to the State of Uttarakhand are pari materia with the provisions of Rule 3.17(ii) of the Punjab Civil Services Rules, discussed above. If that is so, we do not see as to why the period of service rendered on work-charged basis by the appellants should not be counted for purposes of computation of “qualifying service” for grant of pension. The pari materia provisions of Rule 3.17(ii) of the Punjab Civil Services Rules having been interpreted and understood in the above manner by this Court in *Narata Singh* [*Punjab SEB v. Narata Singh*, (2010) 4 SCC 317 : (2010) 1 SCC (L&S) 1025] we do not find any room for taking any other view except to hold that the appellants are entitled to reckon the period of work-charged service for purposes of computation of “qualifying service” for grant of pension. We order accordingly; allow these appeals and set aside the impugned orders [*Madan Mohan Chaudhary v. State of Uttarakhand*, 2011 SCC OnLine Utt 60 : (2011) 128 FLR 910] passed by the High Court.

(emphasis supplied)

8. All necessary and consequential benefit in terms of the present order will be paid and granted by the State to the appellants forthwith and without any delay.”

22. So, the decision of the respondent in not treating the work-charged service put in by the petitioner between May 03, 1982 to January 27, 1983 as qualified service is not justified. In other words, the said service need to be treated as qualifying service and the 240 days of the service put in by the petitioner need to be added to his qualifying service of 18 years, 11 months and 3 days.

23. Now coming to the issue whether the period of suspension (*dies non*) of 257 days need to be excluded for the purpose of qualifying service, none of the parties have filed any order issued treating the period of suspension of 257 days as *dies non*, and excluding the same for the purpose of qualifying service. In any case, it is the submission of Mr. Sahni that neither such an order has been communicated to the petitioner nor any show cause notice was issued to the petitioner for treating the period as *dies non*. That apart, it was his submission that the petitioner was suspended, contemplating departmental inquiry. The petitioner was exonerated in the department inquiry. Hence, the period of suspension during the departmental inquiry was not justified. On the other hand, Mr. Nandrajog justified the exclusion of the suspension period. Suffice to state that Rule 23

of the CCS (Pension) Rules, 1972 which stipulates the eventuality when the suspension period would be counted for the purpose of qualifying service of pension, the same is reproduced as under: -

“23. Counting of periods of suspension

Time passed by a Government servant under suspension pending inquiry into conduct shall count as qualifying service where, on conclusion of such inquiry, he has been fully exonerated or the suspension is held to be wholly unjustified; in other cases, the period of suspension shall not count unless the authority competent to pass orders under the rule governing such cases expressly declares at the time that it shall count to such extent as the Competent Authority may declare.”

24. From a reading of the provision, it is clear that if a government servant under suspension pending inquiry is fully exonerated, then the same shall be counted as qualifying service. The submission of Mr. Sahni that the petitioner has been fully exonerated of the charges has not been denied by the respondents. In that eventuality, the period of suspension need to be treated as qualifying service. In fact Rule 23, does not contemplate any other effect if a government servant is absolved of charges, but to treat the period as qualifying service. The case of the respondent that said period is to be treated as *dies non* and need to be excluded for the purpose of qualifying service is unmerited. The

fact that the petitioner has been exonerated of all charges, suspension being unjustified, the period could not have been treated as *dies non*. The decision is also without issuing a show cause notice to the petitioner, making the same illegal.

25. So, it follows that the period of suspension of 257 days need to be counted for the purpose of qualifying service. Insofar as, whether extraordinary leave without pay is to be excluded for the purpose of qualifying service, I agree with the said stand of the respondents, as it is a case of extraordinary leave without any medical certificate, the same could not have been included for the purpose of qualifying service for pension. In any case, the counting of the periods of work-charged service and suspension, as qualifying service, shall make the total service of the petitioner as 20 years, which shall entitle him for pension. The reliance placed by Mr. Pushkarna on the judgment of the Division Bench of this Court in ***Govt. of Delhi & Ors v. North Delhi Power Ltd. & Ors. (supra)*** to contend that pension is not payable to the petitioner as he lacks the requisite qualifying service, would have no bearing herein, in view of my reasoning above.

26. I am conscious of the fact that the petitioner had applied for voluntary retirement which was granted in the year 2004.

Between 2004 and till the date of submitting the representation, the petitioner sat over his right for pension and has not claimed the same immediately thereafter. The law with regard to a claim for pension being a continuous cause, the petitioner cannot be unsuited as the Supreme Court in the case of ***Union of India and Ors. v. Tarsem Singh (2008) 8 SCC 648***, has held as under: -

“7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition..”

27. The only way to balance the equities is that, the benefits the petitioner shall be entitled to under this order shall be limited to a period of three years before filing of the present petition. In other words, the petitioner shall not be entitled to any monetary benefits between the years 2004 to 2018, but his pension shall be fixed as on February 01, 2004 notionally and actual monetary benefits shall be given for three years preceding the filing of the writ petition and in future. The past benefits shall be paid within eight weeks from today.

28. A further claim has been made by the petitioner with regard to medical facilities. The same has been discontinued as the petitioner has attained the actual age of superannuation.

29. In view of my above conclusion declaring that the petitioner has the qualifying service of 20 years for the purpose of pension, it is to be decided whether the petitioner is entitled to medical benefits as a pensioner. This aspect shall be determined by the respondents in consultation with each other in accordance with the Rules. This I say so, as both the respondents have been shifting the liability of providing medical benefits to each other. This consideration must take place within a period of two months

from today and the benefits, if any, payable to the petitioner shall be released within six weeks thereafter.

30. The reliance placed by Mr. Pushkarna on the judgment of the Supreme Court in the case of *North Delhi Power Ltd. (supra)*, to contend that the pension and medical benefits are to be paid by the employer, is liable to be rejected, inasmuch as the issue therein was whether pensionary liability would lie with the holding company or its subsidiary. Neither the facts nor the issues therein have any applicability in this instant matter.

31. In view of my aforesaid conclusion, the present petition is disposed of. No costs.

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As with the consent of the counsels for the parties I have heard them and decided the petition, this application has become infructuous and is dismissed as such.

V. KAMESWAR RAO, J

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