

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

% Date of decision: 27th September, 2021

+ W.P.(C) 10222/2021 & CM No. 31509/2021

DR. MUHAMMAD ABULAISH

.... Petitioner

Through: Mr. Chandra Shekhar, Adv. with
Mr. Prashant Shekhar, Mr. Ashwani
Saini & Mr. Vivek Sharma, Advs.

versus

JAMIA MILIA ISLAMIA UNIVERSITY

..... Respondent

Through: Mr. Pritish Sabharwal, ASC

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. The present petition has been filed by the petitioner with the following prayers:-

“In view of the facts and circumstances stated herein above, it shall be expedient for the ends of justice and equity that this Hon'ble Court may graciously be pleased to:

a. Issue writ, order or direction in the nature of certiorari calling for the record of the petitioner's case leading to the orders (decisions) dated 21.06.2021 & 27.08.2021, rejecting the petitioner's application/notice dated 01.06.2021 and 28.06.2021 for Voluntary Retirement and quash the same and further issue writ, order or direction in the nature of mandamus commanding the respondent to process the petitioner's case of Retiral Benefits

and other incidental exercise to be performed following the petitioner's voluntary retirement in accordance with law.

b. Pass such other or further orders as this Hon'ble Court deems fit and proper in facts and circumstances coming to the notice during the pendency this petition."

2. In substance, the petitioner is challenging the rejection of his application / notice for voluntary retirement, with a consequential prayer that he be granted the retiral benefits.

3. The case of the petitioner, as contended by Mr. Chandra Shekhar, learned counsel on behalf of the petitioner is that the petitioner joined the respondent University on January 06, 2004 pursuant to an appointment letter issued on December 26, 2003. At the time of joining, the age of the petitioner was 32 years, 5 months and 2 days as his date of birth is August 04, 1971.

4. On June 01, 2021, the petitioner served a notice of three months seeking voluntary retirement on the respondent University. According to Mr. Chandra Shekhar, on the said date, the petitioner had, in all, put in 17 years, 7 months and 26 days of service. The said request of the petitioner was turned down by the respondent University vide the impugned communication dated June 21, 2021 on the ground that the request of the petitioner was examined under Rule 48(A) of CCS Pension Rules 1972 ('Pension Rules', for short) and the petitioner did not fulfill the criteria of having qualifying service. It is stated by Mr. Chandra Shekhar that on June 28, 2021, the petitioner gave a representation adverting to the fact that the petitioner did not seek voluntary retirement under Rule 48(A) of the Pension Rules, as, the contents of the petitioner's letter dated June

01, 2021 clearly discloses that he sought voluntary retirement under Rule 56(k) of the Fundamental Rules ('FR', for short) and on that basis, he sought reconsideration of the respondent's decision dated June 21, 2021.

5. As no action was taken by the University, the petitioner approached this Court by way of a writ petition being W.P.(C) 8204/2021 challenging the order dated June 21, 2021, with a further prayer that he be relieved w.e.f. August 31, 2021. The said writ petition was disposed of by this Court on August 23, 2021 directing the respondent to consider the representation of the petitioner dated June 28, 2021.

6. According to Mr. Chandra Shekhar, it is pursuant thereto that the representation of the petitioner was rejected vide impugned order dated August 27, 2021 on two grounds, which include that the petitioner did not possess qualifying service of 15 years, as required under Rule 56(k) of the FR, because the petitioner availed Extraordinary Leave ('EOL', for short) from time to time and the said period is awaiting regularization. Mr. Chandra Shekhar would submit that this ground of the petitioner not having the qualifying service of 15 years is untenable, as the petitioner has availed the EOL after due sanction and the same is awaiting regularization.

7. That apart, even the stand of the learned counsel for the respondent that the proviso appended to Rule 56(k) of the FR that the petitioner having served South Asian University, New Delhi, his request could not have been considered till such time, he does not serve for a period of one year, is also unsustainable as the South

Asian University is not a Foreign Government for this stipulation to be made applicable.

8. That apart, Mr. Chandra Shekhar would contend that Ordinance 5(v) of the Ordinance (Administrative / General) of the Jamia Millia Islamia University ('JMI', for short) relates to Leave Rules applicable to teachers. Rule 1.1(v) of the Leave Rules defines "*completed years of service*" to mean continuous service of the specified duration under the University and includes period spent on duty as well as on deputation with Government and leave including EOL unless otherwise provided. According to him, EOL is always without pay and allowance. The EOL shall not count for increment except in a case where leave was granted to accept an invitation to a teaching post or fellowship or research cum teaching or an assignment for technical or academic work of importance. In the case of the petitioner, he first proceeded on EOL after being duly granted by the Competent Authority for a period between August 27, 2007 to February 08, 2009. The same was for taking up teaching assignment as Assistant Professor at College of Computer Science, King Khalid University, Abha, Saudi Arabia. The petitioner joined back the respondent University on February 09, 2009, much prior to the expiry of the leave period. The Vice-Chancellor of the University permitted the petitioner to join before the expiry of the leave period and approved the said period for notional increments w.e.f. February 09, 2009.

9. The second spell of EOL was from October 25, 2010 to December 23, 2012, which was sanctioned by the Competent Authority to take up a teaching assignment as Associate Professor at

Center of Excellence in Information Assurance, King Saud University, Saudi Arabia. Upon joining, the Vice-Chancellor of the University not only permitted the petitioner to resume his duties but also approved and granted notional increment to the petitioner w.e.f. December 24, 2012.

10. The third spell of EOL (initially) was from February 01, 2016 to June 23, 2017. This time also, the same was availed for taking up the teaching assignment as Associate Professor at the Department of Computer Science of South Asian University, New Delhi. It may be stated that subsequently, the EOL on deputation was extended upto January 30, 2021. Thus, the petitioner remained on deputation after sanction of leave for a period between February 01, 2016 to January 30, 2021. Mr. Chandra Shekhar would submit, the pre-conditions for applicability of Rule 56(k) of FR are two-fold, i.e., the Government servant ought to have entered the service before attaining 35 years of age and such Government servant may exercise his option to voluntarily retire from service provided, he has attained 50 years of his age. It is clear that a reading of Rule 56(k) of FR, does not refer to ‘*qualifying service*’.

11. Mr. Chandra Shekhar states that the issue relating to the applicability and its pre-conditions as against the power / authority of the employer has been settled in the case of; (i) ***Tek Chand v. Dile Ram, (2001) 3 SCC 290***; (ii) ***Union of India & Ors. v. Harendralal Bhattacharyya, (1983) 5 DRJ 310***, and (iii) ***Union of India & Ors. v. Sh. Ved Prakash Sharma, W.P.(C) No. 8102/2010*** decided on February 15, 2011. Mr. Chandra Shekhar states that the respondent could not have rejected the request of the petitioner

seeking voluntary retirement under Rule 56(k) of FR and also the retiral benefits thereof.

12. On the other hand, Mr. Pritish Sabharwal, learned counsel for the respondent does not dispute the facts as noted above except that out of the total period of service in JMI as 17 years, 7 months and 26 days, out of which the petitioner availed the EOL and deputation in the following period:-

- (i) From August 27, 2007 to February 09, 2009 (1 year, 5 months and 13 days);
- (ii) From October 25, 2010 to December 23, 2012, (2 years, 1 month and 29 days);
- (iii) From February 01, 2016 to January 31, 2021 (on deputation for a period of five years with South Asian University).

13. So, the total period of EOL and deputation of 8 years, 7 months and 12 days need to be taken out for counting the total period of service in JMI. Mr. Sabharwal did concede that though the petitioner was fulfilling the criteria of joining government service before 35 years of age and applying voluntary retirement after attaining the age of 50 years, his 15 years of service in JMI is not completed due to non-regularization of EOL and deputation period. He submits that the issue which arises for consideration is whether the minimum qualifying service seeking voluntary retirement under Rule 56(k) of FR is 15 years. He relies upon a judgment of this Court in the case of ***K. Lalitha v. Government of NCT of Delhi & Ors., W.P.(C) 7704/2014*** decided on August 28, 2015.

14. Having heard the learned counsel for the parties, the issue which arises for consideration is whether the respondent University is justified in passing the impugned order. To appreciate the issue, which falls for consideration, it is necessary to reproduce the contents of the impugned order as under: -

“4. As per record Mr. Abulaish was initially appointed as 'Lecturer' on probation basis w.e.f. 06.01.2004. His total period of qualifying service in JMI is 17 years 07 months 26 days, out of which he availed EOL and deputation as mentioned below:

i. On EOL from 27.08.2007 to 09.02.2009 (01Y-05M-13D) Worked as Asstt, Prof., King Khalid University, K.S.A. (EOL period not regularized).

ii. On EOL from 25.10.2010 to 23.12.2012, (02Y-01M-29D) Worked as Associate Prof. King Saud University, KSA, (EOL period not regularized).

iii. On Deputation from 01.02.2016 to 31.01.2021, period of service 05 years. South Asian University under SAARC (deputation period not regularized).

iv. Total period of his Services in JMI is 17 years, 07 months, 26 days Total period of his Eol & Deputation is :08 years, 07 months, 12 days

Total qualifying service: 09 years, 00 months, 14 days

5. Vide Writ Petition no.7293/2021, FRSR 56(k) was quoted to consider his request of Voluntary retirement which states that.

*"Any Government servant may, by giving notice of not less than three months in writing to the appropriate authority, **retire from service after he has attained the age of fifty years**, if he is in Group 'A' or Group 'B' service or post, **(and had entered Government service before attaining the***

age of thirty :-'five years), and in all other cases after he has attained the age of fifty-five.

Even though he is fulfilling the criteria of joining Govt. service before 35 years of age and applying VRS after attaining the age of 50 yrs., his 15 years of service (50yrs - 35yrs.) in JMI is not completing due to his non regularized EOL and Deputation period.

In the light of the above facts and circumstances, the request of Dr. Muhammad Abulaish for Voluntary Retirement under FRSR-56 (k) is rejected as he does not fulfill the conditions laid down under the said rule.”

15. It may be stated here, though earlier, the University has decided the petitioner's request for voluntary retirement treating it as a notice under Rule 48(A) of the Pension Rules but during the hearing of petition being W.P.(C) 8204/2021 decided on August 23, 2021, this Court had directed the respondent University to decide his representation dated June 25, 2021 by a speaking order.

16. From the impugned order, it is seen that the stand of the respondent University is that the petitioner having availed EOL in three spells totaling, 8 years, 7 months and 12 days and his net qualifying service being 9 years and 14 days, the request of the petitioner is rejected, as he does not fulfill the conditions laid down in the said Rules. To answer the issue posed by this Court, it is necessary to reproduce the relevant part of Rule 56(k) of FR: -

“56 (k) (1) Any Government servant may, by giving notice of not less than three months in writing to the appropriate authority, retire from service after he has attained the age of fifty years, if he is in Group ‘A’ or Group ‘B’ service or post, (and had entered Government service before attaining the age of thirty-five years), and in all other cases after he has attained the age of fifty-five years:”

17. Rule 56(k) of FR also enables a government servant by giving notice of not less than three months in writing to retire from service, if he has attained the age of 50 years; if he is in Group A or Group B service or post and has entered the government service before attaining the age of 35 years. There is no dispute that the petitioner had joined the respondent University before he has attained the age of 35 years. It is also not disputed that his request for voluntary retirement was after he has attained the age of 50 years. To that extent, even the case of the University is that the petitioner is fulfilling the criteria under Rule 56(k) of FR i.e., he has joined before 35 years and applied for voluntary retirement after the age of 50 years. The primary objection of the University appears to be that he has not completed 15 years of service due to the non-regularization of EOL and deputation period.

18. In support of his submission that, the authority could not have rejected the request of voluntary retirement, Mr. Chandra Shekhar has relied upon the Judgments of the Supreme Court and this Court in *Tek Chand (supra)*; *Ved Prakash Sharma (supra)*, and *Harendralal Bhattacharyya (supra)*. I have seen the Judgments. The Supreme Court in *Dinesh Chandra Sangma v. State of Assam, (1997) 4 SCC 441* has in Paras 13 & 17 held as under:

“13. F. Rule 56 is one of the statutory rules which binds the Government as well as the government servant. The condition of service which is envisaged in Rule 56(c) giving an option in absolute terms to a government servant to voluntarily retire with three months' previous notice, after he reaches 50 years of age or has completed 25 years of service, cannot therefore be equated with a contract of employment as envisaged in Explanation 2 to Rule 119.

17. The High Court committed an error of law holding that consent of the Government was necessary to give legal effect to the voluntary retirement of the appellant under F. Rule 56(c). Since the conditions of F. Rule 56(c) are fulfilled in the instant case, the appellant must be held to have lawfully retired as notified by him with effect from August 2, 1976."

It is not the case of the University that the petitioner was under suspension or departmental proceedings are pending against the petitioner for refusal to accept the request of the petitioner for voluntary retirement. Rather the case of the respondent University is that, he has not completed 15 years of qualifying service for being granted the voluntary retirement. Suffice to state there is no requirement in FR 56(k) for a government servant to have 15 years of qualifying service for getting voluntary retirement. I have already spelt out the requirement under FR 56(k). If that be so, the petitioner was within his right to seek retirement, which has to be accepted by the University except if he is under suspension, any disciplinary proceedings are pending against him, or if any judicial proceedings are pending which may amount to grave misconduct. It is only the withdrawal of the notice, which requires the acceptance of the University. It is not such a case here. Even this court in the case of ***Harendralal Bhattacharyya (supra)*** has in Para 20 held as under:

"(20) That this view is right is borne out by Dinesh Chandra Sangma v. State of Assam and others:(1978) ILLJ 17 SC. In the Fundamental Rule 56 under consideration in that case, the equivalent of sub-rule (k) was sub-rule (c). It was worded in exactly the same manner. This is what the Supreme Court said: 'While the Government reserves its right to compulsorily retire a Government servant, even against his wish, there is a corresponding right of the

Government servant under F.R. 56(c) to voluntarily retire from service by giving the Government three months' notice in writing. There is no question of acceptance of the request for voluntary retirement by the Government when the Government servant exercises his right under F.R. 56(c).' (Emphasis mine) And, it was held that: 'The High Court committed an error of law in holding that consent of the Government was necessary to give legal effect to the voluntary retirement of the appellant under F.R. 56 c).''

19. Having said that the petitioner is not only challenging the impugned communication to the extent that his request for voluntary retirement has been rejected, his consequential prayer is that he be granted retiral benefits.

20. It is the submission of Mr. Chandra Shekhar that the EOL whenever taken was counted for the purpose of grant of increment. This appears to be because of Ordinance 5(v) of the Ordinance (Administrative / General) of the JMI on which reliance has been placed by Mr. Chandra Shekhar, which states that EOL shall not count for increment except in a case where leave was granted to accept an invitation to a teaching post or fellowship or research cum teaching or an assignment for technical or academic work of importance. There is no dispute that, on all the occasions the petitioner has availed EOL for holding a teaching position in Saudi Arabia / New Delhi. It is important to state here that in the office order issued to the petitioner, while granting the EOL both on August 09, 2007 and on April 22, 2010, a stipulation was incorporated that he has to give his willingness to remit leave salary / pension and CPF contribution / GPF subscription himself or through his employer, if any during the period of the leave to JMI, i.e., the University at the rates, to be communicated by the Accounts

Officer, JMI, if he wants to get counted his period of leave for pensionary benefits before proceeding on EOL.

21. There is no averment in the writ petition that such a directive was implemented by the petitioner and he or his foreign employer has remitted leave salary / pension and CPF contribution / GPF subscription to the JMI.

22. In any case, I do not think, it is necessary to go into the issue of whether the EOL / deputation period need to be regularized in the facts. The issue of grant of retiring pension on retirement under FR 56(k) is governed by Rule 36(a) of the pension rules. The same is reproduced as under:

“36. Retiring pension

A retiring pension shall be granted -

(a) to a Government servant who retires, or is retired, in advance of the age of compulsory retirement in accordance with the provisions of [Rule 48] [or 48-A] of these rules, or Rule 56 of the Fundamental Rules or Article 459 of the Civil Service Regulations; and”

On the issue of retiring pension, this Court in its judgment in the case of ***K. Lalitha (supra)***, on which reliance has been placed by Mr. Sabharwal, by referring to the judgment of the Supreme Court in the case of ***C. Jacob v. Director of Geology and Mining and Anr., (2008) 10 SCC 115***, has held even in case of Rule 56(k) of FR a government servant need to have 20 years of qualifying service for availing the benefit of retiring pension. The relevant paras are reproduced as under:-

“12. The submission of Mr.Trivedi that since there is no requirement under FR-56(k) of FRSR Part-I General Rules, of a Government servant, putting 20 years of service, the petitioner is entitled to the benefits of pension, is liable to be rejected in view of the judgment

of the Supreme Court in C. Jacob's case (supra), wherein the Supreme Court was considering the case wherein facts were, the petitioner joined service as a Drill Helper in June, 1967, in the Regional Mining Cell, Trichy, in the erstwhile State Geology branch of Department of Industries and Commerce, State of Tamil Nadu. His services were terminated in the year 1982. Nearly eighteen years later, the petitioner gave representations dated May 5, 2000 and July 21, 2000 to the first respondent requesting that he may be taken back into service. As the enclosure to the said representation was incomplete, the first respondent called upon him to send the complete document. Instead of complying with the said request, the petitioner approached the Tamil Nadu Administrative Tribunal seeking a direction the first respondent to dispose of his representation. The Administrative Tribunal disposed of the said application, without notice to the respondents, with a direction to the Director of Geology and Mining (first respondent), to consider petitioner's representation and pass an order thereon within four months. The representation was disposed of vide order dated April 9, 2002. The matter did not rest there. Further, litigation was filed by the petitioner, in which the termination of the petitioner was held to be illegal, by declaring that the petitioner was deemed to have retired from service on July 18, 1982 and directed that the pension be sanctioned from that date and that the entire arrears should be calculated and paid in eight weeks. In the Intra-Court appeal, the Division Bench held that the petitioner has not completed 20 years of qualifying service on July 18, 1982 and therefore, he was not entitled to pension. The said order was challenged before the Supreme Court. Two issues were framed by the Supreme Court, which included the issue with regard to the common error in assuming that 10 years service entitles a Government Servant of pension under the Pension Rules. The Supreme Court in para 16 has held as under:

"16. Rule 33 of TNP Rules provides that a retiring pension shall be granted to a

government servant who retires, or is retired, in accordance with the provisions of Rule 42 of the said Rules. Rule 42 of TNP Rules provides that a government servant, who under fundamental Rule 56(d), retires voluntarily or is required by the appointing authority to retire in public interest shall be entitled to a retiring pension. (corresponding Rule 36 of CCSP Rules which provides that a retiring pension shall be granted to a Government servant who retires, or is retired, in advance of the age of compulsory retirement in accordance with the provisions of Rules 48 or 48-A of those Rules or Rule 56 of the Fundamental Rules or Article 459 of the Civil Service Regulations and to a Government servant who on being declared surplus, opts for voluntary retirement in accordance with Rule 29 of those Rules). The provision relating to retiring pension makes it clear that a minimum of 20 years qualifying service is required for retiring pension. It does not entitle a government servant to retiring pension on completion of ten years service. Therefore, the petitioner is not entitled to retiring pension".

13. From the perusal of the aforesaid conclusion of the Supreme Court wherein, the Supreme Court had also referred to Rule 56 of the Fundamental Rules as applicable to the Central Government employees, which also includes Rule 56(k) of FRSR, Part I, on which reliance was placed by Mr. Trivedi, and held that the provision relating to retiring pension makes it clear that a minimum of 20 years of qualifying service is required for retiring pension. The said conclusion of the Supreme Court is also based on the reading of the Rule 56 of the Fundamental Rules, the submission of Mr. Trivedi needs to be rejected."

23. In view of my above discussion, it must be held even if the petitioner has 15 years of service, that would only enable him to apply for voluntary retirement but he shall not be entitled to retiring

pension for which he must have 20 years of qualifying service, which he does not have, as it is the own case of the petitioner that he has only put in 17 years, 7 months and 26 days.

24. In view of my discussion above, I do not see any merit in the petition. The same is dismissed.

CM No. 31509/2021

Dismissed as infructuous.

V. KAMESWAR RAO, J

SEPTEMBER 27, 2021/ak

