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

% *Judgment reserved on 01.12.2021*

Judgment pronounced on 26.05.2022

+ **W.P.(C) 4424/2019 & CM Nos. 19694/2019 & 1653/2021**

BIBHU DUTT MISHRA Petitioner

Through: Petitioner in-person

versus

UNION OF INDIA AND ORS. Respondents

Through: Mr Hanu Bhaskar, CGSC.

W.P.(C) 4438/2019 & CM Nos. 19716/2019 & 1668/2021

BIBHU DUTT MISHRA Petitioner

Through: Petitioner in-person

versus

UNION OF INDIA AND ORS. Respondents

Through: Mr Hanu Bhaskar, CGSC.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE TALWANT SINGH

RAJIV SHAKDHER, J. :

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Preface:

1. Although the above-captioned writ petitions are directed against the



orders passed by the Central Administrative Tribunal [in short 'the Tribunal'] in two separate Original Applications (OAs), they are not only interconnected but also the parties to the *lis* are common.

2. The first writ petition i.e., W.P.(C)No.4424/2019 assails the order dated 04.04.2019 passed by the Tribunal in O.A.No.3025/2017. The second writ petition i.e., W.P.(C)No.4438/2019 lays a challenge to the charge memo dated 08.03.2018 issued by respondent no.3 i.e., Chairperson, Central Board of Direct Taxes (CBDT) [hereafter referred to as CBDT, unless the context requires otherwise] as also the order dated 04.04.2019 passed by the Tribunal in O.A.No.1381/2018.

3. It is pertinent to note that the short issue which arises for consideration in the first writ petition is: whether the petitioner stood voluntarily retired from service on expiry of his notice period i.e., w.e.f. 10.02.2016?

3.1. It is because the respondents contend to the contrary which has led to the petitioner being issued the aforementioned charge memo dated 08.03.2018. Thus, the only charge levelled against the petitioner is that he has remained absent from duty w.e.f. 11.02.2016.

3.2. Therefore, quite logically, if we were to conclude that the petitioner had completed his qualifying period of service i.e., the period of 20 years as of 10.02.2016, the impugned charge memo would fall by the wayside i.e., would have to be set aside.

Background:

4. To appreciate the issues that have been raised in the above-captioned matters before us, the following broad facts are required to be noticed :

4.1. On 02.01.1996, the petitioner joined the Indian Revenue Service



(IRS).

4.2. The petitioner on an understanding that he would complete 20 years in service on 10.02.2016, served a notice on 06.11.2015, as required, on the respondents under Rule 48A of the Central Civil Services (Pension) Rules, 1972 [in short “CCS(Pension) Rules”], seeking voluntary retirement.

4.3. According to the petitioner, on 10.02.2016, he had completed 20 years, 1 month and 10 days in service.

4.4. It appears that, on 07.01.2016, respondent no.3/CBDT advised the petitioner, to serve a fresh notice, albeit after 02.01.2016, when, according to him, the petitioner would have completed 20 years in service. This communication though was forwarded to the Petitioner through the Principal Chief Commissioner of Income Tax [hereafter referred to as " PCIT"]. In other words, according to respondent no.3/CBDT, the notice dated 06.11.2015 was premature.

4.5. The petitioner responded to this communication that emanated from respondent no.3/CBDT, *via* a reply dated 03.02.2016. In this reply, the petitioner, in brief, took the position that as long as the petitioner retires from service after completing the stipulated period, the fact that notice of intent seeking voluntary retirement from service is served earlier than provided under the extant regime would not render it untenable in law.

4.6. Given this position, respondent no.3/CBDT *via* communications dated 07.01.2016, 08.03.2016 and 12.09.2016 sought the advice of the Department of Personnel and Training (DoPT). Concededly, the response of DoPT [which is dated 23.12.2016], was in line with the stand taken by the petitioner in his letter dated 03.02.2016. For the sake of convenience, the relevant portion of DoPT’s advice is set forth hereafter :



“Department of Revenue may refer to their O.M. dated A-38012/40/2015-AdVI(A) dated 12.09.2016 seeking clarification regarding Voluntary Retirement notice of Sh. Bibhu Dutt Mishra, CIT(DR), ITAT, New Delhi under Rule 48(A) of CCS (Pension Rules), 1972.

2. *Though the officer rendered VRS notice two months before the completion of qualifying service, however, his intended date of retirement was after [the] completion of twenty years of qualifying service which is well under the rules. Hence, the Administrative Department may not hold the permission to grant him voluntary retirement and the officer may be allowed deemed retirement from Govt. service w.e.f. 10.02.2016. In terms with [sic: of] sub-rule (2) of Rule 48(A) of CCS (Pension) Rules, and[sic] his pensionary benefits may be released.*

3. *This issues with the approval of Joint Secretary (GDT).”*

4.7. The record shows that despite the advice tendered by the DoPT, the matter concerning the date from which the petitioner would be deemed to have voluntarily retired from service remained unsettled, as respondent no.3/CBDT thereafter sought clarification from the PCIT *qua* the order dated 03.11.2015, whereby respondent no.3/CBDT had, *inter alia*, recommended conversion of Extraordinary Leave (EOL) [between 17.09.2003 to 31.10.2003 & 21.12.2003 to 04.02.2004] to Leave Not Due (LND), albeit without a medical certificate.

4.8. Concededly, on 18.05.2017, the PCIT clarified that the recommendation made vide order dated 03.11.2015 to, *inter alia*, convert EOL to LND was made having regard to the note appended to Rule 10 of the Central Civil Services (Leave) Rules, 1972 [in short “CCS (Leave) Rules].

4.9. Despite the clarification given by the PCIT on 18.05.2017, respondent no.3/CBDT went ahead and revised its earlier order dated 03.11.2015, *via*



order dated 24.08.2017. The impact of this order i.e., order dated 24.08.2017 was, that the petitioner fell short of the prescribed qualifying service i.e., 20 years as of 10.02.2016 by 32 days; although the total period which was excluded from EOL, which was commuted to LND was 72 days.

5. It appears with the issuance of the order dated 24.08.2017 by respondent no.3/CBDT, the petitioner was put in a tizzy, albeit briefly, and hence, on 01.11.2017, he submitted a fresh notice of voluntary retirement under Fundamental Rule 56(k)¹. This was, however, withdrawn on

¹**F.R. 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:

Provided that-

- (a) Not printed (Since Clause (e) has been Deleted)
- (b) nothing in the clause shall also apply to a Government servant, including scientist or technical expert who (i) is on assignment under the Indian Technical and Economic Co-operation (ITEC) Programme of the Ministry of External Affairs and other aid Programmes, (ii) is posted abroad in a foreign-based office of a Ministry/Department and (iii) goes on a specific contract assignment to a foreign Government unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year; and
- (c) it shall be open to the Appropriate Authority to withhold permission to a Government servant, who seeks to retire under this clause, if-
 - (i) the Government servant is under suspension: or
 - (ii) a charge-sheet has been issued and the disciplinary proceedings are pending; or
 - (iii) if judicial proceedings on charges which may amount to grave misconduct, are pending.

EXPLANATION.- For the purpose of this clause, judicial proceedings shall be deemed to be pending, if a complaint or report of a police officer, of which the Magistrate takes cognizance, has been made or filed in a criminal proceedings;

(i-A)(a) A Government servant referred to in sub-clause (1) may make a request in writing to the Appointing Authority to accept notice of less than three months giving reasons therefor;

(b) On receipt of a request under sub-clause (1-A)(a), the Appointing Authority may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the Appointing Authority may relax the requirement of



29.11.2017. Notice dated 01.11.2017 was, concededly, treated as withdrawn by the respondents, and since the petitioner had stopped reporting for duty (based on his understanding) that he had retired from service w.e.f., 10.02.2016, a notice dated 24.11.2017 was served on him to show cause as to why the period of his absence from duty w.e.f. 11.02.2016, ought not to be treated as an unauthorised absence.

5.1. The said notice, thus, proposed action against the petitioner for violating provisions of Rule 3(1)(ii) and Rule 3(1)(iii) of Central Civil Services (Conduct) Rules, 1964 [in short “CCS (Conduct) Rules”]. The petitioner filed his response to the show cause notice dated 24.11.2017, on 06.12.2017. It appears that the matter did not rest with the aforementioned show cause notice dated 24.11.2017. On 09.01.2018, the petitioner was served with a second show cause notice dated 27.12.2017, which raised the same issue and proposed a similar action which was suggested in the first show cause notice.

5.2. Consequently, the petitioner on 12.01.2018 wrote back to respondent no.3/CBDT stating that his reply dated 06.12.2017 to the first show cause notice be treated as a reply to the second show cause notice.

6. In the meanwhile, the issuance of order dated 24.08.2017 had impelled the petitioner to approach the Tribunal; the action filed was

notice of three months on the condition that the Government servant shall not apply for commutation of a part of his pension before the expiry of the period of notice of three months.

(2) A Government servant, who has elected to retire under this rule and has given the necessary intimation to that effect to the Appointing Authority, shall be precluded from withdrawing his election subsequently except with the specific approval of such authority:

Provided that the request for withdrawal shall be within the intended date of his retirement.”



numbered as O.A.No.3025/2017

6.1. The record shows that the petitioner had filed the said action [i.e., O.A.No.3025/2017], on 28.08.2017. The Tribunal, initially, allowed the said O.A., *via* order dated 10.07.2018. The order was, however, recalled, *via* order dated 22.01.2019, on the ground that the communication dated 07.01.2016 whereby respondent no.3/CBDT had asked the petitioner to submit a fresh notice of voluntary retirement, *albeit*, after 02.01.2016, was not brought to its attention.

6.2. Finally, O.A.No.3025/2017 was, as indicated above, ultimately disposed of *via* order dated 04.04.2019; giving partial relief to the petitioner.

7. In the interregnum, in O.A. No.3025/2017, which was pending adjudication, recovery proceedings that were likely to follow on the issuance of the order dated 24.08.2017 were stayed by the Tribunal *via* order dated 12.09.2017.

7.1. Importantly, the other consequences of the order dated 24.08.2017 was the issuance of charge memo dated 08.03.2018. The charge memo, along with a cover letter dated 15.03.2018, was received by the petitioner on 15.03.2018. As indicated right at the beginning of the narration of events, the only charge levelled against the petitioner concerned his unauthorised absence from duty since 11.02.2016.

7.2. Resultantly, on 28.03.2018, the petitioner filed a second action with the Tribunal i.e., O.A. No.1381/2018. On 06.04.2018, the Tribunal admitted the O.A. and stayed the disciplinary proceedings *qua* the petitioner, which had been triggered *via* charge memo dated 08.03.2018.

7.3. The Tribunal, *via* its order dated 10.07.2018, allowed O.A.



No.3025/2017, and, thus, in a sense, vindicated the petitioner's stand, which is, that he stood retired from service w.e.f. 10.02.2016.

8. As far as O.A. No.1381/2018 was concerned, on 08.10.2018, an order was passed by the Tribunal which reads as follows :

“This case presents an extraordinary situation. The applicant submitted an application for voluntary retirement on 6.11.2015, indicating the effective date of his retirement as 10.02.2016. A doubt was expressed by the authority competent to accept the request for voluntary retirement as to whether the application submitted before completion of 20 years of service, can be accepted. The DoP&T responded promptly on 23.12.2015 and has taken the view that since the date of retirement is after 20 years, neither the request can be rejected nor the retirement benefits can be withheld. Even this was not acted upon by the concerned authority and the applicant had to file OA 3025/2017.

It is during the pendency of that OA that the department has chosen to issue a charge memo dated 8.03.2018 wherein the only allegation is that the applicant did not attend office from 11.02.2016 onwards. There cannot be more arbitrary and vindictive exercise of power than this. It also indicates the level to which an officer can be harassed by his own department.

It is relevant to mention that OA 3025/2017 was allowed by this Tribunal on 10.07.2018. Till today, no counter is filed by the respondents in the present OA, nor the pensionary benefits are being released to the applicant.

We direct that the entire file shall be produced before this Tribunal so that we may fix the responsibility on the officer concerned for this entire episode. List on 26.10.2018.”

8.1. The said OA was, thereafter, taken up by the Tribunal on 26.10.2018. Since on 26.10.2018, the record, as directed on the previous date, was not produced, a direction was issued that the Chairperson, CBDT will remain present before the Tribunal on 30.10.2018.

8.2. The record shows that on 30.10.2018, the Tribunal dispensed with the personal presence of the Chairperson, CBDT.



8.3. Since there was non-compliance with the Tribunal's judgement dated 10.07.2018, passed in OA No.3025/2017, which, as a consequential relief, directed the respondents to release to the petitioner, the retirement benefits, a contempt petition was filed by the petitioner i.e., CP No.671/2018, in and about 01.11.2018.

8.4. It appears that the respondents apprehending an adverse order in the contempt petition, preferred a review application i.e., RA No. 260/2018 qua Tribunal's order dated 10.07.2018, passed in OA No.3025/2017. The review application was accompanied by an application for condonation of delay i.e., MA No.5247/2018. As noticed above, the Tribunal via its order dated 22.01.2019 recalled its order dated 10.07.2018, passed in the aforementioned O.A., on the ground that respondent no. 3's/CBDT's communication dated 07.01.2016 had escaped its attention.

8.5. The Tribunal, via its final order dated 04.04.2019 [passed in O.A. No.3025/2017], set aside the order dated 24.08.2017 passed by respondent no.3/CBDT on the sole ground that the said order was passed without issuing a show cause notice to the petitioner.

8.6. Consequentially, the petitioner's notice for voluntary retirement dated 06.11.2015 stood revived and, therefore, the Tribunal granted four weeks to the respondents to act on the said notice. In effect, the said O.A. was partly allowed by the Tribunal.

8.7. Resultantly, the second OA i.e., OA No.1381/2018, whereby challenge had been laid to the charge memo dated 08.03.2018 was also disposed of on the very same date i.e., 04.04.2019. The relevant part of the said order is extracted hereafter :

"3. The charge memo is virtually a sequel to the proceedings to notice for voluntary retirement from service. The applicant filed O.A.



No.3025/2017 in relation thereto. Today itself, we partly allowed the said O.A. through [a] separate order. Though several grounds are urged in challenge to the charge memo, we are not impressed by them.

4. The question as to whether the absence of the applicant was authorised or not, needs to be examined on the basis of the explanation, which the applicant may offer, and the inquiry if any ordered by the disciplinary authority.”

9. The petitioner was dissatisfied with the orders dated 04.04.2019 [passed in OA Nos.3025/2017 and 1381/2018 respectively], and, hence, approached this court via the above-captioned writ petitions.

10. Before we proceed further, a short rewind of certain events which occurred between September 2002 and February 2004 and, thereafter, between January 2014 and up until 03.11.2015 are required to be noticed.

10.1. The reason why we chose to advert to these events is that these events would have a bearing on the order dated 03.11.2015, passed by respondent no.3/CBDT which was, as alluded to hereinabove, revised by respondent no.3/CBDT via order dated 24.08.2017. It is this order whereby respondent no.3/CBDT, as adverted to hereinabove, has concluded that the EOL granted to the petitioner, *albeit*, without a medical certificate for the period spanning between 06.11.2003 and 31.12.2003 (i.e., 56 days) as also between 20.01.2004 and 04.02.2004 (i.e., 16 days) cannot be counted as qualifying service under Rule 21 of the CCS (Pension) Rules.

10.2. Thus, in effect, as of 10.02.2016 i.e., the date from which the petitioner claims that he retired from service, is short of the prescribed qualifying period in service by 32 days; the qualifying period of service being 20 years.

11. Keeping in mind this prefatory note, it would be relevant to record the



events concerning the saga relating to the application for grant of EOL by the petitioner and its approval as a qualifying service by respondent no.3/CBDT.

11.1. On 23.09.2002, the petitioner had applied for EOL commencing from 01.11.2002 up until 31.10.2003. The reason furnished in the application by the petitioner was that he wanted to undertake self-training in the field of Information Technology.

11.2. Evidently, respondent no.3/CBDT while approving the petitioner's application for grant of EOL, based it on the personal requirement of the petitioner rather than the ground put forth in the application. The petitioner had no say in the reasons given by respondent no.3/CBDT for the grant of EOL.

11.3. It appears that the petitioner sought an extension by a further period of five months, which was approved by respondent no.3/CBDT. The extension was again pivoted on personal grounds. The extended period would, as is evident, come to an end on 31.03.2004. The record, however, reveals that the petitioner rejoined his service little before the extended period of his leave was to come to an end i.e., on 05.02.2004.

11.4. It is important to note that in the service book concerning the petitioner, there was no reference to the fact that EOL granted to him would not count as a qualifying service. However, when after the completion of 18 years in service, a statutory verification was carried out by the concerned authority i.e., in and about 08.01.2014, based on the request of the petitioner when the issue concerning treatment of the petitioner's EOL came to the fore.

12. Accordingly, the petitioner, on 08.01.2014, preferred a representation



with respondent no.3/CBDT for treating the EOL granted to him as a qualifying service. Broadly, the petitioner articulated two grounds as to why, according to him, EOL should be treated as a qualifying service. First, it was applied for pursuing technical studies. Second, in the service book, there was no reference, as noted above, to the fact that EOL would not count towards qualifying service.

12.1. The record reveals that, on this aspect of the matter, the opinion of DoPT was sought by the Ministry of Finance, Department of Revenue (CBDT) vide communication dated 30.01.2014.

12.2. The DoPT, having considered the fact that the petitioner was granted EOL for prosecuting higher technical studies through self-training, advised on 18.02.2014 that the same would automatically "count" as a qualifying service for pension as well as for increments without any further sanctions. In this context, DoPT's Office Memorandum (OM) dated 18.02.1986 was cited. Reference was also made to Rule 21 of the CCS (Pension) Rules, which, according to DoPT, also adverted to qualifying service. Thus, in effect, DoPT advised that decision could be taken based on OM dated 18.02.1986 with input from the Department of Pension & Pensioners' Welfare insofar as Rule 21 of the CCS (Pension) Rules was concerned.

13. It appears that after the internal discussion as to whether EOL granted to the petitioner should count towards his qualifying service, the petitioner's representation dated 08.01.2014 was rejected on 05.11.2014, *albeit*, without furnishing any reason. This propelled the petitioner to move the Tribunal against the rejection of the representation for counting EOL granted to him towards his qualifying service.

13.1. Consequently, on 28.01.2015, the petitioner instituted an action [i.e.,



O.A.No.411/2015] in the Tribunal. It is while the aforementioned action was pending consideration before the Tribunal that respondent no.3/CBDT passed the order dated 03.11.2015, whereby the petitioner's EOL was retrospectively commuted into Earned Leave (EL), Half-Pay Leave (HPL) and LND.

13.2. Once this impediment was out of the way, as noticed above, the petitioner served a notice dated 06.11.2015 on the concerned authority under Rule 48-A of the CCS (Pension) Rules seeking voluntary retirement w.e.f. 10.02.2016.

14. Thus, the core issue which arises for consideration is: whether respondent no.3/CBDT could have revised its order dated 03.11.2015 commuting the EOL granted to the petitioner, *via* order dated 24.08.2017?

Submissions of the petitioner

15. The petitioner, who appeared in person, after taking us through the relevant record, submitted that the order dated 24.08.2017 was flawed, as it failed to take into account the Note appended to Rule 10 of the CCS (Leave) Rules.

15.1. The argument advanced was that the respondents had erroneously concluded that the direction contained in the order dated 03.11.2015 which commuted a part of the EOL as LND was contrary to Rule 31 of the CCS (Leave) Rules.

15.2. According to the petitioner, the requirement of submitting a medical certificate for leave categorized as LND would not apply to retrospective commutation of EOL brought about by respondent no.3/CBDT, in the exercise of powers under Rule 10 of the CCS (Leave) Rules. In support of this plea, the petitioner relied upon the Note appended to Rule 10 of the CCS



(Leave) Rules.

16. It was also the petitioner's submission that the order dated 03.11.2015 was passed after due consideration and, hence, the decision, taken to revise the same *via* order dated 24.08.2017, was completely untenable in law. In this connection, it was pointed out that the order dated 24.08.2017 was passed by respondent no.3/CBDT, despite DoPT's advice dated 23.12.2016 to the contrary. Emphasis was also laid on the fact that this advice was reiterated by the DoPT, on 10.02.2017.

16.1. The submission advanced was that once the petitioner had given notice for seeking voluntary retirement under Rule 48-A of the CCS (Pension) Rules, it became effective after the expiry of the notice period of three months stipulated in sub-rule (1) of Rule 48-A of the CCS (Pension) Rules unless the request was rejected before the expiry of the said period.

16.2. In support of this submission, our attention was also drawn to the proviso appended to sub-rule (2) of Rule 48-A of the CCS (Pension) Rules which indicated that the notice of voluntary retirement of not less than three months had to be given in writing to the Appointing Authority, after the concerned applicant/employee had completed 20 years of service and that this notice required acceptance of the Appointing Authority. The proviso of sub-rule (2) of Rule 48-A was relied upon by the petitioner to demonstrate that since there was no refusal, the retirement became effective from the date of expiry of the notice period i.e., 10.02.2016.

16.3. In other words, respondent no.3/CBDT did not have the power to revise the order dated 03.11.2015 after the retirement became effective from 10.02.2016. As a corollary to this submission, the petitioner argued that the charge memo dated 08.03.2018 [which is assailed in W.P.(C)No.4438/2019]



cannot be sustained since the petitioner stood retired from service after completing 20 years of service w.e.f. 10.02.2016.

16.4. The fact that the Tribunal, to begin with, had agreed that the petitioner insofar as his deemed retirement and the error committed by the respondents in issuing the charge memo dated 08.03.2018 was concerned, was sought to be demonstrated by referring to the order dated 10.07.2018 passed in O.A.No.3025/2017 as also orders dated 08.10.2018 and 26.10.2018 passed in O.A.No.1381/2018 by the Tribunal.

16.5. In support of his pleas, the petitioner relied on the following judgments :

- (i) *Union of India v. Surender Singh Parmar*, (2015) 3 SCC 404
- (ii) *State Bank of Patiala v. Pritam Singh Bedi*, (2014) 13 SCC 474
- (iii) *State of Haryana v. S.K. Singhal*, (1999) 4 SCC 293
- (iv) *P.C. Sekhar v. New India Assurance Company Limited*, 2019 SCC OnLine Del 6633
- (v) *Tek Chand v. Dile Ram*, (2001) 3 SCC 290

Submissions advanced on behalf of the respondents

17. On the other hand, Mr Hanu Bhaskar, who appeared on behalf of the respondents, argued that the commutation of EOL by treating a part of the period as LND without the medical certificate was clearly contrary to the prescribed rules.

17.1. It was submitted by Mr Bhaskar that the requirement of submitting a medical certificate can be waived only when LND is granted in continuation of Maternity Leave or when it is granted to an adoptive mother, or even when it is granted for Child Care Leave (CCL). It was, thus, Mr Bhaskar's contention that since the petitioner's case did not fall within any of these



exceptions, the commutation of EOL by treating 72 days as LND, *albeit* without a medical certificate, was contrary to Rule 31 of the CCS (Leave) Rules.

17.2. Besides this, Mr Bhaskar submitted that the reliance placed on the Note appended to Rule 10 of the CCS (Leave) Rules was misconceived as that Note itself made it clear that what was stated therein was subject to the provisions of Rule 31. In support of his plea, Mr Bhaskar has also relied upon the DoPT's advice dated 22.10.2018.

Analysis and Reasons

18. Having perused the record and considered the facts appearing in this case, what emerges is as follows.

18.1. The petitioner had applied for EOL on 23.09.2002 for the period spanning between 01.11.2002 and 31.10.2003 specifically on the ground that he wished to carry out self-study in the field of Information Technology.

18.2. Respondent no.3/CBDT, on 18.10.2002, granted EOL to the petitioner, as requested, *albeit*, on personal grounds; thus, in effect, altered unilaterally the reason furnished by the petitioner in his application for grant of EOL.

18.3. This leave was extended at the request of the petitioner till 31.03.2004. The petitioner, however, before the expiry of the extended period of EOL, rejoined his duty on 05.02.2004.

18.4. In the petitioner's service book, there was no mention of the fact that the EOL granted to him would not count towards qualifying service.

18.5. It was only in January 2014 when statutory verification of service record was being carried out, that the issue concerning the EOL being counted towards qualifying service came to the fore. The petitioner, as



noticed above, made a representation for this purpose on 08.01.2014.

18.6. Respondent no.3/CBDT sought DoPT's view on whether or not EOL sought by the petitioner for carrying out self-study in Information Technology would count towards qualifying service. The DoPT rendered its advice on 18.02.2014 holding, quite categorically, that leave granted for prosecuting higher technical and scientific study in the petitioner's case would count towards qualifying service for pension and increments without further sanctions. It is important, therefore, at this stage, to quote the relevant part of the DoPT's advice :

“3. On perusal of the record, it is revealed that the officer was granted EOL vide Office Order dated 18.10.2002 & 31.10.2003 on personal grounds but it was not specifically mentioned grant of reasons of EOL (i.e. for prosecuting higher technical studies). However, the officer explicitly stated vide his application dated 23.09.2002 that he wished to update in the field of Information Technology through self training. On the basis of the request, the EOL was granted to the officer.

4. As per this Department's OM dated 18.02.1986, EOL granted to a Government servant for prosecuting higher technical & scientific studies shall automatically count as qualifying service for pension and for increments without any further sanctions. However, Rule 21 of the CCS (Pension) Rules, 1972 also explains about the qualifying service etc.

5. The administrative Department may take administrative decision as per this Department's OM dated 18.02.1986 and take a view as to whether EOL was granted for prosecuting higher technical scientific studies and consult Department of P&PW regarding rule 21 of the CCS (Pension) Rules, 1972.”

19. At this juncture, it would also be apposite to refer to the relevant part of Rule 21 of the CCS (Pension) Rules :

“21. Counting of periods spent on leave.- All leave during service



for which leave salary is payable and all extraordinary leave granted on medical certificate shall count as qualifying service:

Provided that in the case of extraordinary leave other than extraordinary leave granted on medical certificate, the appointing authority may, at the time of granting such leave, allow the period of that leave to count as qualifying service if such leave is granted to a Government servant,-

- (i) omitted*
- (ii) due to his inability to join or re-join duty on account of civil commotion; or*
- (iii) for prosecuting higher scientific and technical studies.”*

20. Despite DoPT's advice that EOL granted for pursuing the technical studies would count towards qualifying service, the petitioner's representation was rejected by respondent no.3/CBDT on 05.11.2014.

20.1. Ultimately, as noted above, after the petitioner had escalated the matter by filing a petition with the Tribunal, respondent no.3/CBDT vide order dated 03.11.2015 retrospectively commuted the EOL granted to him for the period spanning between 01.11.2002 and 04.02.2004, under various heads including LND.

20.2. It is only thereafter, that on 06.11.2015, the petitioner gave the prescribed three months' notice in writing to the Appointing Authority under Rule 48-A of the CCS (Pension) Rules indicating therein unequivocally that the notice period vis-a-vis his request for voluntary retirement would expire on 10.02.2016.

20.3. Concededly, the only objection that respondent no.3/CBDT had, at this juncture, was whether or not the notice dated 06.11.2015 served by the petitioner was premature. This is evident upon a bare a perusal of the



respondent no.3/CBDT's letters dated 07.01.2016, 08.03.2016 and 12.09.2016. On this aspect, respondent no.3/CBDT sought the advice of DoPT.

20.4. The DoPT on two occasions i.e., 23.12.2016 and 10.02.2017 emphatically indicated that, although the petitioner's notice under Rule 48-A of the CCS (Pension) Rules provided for a longer period for bringing about employer-employee disengagement than the prescribed period of three months, however, as long as his intended date of retirement fell after the completion of qualifying service of 20 years, he would be deemed as having retired from government service on 10.02.2016, in terms of the aforesaid Rule. Given this position, DoPT had advised the respondents, in its communication dated 23.12.2016 to release the petitioner's pensionary benefits.

21. Therefore, what the record brings to the fore is once respondent no.3/CBDT could not get its way as regards the validity of the notice dated 06.11.2015 submitted by the petitioner for seeking voluntary retirement, it added another string to its bow by raking up an issue which stood closed with the passing of the order dated 03.11.2015, whereby the petitioner's EOL stood commuted. At this juncture, it may be relevant to refer to the relevant parts of Rule 48-A of the CCS (Pension) Rules :

"48-A. Retirement on completion of 20 years' qualifying service

(1) At any time after a Government servant has completed twenty years' qualifying service, he may, by giving notice of not less than three months in writing to the Appointing Authority, retire from service.

xxx

xxx

xxx

(2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the Appointing Authority.



Provided that where the Appointing Authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period."

21.1. Clearly, a plain reading of the aforementioned rule would show that all that the petitioner was required to do was to give a notice in writing of not less than three months to the Appointing Authority of his intention to retire from service. [See sub-rule (1) of Rule 48-A.]

21.2. Sub-rule (2) of Rule 48-A discloses that notice of voluntary retirement submitted by the petitioner would not become effective till it was accepted by the Appointing Authority. This provision, however, comes with a caveat, which is, that if the Appointing Authority intends to refuse the grant of permission sought for voluntary retirement, such intention has to be communicated to the applicant (in this case the petitioner) before the expiry of the period specified in the said notice failing which the retirement would become effective from the date of expiry of the said period. [See proviso to sub-rule (2) of Rule 48-A.]

22. Concededly, the respondents did not refuse in so many words the permission sought by the petitioner for voluntary retirement; at least not on the ground that his EOL was wrongly commuted on 03.11.2015. This is clearly evident upon a plain reading of the relevant portion of respondent no.3's/CBDT's communication dated 07.01.2016 :

"2. Rule 48 A of the CCS(Pension) Rules, 1972 provide that " at any time after a Government servant has completed twenty years' qualifying service, he may, by giving notice of not less than three months in writing to the Appointing Authority, retire from service" (copy enclosed). Accordingly, Shri Bibhu Dutt Mishra, CIT(DR), ITAT, New Delhi had not completed 20 year of Qualifying Service as on date of giving notice of VRS i.e 06.11.2015.



3. *It is, therefore, requested to advise to Shri Bibhu Dutt Mishra, CIT(DR), ITAT, New Delhi to give a fresh notice of VRS after completing 20 year of Qualifying Service under Rule 48 A of COS Pension Rules, 1972."*

22.1. A similar advice was given to the petitioner even on 08.03.2016, *albeit*, after he had retired (based on his understanding) from service i.e., as of 10.02.2016.

22.2. To our minds, the position, which obtained on 10.02.2016 [as reflected in DoPT's communications dated 23.12.2016 and 10.02.2017], was that the petitioner had completed his qualifying service.

22.3. Therefore, if this position holds, as correctly argued by the petitioner, the respondent no.3/CBDT could not have unsettled the order dated 03.11.2015, concerning the commutation of EOL granted to the petitioner. Thus, if the advice of the DoPT, the order dated 03.11.2015 and the notice for seeking voluntary retirement dated 06.11.2015 [which was served by the petitioner on the respondents] are kept in mind, then, one would have to accept the submission of the petitioner that his retirement became effective from the date of expiry of the period indicated in the said notice i.e., 10.02.2016, given the fact that there was no refusal of the request made by the petitioner before the expiry of the period specified in the notice. This position is in conformity with the principle enunciated by the Supreme Court in the judgment rendered in ***Tek Chand*** :

“32. Under sub-rule (1) of the said Rule, at any time after completion of 20 years' qualifying service, a government servant could give notice of not less than three months' in writing to the appointing authority for retirement from service. Under sub-rule (2), voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority. In the proviso to sub-rule (2) of Rule 48-A, it is



clearly stated that in case the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

33. It is clear from sub-rule (2) of the Rule that the appointing authority is required to accept the notice of voluntary retirement given under sub-rule (1). It is open to the appointing authority to refuse also, on whatever grounds available to it, but such refusal has to be before the expiry of the period specified in the notice. The proviso to sub-rule (2) is clear and certain in its terms. If the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement sought for becomes effective from the date of expiry of the said period. In this case, admittedly, the appointing authority did not refuse to grant the permission for retirement to Nikka Ram before the expiry of the period specified in the notice dated 5-12-1994. The learned Senior Counsel for the respondent argued that the acceptance of voluntary retirement by appointing authority in all cases is mandatory. In the absence of such express acceptance the government servant continues to be in service. In support of this submission, he drew our attention to Rule 56(k) of the Fundamental Rules. He also submitted that acceptance may be on a later date, that is, even after the expiry of the period specified in the notice and the retirement could be effective from the date specified in the notice. Since the proviso to sub-rule (2) of Rule 48-A is clear in itself and the said Rule 48-A is self-contained, in our opinion, it is unnecessary to look to other provisions, more so in the light of law laid down by this Court. An argument that acceptance can be even long after the date of the expiry of the period specified in the notice and that the voluntary retirement may become effective from the date specified in the notice, will lead to anomalous situation. Take a case, if an application for voluntary retirement is accepted few years later from the date specified in the notice and voluntary retirement becomes operative from the date of expiry of the notice period itself, what would be the position or status of such a government servant during the period from the date of expiry of the notice period up to the date of acceptance of the voluntary retirement by the appointing authority? One either continues in service or does not continue in service. It cannot be both that the voluntary retirement could be effective from the date of expiry of the period mentioned in



the notice and still a government servant could continue in service till the voluntary retirement is accepted. The proviso to sub-rule (2) of Rule 48-A of the Rules does not admit such situation.”

[Also see observations made by the Supreme Court in *S.K. Singhal*, which dealt with a *pari materia* rule i.e., rule 5.32(B) of the Punjab Civil Services Rules (Vol. II) and was cited with approval in *Tek Chand*.]

23. However, even if we assume that respondent no.3/CBDT could review its order dated 03.11.2015, what was needed to be ascertained is whether the petitioner was required to furnish a medical certificate for the period which was treated as LND.

23.1. Mr Bhaskar has relied upon Rule 31 of the CCS (Leave) Rules. Concededly, the requirement to furnish a medical certificate where LND is granted is waived in three situations i.e., where it is granted in continuation of Maternity Leave or when it is granted to an adoptive mother and lastly, in a case where it is granted as CCL.

23.2. However, when Rule 31 of the CCS (Leave) Rules is read in conjunction with Rule 10 of the CCS (Leave) Rules, which confers powers on the concerned authority to commute one kind of leave to another, as correctly argued by the petitioner, it is evident that it has no application where leave is commuted retrospectively. To appreciate this aspect of the matter, the relevant rule is extracted hereafter :

“10. Commutation of one kind of leave into another

(1) At the request of a Government servant, the authority which granted him leave may commute it retrospectively into leave of a different kind which was due and admissible to him at the time the leave was granted, but the Government servant cannot claim such commutation as a matter of right.

Provided that no such request shall be considered unless received by such authority, or any other authority designated in



this behalf, within a period of 30 days of the concerned Government servant joining his duty on the expiry of the relevant spell of leave availed of by him.

(2) The commutation of one kind of leave into another shall be subject to adjustment of leave salary on the basis of leave finally granted to the Government servant, that is to say, any amount paid to him in excess shall be recovered or any arrears due to him shall be paid.

NOTE.- Extraordinary leave granted on medical certificate or otherwise may be commuted retrospectively into leave not due subject to the provisions of Rule 31."

23.3 A careful perusal of Rule 10 of the CCS (Leave) Rules would show that if a request is made, the concerned authority which granted leave to the applicant (in this case the petitioner) may commute the same retrospectively into different kinds of leaves which were due and admissible to him at the time when the leave was first granted. Sub-rule (1) of Rule 10 makes it clear that the commutation of leave of one kind to another is at the discretion of the authority and, hence, cannot be sought as a matter of right by the applicant. The other condition that an applicant is required to fulfil is that a request in this behalf i.e., commutation should be made within 30 days of the applicant joining his duties on the expiry of the relevant spell of leave availed by him.

23.4. It is not in dispute that when the petitioner was granted EOL, at that juncture, there was no indication made that it would not qualify for qualifying service. That the respondents were required to indicate as to whether or not EOL granted to the petitioner would count towards the qualifying service emerges upon a perusal of the Government of India's decision dated 28.02.1976, as contained in Swamy's Pension Compilation on page 58.



"(1) Need for making proper entries for treatment of extraordinary leave for pensionary benefits.- Under Rule 21 of the CCS (Pension) Rules, 1972, extraordinary leave granted on [sic: a] medical certificate qualifies for pension. The Appointing Authority may, at the time of granting extra-ordinary leave, also allow the period of such leave to count as qualifying for pension if the leave is granted to a Government Servant-

(i) due to his inability to join or rejoin duty on account of civil commotion, or

(ii) for prosecuting higher technical and scientific studies.

Extraordinary leave taken on other grounds is treated as non-qualifying and, therefore, a definite entry is to be made in the service records to that effect. Entries regarding service being qualifying or otherwise are required to be made simultaneously with the event. Even where this is not done, it should still be possible to rectify the omission during the period allowed for preparatory action i.e., from two years in advance of the retirement date up to eight months before retirement. At the end of that period, however (i.e., when the actual preparation of the pension papers is taken in hand), no further enquiry into past events or check of past records should be undertaken. Specific entries in the service records regarding non-qualifying periods will be taken note of and such periods excluded from the service. All spells of extraordinary leave not covered by such specific entries will be deemed to be qualifying service."

23.5. It is only when the petitioner applied for service verification, under Rule 32 of the CCS (Pension) Rules, upon completion of 18 years of service that the ambiguity came to the fore and, therefore, the petitioner was advised to seek clarification from the Establishment Section of Ministry of Defence, where he was posted on deputation, via communication dated 28.01.2014. It is in this context that the petitioner had earlier made a representation to respondent no.3/CBDT on 08.01.2014.

23.6. It is important to note that the Ministry of Defence on behalf of the petitioner also made a reference to respondent no.3/CBDT on 06.02.2014.



This is an aspect which emerges upon perusal of the petitioner's communication dated 29.09.2015 addressed to the Member (P&V), CBDT.

23.7. Admittedly, the petitioner, as noted above, had rejoined his duties on 05.02.2004, which was much before the extended period of his EOL was to expire i.e., 31.03.2004.

23.8. Because of the aforesaid circumstances, the petitioner, to our minds, correctly assumed up until January 2014 that the EOL granted to him would count towards qualifying service.

23.9. Therefore, in substance, the second condition provided in the proviso appended to sub-rule (1) of Rule 10 of the CCS (Leave) Rules also stood fulfilled or at the very least did not apply to him, as the confusion on this score was caused by the respondents.

24. This brings us to the third limb of Rule 10, which is captured in the Note. A careful perusal of the Note would show that Rule 10 permits EOL, which is granted against a medical certificate or otherwise, to be commuted retrospectively into LND subject to the provisions of Rule 31 of the CCS (Leave) Rules.

24.1. Clearly, the expression "otherwise" excludes that part of Rule 31 of the CCS (Leave) Rules, which requires an applicant to obtain a medical certificate for commuting EOL to LND. The three exceptions where a medical certificate is not required, as noticed above, would not apply to an applicant who seeks commutation of EOL retrospectively into a leave of a different kind. If the note is read in any other way, it would lead to a strained construction.

24.2. Therefore, in our opinion, the stand of the respondents that because a medical certificate was not taken, the retrospective commutation of EOL to



the extent it was treated as LND *via* order dated 03.11.2015 was erroneous, is misconceived.

25. This apart, we have serious doubt as to whether respondent no.3/CBDT could have revised the order of commutation dated 03.11.2015, *via* order dated 24.08.2017, when the petitioner based on order dated 03.11.2015, had taken steps to voluntary retire from service.

25.1. The petitioner was entitled to arrange his affairs after 10.02.2016, as there was no refusal of the request made by him for being allowed to voluntarily retire from service. To our minds, the petitioner's belief that he had completed the prescribed period of qualifying service was correctly rooted in the certificate dated 25.07.2017, issued by the respondents under Rule 32 of the CCS (Pension) Rules, which clearly stated that he had put in 20 years 01 month and 10 days in service. The certificate in no uncertain terms indicated that it shall be treated as "final", and will not be reopened except when necessitated by a subsequent change in the rules and orders under which service qualifies for pension.

25.2. Thus, the respondents' past conduct, as captured hereinabove, in our view, would estop them from revisiting the order dated 03.11.2015. [See ***Nandini Nitin Patil v. State of Maharashtra***, 2000 SCC OnLine Bom 43².]

² "10. The circular, dated 26 September 1988, nowhere mentioned that the said circular or the scheme floated therein for voluntary retirement was subject to the approval of the State Government. There was no such indication in the said circular, dated 26 September 1988. Consequently, petitioner was perfectly justified in accepting the representation made by respondent 2-Corporation and accordingly she accepted voluntary retirement. In other words, she accepted it to her prejudice by acting upon the said circular, dated 26 September 1988. In these circumstances, we are satisfied that [sic: that] the respondent-Corporation is estopped from denying the said benefit to the petitioner. The petitioner is entitled to retirement compensation at the rate of three months' salary for each completed year of service from 6 January 1984 to 6 December 1988 amounting to Rs. 37,500 after deducting an amount or compensation of Rs. 17,334 which she has already received. Thus she is entitled to balance amount of Rs. 20,166."



If the respondents are permitted to revisit such orders, it would lead to uncertainty for those who would want to arrange their affairs after having made a request, as per the extant legal regime for seeking voluntary retirement.

26. What has made the matters worse for the petitioner is the issuance of the charge memo dated 08.03.2018; which is, concededly, the consequence of respondent no.3/CBDT passing the order dated 24.08.2017.

26.1. Furthermore, in our view, the petitioner is right that the Tribunal in setting aside the order dated 24.08.2017 *via* impugned order dated 04.04.2019 passed in O.A.No.3025/2017, did not address the principal and core issues, firstly, as to whether the petitioner stood retired from service w.e.f. 10.02.2016, and, secondly, as to whether respondent no.3's/CBDT's order dated 24.08.2017 was based on a correct interpretation of Rule 10 read with Note appended to it and Rule 31 of the CCS (Leave) Rules.

Conclusion

27. Given the reasons set forth above, we are of the opinion that the prayers made in both writ petitions would have to be allowed.

27.1. Accordingly, the two separate but identical dated orders i.e., orders dated 04.04.2019 passed in O.A.Nos.3025/2017 and 1381/2018, are set aside.

27.2. The petitioner will be deemed as having retired from service on 10.02.2016. Consequentially, the charge memo dated 08.03.2018 shall stand quashed.

27.3. Resultantly, the respondents will release the retiral dues payable to the petitioner along with interest at the rate of 8% [simple] per annum, commencing from 11.02.2016 which will run, till the date of payment.



27.4. Furthermore, the respondents will also pay Rs.20,000/- as a cost, to the petitioner.

27.5. Insofar as the payment of retiral dues with interest is concerned, the appropriate amount will be remitted to the petitioner upon fulfilment of necessary formalities, within four weeks.

27.6. The costs will also be remitted to the petitioner within the same timeframe.

28. The writ petitions are disposed of in the aforesaid terms. Consequently, pending applications shall stand closed.

(RAJIV SHAKDHER)
JUDGE

(TALWANT SINGH)
JUDGE

MAY 26, 2022/aj

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