

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE**

Present:

The Hon'ble Justice Rai Chattopadhyay

WPO 420 of 2020

Basudev Tiwary

Vs.

The State of West Bengal & Ors.

For the Petitioner

: Mr. Debdutta Basu

For the State Respondent

: Mr. Sirsanya Bandyopadhyay

For the Respondent Nos. 2 to 6

: Mr. Soumya Majumder

: Mr. Niladri Bhattacharjee

: Ms. Deblina Chattaraj

Judgment on

: 13.06.2025

Rai Chattopadhyay, J. :-

(1) The petitioner is a superannuated employee (tram driver No. 297/641), of the respondent No. 2/ West Bengal Transport Corporation Limited, who has retired from the service with effect from October 31, 2018, afternoon. The petitioner is aggrieved with the order of the Managing Director of the respondent Corporation [in short "the MD"], dated June 26, 2020, that there is no scope for the petitioner to receive pension option form at this stage and prayer as to the same has been rejected thereby for two reasons. Being aggrieved, the petitioner has filed the instant writ petition. The petitioner has sought for the relief that he be released the pension upon completion of formalities,

including exercise of option, with 12% interest. The petitioner is agreeable to refund the excess fund drawn as a non-object of pension, in order to exercise his option for pension.

(2) Let the factual background of the case, as necessary to be dealt with here be narrated in a nut-shell as here in below. Admittedly, the petitioner has been a permanent employee of the respondent No. 2/Corporation. Admittedly, also that the petitioner has retired with effect from October 31, 2018. According to the petitioner, in February 2005, when the petitioner was discharging duty at Tollygunge depot, he underwent on medical leave with effect from February 14, 2005, due to his illness. He thereafter moved to his native village at Bihar. Admittedly also, that the petitioner could not join within a reasonable period of time and approached the Authority for resumption of duty after being recovered. In the intermittent period, the petitioner has time and again contacted with the Authority, informing the same regarding his continued ill health. However, allegedly in spite of his endeavour to resume the duty after being recovered, he was not allowed to do that by the respondent Authority.

(3) In the year 2001, the respondent/Corporation introduced pension scheme for the employees. However, many of them, including the petitioner could not respond to the scheme by filing option form then. During the period of absence of the petitioner, the respondent had again called for the option forms to be submitted by such employees, who had not exercised the option earlier. The MD had issued an order on July 24, 2006, directing all the desiring employees to exercise option form by July 31, 2006. It is the contention of the petitioner that being not able to join in duty, due to non-cooperation by the respondent/Corporation

in allowing him to join in duty, neither he could gather the knowledge regarding the letter of the MD dated July 24, 2006, nor could he exercise his option by filing his option form with the authority to opt for the pension within the said stipulated date. According to the petitioner the chronology of events which followed thereafter should prompt the Authority to treat the petitioner to be in continuous and uninterrupted service with the respondent/Corporation. Therefore, according to the petitioner, he would be eligible under the law to exercise the option form and after due compliance with the formalities like refunding of the excess amount drawn by him as having not opted for the pension, he would be eligible for grant of pension.

(4) The petitioner has alleged that the respondent/Corporation has kept him out of employment, only unauthorisedly, irrationally, and illegally, in so far as during the entire period when he could not join duty, neither any disciplinary proceeding was initiated against him nor he has ever been issued with any suspension order or been granted with the subsistence allowance, till the time this Court has interfered with and directed the respondent to pay the subsistence allowance to him. On the contrary, in spite of the petitioner having made several endeavours to join in duty after his recovery, he has not been issued any order for resumption of duty by the said respondent/Corporation and thus has been illegally kept out of his employment, without following the due process of law.

(5) In the meantime, in 2016 and 2019 the petitioner had filed two writ petitions being WPA No. 867 of 2016 and WPA no. 238 of 2019 respectively. Pursuant to the order of the Court in 2016 writ petition, an order dated May 18, 2017, was issued by the Deputy Managing Director

of the Corporation, directing the petitioner to resume duty. Vide the order of the Court dated September 22, 2016, the petitioner was granted subsistence allowance.

(6) That the 2019 writ petition was filed by the present petitioner seeking relief that chargesheet against him dated September 23, 2015, should be dropped consequent to his superannuation on October 31, 2018 and the petitioner should be paid with the salary from the period April 27, 2015 to May 18, 2017, after adjustment of the subsistence allowance paid to the petitioner during the said period of time. Admittedly, during pendency of the said case, the Joint Managing Director, upon hearing the petitioner on October 25, 2019 has directed the chargesheet against the petitioner to be dropped. The petitioner was also paid full salary from June 1, 2015, to May 18, 2017, after adjusting the subsistence allowance already paid. Subsequently, the petitioner has also been paid with the consequential benefit for the same period that is June 1, 2015 to May 18, 2017.

(7) On this factual background, the petitioner has come up in the instant writ petition that he should be granted the opportunity to exercise option for pension and may be granted the pensionary benefit upon refund of the excess amount drawn by him as an employee, not having opted for pension.

(8) Mr. Basu has represented the writ petitioner. In his argument he has demonstrated as to how and to what extent the petitioner has been deprived of his rightful and legal claim as to the salary/subsistence allowance/pension and has sought for the relief that the petitioner may be allowed to exercise option for grant of pension to him. Mr Basu has

stated that after recovery from illness, the petitioner intended to join his duty but has never been issued with an order for resumption of duty by the Authority. That, neither the petitioner was allowed to join in duty nor he was subjected to any disciplinary proceeding due to any alleged misconduct like unauthorised absent. Even, no suspension order was ever issued against the petitioner. It is stated that only due to the intervention of this court, the petitioner was allowed to join in duties at a belated period, vide letter dated May 18, 2017. That, by the order of the Court, the petitioner was also granted the subsistence allowance. At a very later stage, only, on September 23, 2015, a charge-sheet was issued to the petitioner and was served through posts. The petitioner received the same only in July 2016 and replied with his letter dated June 18, 2016. That the disciplinary proceeding did not effectively proceeded since thereafter till the retirement of the writ petitioner on October 31, 2018. Even after his retirement the charge-sheet against him was not dropped. Thereafter, only after intervention of this Court, the Authority has dropped the same and paid the petitioner salary as well as the consequential benefits for the relevant period of time, as discussed above.

(9) According to Mr. Basu, the service of the petitioner has been treated to be a continuous one by the Court and the benefits emanating from a continuous service is therefore to be allowed to the writ petitioner, by the respondent No.2/Corporation. It is submitted that had the petitioner been allowed to resume his duty after recovery from illness, he could have gathered knowledge about the pension scheme re-introduced in 2006 and opted for the same. It is submitted that since due to the purported inaction of the said respondent, not having allowed the petitioner to join in duty in due course and the said

respondent, subsequently having directed the petitioner to resume duty pursuant to the Court's order, as well as having released him the subsistence allowance and the salary and consequential benefits, would therefore be duty bound also to allow the petitioner to be benefited under a beneficial scheme which came into force during this period of the petitioner being kept out of employment unauthorisedly and illegally, without following the due course of law.

(10) Mr. Basu has submitted that the rights of the petitioner to claim the unpaid service benefits only have crystallised after dropping of his charge-sheet vide order dated October 25, 2019. He has further submitted that in the previous writ petitions by the present petitioner there has not been any scope to raise the grievance and the prayer of him, as has been made here in the instant case, the said reason as stated above. He says further that the subject matter of the previous writ petitions by the petitioner have been separate from the instant one. In this regard he has made reference to the 'Explanation-IV' of section 11 of the Civil Procedure Code, to say that the issues related in the instant case being not the subject matter of consideration in the earlier cases by the petitioner and not being directly and substantially in issue therein, should not act as a bar for due consideration of the prayer of the petitioner in this case. He has submitted that at this stage, the respondent cannot come up with the contention and allegation of unauthorised absence by the petitioner in so far as the said respondent has never voluntarily proceeded in accordance with the law against the petitioner at any point of time, he being a permanent employee of the respondent and covered under the Rules governing the employees of the respondent. The Rules were only made applicable in case of the

petitioner and a disciplinary proceeding was started on allegation whatsoever, only after intervention of this Court and directions being made that the petitioner should be allowed the subsistence allowance. Therefore, according to the petitioner, at this later stage, the respondent would not have any authority to again rely on the point of unauthorised absence of the writ petitioner. Mr. Basu seeks that the writ petition maybe allowed by allowing the prayer of the petitioner as made therein.

(11) According to the respondent/Corporation, which is represented by Ms. Chatteraj learned advocate, the contentions and grounds taken by the petitioner in this case are baseless and there would not be any illegality or impropriety in the order passed by the MD dated June 26, 2020. The main contention of the said respondent is about prolonged and unauthorised absence of the writ petitioner. According to the respondent, the petitioner has absented from duty according to his own volition and for a prolonged period and has never joined in duty till the time the Court passed order upon the respondent to issue an order directing him to resume his duty. That the petitioner has never made any prayer for extension of the leave, once taken by him. Also that there is no documentary proof that he has ever approached the respondent for joining, during the entire period of his absence.

(12) Thus, the petitioner having not joined in duty at the time when the pension scheme was reintroduced by the Authority in the year 2006, he cannot be granted any benefit under the said scheme. It is submitted further that after the period for opting for the said scheme, introduced for the second time in 2006, having been over much before, that is on July 31, 2006, there would not be any scope for the petitioner to switch over to that now. It is stated by the respondent that the

petitioner did not opt for the pension scheme when it was introduced for the first time in 2001. Accordingly, on his superannuation, he has been paid the retirement benefits, treating him as an employee not having opted for pension and the petitioner has accepted the retirement benefit on January 7, 2019, without any protest. Therefore, according to the respondent, it is only afterthought by the petitioner that he wants to switch over to the pension scheme, reintroduced at a later point of time by the respondent/Corporation and for that the petitioner has brought on record some frivolous and untenable grounds which are not maintainable in the eye of law.

(13) In this regard the respondent has relied on the order/judgments of this Court as follows:

- (i) Order dated January 7, 2014, in W.P.No. 1254 of 2013 **[Dilip Sankar Das & Ors. Vs. State of West Bengal & Ors.]**;
- (ii) Judgment dated February 22, 2016 in APO No. 302 of 2015 **[Dilip Sankar Das & Ors. Vs. State of West Bengal & Ors.]**; And
- (iii) Judgment dated July 26, 2023 in WPA No. 7450 of 2021 **[Monojendra Chakraborty & Ors. Vs. The State of West Bengal & Ors.]**

(14) Ms. Chatteraj, learned advocate for the respondent Corporation has sought for dismissal of the writ petition.

(15) During his argument, Mr. Basu for the petitioner has also tried to argue and establish that the petitioner should be considered entitled to his salary for the period from February 2005 to May 2017, subject to deduction of the amount as already has been paid including the subsistence allowance, as during the said period allegedly the petitioner

has been compelled to remain out of employment, being not allowed by the respondent/Corporation to resume his duty. It is further so due to the reason, that the petitioner has been treated as on duty during that period, since he has been paid gratuity on superannuation, taking into consideration the said period of time. The submission appears to be beyond the scope of the writ petition. The petitioner has not made any prayer as regards the same, here in this writ petition.

(16) Therefore the moot question for determination before the Court is whether the writ petitioner should be considered eligible to exercise his option for pension now as on this day and be granted with the pension, subject to compliance of due formalities.

(17) The Hon'ble Division Bench in the case of ***Dilip Shankar Das and Others (supra)***, has held as follows:

"There is no doubt that right to receive pension has now been considered as a fundamental right by the Supreme Court as pension is the property of an employee. However, when a Scheme for pension is made applicable to existing employees conditional upon them opting for the same and such option is not exercised within the stipulated time, they cannot claim the pension as a matter of right. The pension is payable under the Pension Regulations of 2001, which have been notified in the Official Gazette. Since, the appellants chose not to exercise their option within the time frame stipulated in the Pension Regulations and as extended by the CTC, they are not entitled to claim the pension under the aforesaid Regulations."

(18) Hence, it has been held by the Court that a Scheme, application of which is conditional upon opting for the same by the employee within a stipulated time period but not opted for within the said time period, hence cannot be claimed at a later stage, as a matter of right.

(19) In the other case of ***Monojendra Chakraborty and Others (supra)***, referred to by the respondent, the Court has been relying on the

decision of ***Dilip Shankar Das ans Others (supra)***, has turned down the petitioner's prayer for exercising option for pension beyond the cut-off date and for grant of pension.

(20) Admittedly, in this case, the petitioner has neither exercised his option at the time of initial introduction of the Scheme in 2001. In 2006 when the Scheme was reintroduced and the cut-off date was fixed on July 31, 2006, the petitioner has alleged to have forcefully been kept out of his employment, by the respondent Corporation. The petitioner has contended that his right to claim exercise of option has only crystallised after setting aside of the charge-sheet on October 25, 2019 against him, which was earlier issued by the said respondent on September 23, 2015. It is a matter of surprise as to what prevented the petitioner from seeking to exercise pension option since after July 31, 2006, that is the cut of date till the date of his superannuation. During this period, the petitioner has moved this Court on several occasions and with different reliefs prayed for, but none of the writ petitions contained the petitioner's prayer for an order allowing him to exercise pension option. It is by the Court's order, that the petitioner was granted the subsistence allowance and a disciplinary proceeding was initiated against him.

(21) Admittedly also the petitioner after his superannuation has been paid salary for the period under charge-sheet, gratuity and other retrial benefits with all consequential benefits for the said period and received the same without protest. Taking clue from that the respondent has paid him gratuity after taking into consideration the entire service period of him, the petitioner has now come up in this writ petition to pray for an order allowing him to exercise option for pension. The

reasons shown is firstly that the respondent has treated him to be continuously in service by allowing him gratuity on consideration of his entire period of service and secondly that at the relevant point of time, the petitioner was wrongfully restrained by the respondent to resume his duties.

(22) In this case the record has revealed that the petitioner has been allowed notional benefits in his service for his entire service period, which includes the gratuity paid to him after his superannuation. Notional benefits given in connection with the service period of the petitioner and remittances of actual service benefits to him, stands on different footing. Notional benefits are hypothetical benefits, often related to promotion or seniority, that are recognized for calculation or entitlement purposes but does not result in actual monetary compensation. Actual benefits, on the other hand, are tangible, monetary rewards, such as salary increments or arrears, that directly impact an employee's financial situation. The petitioner has advanced argument that the respondent has calculated increments in his case, during the period when he has been allegedly restrained to join in duty. However, calculation of such increment cannot be considered as remittance of the actual service benefit to the petitioner directly impacting his financial situation, but the same appears to have done to come to the pay scale applicable to the petitioner, for the period for which he has been paid salary and other benefits. Those are taken in to consideration for the purpose of calculation only and not for the purpose of being remitted to the petitioner in monetary terms actually.

(23) It is noted that the period of absence of the petitioner has not been regularised by the respondent by treating the absence as

extraordinary leave. Also that none of the Courts have ordered to that effect earlier. According to the Supreme Court, in the case of ***Jaya Bhattacharya vs The State of West Bengal & Others [2025 SCC Online SC 434]***, a retired government employee cannot be denied pensionary benefits if his absence was regularised as extraordinary leave, ensuring continuity in service. The Court has held that even if an employee was absent for an extended period, once his service is regularised by treating the absence as extraordinary leave period, it cannot be considered as a break in service to deny pension benefits. The petitioner's case here is, however, otherwise and would not therefore fall within the parameters so set by the Court in the judgement as mentioned above.

(24) It is a law settled that denial of pensionary benefits must be based on a Rule that explicitly permits such denial. In the instant case the Scheme and the policy undertaken allows exercise of option for pension till July 31, 2006 and not beyond. Accordingly, there is no infirmity or illegality if not an employee is allowed to exercise such option beyond the said period of time.

(25) Furthermore, it is the contention of the petitioner that during the period from February 14, 2005 to April 27, 2015, he has been forcefully and illegally restrained to join in duty by the respondent and hence the principle 'no work and no pay' may not be applicable in his case. Instead, the petitioner has urged that he should be considered to be on duty during the said period. Before such claim of the petitioner could have been entertained by the Court, it has to satisfy itself that the claim of the petitioner as above is supported by sufficient tangible material, which unfortunately is not to be seen in the instant writ petition.

Excepting stating the fact as above, the petitioner has not been able to corroborate the same with sufficient documentary proof as to show that he has approached the authority or ever knocked the doors of the Court to raise his grievance as above. In this regard, as to why the petitioner's argument of crystallisation of his right only upon dropping of the charge sheet, would not be tenable in the eye of law, has been discussed earlier in this judgment. Also, that it involves disputed questions of fact, which cannot be gone into by this Court sitting in writ jurisdiction. No doubt, during the entire period, the respondent has neither suspended him for any alleged misconduct nor initiated any disciplinary proceeding against him. However, the petitioner has to rest his case on its own merit and not on the demerits of the case of the respondent. In such circumstances, the petitioner's prayer for allowing him to exercise the option for pension at this belated stage, after expiration of the validity period for the same much earlier on July 31, 2006 and also after considering him to be on duty during the period of his absence, appears to be a prayer far-fetched and based on no sufficient grounds.

(26) For all the reasons as discussed above, this writ petition is found to be bereft of merits and is liable to be dismissed. The impugned order of the MD dated June 26, 2020 is found to be just, legal and proper and hence is upheld.

(27) The writ petition No. WPO 420 of 2020 is dismissed.

(28) Urgent certified website copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Rai Chattopadhyay, J.)