(2014) 03 P&H CK 0251

High Court Of Punjab And Haryana At Chandigarh

Case No: CWP Nos. 21554-CAT of 2013 and 25530-CAT of 2013

Om Parkash		APPELLANT
	Vs	
Union of India		RESPONDENT

Date of Decision: March 18, 2014

Citation: (2014) 175 PLR 465

Hon'ble Judges: Hemant Gupta, J; Fateh Deep Singh, J

Bench: Division Bench

Advocate: G.S. Bal, Advocate for the Appellant; A.K. Bansal, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Hemant Gupta, J.

This order shall dispose of aforementioned two writ petitions i.e. CWP No. 21554 of 2013 directed against an order passed by the Central Administrative Tribunal, Chandigarh Bench, Chandigarh (for short ''the Tribunal'') on 15.05.2013, whereby claim of the petitioner for pension after taking into consideration his previous service, as a daily wager/work charge basis was dismissed and CWP No. 25530 of 20-13 directed against an order passed by the Tribunal on 15.05.2013 declining the claim of pay from the date of his termination in the year 2006 till his date of appointment as Beldar on 25.02.2010. The petitioner initially started working as Khalasi in the year 1972. However, in February, 1976, he was posted as Motor Lorry Driver, on which post he continued till February, 1981. In February, 1981 due to family circumstances, petitioner left his service on his own accord. The petitioner was again appointed as Motor Lorry Driver on 24.09.1990 and had been continuously performing his duties. Since the services of the juniors were said to have been regularized ignoring the petitioner, therefore, the petitioner filed an Original Application before the Tribunal. The Tribunal vide order dated 17.05.1998 directed the respondents to consider the claim of the petitioner for regularization. Such claim of the petitioner was rejected on 17.08.1998 for the reason that there was no vacancy available. The petitioner again filed an Original Application

challenging the order dated 17.08.1998. While disposing of such application vide order dated 17.08.2001, the Tribunal directed the Department to pass a speaking order. However, again the claim of the petitioner was rejected for the reasons that he did not have the experience of three years and that ban was imposed by the Government of India in filling up vacant posts. The petitioner filed another Original Application, which was dismissed on 12.03.2003. The review application filed by the petitioner was also dismissed. Thereafter, the petitioner challenged the said order before this Court by way of CWP No. 8332 of 2003, which was allowed on 02.04.2004 directing the respondents to consider the claim of the petitioner for regularization of his service as Motor Lorry Driver within a period of two months. Since the respondents failed to take any action, the petitioner invoked the contempt jurisdiction of the Tribunal, but during the pendency of such contempt petition, appointment order dated 21.07.2005 was issued. However, during medical examination, the petitioner was found to be ''colour blind'' and, thus, could not be permitted to join. Thereafter, a letter was issued on 31.01.2006 declining the petitioner to continue in service, as he was no longer required being medically unfit for the job of Driver.

2. The petitioner again invoked the jurisdiction of the Tribunal for getting him medically re-examined by a Board of Doctors of PGI or in any other hospital, so as to ascertain his alleged colour blindness and suitability for the job. The petitioner was reexamined from Government Medical College & Hospital, Sector-32, Chandigarh and was found to be ''colour blind'' and as such the Original Application was dismissed on 28.07.2006. Thereafter, the petitioner got ﷺhiara Plates Test'' from PGI and on the basis of the report that he is fit to be appointed as Driver, filed a Miscellaneous Application to seek a direction that he should be re-examined from PGI or some alternative job of regular basis may be granted to him. Such application was dismissed on 04.10.2006. The petitioner filed a writ petition bearing CWP No. 16921 of 2006 before this Court, which was disposed of on 07.05.2009 with a direction to the respondents to give appointment to the petitioner on a Class-III post against any available vacant post or to the next post, which falls vacant. The relevant extract from the order dated 07.05.2009 reads as under:

"After hearing learned counsel for the parties, we are of the considered opinion that the petitioner cannot be appointed as a Motor Lorry Driver, as he has failed in the ﷺhihara Colour Plates'' test twice. The petitioner cannot differentiate between different colours. Therefore, this prayer of the petitioner for appointing him as Lorry Motor Driver, is outrightly rejected.

However, we are of the considered opinion that as the petitioner has worked for more than 25 years in the CPWD Department as a Lorry Driver and has an unblemished service record, therefore, it would be appropriate if the petitioner can be adjusted on a post which has sedentary duties. Accordingly, we direct the respondents to give appointment to the petitioner on some alternative post in the

department in which colour blindness does not come in his way in the performance of his duties.

Counsel for the respondents submits that there is no post lying vacant at present in the department, and hence, no alternative appointment can be given to the petitioner.

Although, the statement of the learned counsel for the respondents, is contested by Mr. Bal, counsel for the petitioner, but nevertheless, we direct the respondents to give appointment to the petitioner on a Class-III post against any available vacant post or to the next post, which falls vacant. In case, a Class III post is not available, then the petitioner may be adjusted on some Class-IV post."

3. It is in pursuance of such directions, the petitioner was issued appointment letter for the post of Beldar on 17.02.2010. The petitioner joined his services as Beldar on 25.02.2010. The petitioner attained the age of superannuation on 28.02.2011. The claim of the petitioner to take into consideration, the period of daily wager has been rejected inter-alia on the ground that the petitioner has been offered appointment on 17.02.2010 after new pension scheme was enforced by the Government of India w.e.f. 01.01.2004. Therefore, the petitioner is not entitled to pension.

4. The petitioner firstly claims pension after taking into consideration the period of his services rendered as Khalasi from the year 1972. We do not find any merit in such claim. The petitioner left his assignment voluntarily as Motor Lorry Driver in February, 1981. Since, the petitioner left his work on his own account, therefore, he cannot claim benefit of such service after his deemed resignation. Such break in service was not actuated by any action of the respondents, but as per the petitioner himself, it was a voluntary act due to adverse family circumstances. Such period cannot be counted towards qualifying service in any circumstances whatsoever.

5. Reference may be made to the Full Bench judgment of this Court in State of Haryana and others v. Dr. (Mrs.) Sudha Seth (2011-1)161 PLR 650, wherein it has been held that the service prior to resignation cannot be counted towards qualifying service. Since the petitioner ceases to work as daily wager at his own, the case of the petitioner is analogous to that of a resignation and, therefore, the said period cannot be taken into consideration for determining the qualifying service.

6. It was thereafter on 24.09.1990, the petitioner started again performing duties as Motor Lorry Driver, which he continued to perform till 31.01.2006 for the reason that after rejecting his joining report on 05.08.2005 against the post of Motor Lorry Driver on account of his colour blindness.

7. The petitioner also claims that the period after his termination on 31.01.2006 till his joining on 25.02.2010 be also counted as duty period and that period will also be counted towards pensionary benefits. Learned Counsel for the petitioner has vehemently argued that the work-charged period rendered by the petitioner prior to

his regular appointment is required to be counted for determining his entitlement for pensionary benefits. Reliance is placed upon a Division Bench judgment of this Court in Hazura Singh v. State of Punjab 2004 (2) SLR 719, wherein it was held that interruption in daily-wage service or contractual employment should be ignored, if the same is beyond the control of the employee. It was observed "We are of the opinion that the period of ad hoc temporary service prior to regularization of the service is liable to be counted for the purpose of gratuity and pension. The break in service was only on account of summer vacations a reason beyond the control of the petitioner."

8. We do not find any merit in the argument raised. In the judgment referred to by the learned counsel for the petitioner, there was notional break of one day while renewing the contract of employment. It was such notional break, which was said to be liable to be ignored. In the present case, the break in service is of 9 years in the first instance i.e. February, 1981 till September, 1990 and of almost four years from 2006 till 2010.

9. The pensionary benefits are payable to a Central Government employee in terms of Rule 14 of the Central Civil Services (Pension) Rules, 1972 (for short the Rules''). The petitioner did not work from 01.02.2006 till 24.05.2010, since he was not medically fit. The claim of the petitioner for appointment as Motor Lorry Driver remained unsuccessful before the Tribunal and later before this Court vide order dated 07.05.2009. Since the order of appointment as Motor Lorry Driver could not be given effect on account of colour blindness of the petitioner, therefore, the petitioner cannot claim wages after the order was passed on 31.01.2006 or to assert that the period after 31.01.2006 be counted towards his qualifying service. The non appointment of the petitioner as motor lorry driver was not interfered with by this court. It was an act of grace shown by this Court when a direction was issued for appointment of the petitioner on another post. In pursuance of such direction, the petitioner was offered letter of appointment on 17.02.2010 for the post of Beldar, however, he joined his services on 25.05.2010. The said appointment is a fresh appointment totally unconnected with previous service on work-charged basis. Therefore, the fresh appointment pursuant to the direction of this Court will not entitle the petitioner to claim pensionary benefits after taking into consideration the period for which he worked as Motor Lorry Driver prior to 2006.

10. The argument of learned counsel for the petitioner is that he was offered appointment only in view of his experience on the post of Motor Lorry Driver, therefore, such experience is bound to be taken into consideration for the purpose of qualifying service. We do not find any merit in the said argument as well. No doubt, the work on the post of Motor Lorry Driver was the consideration for the issuance of a direction to the respondents to appoint the petitioner on a post lower than Motor Lorry Driver, but that does not make him eligible to club the period of daily-wager while working as Motor Lorry Driver with that of a Beldar. Neither such

appointment was continuous with notional breaks nor were the duties similar in nature. Therefore, the service rendered by the petitioner as a daily-wager prior to his appointment as a Beldar pursuant to the direction of this Court i.e. from the year 1990 till 2006 cannot be taken into consideration.

11. The judgment in Kesar Chand Vs. State of Punjab and Others, holding that daily-wage service is to be counted for the purpose of pension is not helpful to the petitioner. Such judgment is that where services of the daily-wager stand regularized and that the regularization is on the same post on which the employee was working as a dairy-wager. Since the petitioner has not been regularized on the post on which he was working, therefore, the period of daily-wage service cannot be counted towards the qualifying service. The services of the petitioner were not regularized. It is case of fresh appointment. The regularization is on the same post and not on different post.

12. Above all, the petitioner has been appointed as Beldar in the year 2010. The Central Civil Services (Pension) Rules, 1972 are not applicable to an employee, who is appointed after 01.01.2004. The relevant extract from Rule 2 reads as under:

"2. Application

Save as otherwise provided in these rules, these rules shall apply to Government servants appointed on or before 31st day of December, 2003 including civilian Government servants in the Defence Services appointed substantively to civil services and posts in connection with the affairs of the Union which are borne on pensionable establishments, but shall not apply to -

(a) railway servants;

(b) persons in casual and daily rated employment;

(c) persons paid from contingencies;

(d) persons entitled to the benefit of a Contributory Provident Fund;

(e) members of the All India Services;

(f) persons locally recruited for service in diplomatic, consular or other Indian establishments in foreign countries;

(g) persons employed on contract except when the contract provides otherwise; and

(h) persons whose terms and conditions of service are regulated by or under the provisions of the Constitution or any other law for the time being in force.

13. Since the petitioner was appointed after such Rules became inapplicable to the new appointees, the petitioner cannot claim pension under the old Rules. The pension is admissible to an employee in terms of the Rules at the time of appointment or at the time of retirement or at the time of attaining the age of

superannuation. Neither on the date of appointment nor on the date of superannuation, the petitioner was eligible for pension in terms of Central Civil Services (Pension) Rules, 1972. In view of the above, we do not find any merit in both the writ petitions. The same are, thus, dismissed.