

SUPREME COURT OF INDIA

P. Bandopadhyaya

Vs.

Union of India

C.A.No.3149 of 2019

Uday Umesh Lalit and Indu Malhotra, JJ.,)

15.03.2019

JUDGMENT

Indu Malhotra, J.,

SLP(Civil)No.10663 of 2016

1. Leave granted.
2. The present Civil Appeal arises out of S.L.P. (C) No. 4652 of 2018 wherein the impugned Judgment and Order dated January 13, 2016 passed by the Bombay High Court in Writ Petition No. 2704 of 2005 has been challenged.
3. The facts relevant for the present Civil Appeal, are briefly set out below:

3.1. The Appellants were erstwhile employees in the Overseas Communications Service [“OCS”], a Department of the Government of India. On April 1, 1986 the OCS was converted into a Government Company known as the Videsh Sanchar Nigam Limited [“VSNL”]. Initially, all employees of the erstwhile OCS were transferred en masse to Respondent No. 4 - VSNL (now known as Tata Communications Limited), where they worked on deputation from April 1, 1986 to January 1, 1990.

3.2. On July 5, 1989 the Department of Pension and Pension Welfare of the Government of India issued Office Memorandum No. 4/18/87-P & P.W.(D) “Office Memorandum”] specifying the terms and conditions governing the pensionary benefits of employees who were transferred en masse on the conversion of a Government Department into a Central Public Sector Undertaking or Autonomous Body. The relevant extract of the Office Memorandum is set out hereinbelow for ready reference:

“...The following terms and conditions will be applicable in the case of en masse transfer of employees:

(a) The permanent Government servants shall have an option to retain the pensionary benefit available to them under the Government rules or be governed by the rules of the Public Sector Undertaking/Autonomous Body. This option shall also be available to the quasi permanent and temporary employees after they have been confirmed in the Public Sector Undertaking/Autonomous Body.

(b) The Government servants who opt to be governed by the pensionary benefits available under the Governmentt, shall at the time of their retirement, be entitled to pension, etc., in accordance with the Central Government rules in force at that time.

(c) The permanent Government servants with less than 10 years' service, quasi permanent employees and temporary employees who opt for the rules of the Public Sector Undertaking/Autonomous Body shall be entitled to an amount equal to Provident Fund contribution for the period of their service under the Government up to the date of permanent absorption in the PSU/Autonomous Body with simple interest at 6% per annum a.s opening balance in their CPF account with the Public Sector Undertaking/Autonomous Body...”

(emphasis supplied)

2.3. In pursuance of the Office Memorandum, Notice dated December 11, 1989 was issued by Respondent No. 4 - VSNL giving the erstwhile employees of OCS the option to either be absorbed in the regular service of VSNL; or, be transferred to the Surplus Staff Cell of the Central Government for employment against possible vacancies available in other Government offices. The Appellants voluntarily exercised the option to be absorbed into the regular service of VSNL with effect from January 2, 1990.

2.4. Thereafter, a Staff Notice dated February 21, 1990 was issued by Respondent No. 4 - VSNL to its employees, who were earlier working in OCS. The employees were called upon to exercise their option in terms of Clause (a) of the Office Memorandum, i.e. either to retain the pensionary benefits available under the Government of India at the time of retirement as per the applicable Central Government rules in force, or opt to be governed by the rules of Respondent No. 4 - VSNL. The format in which the option was to be indicated was enclosed with the Staff Notice, along with a document titled “ Clarificatory Information to Facilitate Exercise of Option”. As per paragraph I (1) (ii) of the clarificatory document, the eligibility of employees who chose to retain pensionary benefits under the Central Government was conditional on putting in a minimum of ten years of qualifying service. The relevant portion of Paragraph I (1) is reproduced hereinbelow for ready reference:

“I. Exercise of option in favour of retention of pensionary benefit under Central Government rules.

(1) This option is open to every employee whose services have been transferred

from Overseas Communications Service to Videsh Sanchar Nigam Limited and who has been permanently absorbed in the Videsh Sanchar Nigam Ltd., irrespective of service rendered in the Overseas Communications Service. Your eligibility for benefits under the Pension Rules will however be conditional to :-...

... (ii) Putting in a minimum of ten years of qualifying service. (9 years 9 months and above will be reckoned as 10 years).”

(emphasis supplied)

2.5. The Appellants opted to retain pensionary benefits under the rules of the Central Government by exercising their option in pursuance of the Staff Notice dated February 21, 2009.

2.6. Respondent No. 4 - VSNL vide Letters dated May 22, 2003 and June 29, 2004, sought a clarification from Respondent No. 3 - Ministry of Communications and Information Technology, Department of Telecommunications [“DOT”] as to whether the Appellants - P. Bandhopadhyaya, I.P. Singh and G. Palaniappan could retain the pensionary benefits in spite of having less than 10 years of service as on January 2, 1990.

2.7. In response, the DOT vide Letter dated October 13, 2004 requested VSNL to settle the cases of the Appellants in accordance with Clause (b) of the Office Memorandum.

2.8. Accordingly, by Letter dated November 30, 2004, Respondent No. 4 - VSNL informed Respondent No. 2 - Department of Pension and Pension Welfare, Government of India to settle the cases of the Appellants in accordance with Clause (b) of the Office Memorandum.

2.9. In supersession of the Letter dated October 13, 2004, the Department of Pension and Pension Welfare, Government of India, vide Letter dated March 24, 2005 informed Respondent No. 4 - VSNL that the payment of Pension to the Appellants would be settled in terms of the Office Memorandum. This was re-confirmed by Respondent No. 3 - DOT vide Letter dated May 30, 2005.

2.10. Accordingly, Respondent No. 2 - Department of Pension and Pension Welfare, Government of India informed the Appellants that their pension would be settled in terms of the Office Memorandum.

2.11. On June 27, 2005 the Appellants were informed by Respondent No. 4 - VSNL that they would not be eligible to receive Government Pension. They would, however, be eligible to receive benefits under Clause (c) of the Office Memorandum i.e. an amount equal to the Provident Fund contribution for the period of their service under the Government up to the date of permanent absorption in the Public Sector Undertaking/Autonomous Body with 6% Simple Interest as opening balance in their CPF account with the Public Sector Undertaking/Autonomous Body.

2.12. Aggrieved by this decision, the Appellants made a representation before the Respondents seeking for a declaration that their cases be governed by Clause (b), and not Clause (c) of the Office Memorandum.

2.13. The Appellants thereafter filed Writ Petition No. 2704 of 2005 before the Bombay High Court seeking the following prayers:

- setting aside of Communication/Orders passed by the Respondents on March 24, 2005, May 30, 2005 and June 27, 2005;
- directions to treat the cases of the Appellants as being governed by Clause (b), and not Clause (c) of the Office Memorandum. In effect, the Appellants were seeking directions that their cases be considered eligible for grant of pension by the Government of India.

2.14. A Division Bench of the Bombay High Court dismissed Writ Petition No. 2704 of 2005 on April 26, 2006 after holding that the case of the Appellants was covered by an earlier decision of a Division Bench in *S.V. Vasaikar & Ors. v. Union of India & Ors*¹. The Judgment dated April 26, 2006 passed by the Division Bench was challenged by the Appellants before this Court by way of S.L.P. (C) No. 15862 of 2006, which was later renumbered as Civil Appeal No. 3059 of 2007. This Court vide Order dated July 14, 2011 set aside the Judgment dated April 26, 2006 passed by the Division Bench of the Bombay High Court in view of the submission by the Appellants that the decision in *S.V. Vasaikar & Ors. v. Union of India & Ors*². was not applicable to the facts of their case. The matter was remanded to the High Court for fresh consideration on merits.

2.15. After remand, the Bombay High Court re-heard the matter, and passed a detailed judgment dismissing Writ Petition No. 2704 of 2005, and held that the Appellants were not eligible to avail pensionary benefits under the Government of India, since they had served for less than 10 years on the date of their absorption into VSNL. The High Court held that on a cumulative reading of Clauses (a), (b), and (c) of the Office Memorandum makes it clear that only permanent Government servants who have served for more than 10 years would have the option of getting pensionary benefits after their absorption in Public Sector Undertakings. The case of the Appellants would be governed by Clause (c) of the Office Memorandum which clearly carved out the category of employees who had not completed 10 years of service. It was held that a new category which is either contrary to Clause (c), or renders the import of Clauses (a) and (b) nugatory, cannot be created by way of judicial interpretation. The High Court held that the matter was squarely covered by the earlier decision of a Division Bench of the Bombay High Court in *S.V. Vasaikar & Ors. v. Union of India & Ors*.

4. Aggrieved by the Judgment and Order dated January 13, 2016 passed by the Division Bench, the Appellants filed the present Special Leave Petition. Applications for Impleadment have been filed by 48 persons who claim to be similarly situated as the

Appellants.

5. Mr. Sanjay Kumar Mishra, Advocate appeared on behalf of the Appellants, and sought the setting aside of the impugned Judgment and Order dated January 13, 2016 passed by the Division Bench. Mr. Vikramjit Banerjee, learned Additional Solicitor General, appeared on behalf of Respondent Nos. 1 - 3, and Mr. Maninder Singh, learned Senior Advocate, appeared on behalf of Respondent No. 4 - VSNL.

6. We have perused the record with the able assistance of the counsel for the parties. The issue which arises for our consideration in the present Civil Appeal is whether the Bombay High Court was justified in holding that the case of the Appellants was covered by the earlier decision in *S.V. Vasaikar & Ors. v. Union of India & Ors.* [2003 (2) Mh. L.J. 691 : 2003 (4) Bom CR 79], and whether they are entitled to receive pensionary benefits under the Central Government.

7. Submissions of Petitioners

7.1. Mr. Sanjay Kumar Mishra, Advocate, submitted that the Division Bench of the Bombay High Court had committed an error by denying pensionary benefits to the Appellants.

7.2. It was submitted that Clause (b) of the Office Memorandum would govern the case of the Appellants, since they had opted to avail the pensionary benefits available under the Central Government at the time of their retirement under Clause (a) of the Office Memorandum.

7.3. It was further submitted that the Office Memorandum should be interpreted in isolation on the basis of its plain text, and the Form attached with the Staff Notice dated February 21, 1990 should not condition the said interpretation.

7.4. The Division Bench had erroneously interpreted the Office Memorandum, since Clause (a) is the controlling provision, and Clause (c) in no way dilutes what is provided by Clause (a). The Appellants challenged the interpretation of the Office Memorandum given by a co-ordinate bench in *S.V. Vasaikar & Ors. v. Union of India & Ors.* According to Mr. Mishra, Clauses (c) and (d) of the Office Memorandum provides only the mode of payment of retiral benefits with respect to two different categories of employees - viz. employees with less than 10 years of qualifying service, and employees with more than 10 years of qualifying service.

8. Submissions of Respondents

8.1. The counsel for the Respondents inter alia submitted that the issue in the present case was squarely covered by the earlier judgment of the Bombay High Court in *S.V. Vasaikar & Ors. v. Union of India & Ors.* The Appellants through their Federation had appeared in this case, and had not challenged this judgment before this Court. As a consequence, this judgment attained finality. It was therefore not

open to the Appellants to re-litigate the same issue in the present Writ Petition. The Division Bench rightly followed the said decision while dismissing Writ Petition No. 2704 of 2005 by way of the impugned Judgment and Order dated January 13, 2016.

8.2. It was submitted on behalf of VSNL that the Office Memorandum categorises employees into two classes - first, those who have completed 10 years of qualifying service; and second, those who do not have 10 years of qualifying service. Under the Office Memorandum, while the first class of employees is entitled to pension under the Government of India, the second class is entitled to a certain sum of Provident Fund contribution.

8.3. The Appellants admittedly had less than 10 years of qualifying service. They had voluntarily exercised their option of getting absorbed in the regular service of VSNL. As a consequence, this resulted in the severance of their previous service with the Central Government, and they were deemed to have retired from Government service on January 2, 1990 i.e. the date of their absorption with VSNL in accordance with Rule 37(1) of the Central Civil Services (Pension) Rules, 1972 [“CCS (Pension) Rules, 1972].

The Appellants having taken a conscious decision to opt for absorption in VSNL, knowing fully well that they had not completed 10 years of qualifying service with the Central Government, were not entitled to receive pensionary benefits as per Rule 49 of the CCS (Pension) Rules, 1972.

8.4. It was submitted that the Office Memorandum was virtually in conformity with Rule 49 r.w. Rule 37 of the CCS (Pension) Rules, 1972. In any case, the Office Memorandum cannot be interpreted in isolation, and has to be construed in consonance with the CCS (Pension) Rules, 1972. The requirement of having completed a minimum qualifying service of 10 years for entitlement to pensionary benefits under Rule 49 of the CCS (Service) Rules, 1972 would apply to Clause (a) of the Office Memorandum. The Appellants had admittedly less than the minimum qualifying service of 10 years, and were deemed to have retired from Government service, and were not entitled to pensionary benefits under the Central Government. On absorption with VSNL, they would not be entitled to pension.

9. Discussion and Analysis

9.1. Rule 37 of the CCS (Pension) Rules, 1972 provides that a Government servant who is absorbed in a Corporation or Government Company is deemed to have retired from government service on the date of his/her absorption. The relevant extract of Rule 37 of the CCS (Pension) Rules, 1972 is reproduced hereinbelow:

“37. Pension on absorption in or under a corporation, company or body

(1) A Government servant who has been permitted to be absorbed in a service or

post in or under a Corporation or Company wholly or substantially owned or controlled by the Central Government or a State Government or in or under a Body controlled or financed by the Central Government or a State Government, shall be deemed to have retired from service from the date of such absorption and subject to sub-rule (3) he shall be eligible to receive retirement benefits if any, from such date as may be determined, in accordance with the orders of the Central Government applicable to him. (2) ... financed by the Central Government in which a Government servant is absorbed, he shall be entitled to exercise option either to count the service rendered under the Central Government in that body for pension or to receive pro rata retirement benefits for the service rendered under the Central Government in accordance with the orders issued by the Central Government.

Explanation.- Body means Autonomous Body or Statutory Body.”

(emphasis supplied)

The Appellants having voluntarily exercised the option to get absorbed in the regular service of VSNL, were deemed to have retired from the service of the Central Government on the date of their absorption i.e. January 2, 1990 as per Rule 37(1) of the CCS (Pension) Rules, 1972.

9.2. It is the admitted position that the Appellants had not completed 10 years of service on the date of their absorption into VSNL, i.e. when they were deemed to have retired from the service of the Central Government. To receive pensionary benefits from the Government, a Government servant is required to put in a minimum ‘qualifying service’ as defined by Rule 3(q) of the CCS (Pension) Rules, 1972. According to Rule 3(q), ‘qualifying service’ means the service rendered while on duty or otherwise which shall be taken into account for the purpose of Pensions and Gratuities admissible under the CCS (Pension) Rules, 1972.

9.3. Rule 49(2) of the CCS (Pension) Rules, 1972 provides that a Government servant is entitled to receive pension on retirement only after the completion of the qualifying service of 10 years. On the other hand, a Government servant who retires before completing the qualifying service of 10 years is entitled to service gratuity under Rule 49(1) of the CCS (Pension) Rules, 1972. The relevant extract of Rule 49 of the CCS (Pension) Rules, 1972 is reproduced hereunder for ready reference:

“49. Amount of Pension

(1) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month’s emoluments for every completed six monthly period of qualifying service.

(2) (a) In the case of a Government servant retiring in accordance with the provisions of these rules after completing qualifying service of not less than thirty-three years, the amount of pension shall be calculated at fifty per cent of average

emoluments, subject to a maximum of four thousand and five hundred rupees per mensem.; accordance with the provisions of these rules before completing qualifying service of thirty-three years, but after completing qualifying service of ten years, the amount of pension admissible under Clause (a) and in no case the amount of pension shall be less than Rupees three hundred and seventy-five per mensem;...”

(emphasis supplied)

A conjoint reading of the statutory rules, i.e. Rule 37 with Rule 49 of the CCS (Pension) Rules, 1972, would make it abundantly clear that the Appellants were not entitled to pensionary benefits since admittedly they did not have the minimum qualifying service of 10 years, to make their service pensionable with the Central Government. On absorption in VSNL on January 2, 1990 there was a severance of their service with the Central Government. The Appellants would be entitled to the retiral benefits under VSNL. After exercising the option to be absorbed in VSNL, the Appellants are now estopped from seeking pensionary benefits from the Central Government.

9.4. The Office Memorandum dated July 5, 1989 was issued by the Department of Pension and Pension Welfare, Government of India to settle the pensionary terms and conditions applicable in cases of en masse transfer of employees on the conversion of a Government Department into a Central Public Sector Undertaking/Autonomous Body. (A) Clause (a) of the Office Memorandum provided an option to Government servants (permanent, quasi-permanent and temporary) to either retain the pensionary benefits available to them under the Government rules or be governed by the rules of the Public Sector Undertaking/Autonomous Body. Under Clause (b), Government servants who opt to retain pensionary benefits were entitled to receive pension at the time of their retirement “in accordance with Central Government rules in force at that time”.

(b) A conjoint reading of Clauses (a) and (b) would indicate that the option of retaining pensionary benefits was available only to those Government servants who were, in the first place, entitled to receive pension at the time of their retirement. This is evident from Clause (a) which provides the option to “retain” pensionary benefits available under the relevant Government rules. Clauses (a) and (b) presuppose that the Government servants who opt to retain pensionary benefits, should be entitled to receive pensionary benefits under the Central Government rules, in the first place. (C) Rule 37 read with Rule 49 of the CCS (Pension) Rules, 1972 indicates that the Appellants were not entitled to receive Pension under the CCS (Pension) Rules, 1972, since they had not completed 10 years of qualifying service. There was, therefore, no question of the Appellants availing of the option of ‘retaining’ the benefits under Clause (a). (d) The Division Bench has rightly held that Clause (b) of the Office Memorandum cannot be read in isolation, and is required to be read in conjunction with Clause (a). The entitlement to Pension under Clause (b) is qualified by the phrase “in accordance with the Central Government rules in force at that time’. (e) Further, Paragraph I (1) (ii) of the document titled “Clarificatory Information to Facilitate Exercise of Option” clearly stated that the

eligibility to retain pensionary benefits under the Central Government was subject to the condition of putting in a minimum of 10 years as qualifying service. The Appellants were specifically informed of this clarification at the time of exercising their option that their eligibility for pensionary benefits under the CCS (Pension) Rules, 1972 was dependant on their fulfilling the minimum eligibility requirement of 10 years qualifying service on the day their retirement.

9.5. We find great force in the submissions made by Mr. Maninder Singh, Senior Advocate appearing for VSNL, and the learned Additional Solicitor General, that the case is squarely covered by the earlier decision of a Division Bench of the Bombay High Court in *S.V. Vasaikar & Ors. v. Union of India & Ors.* [2003 (2) Mh. L.J. 691 : 2003 (4) Bom CR 79].

9.6. It has been rightly contended that the earlier Writ Petition No. 5374 of 2002 was filed in a representative capacity. Petitioner No. 3 in the said Writ Petition was the Federation of the VSNL Employees Union, a collective body of VSNL employees. The Federation was espousing the collective interest of the Appellants, and other similarly situated persons before the Division Bench. The prayers in Writ Petition No. 5374 of 2002, was recorded by the High Court in the following words: “3. In the second petition, i.e., Writ Petition No. 5374 of 2002, a prayer is made for declaring that the action of the respondents in not giving the petitioners and similarly situated employees. who had not completed ten years of service with the Government of India. the right to exercise option for retaining Government pensionary benefits on their absorption with VSNL is arbitrary. discriminatory and violative of Articles 14 and 16 of the Constitution. It was, therefore, prayed that appropriate direction be issued to the Government of India that the Petitioners and similarly situated employees, who had not completed ten years of service on their date of absorption in VSNL. are entitled to exercise option for retaining Government pensionary benefits by counting their service in Government of India along with their service with VSNL for such benefits.”

(emphasis supplied)

The Division Bench dismissed the Writ Petitions, and held as follows:

“26. Regarding the contention that employees, who had not completed ten years, were not allowed to exercise the option with regard to pensionary benefits, it may be stated that even when they were in the Government service, when VSNL was a Government Company, they were not entitled to such benefits. Reading the memorandum also, it becomes abundantly clear that the persons, who had not completed ten years of service with the Governmentt, were not entitled to Governmentt. and to be exercised by the employees. was in respect of those employees who had completed ten years or more of service and quasi-permanent employees and temporary employees, who would be entitled to such benefits after they would be confirmed in the Public Sector or Autonomous Bodies. Since the petitioners and similarly situated persons. who had not completed ten years of service. were not entitled to such benefits even under the Governmentt. they cannot

make grievance for pensionary benefits”

(emphasis supplied)

The afore-said findings of the Division Bench squarely cover the present case of the Appellants.

9.7. The decision in *S.V. Vasaikar & Ors. v. Union of India & Ors*¹. was not challenged before the Supreme Court, and has since attained finality. Therefore, the relief sought by the Appellants before the High Court was barred by the principle of res judicata. Reference can be made to the decision of the Constitution Bench in *Direct Recruit Class II Engineering Officers’ Association v. State of Maharashtra & Ors.* wherein Sharma, J., on behalf of the five-judge bench, held:

“35...It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have, in the event of his success, obtained in the earlier writ petition before the High Court. The petitioner in reply contended that since the special leave petition before this Court was dismissed in limine without giving any reason, the order cannot be relied upon for a plea of res judicata. The answer is that it is not the order of this Court dismissing the special leave petition which is being relied upon; the plea of res judicata has been pressed on the basis of the High Court’s judgment which became final after the dismissal of the special leave petition. In similar situation a Constitution Bench of this Court in *Daryao v. State of UP* held that where the High Court dismisses a writ petition under Article 226 of the Constitution after hearing the matter on the merits, a subsequent petition in the Supreme Court under Article 32 on the same facts and for the same reliefs filed by the same parties will be barred by the general principle of res judicata. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32...”

(emphasis supplied)

Albeit the decision of the Constitution Bench was in the context of a Writ Petition filed under Article 32, it would apply with greater force to bar a Writ Petition filed under Article 226, like the one filed by the present Appellants, by the operation of the principle of res judicata.

9.8. The Appellants were not entitled to receive pensionary benefits either under the CCS (Pension) Rules, 1972 or under Clauses (a) and (b) of the Office Memorandum. The case of the Appellants being Government servants prior to their absorption in VSNL, with less than 10 years of qualifying service, would be squarely covered by Clause (c) of the Office Memorandum. Under Clause (c), they

would be entitled to receive an amount equal to the Provident Fund contribution for the period of their service under the Government, upto the date of their permanent absorption along with Simple Interest at 6% per annum as the opening balance in their CPF account with the Public Sector Undertaking/Autonomous Body.

10. In view of the aforesaid findings, the present Civil Appeal is dismissed. The impugned Judgment and Order dated January 13, 2016 passed by the Bombay High Court in Writ Petition No. 2704 of 2005 is affirmed.

11. The Applications for Impleadment filed in the Appeal are disposed of in terms of the present judgment. Any other pending I.A.s are disposed of.

Judgment Referred.

¹(2003) 2 *Mh. L.J.* 691; 2003 (4) *Bom CR* 0079