

SUPREME COURT OF INDIA

Surinder Nath Kesar

Vs.

Board of School Education

C.A.No.9682 of 2019

(Ashok Bhushan and M.R.Shah,JJ.,)

06.01.2020

JUDGMENT

Ashok Bhushan,J.,

SLP(C)No.25200 of 2015

1. This appeal has been filed against the judgment dated 21.05.2015 of High Court of Punjab & Haryana by which LPA No.1747 of 2014 filed by the appellant has been dismissed. LPA was filed by the appellant challenging the judgment of learned Single Judge dated 20.04.2013 in Civil Writ Petition No. 3037 of 2003 by which judgment learned Single Judge had dismissed the writ petition filed by the appellant praying for grant of pension by adding interruption of service between 01.02.1988 to 03.08.1994.

2. Brief facts of the case necessary to be noticed for deciding this appeal are:-

2.1 The appellant was initially appointed by Board of School Education, Haryana, Bhiwani (hereinafter referred to as "Board") on 08.05.1970 on the post of Proof Reader. The appellant due to his family circumstances voluntarily retired on 01.02.1988. The appellant submitted a representation to the Education Minister of Haryana. The Education Minister, Haryana vide his letter dated 27.03.1993 forwarded the application of the appellant recommending consideration of his case for re-appointment on humanitarian ground after treating the period of absence without pay even if be Rules have to be relaxed. The Board keeping into view the recommendation of the Education Minister resolved on 31.05.1994 granting sanction to reappoint the appellant afresh. It was observed that for giving the benefit of past service, the opinion of the Government be obtained. A fresh appointment order dated 25.07.1994 was issued to the appellant for appointment on the post of Proof Reader in the pay-scale of Rs.1400- 2600, in pursuance of which, the appellant joined on 03.08.1994. on 05.12.1994, Secretary of the Board wrote to the Secretary of Government of Haryana, Education Department seeking clarification on benefit of past service to the appellant. On 05.12.1994, the respondent No.4

clarified that past service of appellant could only be counted for the purpose of seniority and pension after giving the benefit of continuity in service and the period of his break be treated as leave without pay. The Board vide its resolution dated 31.05.1995 decided to condone the period from 02.02.1988 to 02.08.1994 by treating the same as leave without pay for continuity of service for the purpose of pension and seniority. The Financial Commissioner & Secretary, Haryana Government, Education Department wrote a letter dated 27.05.1997 regarding giving the benefit of past service to the appellant. The letter referred to Rule 4.23 of Punjab Civil Services Rules Volume II (hereinafter referred to as "PCSR") which states that period of interruption of one year can be condoned for giving the benefit of pension and whereas in the case of the appellant, the period of six years is condoned for the purpose of pension. Clarification was asked for in the above regard.

2.2 The Board asked the appellant on 04.02.1998 to deposit alongwith interest upto 31.03.1998 amount with regard to gratuity, provident fund, leave encashment etc. as received by him consequent to voluntary retirement. On 18.01.1999, the Director, Local Audit, Haryana wrote to the Secretary of the Board that Rule 4.22 of Punjab Civil Services Rules Volume II is not attracted and relevant rule is 4.23, which rule only authorised condonation of break of service upto one year duration. The condonation can only be made by competent authority in relaxation of provisions of Rule 4.23 of PCSR. On 15.05.2000, the appellant deposited the amount with interest upto 31.03.1998. The Director, Secondary Education vide letter dated 24.08.2000 referring to audit objections requested for obtaining relaxation in Rule 4.23 of PCSR from Finance Department through Commissioner and Secretary Haryana Govt. Education Department.

2.3 On 24.08.2001, Director, Secondary Education, Haryana wrote to the Secretary of the Board that Finance Department has declined to accept the proposal and has suggested that the pay of the employee be fixed under Foot Note 6 of Rule 7.18 of PCSR. The Board asked the appellant to deposit interest upto 31.12.2001, which was deposited on 04.01.2002. The appellant retired on 31.05.2002. After retirement certain retirement benefits were paid to the appellant, which were accepted with protest. On 02.08.2002, appellant submitted a representation to Board claiming pension. On 26.11.2002, the appellant was informed that as per Finance Department and as per pension rules he has already been paid the benefits, which were due to you on account of re-employment.

2.4 In July, 2002, the appellant had received the retirement benefits including the amount, which was deposited by the appellant. Civil Writ Petition No.3037 of 2003 was filed by the appellant claiming pension and other benefits of service for the period service from 08.03.1970 to 31.01.1988 and for addition of interruption of period from 02.02.1988 to 02.08.1994 in his service. Learned Single Judge referred to Rule 4.23 of PCSR. Learned Single Judge took the view that as per Rule 4.23 if the break in service has been occasioned on account of resignation, dismissal or

removal, the period of interruption of service cannot be condoned. Learned Single Judge further observed that even the order of appointment is a fresh appointment order, it is not possible to compute two different spells of service as a single service. A review petition was filed by the appellant, which too was rejected on 22.11.2013. The learned Single Judge while rejecting the review petition also observed that Clause 4.22 of rules is also not attracted. The appellant, therefore, filed a LPA before the Division Bench, which has been dismissed on 21.05.2015, against which, this appeal has been filed.

3. Learned counsel for the appellant in support of appeal contends that under Rule 4.23 what is not condonable is only in cases where the interruption has been caused by resignation, dismissal or removal from service or due to participation in a strike. He submits that appellant having voluntarily retired, which is not covered in the definition of resignation as mentioned in Rule 4.23, he is entitled for automatic condonation of interruption between 02.02.1988 till 02.08.1994. It is further submitted that the Board having passed resolution for condonation of the aforesaid period and in consequence of which the appellant has deposited the gratuity, provident fund and leave encashment amount, which was received by him at the time of voluntary retirement, the respondents could not have denied the benefit of adding the interruption period for computing the pension. Resolution was passed by the Board on 31.05.1994, which could not have been legally reviewed after five years. He submits that the appellant is entitled for the benefit of Rule 4.23 of PCSR.

4. Learned counsel for the State refuting the submission of the appellant contends that Rule 4.23 as relied by the appellant is not the relevant rule, which is applicable in the State of Haryana. Referring to the counter affidavit, learned counsel submits that in the counter affidavit, Annexure R-1, the relevant clause, i.e. Rule 4.19, 4.20, 4.21, 4.22 and 4.23 as applicable in the State of Haryana has been filed. He submits that Rule 4.23 sub-rule (3) provides that interruption should not be of more than one year's duration and in the present case, interruption being of more than six years, Rule 4.23 does not help the appellant. He further submits that appellant having accepted voluntary retirement on 01.02.1988 and having joined again on 03.08.1994 as a fresh appointment, the earlier period cannot be added for the purpose of pension.

5. This Court by order dated 09.12.2019 noticed the difference in Rules 4.22 and 4.23 of PCSR Volume II as claimed by both the parties. This Court directed the learned standing counsel to produce the copy of the gazette containing the relevant rules which were in existence at the relevant time. During the course of submissions, learned counsel for the State has produced before us Punjab Civil Services Rules Volume II as applicable in the State of Haryana. The book also contains the amendments, which were issued in the Rules by the Finance Department, Haryana between 01.01.1969 to 29.02.1992. The provisions of Rules 4.22 and 4.23 are same as have been filed as Annexure R-1 in the counter affidavit of the respondents. It appears that both learned Single Judge and Division Bench has referred to Rules 4.22 and 4.23 of Punjab Civil Services Rules Volume II, which were not the rules applicable in the State of Haryana.

6. We have no reason to doubt the authenticity of the book, which has been produced by the learned counsel for the State of Haryana, which contains the provisions of Rules 4.22 and 4.23 as applicable in the State of Haryana as Annexure R-1. We may also notice the Rules 4.22 and 4.23 of Punjab Civil Services Rules Volume II as has been noticed by the Division Bench, which is to the following effect:-

"4.22. - The authority which sanctions the pension may commute retrospectively periods of absence without leave into leave without allowances or extraordinary leave.

4.23.- In the absence of a specific indication to the contrary in the service record, an interruption between two spells of service rendered under the State Government shall be treated as automatically condoned, and the pre-interruption service shall be treated as qualifying service for pension purposes, except where the interruption has been caused by resignation, dismissal or removal from service or due to participation in a strike, but the period of interruption itself shall, under no circumstances, be reckoned as qualifying service for pension purposes."

7. A perusal of the material on record including the letter dated 27.05.1997 written by Financial Commissioner & Secretary, Haryana Government, Education Department, Chandigarh (Annexure P-9) indicate that the reference has been made to Rule 4.23 providing that maximum period of interruption of one year can be condoned. To the same effect is letter dated 18.01.1999 written by the Director, Local Audit, Haryana, Chandigarh (Annexure P-11), paragraph 2 of which is as follows:-

"2. The period between the date of voluntary retirement, i.e., 1.2.88 to the date of fresh reappointment of the incumbent on the same post in the Board i.e. 3.8.94, cannot be treated as period of absence without leave and as such rule 4.22 of CSR Vol. II is not attracted in the case. The period rather denotes the break/interruption in service is rule 4.23 of CSR Vol. II. Even this rule authorise condonation of Break/Interruption upto one year duration in the normal course and in the instant case, the period of break in service being six years, six months and one day. The condonation can only be made by the competent authority in relaxation of provisions of rule 4.23 of Punjab CSR Vol. II. Hence you are advised to act accordingly."

8. From the above it is clear that Rule 4.23 which is applicable to the State of Haryana is one which has been brought on the record as Annexure R-1 in the counter affidavit. Rules 4.22 and 4.23 are quoted below:-

"4.22 The authority which sanctions the pension may commute retrospectively periods of absence without leave into leave without allowances or extraordinary leave.

4.23 Interruption in service either between two spells of permanent, or

temporary service or between a spell of temporary service and permanent service or vice versa in the case of an officer retiring on or after the 5th January, 1961, may be condoned, subject to the following conditions, namely:-

(1)The interruption should have been caused by reasons beyond the control of Government employee concerned.

(2) Service preceding the interruption should not be less than five years' duration. In cases where there are two or more interruptions, the total service, pensionary benefits in respect of which shall be lost if the interruptions are not condoned should not be less than five years.

(3)The interruption should not be of more than one year's duration. In cases where there are two or more interruptions, the total period of all interruptions to be condoned should not exceed one year."

9. We may refer to a judgment of Punjab & Haryana High Court in which it had occasion to consider Rule 4.23 of PCS Rules as applicable in Haryana, i.e., in *Subedar Harpal Singh, Retd. Vs. State of Haryana and Another*.,. In the above case, Rule 4.23 of PCSR as applicable in case of an employee in Haryana is quoted in paragraph 3 of the judgment. In the above case also, the petitioner's case was held not covered by Rule 4.23. paragraph 3 of the judgment is as follows:-

"3. Admittedly, the case of the petitioner does not fall in any of the exception, Rule 4.23, however, deals with condonation of interruption in service and reads thus:-

"Interruption in service (either between two spells of permanent, or temporary service or between a spell of temporary service and permanent service or vice versa in the case of an officer retiring on or after the 5th January, 1961, may be condoned, subject to the following conditions, namely:-

(1)The interruption should have been caused by reasons beyond the control of Government employee concerned.

(2)Service preceding the interruption should not be less than five years' duration. In cases where there are two or more interruptions, the total service, pensionary benefits in respect of which shall be lost if the interruptions are not condoned should not be less than five years.

(3) The interruption should not be of more than one year's duration. In cases where there are two or more interruptions, the total period of all interruptions to be condoned should not exceed one year."

As the service of the petitioner preceding the interruption was less than five years, the break cannot be condoned in terms of this rule. No other provision was brought

to my notice on the basis of which the break can be condoned so as to entitle the petitioner to claim pension after counting his previous service in the Industries Department."

10. Rule 4.23 does not permit condonation of interruption of more than one year's duration, hence the case of the appellant was not covered under Rule 4.23. It was due to this reason that a letter was written by the Government for obtaining relaxation under Rule 4.23. In letter dated 24.08.2000 of Director, Secondary Education Haryana, Chandigarh (Annexure P-15) it was provided that relaxation be obtained in Rule 4.23 of Punjab Civil Services Rules Volume II from Finance Department through Commissioner and Secretary, Haryana Govt. Education Department. In letter dated 24.08.2000, following was stated:-

"As such in view of the audit objection you are requested to kindly obtained relaxation in Rule 4.23 of Punjab CSR Vol.

II from Finance Department through Commissioner and Secretary Haryana Govt. Education Department and the same may be sent to this office."

11. The relaxation from Rule 4.23 as claimed by the appellant was not acceded to by the Government, which was communicated by letter dated 24.08.2001 of Director, Secondary Education Haryana, Chandigarh. It is useful to extract the said letter, which has been brought on record as Annexure P-16, which is to the following effect:-

"From Director, Secondary Education Haryana, Chandigarh.

To,
Secretary,
Board of School Education Haryana, Bhiwani.
Letter No.5/37-99-E(2)
Dt. Chandigarh
24.8.2001

Subject : Regarding granting of benefit of past service to Sh. Surinder Nath Kesar, Proof Reader.

With reference to your letter No.334- 35 dt. 31.07.2001 on the subject noted above. In this matter the Finance Department has declined to accept the proposal of this Department and has suggested that the pay of the employee be fixed under Foot Note 6 of Rule 7.18 of CSR Vol. II.

Sd/-
Assistant Director Schools-1 for Director Secondary Education Haryana,
Chandigarh."

12. From the above, it is clear that the case of the appellant was not covered by Rule 4.23

and further the request for granting relaxation by the Government from Rule 4.23 was not acceded to. When the State has refused to grant relaxation in the rule, the refusal by the respondent for adding the period of interruption for pensionary benefit cannot be faulted.

13. Insofar as the submission of the learned counsel for the appellant that Board has resolved to condone the interruption and it was only after five years, the claim is denied by the Government, it is relevant to notice that in the resolution of the Board dated 31.05.1994, it was provided that regarding giving benefit of the past service, the opinion of the State Government be obtained. Further, although the Board passed resolution on 31.03.1995 to add the period subject to appellant depositing the provident fund, gratuity and leave encashment, the amount sought to be deposited in pursuance of the resolution of the Board was not accepted due to certain audit objection and when the appellant deposited the amount on 15.05.2000, the Board was directed to obtain relaxation in Rule 4.23 since the appellant's case for condonation of interruption was not covered by Rule 4.23. The Government having subsequently refused the relaxation in Rule 4.23, the benefit was denied. Insofar as letter dated 27.05.1997 from Financial Commissioner & Secretary regarding giving the benefit of past service, it was also mentioned that the case is not covered by Rule 4.23 PCSR Volume II and clarification was called from the Board. Letter dated 05.12.1994, which was also a letter from Financial Commissioner & Secretary was based on Rule 4.22, which mentioned that period of break in service of the appellant be condoned which can only be treated as leave without pay, which can only be counted for seniority and pension. The said letter cannot come to the rescue of the appellant since it did not refer to Rule 4.23, which was relevant and Rule 4.22, which referred to interruption in period of absence and the period from 02.02.1988 to 02.08.1994 was not period of absence but was a period when the appellant had already taken voluntary retirement, the said letter also does not come to rescue of the appellant. Further subsequent correspondences with the Board and the Government clearly indicate that rule, which was relevant was Rule 4.23 as applicable in the State of Haryana and the proposal for relaxation from Rule 4.23 was not acceded to by the Government as communicated by Director of Secondary Education Haryana by letter dated 24.08.2001.

14. At no stage, the Government condoned the interruption between 02.02.1988 to 02.08.1994. Although, learned Single Judge has dismissed the writ petition, which judgment has been affirmed by the Division Bench but High Court having not considered the relevant rule, i.e., Rule 4.23 as applicable in the State of Haryana, which rule, we have noticed above, the dismissal of the writ petition has to be sustained but on the reasons as given above.

15. When the Statute does not permit condonation of interruption of period from 02.02.1988 to 02.08.1994 and the proposal for granting relaxation in Rule 4.23 had been refused, we cannot find any fault in the decision of the respondent refusing to grant the benefit of condonation by adding the earlier period. The appellant's period after fresh appointment from 03.08.1994 being less than qualifying service of 10 years, he was not entitled for pension.

16. In view of the foregoing discussions, we are of the view that the appellant is not entitled for any relief in this appeal. The appeal is dismissed.

Judgment Referred.

¹(1994) 1 SLR 0436