

CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH, AHMEDABAD

Original Application No. 51 of 2014
This the 7th day of August, 2020

Date of Reserve: 13.07.2020

Date of Pronouncement: 07.08.2020

CORAM :

HON'BLE SHRI JAYESH V BHAIRAVIA, MEMBER (J)

HONBLE DR A K DUBEY, MEMBER(A)

Usha G Limbone,
Nani Hamam Ni Pole,
Matavalo Khancho, Nr. Ghee-Kanta Road,
Ahmedabad – 380 001.

... Applicant

By Advocate :Tanna Associates
Shri A L Sharma

V/s

- 1 The Medical Superintendent ,
Employees' State Insurance Corporation,
Model Hospital, Bapunagar, Ahmedabad – 380 024.
 - 2 State of Gujarat,Through Secretary,
Health & Family Welfare Department,
Block No.7, 7th Floor, Sardar Patel Bhavan,
Sachivalaya, Gandhijnagar – 380 021.
 - 3 Employees' State Insurance Scheme,
Through Director of Health Services,
Employees' State Insurance Scheme, "Panchdeep Bhawan",
Ashram Road, Ahmedabad – 380 014.
 - 4 Employees' State Insurance Corporation,
Through Director General,
Panchdeep Bhawan,
Comrade Inderjeet Gupta (CIG) Marg,
New Delhi – 110 002.
- ... Respondents.

By Advocate Shri Shashikant Gade for R-1 & 4

ORDER

Per Dr A K Dubey, Member(A)

- 1 The present OA has been filed by the applicant challenging the order
of the Director, Medical Services, ESIS dated 20.10.2011 stipulating that

the applicant would be retiring on 31.10.2011 on superannuation (Annexure A) and the relieving order dated 25.10.2011 (Annexure A/1), by Deputy Director, Model Hospital, Bapunagar stating that it is against the provisions of the ESIC (Staff and Conditions of Service) Regulations 1959 and is contrary to the terms and conditions accepted by the applicant at the time of her absorption in ESIC as a staff nurse.

2 The relief prayed for by the applicant are as follows:-

“(i) Quash and set-aside and declare that office order passed by the respondent no.3 Director, Medical Services, ESIS, Ahmedabad dated 20.10.2011 and it's confirming order dated 25.10.2011 by Dy. Director, Model Hospital, Bapunagar Annexure A1 herein retiring the applicant at the age of 58 years is contrary to law and contrary to the provisions of Employees' State Insurance Corporation (Staff & Conditions of Service) Regulations, 1959, and terms & conditions as well as undertaking & acceptance signed by the applicant at the time of applying for absorption in ESIC and also is in clear breach of Articles 14 & 16 in as much as it discriminatory treats the present applicant along with her other employees Smt. E.B.Parmar (Staff Nurse) and Mrs Kirti IK Shah (E.C.G. Tech.).

(ii) Declare that the applicant is entitled to continue to work till the age of 60 years in view of the terms & conditions as well as undertaking & acceptance signed by the applicant at the time of applying for absorption in ESIC, and that having regard to the fact that at the end of the term the applicant is entitled to work and this Hon'ble Court may be pleased to declare that such declaration be made by way of a writ of mandamus declaring that the applicant is entitled to work till 31.10.2013.

(iii) Declare that that the applicant is entitled of salary having regard to the fact that applicant is entitled to continue to work till the age of 60 years and direct the respondents to pay the salary to the applicant till the age of her superannuation, and subsequently revision in her pay scale from time to time and her retiral benefits and all consequential benefits.”

2.1 Counsel for the applicant stated that initially the applicant had been serving as staff nurse with respondent no.1 since 06.09.1976 and

thereafter was permanently absorbed by the ESI Corporation, New Delhi on 29.08.2011, as may be seen from ESIC letter No.U/11/11/12-A/Bapunagar/2005/Med. dated 29.08.2011 and under the terms & conditions laid down by ESI Corporation New Delhi in its Memorandum No.ESIC/37/MHB/Admn/Absorb dated 16-19.09.2011 (Annexure A 2). The counsel for the applicant argued that it was clear from the ESIC letter dated 16-19.09.2011 (supra), that ESI Corporation Headquarter office had approved the absorption of the applicant, who until then was a State Government staff, with certain conditions. The ESI Corporation had made it clear that those who retired prior to August 2011 would not be absorbed. Since the applicant was to retire while under State Government only in October 2011, ESIC had approved her absorption in the ESI Corporation vide ESIC Order No.1 of 2011 in No.U/11/11/12-A/Bapunagar/2005/Med. dated 29.08.2011 where in the initial paragraph, it is clearly stated that Director General, ESI Corporation had approved the absorption of employee of State Government staff working in ESIC Model Hospital, Bapunagar, Ahmedabad w.e.f. 01.01.2006. It is submitted by the counsel for the applicant that term no.5 onwards contained in the memorandum dated 16-19.09.2011 indicates that employees would have to give an undertaking to the effect of unconditional acceptance for the posts and pay scales offered in ESIC, and accordingly the applicant had signed and submitted the said undertaking and acceptance (Annexure A-4).

2.2 The Counsel for the applicant submitted application to the Medical Superintendent on 15.10.2011 (Annexure A-5), requesting that she had already given her consent for absorption and signed the undertaking and

acceptance as per the terms & conditions of ESIC, and that her date of retirement as per rules of the State Government was 31.10.2011 and hence, she should be absorbed immediately. However, to her shock and surprise, she immediately received an office order passed by Director, Medical Services, ESI Scheme Ahmedabad dated 20.10.2011, the impugned order in this OA (Annexure A1), contending that her date of retirement was 31.10.2011 and she would be relieved from her job on the said date. Thereafter, on contacting the Medical Superintendent about her retirement order, the Medical Superintendent vide letter dated 25.10.2011 (Annexure A-6) to Director of Medical Services, ESI Scheme informed that applicant had opted for absorption in ESIC and same had been approved by the ESIC head quarter vide letter dated 29.08.2011 and hence she should not be retired on attaining the age of superannuation as per State Govt. service rules. But on the same day Deputy Director, Model Hospital, Bapunagar passed an order relieving her from service confirming office order passed by Director, Medical Services, Ahmedabad dated 20.10.2011. After receiving confirmation order passed by Dy. Director, the applicant immediately on 25.10.2011 (Annexure A-7) wrote a letter to Medical Superintendent requesting her absorption in the ESIC and also mentioning that if there would be any delay from the department she would have no objection. The counsel for the applicant submitted that the words in the said application that even if she was not absorbed even then she would not object, was an error committed by applicant as she was in deep shock after receiving the retirement order.

2.3 Thereafter applicant made several representations to the Director General, ESIC, New Delhi as well as to the Medical Superintendent, Model

Hospital, Bapunagar (Annexure A-8), regarding her absorption stating that she had reported and was all through remaining present on her services but she was not allowed to sign in the register. Nor had she opted for any retiral benefits such as commutation, gratuity or pension, and hence her absence after 01.11.2011 could be considered as E.L. and she was ready to be absorbed. The applicant's counsel contended that even after submission of numerous representations, neither any communication nor any satisfactory reply was received by her from the respondents. Applicant's counsel submitted that after all her futile efforts she eventually accepted pension after three months and also the commutation value and gratuity in February 2012, as she was left with no choice by the respondent but to accept the retirement benefits. It was said that the applicant had not claimed leave encashment.

2.4 The Counsel for the applicant submitted that to her shock and surprise, the applicant received a communication dated 11.04.2012 on 12.04.2012 advising applicant to submit an undertaking to the effect that she has not accepted and claimed her pensionary benefits from State Government. Finally applicant made her representation again on 12.09.2012 (Annexure A-10) to Joint Director, ESIC, New Delhi requesting to give her continuous service order and she also clarified that she received her pension permission order dated 19.12.2011 despite the fact that she was absorbed by ESI Corporation vide office order dated 29.08.2011 and she was retired on 31.10.2011 as per rules of State Government. She further said that she came to know from reliable sources that same situation arose in the case of Smt. E.B.Parmar (Staff Nurse) and Mrs Kirti K Shah (E.C.G. Tech), who had retired in January 2012 as per State

Government rules but they made representation regarding their absorption and vide order dated 2-5.06.2012 by the Dy. Director, ESIC, Model Hospital, Bapunagar they were advised to resume duties. Copies of replies under RTI applications made by respective employees are at Annexure A-11. The applicant had preferred a Writ Petition before Hon'ble High Court of Gujarat in Special Civil Application No.15984/2012 which was disposed of vide order dated 17.07.2013 with liberty to approach appropriate forum hence, the instant OA.

3 On receipt of notice, the respondents filed detailed reply stating therein that ESI Model Hospital was earlier run by State Government and was taken over on "as is where is" basis as per MoU signed between ESI Corporation and Government of Gujarat and all State Government employees posted in the hospital were relieved by State Government. Initially the employees were taken on deputation and with option for absorption on date to be decided by ESIC and Government of Gujarat. The conscious decision of doing away with requirement of rendering technical resignation by employees of Govt. of Gujarat as mentioned in terms of absorption, was taken by ESIC in the interest of employees because of delay in communicating the decision by State Government on important personal matter and that formal acceptance of technical resignation by Government of Gujarat had not taken place till then. But following actions taken by State Government indicated acceptance or waiver of need of the same.

- (i) Transfer of GPF accumulations amounting to Rs. 9.74 crore to ESIC in respect of absorbed employees by AG (A&E) Gujarat in Nov'13.
- (ii) On absorption in ESI Corporation, retirement age of GDMOs was reduced to 60 from 62.

3.1 It has been stated that applicant was a State Government employee and was approved to be absorbed in ESI Corporation w.e.f. 01.01.2006 vide head quarter letter dated 29.08.2011. Despite the approval for absorption of the applicant, State Government issued her retirement order on 20.10.2011. On receipt of applicant's letter dated 15.10.2011 and her retirement order issued by State Government, Respondent no.1 vide letter dated 25.10.2011 requested the Director of Medical Services, ESI Scheme, Government of Gujarat not to retire the applicant as she had already been approved for absorption in ESI Corporation. Still the applicant's relieving order was issued by Deputy Superintendent who was not an ESIC Officer but an official of the ESI Scheme, Government of Gujarat.

4 Respondents in their reply have contended that the applicant vide her application dated 25.10.2011 informed Respondent no.1 office that she would not object if she would not be absorbed in ESIC, Central Government. Reply to OA also refutes her statement in the concluding para of application dated 25.10.2011 (Annexure A-7) that she simply indicated her consent for non-absorption which was confirmed by her conduct of acceptance of pensionary benefits from Government of Gujarat, her parent employer despite being aware of the efforts made by ESI Corporation regarding her absorption. The preference of opting and accepting retirement benefits from State Government as per personal limitations and declaration made in her application dated 25.10.2011 has been accepted in para 5.2 of OA as "true error committed by the applicant in state of deep shock."

5 We have heard Shri A L Sharma, learned counsel for applicant and

Shri Shashikant Gade, learned counsel for respondent no.1. The sequence of events has been that the applicant was working as staff nurse in the ESIC Model Hospital, Bapunagar, Ahmedabad under the State Government. Vide communication dated 29.08.2011, ESIC intimated the ESIC Model Hospital, Bapunagar Ahmedabad that the Director General, ESIC, New Delhi had approved the absorption of State Government staff into ESIC on terms and conditions stipulated therein. Vide Office Order dated 29.08.2011, ESIC Headquarter, New Delhi came out with a list of staff approved for absorption and the conditions of such absorption. The applicant's name appeared at S.No.142 in this list. It is a pertinent point that the age of superannuation in Gujarat State was 58 years whereas in ESIC, Government of India, it was 60. Subsequent to this letter and Office Order, ESIC Model Hospital's Joint Director issued a Memorandum dated 16/19.09.2011 notifying the State Government Employees that ESIC Headquarter had approved their absorption in ESIC w.e.f. 01.01.2006 on the terms and conditions stipulated therein. It also laid down certain procedural requirements that had to be fulfilled.

6 Later, Office Order dated 20.10.2011 issued by the Director of Medical Services, ESI Scheme, Ahmedabad (a State Government Establishment) stipulated that the applicant would be retiring on superannuation on 31.10.2011. There is no such communication issued by ESIC, Government of India that the letter dated 29.08.2011 and 16/19.09.2011 were not in force or reckoning between 16/19/08.2011 and 20.10.2011. The applicant had given an application dated 15.10.2011 (Annexure A5) to the Medical Superintendent of ESIC Model

Hospital requesting that she had opted for absorption and hence should get absorbed immediately in ESIC as her date of superannuation as per State Government 31.10.2011 was nearing. Still ESIC Model Hospital, Ahmedabad (State Government) vide its Office Order dated 25.10.2011 signed by the Dy. Superintendent notified the relief of the applicant on superannuation on 31.10.2011. The Medical Superintendent of ESIC Model Hospital too wrote to Director of Medical Services, Gujarat (State Government), a letter dated 25.10.2011 requesting not to retire the applicant as per State Rules. This was in response to the applicant's letter to him dated 25.10.2011. Upon receipt of this Office Order, the applicant again wrote to the Medical Superintendent of ESIC, Model Hospital requesting for absorption and mentioned that even if there was some delay in the process, she would have no objection.

7 We observe that thus far, the applicant's case was considered for absorption and was interested in it and requested for it, but in her application dated 25.10.2011 to the Medical Superintendent, she also mentioned that even if she was not absorbed, she would not object. This she claimed as an error committed by her since she was in deep shock.

8 The sequence of events subsequent to the applicant's request to Medical Superintendent dated 25.10.2011 shows her attempts to retrieve the lost opportunity of absorption. She made representations dated 13.01.2012 to the Director General, ESIC, Government of India, to Medical Superintendent, ESIC, Model Hospital (Annexure A8), claiming that though she presented herself for duty, she was not permitted to join or record her presence in the attendance register. Vide her letter dated 17.12.2011, the

applicant requested Director General, ESIC, New Delhi that though as per State Government rule she had retired, she had consented for absorption and hence should be absorbed in ESIC. Again vide her letter dated 23.12.2011, she made similar request to the Medical Superintendent, ESIC Model Hospital, Ahmedabad. Later on, vide letter dated 13.01.2012, the applicant requested Medical Superintendent, ESIC Model Hospital that in hope of getting absorbed, she had not accepted retiral benefits and the period from 01.11.2011 could be treated as Earned Leave and she may be absorbed.

9 Upon learning that in a similar case where a staff nurse absorbee was directed by ESIC, New Delhi to contact Medical Superintendent on the plea that since she had been absorbed by ESIC, the retirement age was 60 (Annexure A-11). The applicant's case is that despite her representations and requests, she did not received any communication or reply from the respondents. After all these futile efforts, she eventually accepted pension after three months, gratuity and commutation amount in February 2012, since she had no other option. However, to her shock, she received a communication dated 11.04.2012 asking her to give an undertaking that she had not responded to the notice of retirement and had not accepted pensionary benefits from Government of Gujarat. She again made a request to ESIC, New Delhi vide her request dated 12.09.2012, for continuous service.

10 Above sequence of events indisputably and unambiguously establishes that while in response to the Office Order dated 20.10.2011 and 25.10.2011, the applicant was treated as superannuated w.e.f.

31.10.2011 even as records viz. The ESIC New Delhi's letter dated 29.08.2011 and 16/19.09.2011 already stipulated that she was accepted for absorption. However, there are no papers on record to confirm that she was absorbed, after completion of the process of absorption. journey from "approval for absorption" to the status of "absorbed" had not been completed. But we are constrained to observe that after approval for absorption, the letter from the Model Hospital and from ESIC, New Delhi dated 20.10.2011 and 25.10.2011 completely ignored this aspect of completing the process of absorption and in effect negated the very proposal of Applicant's absorption, by insisting on her relief on 31.10.2011.

11 Now status is that the applicant had accepted the pension and retiral amounts and the age of superannuation even if the absorption had materialised, is long over. But she herself had given it in writing that even if the absorption didn't come through, she would not have any objection even though she has contended in the plea that she wrote that in shock. We take these words of the applicant as an expression out of exasperation and frustration as observed by the Apex Court in P K Ramachandra Iyer & Ors v/s Union of India & Ors {(1984) 2 SCC 141}, and therefore, we are not inclined to hold it against her.

12 Counsel for applicant has placed reliance on the judgment of the Apex Court in J N Srivastava v/s Union of India {AIR 1999 SC 7571} to argue that the applicant was entitled to function till the age of superannuation under the absorber organisation namely ESIC, New Delhi. But we find that this case, however, is about withdrawal of notice of voluntary retirement which the notice tenderer wished to withdraw during the notice time. Hon'ble Apex Court had permitted continuance in the

service till superannuation treating the notice of voluntary retirement as withdrawn. But this judgment cannot be applied to the applicant's case in toto because, although the ESIC, New Delhi had asked the State Government to complete the formalities, it was the State Government which did not act on it and the applicant superannuated as per State Government's rule.

13 Counsel for applicant has relied on *Nar Singh Pal v/s Union of India & Ors* {2000(3) SCC 588}. That case, again has a different set of facts where the services of the appellant who was a temporary labourer with Telecom Department was terminated after he was arraigned as an accused in a crime which was charged before the Chief Judicial Magistrate of Agra. The trial went on for about six years and the appellant was acquitted but his services were terminated immediately after commission of crime by him. Unlike that case, there is neither any proceedings nor any mid service issue in this case. In the present case before us, it is a matter of superannuation as per the State Government Rules even if the ESIC, New Delhi had agreed to absorb which would have given the applicant two more years. We see that there is no infringement of any right here though a possible benefit of two more years under a different employer could not accrue to the applicant.

14 The counsel for the applicant has also referred to the Apex Court judgment in *Punjab & Sind Bank & Ors v/s Mahindra Pal Singh & Ors* {2003 (12) SCC 747} on the argument that even if the applicant had received the payment, the retirement on 31.10.2011 was still to be questioned. In *Punjab & Sind Bank* case, the appellant had initially opted for voluntary

retirement under a specific scheme but withdrew before it. Still, some part of retiral benefits was deposited in his account which was not even in the knowledge of the appellant and his resumption into service was not allowed by the Bank. The Apex Court was pleased to order restoration of the appellant into service.

15 In view of the observations of the Apex Court mentioned above, two criteria could be applied to judge whether the appellant deserves the relief. First, appellant's conduct in getting the retiral benefits. Second, the Employer's conduct in view of Apex Court observation in P K Ramachandra Iyer & ors V/s Union of India & Ors {(1984) 2 SCC 141}. As indicated earlier, we are inclined to disregard the words of the appellant while requesting the Medical Superintendent of ESIC, Model Hospital that even if absorption doesn't come through, it is acceptable to her. However, acceptance by the applicant of retiral benefits as well as pension from the State Government concludes the process of service even as the absorption process was yet to be completed after having been agreed to. Despite concurring in the absorption proposal, insistence by the ESIC Model Hospital on her retirement and relief is strange, to say the least. That the ESIC was still willing to absorb her as revealed from its Memorandum dated 11.04.2012 is of hardly any help since she had already accepted the pension, commutation value, gratuity etc from Government of Gujarat. For absorption into another organisation, continuation in the original organisation is indispensable for that alone is the basis for claiming absorption. But by accepting, the pension and retiral benefit, this umbilical cord between the employer and the employee was severed irreversibly to the complete negation of the proposed absorption.

16 In the light of aforementioned findings, we do not find any infirmity in the impugned order and also, the relief sought by the applicant is devoid of merit after having accepted the retiral benefits on superannuation and hence this OA deserves to be dismissed. Accordingly OA is dismissed with no costs.

(Dr A K Dubey)
Member(A)

(Jayesh V Bhairavia)
Member(J)

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