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CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No: 465/94

Transfar Application No: --

DATE OF DECISION: 4-12-95

Dr. Haresh D. Ramaiya

Petitioner

Mr. S.R. Atre

Advocate for the Petitioners

Versus

Union of India & Ors.

Respondent

Mr. V. S. Masurkar

Advocate for the Respondent(s)

CORAM :

The Hon'ble Shri M.R. Kolhatkar, Member(A)

The Hon'ble Shri

1. To be referred to the Reporter or not ?
2. Whether it needs to be circulated to other Benches of the Tribunal ?

M.R.Kolhatkar
(M.R.KOLHATKAR)
Member(A)

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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

O.A.NO: 465/94

Monday the day of 4-12-1995

HON'BLE SHRI M.R.KOLHATKAR, MEMBER(A)

Dr.Haresh D.Ramaiya

(By advocate Shri S.R.Atre)

.. Applicant

vs.

Union of India & Ors.

(By advocate Mr.V.S.Masurkar)

.. Respondents

O R D E R

(Per M.R.Kolhatkar, Member(A))

In this case the applicant who is working as Public Health Dentist, PHC Diu is seeking a direction to the respondents No.1,2 and 3 to count his previous service with the Western Railways from 11-10-1973 to 15-11-1975 for calculation of pensionary benefits. The applicant also prays that the break in service for one day viz. 16-11-1975 may be directed to be condoned. The facts of the case are as below:

2. The applicant worked as Assistant Medical Officer (Class-II), Western Railways at Ajmer from 11-10-1973. While so working he applied for the post of Dental Surgeon under Govt. of Goa, and Daman and Diu, was selected for the post by the UPSC. According to the applicant, he had made known to the Western Railways that he desired to resign from the post of Assistant Medical Officer to join his posting at Daman and accordingly he had been relieved in the A/N of 15-11-1975/16-11-1975. ~~16-11-1975~~ was a Sunday. Even otherwise the journey between

Ajmer and Daman, where he was posted, takes more than 48 hours. Thus he joined at Daman on 17-11-75 with a technical break of one day. The applicant pursued the question of counting of his previous service with Western Railway both in connection with pay fixation and pensionary benefits. While his request for counting of past service for pay fixation was allowed on 9-9-1985 vide Ex.R-II to the written statement, his request for counting of past service for pensionary benefits remained pending. However, respondents have pointed out that this request was in fact rejected on 10-12-1992 to written statement vide Ex. R-I/ on the ground that his earlier service prior to joining Administration of Daman and Diu cannot be regularised since he was appointed by the UPSC purely on ad-hoc basis. The applicant further states that he had made a representation on 20-10-1993 which is still pending. He has filed this application on 10-3-1994 since no reply has been forthcoming. The applicant contends that he is entitled to counting of his previous service in Western Railway's towards the pensionary benefits under the provisions of Rule 26 of the Central Civil Service Pension Rules. Rule 26(2) says that "A resignation shall not entail forfeiture of past service if it has been submitted to take up, with proper permission, another appointment whether temporary or permanent, under the Government where service qualifies." According to the applicant, he had resigned from Western Railway and his resignation from Western Railway does not entail forfeiture because he had submitted his resignation through proper channel.

According to the applicant the break in service viz. 16-11-75 also deserves to be condoned as a technical break. Since the respondents have already counted his past service for purposes of pay fixation there is all the more reason why his past service should not be counted for pensionary purpose. The action of the respondents in not counting it is arbitrary and is violative of the provisions of Articles 14 and 16 of the Constitution of India.

3. Respondents contend that the application is time barred because the applicant ought to have pursued the matter for counting his service for pensionary benefit immediately after the decision regarding pay fixation was taken in 1985. The O.A. is also time barred because a formal reply rejecting his request was already issued on 10-12-1992. The respondents however do not deny that the representation of the applicant dt. 22-10-93 is still under process. It is not in dispute that the applicant's date of birth is 1944 and therefore his date of superannuation is 2002. Apart from the fact it is open to the applicant to pursue the question of counting of past service for pensionary benefits any time prior to superannuation, the fact that after rejection of first representation in the matter, the applicant sent a further representation to which no reply has been sent being under process would show that not be proper to treat the O.A. as time barred. I therefore propose to proceed to consider the O.A. on merits.

4. The main contention of the applicant is that the applicant's case does not fulfil Govt. of India's decision No.1 and 3 under Rule 26. Govt. of India's decision No.1 under Rule 26 deals with the subject "When resignation a technical formality and when it subsists." The material portion of this decision states that "Once the application has been forwarded unconditionally and the person concerned is offered the post applied for, he should be relieved of his duties to join the new post applied for, as a matter of course and the question of his resigning the post held by him in such circumstances should not arise." This is what stated in Govt. of India, Ministry of Finance O.M. dt. 17-6-1965. In the subsequent O.M. dt. 19-12-1969 there is a reference to permanent and quasi permanent central Govt. servants and it is stated that it has been decided that in the case of such employees the resignation should be deemed to be resignation within the meaning of Article 418(b) of CSRs(Rule 26(2)) for pension. It would thus appear that the difficulty has arisen in this case because of the reference to the status as permanent and quasi-permanent central Govt. servant and admittedly the applicant was not a permanent or quasi-permanent employee of the Western Railway but he was only a temporary servant of the Western Railway. Decision 3 under Rule 26 of the CCS Pension Rules lays down "Procedure to be followed when benefit of past service is allowed." This envisages that the order accepting the resignation should clearly indicate

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that the employee is resigning to join another appointment with proper permission and that the benefits under Rule 26(2) will be admissible to him. Apparently the Accounts Department of Administration of Daman & Diu thinks that in the absence of such a certificate from the Railways, Rule 26(2) have no applicability.

5. In his rejoinder the applicant has produced certain documents from the Western Railway at Annexure A-1. These documents indicate the date of resignation as 15-11-75. But this is so far as the applicant is concerned. From the point of view of Western Railway, since the appointment was purely temporary and his services were liable to be terminated at any time without assigning any reasons his services were treated as terminated w.e.f. 15-11-1975. Thus the whole question boils down as to whether a temporary service under a Central Govt. department can be counted for purposes of pension. Here we are required to consider the scheme and text of pension rules, and not get confused by reference to Govt. of India's decisions which may be printed by publisher(Swamy)under the relevant rules by way of guidance which may not be strictly in accordance with the spirit of rules, when out of date. When we see the text of rule it is categorical that a resignation shall not entail forfeiture of past service if it has been submitted to take up, with proper permission, another appointment whether temporary or permanent, under the Government where service qualifies. The material terms in this rule are whether there was a "proper permission"

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from the Western Railway which there was because the / applied for the post under Union Territory of Daman and Diu through proper channel. There is also a certificate dt. 4-11-74 at Annexure A-4 to the rejoinder which incorporates "no objection certificate" from the Western Railway. There is also no doubt about the joining ~~the post by~~ the applicant (and not ~~merely application~~ for the post) ~~by~~ by proper permission, Considering the correspondence enclosed by the applicant viz. letter dt. 31-1-78 which is already in possession of the Department of Health of U.T. of Daman and Diu. So far as the question of qualifying service is concerned it is dealt with in Rule-13 which provides that "qualifying service shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity: Provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post: Considering ~~the~~ temporary service under Western Railway was followed by substantive appointment in another service, we are required to hold that the qualifying service of the applicant starts from 11-10-1973. Rule 14 deals with the conditions of qualifying service which are reproduced below:

"(1) The service of a Government servant shall not qualify unless his duties and pay are regulated by the Government, or under conditions determined by the Government.

(2) For the purposes of sub-rule(1), the

~~expression "Service" means service under~~

the Government and paid by the Government from the consolidated Fund of India or a Local Fund administered by that Government but does not include service in a non-pensionable establishment unless such service is treated as qualifying service by that Government."

On perusal of the rules it is clear that the service of the applicant under Western Railway is a qualifying service and that in terms of Rule 26(2) the applicant is entitled to count his service. However, for service to qualify it ~~must~~ be service without interruption. This point is dealt with in Rule 26(3) of the CCS Pension Rules:

"(3) Interruption in service in a case falling under sub-rule(2), due to the two appointments being at different stations, not exceeding the joining time permissible under the rules of transfer, shall be covered by grant of leave of any kind due to the Government servant on the date of relief or by formal condonation to the extent to which the period is not covered by leave due to him."

It will be seen that if the interruption does not exceed the joining time permissible, the same is entitled to be covered by grant of leave or condonation. Since the period does not exceed joining time I hold that the applicant is entitled to claim condonation of the interruption in terms of Rule 26(3).

6. Although none of the parties cited before me any case law, I take judicial notice of my decision in O.A.893/94, **D.M.Jadhav. v. U.O.I. & Ors.**, decided on 13-10-1995. In that decision I had also referred to the decision of the Division bench of Principal Bench

in R.R.Singh vs. Chief C.D.A.(P) Allahabad & Ors. reported at 1994(2)ATJ 461. In order to make the position clear, the portion from the judgment which was quoted in para 7 would need reproduction:

"(9)The contents of sub-rule (1) are absolute. They stipulate that in a normal situation where a resignation is tendered by a Government servant, there can be no escape from forfeiture of his past service. However, in sub-rule (2), the rigour has been relaxed. For attracting sub-rule (2) the conditions imposed therein have to be satisfied. The key words in sub-rule (2) are "proper permission". The expression "permission" imports application of mind of the authority according the same. Therefore, in the said expression it is implied that the relevant authority shall focus his attention to three aspects, namely, legality, propriety and the genuineness of the transaction. The fulfilment of these requirements is highlighted by the preceding expression "proper". The said expression includes the competence of the authority granting permission.

(10)Permission may be express or implied. Therefore, for applying sub-rule(2)Rule 26 to the instant case, we have to examine whether the applicant tendered his resignation with either express or implied permission of the competent authority to take up an assignment.....Judicial notice can be taken of the fact that, in the Government, no application for an appointment made by a candidate, who is already serving in a particular Department of the Government either Central or State is normally considered unless the same is forwarded for consideration by

the concerned authority of the Department where such a candidate is already working. The applicant, therefore, is entitled to press into service the well-known rule of evidence that there is a presumption of official acts being duly performed. This presumption, however, is rebuttable."

7. Considering therefore the pleadings, documents on record and arguments of the parties and the above discussion I am inclined to allow the application and dispose of the same by passing the following order :

O R D E R

O.A. is allowed. Respondents No.1 to 3 are directed to count the service of the applicant with the Western Railway from 11-10-1973 to 15-11-75 towards pension subject to what follows. Respondents are directed, on a formal application from the applicant which may be submitted within 15 days of the receipt of the order, to consider the condonation of interruption in service in respect of 16-11-75 within one month of the receipt of the representation from the applicant.

There will be no order as to costs.

M.R.Kolhatkar

(M.R.KOLHATKAR)
Member(A)