IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA

ON THE 2nd OF DECEMBER, 2024

WRIT PETITION No. 5019 of 2012

DR. YOGESH SHAH

Versus

PRINCIPAL SECRETARY STATE OF M.P. AND 4 ORS. AND OTHERS

Appearance:

Shri Arjun Agrawal, learned counsel for the petitioner.

Shri Shrey Raj Saxena, learned Deputy Advocate General for the respondents/State.

ORDER

The present petition is filed under Article 226 of the Constitution of India seeking quashment of the orders Annexure P/7 & P/8 by which the application of the petitioner for voluntary retirement as per the unamended Rule of 42-A of M.P. Civil Services Pension Rules, 1976 (hereinafter referred as **Pension Rules**) prevailing at the time of the submission of the application has been rejected and the same has been communicated by letter dated 09.02.2012.

02. Draped in brevity the facts of the case are that the petitioner was appointed on 17.12.1985 to the post of Assistant Surgeon/Insurance Health Officer in Directorate Employee State Insurance Services on an ad-hoc basis. The services of the petitioner were regularised for the post of Assistant Surgeon/Insurance Health Officer vide order dated 26.06.1987. The petitioner submitted an application for voluntary retirement and served a notice in Form 28 both on 21.03.2006.

03. On 07.04.2006 Rule 42 and 42-A of the Pension Rules were amended and as per Rule 42(1)(a) the minimum qualifying service for seeking voluntary retirement was raised from 15 years to 20 years. Further Rule 42-A was amended and earlier the qualifying service was increased with such period that would take an employee to the date of superannuation subject to a capping that the total service does not exceed 33 years. However, after the amendment dated 07.04.2006, as per Rule 42-A, a period of up to 5 years could only be added in the qualifying service, with a capping that the total service does not exceed 33 years. A formal order was issued accepting the application for voluntary retirement of the petitioner vide Annexure P/4 dated 06.07.2006 though no such formal order of acceptance was required to be passed under Rule 42 of Pension Rules. The Pension Payment Order (PPO) of the petitioner was prepared in 2009 where the total qualifying service of the petitioner was taken as 20 years 4 months and 5 days in contravention of Rule 42-A of the Pension Rules existing at the time of submission of application for voluntary retirement and issuance of notice Form 28.

04. Counsel for the petitioner submits that the application of the petitioner for voluntary retirement/Notice form 28 submitted on 21.03.2006 shall be governed by the unamended provisions of Rule 42 and 42-A of Pension Rules as the amendment came into force on 07.04.2006. The said amendment would not be applicable retrospectively as an indefeasible right

for seeking voluntary retirement under Rule 42 of Pension Rules has already vested on the date of filing of application itself. In support of his submission, he has placed reliance on the judgment passed in the case of ***Indra Prakash Bhatnagar vs. State of M.P. (1985) MPLJ 229, Narayan Prasad vs. District & Sessions Judge, Ratlam, 1999 (1) JLJ 169, Garikapati Veeraya vs. N. Subbiah Choudhary, AIR 1957 SC 540, Dr. Umesh Sharma vs. State of M.P. (WP No.4382/2006 decided by Coordinate Bench on 29.01.2007***.

05. Per contra counsel for the respondents argued that in the application for voluntary retirement and Form 28, the petitioner had intended the date of voluntary retirement w.e.f. 20.04.2006 and prior to the expiration of the notice period, the amendment had come into effect on 07.04.2006 and, therefore, the amended rule of 42 & 42-A of Pension Rule shall govern the application for voluntary retirement. He argued that the judgments which have been relied upon by the counsel for the petitioner are distinguishable and not applicable to the facts of the present case as in the present case, the amendment in the Rules had come into effect prior to expiration of notice period.

06. I have heard learned counsel for the parties at length and after hearing learned counsel for the parties, the issue which crops up for consideration is:-

Whether in the case of voluntary retirement of an employee, the Rules on the date of application/notice under Rule 42(1)(a) of Pension Rules or the Rules prevailing on the date when one month notice period expires would be applicable?

07. In order to appreciate the aforesaid question, it is apposite to refer the provisions of Rule 42 of M.P. Pension Rules 1976:-

Prior to amendment dated 7-4-2006 as on 20-03- 2006 Rule 42 & 42-A of pension Rules read as follows:-

Rule 42: Retirement of completion of 15/20 years qualifying service :-

(1)(a) Government servant may retire at any time after completing 15 years qualifying service, by giving a notice in form 28 to the appointing authority at least [one month] before the date on which he wishes to retire or on payment by him of pay and allowances for the period of [one month] or for the period by which the notice actually given by him falls short of [one month]

Provided that this sub rule shall not apply to the Government servants mentioned in brackets against each of the following Departments, until they have not completed 20 years qualifying service :-

(a) Public Health and Family Welfare Department (Medical Paramedical and Technical Staff);

(b) Medical Education Department (Teaching Staff, Paramedical and Technical Staff);

(c) Technical Education and Man Power Planning Department (Teaching Staff);

(d) Higher Education Department (Teaching Staff)

(e) School Education Department (Teaching Staff)

(f) Tribal Welfare Department (Teaching Staff)

(g) Home (Police) Department (Non ministerial staff):

Provided further that such Government servant shall not be allowed to retire from service without prior permission in writing of the appointing authority under the following circumstances:-

(i) Where the Government Servant is under suspension;

(ii) Where it is under consideration of the appointing authority to institute disciplinary action against the government servant:

Provided also that if the appointing authority has not taken the decision under clause (ii) of the second proviso, within six months from the date of notice given by the Government servant with regard to such disciplinary action it shall be deemed that the appointing authority has allowed to such Government servant to retire from service on the date after expiry of the period of six month

(b) The appointing authority may in the public interest require a Government servant to retire from service at any time after he has completed 20 Years qualifying service or he attains the age of 50 years whichever is earlier with the approval of the State Government by giving him three months notice in Form 29;

Provided that such Government servant may be retired forthwith an on such retirement forthwith and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rate at which he was drawing immediately before his retirement or, for the period by which such notice falls short of three months, as the case may be.

(2) A Govt. servant who has elected to retire under clause (a) of sub-rule (1) and has given the necessary intimation to that effect to the appointing authority, shall be precluded from withdrawing his election subsequently except with the specific approval of such authority on consideration of the circumstances of the case to withdraw the notice given by him:

Provided that the request for withdrawal shall be prior to the intended date of his retirement.

(3) Where the notice of retirement has been served by appointing authority on the Govt. servant, it may be withdrawn, if so desired for adequate reasons, provided that the Government servant concerned is agreeable.

Rule 42-A (inserted on 08-03-2002 and as amended on 01-10-2002):

Addition to qualifying service on voluntary retirement ;-

(1) The qualifying service as on the date of intended retirement of the Government servant retiring under clause (a) of sub- rule (1) of Rule 42 with or without permission, ashall be increased by

a period [that takes him to the date of superannuation subject to the condition that the total qualifying service rendered by the Government servant does not in any case exceed thirty three years].
(2) The increase [xxx] in his qualifying service under sub rule (1) shall entitle him to notional fixation of pay for purposes of calculation of pension and gratuity.
(3) This rule shall not apply to a Government servant who retires from Government service for being absorbed permanently in Central Government, in an Autonomous Body or Public Sector Undertaking to which he is on deputation at the time of seeking voluntary retirement.
(4) The weight age of [xxx] under sub rule (1) shall not be admissible in cases of those Government servants who are prematurely retired by the Government in the public interest under Rule 42 (1) (b) or Forest Ranger 56 (2).

<u>Rule 42 & 42-A of pension Rules as amended on 07-04-2006 read as follows :-</u>

<u>RULE 42: Retirement of completion of 20/25 years qualifying service:</u>

(1) (a) Government servant may retire at any time after completing 20 years qualifying service, by giving a notice in form 28 to the appointing authority at least [one month] before the date on which he wishes to retire or on payment by him of pay and allowances for the period of one month or for the

period by which the notice actually given by him falls short of [one month] Provided that this sub rule shall not apply to the Government servants mentioned in brackets against each of the following Departments, until they have not completed 25 years qualifying service :-

(a) Public Health and Family Welfare Department (Medical Paramedical and Technical Staff):

(b) Medical Education Department (Teaching Staff, Paramedical and Technical Staff);

Provided further that such Government servant shall not be allowed to retire from service without prior permission in writing of the appointing authority under the following circumstances :-

(i) Where the Government Servant is under suspension;

(ii) Where it is under consideration of the appointing authority to institute disciplinary action against the government servant.

Provided also that if the appointing authority has not taken the decision under clause (ii) of the second proviso, within six months from the date of notice given by the Government servant with regard to such disciplinary action it shall be deemed that the appointing authority has allowed to such Government servant to retire from service on the date after expiry of the period of six month.

(b) The appointing authority may in the public interest require a

Government servant to retire from service at any time after he has completed 20 Years qualifying service or he attains the age of 50 years whichever is earlier with the approval of the State Government by giving him three months notice in Form 29;

Provided that such Government servant may be retired forthwith an on such retirement forthwith and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rate at which he was drawing immediately before his retirement or, for the period by which such notice falls short of three months, as the case may be.

(2) A Govt. servant who has elected to retire under clause (a) of sub-rule (1) and has given the necessary intimation to that effect to the appointing authority, shall be precluded from withdrawing his election subsequently except with the specific approval of such authority on consideration of the circumstances of the case to withdraw the notice given by him:

Provided that the request for withdrawal shall be prior to the intended date of his retirement.

(3) Where the notice of retirement has been served by appointing authority on the Govt. servant, it may be withdrawn, if so desired for adequate reasons, provided that the Government servant concerned is agreeable.

> <u>Rule 42-A Addition to qualifying service on voluntary retirement;</u>
>
> (1) The qualifying service as on the date of intended retirement of the Government servant retiring under clause (a) of sub rule (1) of Rule 42 with or without permission, shall be increased by a period not exceeding five years, subject to the condition that the total qualifying service rendered by the Government servant does not in any case exceed thirty three years and it does not take him beyond the date of superannuation.
>
> (2) The increase not exceeding five years in his qualifying service under Sub rule (1) shall not entitle him to notational fixation of pay for purposes of calculation of pension and gratuity.
>
> (3) This rule shall not apply to a Government servant who retires from Government service for being absorbed permanently in Central Government, in an Autonomous Body or Public Sector Undertaking to which he is on deputation at the time of seeking voluntary retirement.
>
> (4) The weight age of five years under sub rule (1) shall not be admissible in cases of those Government servants who are prematurely retired by the Government in the public interest under Rule 42 (1) (b) or Forest Ranger 56 (2).

08. Rule 42(1)(a) as amended on 08.03.2002 required completion of 15 years of service by a Govt. servant to enable him to give a notice to the appointing authority. In this Rule w.e.f. 01.10.2002, the notice period of one month was made mandatory. Rule 42(2) precludes the Govt. servant from withdrawing the said notice without the approval of the authority. The Rule as a whole does not envisage acceptance of notice rather indicates that once the notice is given the period of one month starts running immediately on submission thereof and on completion of period of one month, the relationship of employer and employee ceases to have effect. As on 21.03.2006 Rule 42-A provided an addition of notional period to the qualifying service in case of voluntary retirement under Rule 42(1)(a). Rule 42-A (1) provided that the qualifying service shall be increased by a period that takes the employee to the actual date of superannuation subject to a condition that the total qualifying service shall not exceed 33 years. The object of this fictional addition was to provide succor to the employee entitling him to notional fixation of pay for the purposes of calculation of pension and gratuity. That w.e.f. 07.04.2006 under Rule 42(1)(a) the minimum qualifying service was raised from 15 years to 20 years, however, the minimum notice period was kept intact as one month. That Rule 42-A providing for fictional addition was also amended and the qualifying service of 20 years was to be increased by adding maximum period of 5 years subject to the condition that total qualifying service does not exceed 33 years. That Rule 42A(2) was also amended and the addition of 5 years period in the qualifying service was not even made applicable for notional fixation of pay for the purpose of calculation of pension & gratuity.

09. Rule 42(1)(b) of Pension Rules confers right to the government servant to voluntarily retire after he has completed 20/25 years of qualifying service and he has served a notice in form 28 to the appointing authority at least one month before the date on which he wishes to retire or on payment by him of pay and allowances for the period of one month or for the period by which the notice actually given by him falls short of one month.

10. The entire scheme of Rule 42 clearly provides that once a notice in prescribed proforma is given, there is a specific bar of sub-rule (2) of Rule 42(1)(a) and the same shall not be withdrawn by the government servant without the approval of the competent authority. This is indicative of the fact that the acceptance of a notice of voluntary retirement is not required or contemplated for full operation of the said notice of voluntary retirement. If the notice of voluntary retirement is not withdrawn before the date indicated in the said notice of voluntary retirement, it will automatically become operative from the date indicated in the notice of voluntary retirement and the Government Servant would be retired voluntarily from the date of his choice indicated in the aforesaid notice. This aspect has been considered by this Court in the case of ***Indra Prakash Bhatnagar*** (supra) wherein it has been categorically held that once the notice of voluntary retirement is given indicating a choice, the same will become operative from the date indicated in the notice. Thus, a right to a government servant to get voluntarily retire after completion of qualifying service is an absolute and vested right created on the date of application/notice sent by the petitioner. No discretion is left with the employer to accept or reject the said application. On the contrary, there is a bar under sub-rule (2) that the application will not be withdrawn by the government servant without the approval of the competent authority. Thus, the intention of the Rule making authority is to confer an absolute and indefeasible right to the government servant to get voluntarily retire after completing qualifying services from the date on his choice indicated in the aforesaid notice.

11. In the case of ***Narayan Prasad*** (supra), the Division Bench has taken the same view that the government servant who has completed 20 years of his qualifying service has an absolute and indefeasible right to retire at any date of his choice. In the case of ***Garikapati Veerya vs. N. Subbiah Choudhry & Ors. AIR 1957 SC 540***, the Apex Court was dealing with a right to appeal which was taken away by the amendment and held that the right of appeal is not in a mere matter of procedure but is a substantive right. The said right is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgement is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

12. In the case of ***State of Rajasthan vs. R. Dayal & Ors. (1997) 10 SCC 419,*** the Apex Court while dealing with the change in respect of eligibility conditions in the matter of recruitment held in para-8 that the recruitment to the vacancies which occurred prior to the amendment of the Rules would be governed by the original Rules and not by the amended Rules. Thus, it was held that the posts which fell vacant prior to the

amendment of the Rules would be governed by the original Rules and not the amended Rules. A Coordinate Bench in the case of ***Dr. Umesh Chandra vs. State of M.P. & Ors. (WP No.4382/2006(S)*** while dealing with the amended provisions of Rule 42(1)(a) of the Pension Rules, 1976 in para-6 categorically held that the amended Rules cannot be made applicable with retrospective effect by which the period of service for voluntary retirement was enhanced to 25 years in place of 20 years.

13. In the light of the aforesaid enunciation of law, the issue is answered that in case of voluntary retirement of an employee, the Rules prevailing on the date of application/notice under Rule 42(1)(a) will be applicable and not the Rules prevailing on the date of expiration of notice period.

14. Once this Court held that the employee has an absolute and indefeasible right to get voluntary retired without there being any discretion with the employer, a vested right has accrued to the employee on the date of application/notice Form 28. Thus, the right to get voluntary retirement under Rule 42 of Pension Rules is a substantive right and, therefore, the ancillary issue arises for consideration is that <u>whether an amendment in a substantive law would apply prospectively or retrospectively</u>. The law in this regard is no longer res *integra*. In the case of ***Moti Ram vs. Suraj Bhan 1960(2) SCR 896***, it has been held that an amendment affecting vested rights, would operate prospectively unless this is expressly made retrospectively. In the case of ***Videocon International Ltd. vs. Securities & Exchange Board of India (2015) 4 SCC 33***, the Apex Court held that the amendment to the procedure is

generally effective retrospective but an amendment to a provision vesting a substantive right is prospective, unless otherwise statute provides. In the case of ***Securities and Exchange Board of India vs. Classic Credit Ltd. (2018) 13 SCC 1***, the Apex Court held that it is a settled proposition of law that amendment/alteration of substantive law is always presumed and treated as having only prospective implications.

15. In view of the aforesaid, it is held that the amendment in Rule 42 & 42-A of Pension Rules shall operate prospectively and not retrospectively.

16. In view of the aforesaid, the impugned orders Annexure P/7 & P/8 dated 09.02.2012 & 11.01.2012 are quashed. The respondents are directed to re-determine and add period of 10 years 2 months and 10 days w.e.f. 21.03.2006 to 31.05.2016 in the qualifying service of the petitioner and as a consequence to revise the pension, gratuity and other retiral benefits.

17. The difference of pension, gratuity etc. shall be paid to the petitioner with 6% interest from the date it became due till the same is paid to the petitioner. Let the entire exercise be completed within a period of 3 months from the date of filing of copy of the order before the respondents.

18. The petition is **allowed**. No order as to costs.

(VIJAY KUMAR SHUKLA)
JUDGE

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