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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.553 OF 2024

Mr Sudesh Kumar Waingade,
Aged 59 years, son of Mr
Hanumant Rao Waingade,
Residing at Flat No.C5/8,
Dhanlaxmi Colony, Bhatlem,
Panaji-Goa.

... Petitioner

Versus

1. State of Goa, through Chief
Secretary, Having office at
Secretariat, Porvorim-Goa.

2. The Director of Food &
Drugs Administration
Department, Directorate of
FDA, Dhanwantari, Opp.
Shrine of Holy Cross,
Bambolim-Goa.

... Respondents

Mr Shivraj Gaonkar, Advocate with Mr Prabhav Pravin Sirvoicar,
Advocate for Petitioner.

Ms Sulekha S. Kamat, Additional Government Advocate for
Respondents.

**CORAM: M.S. KARNIK &
VALMIKI MENEZES, JJ.**

DATED: 21st August, 2024

ORAL JUDGMENT: (Per M. S. Karnik, J)

Heard Shri Shivraj Gaonkar, learned Counsel for the petitioner and Ms Sulekha Kamat, learned Additional Government Advocate for the respondents.

2. This petition under Article 226 of the Constitution of India seeks a direction to implement the order dated 29.02.2024 passed by the State Commissioner for Persons with Disabilities. It is prayed that the Director of Food and Drugs Administration, i.e. the Respondent No.2, reinstate the petitioner in service with back-wages and continuity in service along with consequential benefits.

3. This petition was filed on 10.07.2024. During the pendency of this petition, the respondent No.2 by an order dated 19.08.2024 decided to reinstate the petitioner back to the post of Food Safety Officer. The petitioner has joined duty w.e.f 20.08.2024.

4. Learned Counsel for the petitioner submitted, on instructions, that the petitioner is willing to give up his claim for back-wages. It is further submitted that the order dated 19.08.2024 only states about reinstatement of the petitioner without any mention of continuity in service. It is submitted that the petitioner's date of superannuation is 30.09.2024. The concern expressed by the learned

Counsel for the petitioner is that if the period he has actually discharged duties is taken into consideration, then for the period from 24.12.1992 till the date when he was relieved on 21.03.2002, the same works out to 9 years and 3 months of service. The apprehension of learned Counsel is that as the petitioner is due to retire next month, it may be construed that he does not have 10 years of service to his credit. This will disentitle him from claiming pensionary benefits in terms of clause 2 of Rule 49 of the Central Civil Services (Pension) Rules, 1972. Learned Additional Government Advocate submitted that the issue of payment of pension cannot arise in this petition which was limited to a claim of reinstatement with back-wages and continuity of service. However, in view of the subsequent events, petitioner is reinstated in service, in the peculiar facts of the present case we are inclined to consider the prayer of the petitioner for continuity of service to a limited extent so that he can claim pensionary benefits in terms of Clause 2 of Rule 49 of the CCS (Pension) Rules, 1972 ('Pension Rules' for short).

5. The petitioner was appointed on 24.12.1992 as a Food Safety Officer. He was diagnosed with Schizophrenia on 09.02.2001. He tendered his resignation on 26.02.2002. The petitioner was relieved from services on 21.02.2002 by which time the petitioner had completed 9 years and 3 months of service, i.e. less than 10 years.

6. It is the contention of the learned Counsel that as the petitioner suffered a disability, he was not in a proper frame of mind to understand the consequences of a resignation. It is submitted that his employer was well aware of the disability since such certificate was submitted at the relevant time.

7. After a period of 20 years, the petitioner by letter dated 01.08.2022 made an application under Section 80 (b) of The Rights of Persons with Disabilities Act, 2016 (Disabilities Act, 2016) before the State Commissioner for Persons with Disabilities – respondent No.3, making out a case that the respondent No.2 discriminated against the petitioner by relieving him from services in violation of Section 20 of the Disabilities Act, 2016 and Section 47 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (‘ Disabilities Act of 1995’ for short). It was pointed out that he ought to have been shifted to any other post with the same payscale and service benefits. The petitioner therefore claimed reinstatement with back-wages and continuity of service.

8. Pursuant to the order passed in Writ Petition No.480/2023 earlier filed by the petitioner in this Court, the IPHB vide its letter dated 08.02.2024 provided the medical report which, *inter alia*, stated that the petitioner is diagnosed with Psychosis in remission

and that his psychological testing done by Clinical Psychologist, IPHB, on 09/12/2022 is suggestive of below average intellectual functioning (IQ-82) with deficits in coping, impulsive tendencies, difficulties with interpersonal interactions and that the Indian Disability Evaluation and Assessment Scale is suggestive of Mild Disability (less than 40% disability).

9. By the order dated 29.02.2024 the State Commissioner recommended the petitioner be reinstated in service as expeditiously as possible with grant of service benefits which he was otherwise entitled in the course of his regular employment. The petitioner filed this petition for implementation of the reinstatement order dated 29.02.2024 of the State Commissioner. During the pendency of the petition, by the order dated 19.08.2024 of the Appointing Authority, the petitioner was reinstated back in the post of Food Safety Officer. The petitioner joined on 20.08.2024. The petitioner is due to retire next month.

10. The petitioner has given up his claim for back-wages. However, we are inclined to consider the request of the petitioner for grant of continuity of service without back-wages so that the petitioner is eligible to claim pensionary benefits in terms of Rule 49(2) of the Pension Rules, 1972. Learned Additional Government Advocate submitted that it is only in the year 2022 that an

application was made for reinstatement and that the petitioner was out of employment for a period of almost 22 years since the date when he was relieved from services. She submits that the petitioner has actually worked only for 9 years and 3 months. We find that the State Commissioner for Persons with Disabilities recommended the petitioner be reinstated in service as expeditiously as possible and be granted service benefits which he was otherwise entitled in the course of his regular employment. The State Government has taken a decision to accept the recommendation of the State Commissioner for Persons with Disabilities to reinstate the petitioner in his service. However, nothing is indicated as regards continuity of service. For convenience, we extract the Order dated 19.08.2024 of the Competent Authority which reads thus:

“O R D E R

WHEREAS, Shri Sudesh Kumar Waingade while working as Food Safety Officer in the Directorate of Food and Drugs Administration had tendered his resignation from the said post vide letter dated 26/02/2002.

AND WHEREAS, the resignation tendered by Shri Sudesh Kumar Waingade was accepted by the Competent Authority and he was relieved from the said post of Food Safety Officer w.e.f 21/03/2002 Order read at preamble (1):

AND WHEREAS, the said Shri Sudesh Kumar Waingade submitted representation requesting to cancel his resignation and allow to attend his duties.

AND WHEREAS, since the resignation of Shri Sudesh Kumar Waingade was already accepted he was

informed among other things that it was not possible to reinstate in his post as the resignation tendered by him was accepted.

AND WHEREAS, aggrieved on the decision of the competent authority stated in the preceeding paragraphs the said Shri Sudesh Kumar Waingade approached the State Commissioner for Persons with Disabilities.

AND WHEREAS, the State Commissioner for Person with Disabilities in their judgement dated 09/05/2023 stated inter alia that the grievances of Shri Sudesh Kumar Waingade are not falling within the purview of the State Commissioner for Persons with Disabilities and passed an appropriate order to the above effect.

AND WHEREAS, aggrieved with the State Commissioner for Persons with Disabilities, the said Shri Sudesh Kumar Waingade filed the Writ Petition before the Hon'ble High Court and the Hon'ble High Court passed an order that the application of the said Shri Sudesh Kumar Waingade has to be decided by the State Commissioner for Persons with Disabilities as early as possible and within a period of one month from the date of the Judgement.

AND WHEREAS, the State Commissioner for Persons with Disabilities in their Judgement dated 29/02/2024 recommended that the said Shri Sudesh Kumar Waingade be reinstated in service as expeditiously as possible and grant all service benefits which he was otherwise entitled in the course of his regular employment.

AND WHEREAS, vide communication dated 18/07/2024 from Under Secretary (Health-II), Public Health Department it has been informed that the Government has accepted the recommendation of the said State Commissioner for Persons with Disabilities to reinstate said Shri Sudesh Kumar Waingade in his service.

AND WHEREAS on consideration of the facts and circumstances as has come on record the undersigned as

the Appointing Authority over the said Shri Sudesh Kumar Waingade has decided to reinstate the said Shri Sudesh Kumar Waingade back in the post of Food Safety Officer with effect from issuance of this order.”

(Emphasis supplied).

11. At this juncture it is pertinent to note that the Government of Goa has adopted and made applicable to its employees the Pension Rules, 1972. In terms of the Pension Rules, 1972, the definition of ‘qualifying service as per Rule 2(q) is the service rendered while on duty or otherwise which shall be taken into account for the purpose of pensions and gratuities admissible under the rules. It is significant to note that Rule 2(q) uses the expression “service rendered while on duty or otherwise”. The word ‘otherwise’ is of significance in the present facts. This will have to be understood in the context of Section 20 of the Disabilities Act, 2016. The reinstatement of the petitioner recommended by the State Commissioner which formed the basis for the State Government accepting the recommendation is in view of Section 20 of the Disabilities Act, 2016. Section 20 reads thus:-

“20. Non-discrimination in employment.—(1) No Government establishment shall discriminate against any person with disability in any matter relating to employment:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, exempt any establishment from the provisions of this section.

(2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.

(3) No promotion shall be denied to a person merely on the ground of disability.

(4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service:

Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(5) The appropriate Government may frame policies for posting and transfer of employees with disabilities.”

12. Rule 38 deals with *Invalid Pension* which reads thus: -

“[38. **Invalid pension.**— (1) The case of a Government servant acquiring a disability, where the provisions of Section 20 of the Rights of Persons with Disabilities Act, 2016 (49 of 2016) are applicable, shall be governed by the provisions of the said section:

Provided that such employee shall produce a disability certificate from the competent authority as prescribed under the Rights of Persons with Disabilities Rules, 2017.

(2) If a Government servant, in a case where the provisions of Section 20 of the Rights of Persons with Disabilities Rules, 2016 (49 of 2016) are not applicable, retires from the service on account of any bodily or mental infirmity which permanently incapacitates him for the service, he may be granted invalid pension in accordance with Rule 49:

Provided that a Government servant, who retires from service on account of any bodily or mental infirmity which permanently incapacitates him for the service before completing qualifying service of ten years, may also be granted invalid pension in accordance with sub-rule (2) of Rule 49 subject to the conditions that the Government, servant –

- (a) Has been examined by the appropriate medical authority either before his appointment or after his appointment to the Government service and declared fit by such medical authority for Government service; and
- (b) fulfils all other conditions mentioned in this rule for grant of invalid pension.]
- (3) Where a Government servant, referred to in sub-rule (2), applies for an invalid pension, he shall be required to submit a medical certificate of incapacity from the following medical authority, namely-
 - (a) a Medical Board in the case of a Gazetted Government servant and of a non-gazetted Government servant whose pay, as defined in Rule 9 (21) of the Fundamental Rules, exceeds [Two thousand and two hundred rupees] *per mensem*;
 - (b) Civil Surgeon or a District Medical Officer or Medical Officer of equivalent status in other cases.”

13. The request of the petitioner is to grant him invalid pension in terms of Rule 49(2) of the CCS (Pension) Rules. Rule 49 is a provision as regards the amount of pension to which an employee is entitled. Rule 49 reads thus:

- “49. Amount of pension— (1) In the case of a Government servant retiring in accordance with the provisions of these rules before completing 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 gratuity qualifying service.
- (2) Subject to the proviso to sub-rule (2) of Rule 38, in the case of a Government servant retiring in accordance with the provisions of these rules after completing qualifying service of not less than ten years, the amount of pension shall be calculated at fifty per cent of emoluments or average emoluments, whichever is more beneficial to him, subject to a minimum of nine thousand rupees *per mensem* and maximum of one lakh twenty-five thousand rupees *per mensem*.]
- (3) In calculating the length of qualifying service, fraction of a year equal to [three months] and above shall be treated as a completed one half-year and reckoned as qualifying service.
- (4) The amount of pension finally determined under Clause (a) or Clause (b) of sub-rule (2), shall be expressed in whole rupees and

where the pension contains a fraction of a rupee it shall be rounded off to the next higher rupee.”

14. Rule 38 of the Pension Rules deals with Invalid Pension. The petitioner submits that he will be satisfied if he gets pension in terms of Rule 49(2) of the Pension Rules. The petitioner is superannuating next month. There is a period of almost 22 years not spent on duty after acceptance of resignation because of the disability suffered. In view of Section 20 of the Disabilities Act, 2016, the petitioner is reinstated but without back-wages and continuity of service. Therefore, if continuity of service is granted, the petitioner would be entitled to pension as per his entitlement on superannuation. Rule 38 therefore is not strictly applicable in the present case. For the qualifying service to be regarded as more than 10 years, we are inclined to grant the relief of continuity of service to a limited extent making the petitioner eligible for pension in terms of Rule 49(2) of the Pension Rules.

15. To draw support, we find it significant to notice the decision in *Union of India & Ors. v/s. P. A. Thomas*¹. Rule 38 and 49 of the CCS (Pension) Rules, 1972 amended on 04.01.2019 came up

for consideration. The Hon'ble Supreme Court observed thus:

“O R D E R

In our previous order dated 10.5.2018, we had recorded that benefits as claimed have been conferred to the respondent, but a larger question did arise in the case, which was recorded in the said order in the following terms:-

“Rule 38 of the Central Civil Services (Pension) Rules, 1972 has been amended on 30.09.2016. By virtue of the amendment made persons who suffer disabilities while in service, if given the benefit under Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, ‘Disabilities Act’) would henceforth be governed under the provisions of Section 47 of the Disabilities Act subject to production of a disability certificate from the competent authority as prescribed under the Act. However, Rule 38(2), as amended, provides that if such employees to whom the provisions of Section 47 of the Disabilities Act are not applicable and such person retires from service on account of bodily or mental infirmity which permanently incapacitates him for service, he may be granted invalid pension or service gratuity in accordance with Rule 49 of the Pension Rules depending upon the length of his qualifying service on the date of retirement.

The matter needs clarification and in our considered view, by the Government. If on sustaining incapacity while in employment alternative employment under Section 47 of the Disabilities Act is guaranteed in cases of permanent incapacity should grant of invalid pension be contingent on completion of any particular length of service. Rather would such length of service be relevant for computation of quantum of invalid pension.

The learned Additional Solicitor General has submitted that the matter may be adjourned for a period of three months to enable the concerned authority in the Union of India to deal

with the matter and pass appropriate orders/clarifications as may be considered necessary.

List the matter after three months.”

Rules 38 and 49 of the Central Civil Services (Pension) Rules, 1972 have been amended on 4.1.2019 in the following manner:-

“2. In the Central Civil Services (Pension) Rules, 1972 –

(i) in rule 38, for sub-rule (1) and sub-rule (2), the following sub-rules shall respectively be substituted, namely:-

“(1) The case of a Government servant acquiring a disability, where the provisions of section 20 of the Rights of Persons with Disabilities Act, 2016 (49 of 2016) are applicable, shall be governed by the provisions of the said section:

Provided that such employee shall produce a disability certificate from the competent authority as prescribed under the Rights of Persons with Disabilities Rules, 2017.

(2) If a Government servant, in a case where the provisions of Section 20 of the Rights of Persons with Disabilities Act, (49 of 2016) are not applicable, retires from the service on account of any bodily or mental infirmity which permanently incapacitates him for the service, he may be granted invalid pension in accordance with rule 49:

Provided that a Government servant, who retires from service on account of any bodily or mental infirmity which permanently incapacitates him for the service before completing qualifying service of ten years, may also be granted invalid pension in accordance with sub-rule (2) of rule 49 subject to the conditions that the Government servant-

(a) has been examined by the appropriate medical authority either before his appointment or after his appointment to the Government service and declared fit by such medical authority for Government service; and

(b) fulfills all other conditions mentioned in this rule for grant of invalid pension”;

(ii) in rule 49, for sub-rule (2), the following sub-rule shall be substituted, namely:- “(2) Subject to the proviso to sub-rule (2) of rule 38, in the case of a Government servant retiring in accordance with the provisions of these rules after completing qualifying service of not less than ten years, the amount of pension shall be calculated at fifty per cent of emoluments or average emoluments, whichever is more beneficial to him, subject to a minimum of nine thousand rupees per mensem and maximum of one lakh twenty five thousand rupees per mensem.””

The said amendments having been placed before the Court, the Court was of the view that further clarification was required which has now been made by a clarificatory Office Memorandum bearing No. 21/01/2016-P&PW(F) dated 12.2.2019 in the following terms:-

“2. In this connection, it is clarified that the condition of qualifying service of ten years for grant of pension under Rule 49(2) of the CCS (Pension) Rules, 1972 shall not be applicable in the case of a Government servant retiring on Invalid Pension on account of any bodily or mental infirmity, under Rule 38. Accordingly, Invalid Pension at the rate of 50% of emoluments or average emoluments, whichever is more beneficial, subject to a minimum of nine thousand rupees per mensem and maximum of one lakh twenty five thousand rupees per mensem, shall be payable to a Government servant who retires under Rule 38 of CCS (Pension) Rules, 1972 even before completing a qualifying service of ten years.”

Having perused the aforesaid clarification, we are of the view that the matter now stands adequately covered and would be governed by provisions of the amended Rules 38 and 49 of the Central Civil Services (Pension) Rules, 1972, which would be

applied to all eligible cases.

The special leave petition consequently shall stand disposed of in the above terms.

Pending interlocutory applications, if any, shall stand disposed of.”

16. Thus, if the petitioner is granted the relief of continuity of service without back-wages, he would be entitled to a superannuation pension. However, it is the contention of the learned Counsel for the petitioner, on instructions, that having regard to the fact that the petitioner has put in actual service of 9 years and 3 months while on duty, the petitioner would be satisfied if the petitioner is granted continuity of service notionally so that he is at least eligible for pension in terms of Rule 49(2) of the Central Civil Service (Pension) Rules, 1972. Considering that the petitioner is not insisting for applicability of Section 20 of the Disabilities Act for the purpose of pension, according to us, in the interest of justice the petitioner should not be denied pension in terms of Section 49(2) as such view will advance the cause of justice. For this limited extent we grant to the petitioner continuity of service consequent to his reinstatement but without back-wages.

17. We direct the respondents to consider the case of the Petitioner for pension in terms of Rule 49(2) of the CCS (Pension) Rules by considering the petitioner’s qualifying service as not less than 10

years. The necessary procedure/formalities in respect of the pension of the petitioner be completed on this basis expeditiously as he is to retire next month. Notional benefit of continuity of service is granted to the limited extent above indicated.

18. The Petition is allowed in the aforesaid terms. No costs.

(VALMIKI MENEZES, J.)

(M. S. KARNIK, J.)