

Retired Employee Can't Seek Annual Increment For Pension & Gratuity If It Falls Due A Day After Superannuation: Kerala HC

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IN THE HIGH COURT OF KERALA AT ERNAKULAM
A.K. JAYASANKARAN NAMBIAR; J, MOHAMMED NIAS C.P.; J.
O.P. (CAT) NO. 111 OF 2020; 22 November 2022
UNION OF INDIA versus PAVITHRAN K.

Against the Order dated 16.12.2019 in O.A.NO.180/00840/2018 of Central Administrative Tribunal, Ernakulam Bench

Petitioners / Respondents by Manu S., Deputy Solicitor General of India, Vinu T.V., CGC, Adv. N.K. Subramanian; Respondents / Applicants by Adv. Martin G. Thottan

J U D G M E N T

A.K. Jayasankaran Nambiar, J.

The short issue that arises for consideration in these O.P.(CAT)'s is whether a Government servant who retires on the last working day of the preceding month and whose annual increment falls due on the first of the succeeding month is entitled for sanction of annual increment for the purposes of pension and gratuity ? This being the sole issue on which the O.P.(CAT)'s have been preferred by the Union of India, we do not deem it necessary to record the factual circumstances arising in the individual cases.

2. Briefly stated, the facts that are common to all the cases are that the respondents/applicants retired from their respective establishments on attaining the age of superannuation. Their next annual increment, had they continued in service, would have accrued to them on the very next day. When their claim for reckoning the said increment along with their last drawn pay for the purposes of their retirement benefits did not yield a favourable response from the Government, they approached the Central Administrative Tribunal through the applications that were disposed by the impugned orders of the Tribunal.

3. The Tribunal essentially followed the judgment of the Madras High Court in **P.Ayyamperumal v. Union of India and others** -

[judgment dated 15.9.2017 in W.P.(C).No.15732/2017], the Special Leave Petition [SLP] against which was dismissed by the Supreme Court, to find that the respondents were entitled to the grant of annual increment on their completion of one full year of service at the time of their retirement for the purposes of pensionary benefits. It is impugning the said finding of the Tribunal that the petitioners are before us in these O.P.(CAT)'s.

4. We have heard Sri.Manu.S., the Deputy Solicitor General of India, Sri.T.V. Vinu, the learned Central Government Counsel as also Sri.K.I.Mayankutty Mather, the learned counsel for the petitioners in these O.P.(CAT)'s and Sri.Martin G. Thottan, Sri.C.S.Gopalakrishnan Nair and Sri.Saiby Jose Kidangoor, the learned counsel for the respondents in all these O.P.(CAT)'s.

5. At the outset, we deem it apposite to notice the Rules governing the issue, namely, the Fundamental Rules [F.R. 17, F.R. 24, F.R. 56(a) and the 1st proviso to F.R. 56(a)] and Rules 3, 5, 14, 33 and 34 of the CCS (Pension) Rules, which read as follows:-

Fundamental Rules

"F.R. 17. (1) Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post

with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties.

F.R. 24. An increment shall ordinarily be drawn as a matter of course unless it is withheld. An increment may be withheld from a Government servant by the Central Government or by any authority to whom the Central Government may delegate this power under Rule 6, if his conduct has not been good or his work has not been satisfactory. In ordering the withholding of an increment, the withholding authority shall state the period for which it is withheld, and whether the post-ponement shall have the effect of postponing future increments.

F.R. 56(a). Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Government servant whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years."

Central Civil Services (Pension) Rules

“Rule 3

Clauses 1(b) (e) and (q)

1(b) 'Average Emoluments' means average emoluments as determined in accordance with Rule 34;

1(e) 'Emoluments' means emoluments as defined in Rule 33;

1(q) 'Qualifying Service' means service rendered while on duty or otherwise which shall be taken into account for the purpose of pension and gratuities admissible under these rules;

Rule 5

5. Regulation of claims to pension or family pension :- (1) Any claim to pension or family pension shall be regulated by the provisions of these rules in force at the time when a Government servant retires or is retired or is discharged or is allowed to resign from service or dies, as the case may be.

(2) The day on which a Government servant retires or is retired or is discharged or is allowed to resign from service, as the case may be, shall be treated as his last working day. The date of death shall also be treated as a working day.

Rule 14

14. Conditions subject to which service qualifies:-(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 that Government from the Consolidated Fund of India or a Local Fund administered by that Government but does not include service in a non-pensionable established unless such service is treated as qualifying service by that Government.

(3) In the case of a Government servant belonging to a State Government, who is permanently transferred to a service or post to which these rules apply, the continuous service rendered under the State Government in an officiating or temporary capacity, if any, followed without interruption by substantive appointment, or the continuous service rendered under that Government in an officiating or temporary capacity, as the case may be, shall qualify:

Provided that nothing contained in this sub-rule shall apply to any such Government servant who is appointed otherwise than by deputation to a service or post to which these rules apply,

Rule 33

33. Emoluments

The expression 'emoluments' means basic pay as defined in Rule 9(21)(a)(i) of the Fundamental Rules which a Government servant was receiving immediately before his retirement or on the date of his death; and will also include non-practising allowance granted to Medical Officer in lieu of private practice.

Explanation :-Stagnation increment shall be treated as emoluments for calculation of retirement benefits.

Note 1 - If a Government servant immediately before his retirement or death while in service had been absent from duty on leave for which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn had he not been absent from duty or suspended shall be the emoluments for the purposes of this rule:

Provided that any increase in pay (other than the increment referred to in Note 4) which is not actually drawn shall not form part of his emoluments.

Note 2 - Where a Government servant immediately before his retirement or death while in service had proceeded on leave for which leave salary is payable after having held a higher appointment, whether in an officiating or temporary capacity, the benefit of emoluments drawn in such higher appointment shall be given only if it is certified that the Government servant would have continued to hold the higher appointment but for his proceeding on leave.

Note 3 - If a Government servant immediately before his retirement or death while in service had been absent from duty on extraordinary leave or had been under suspension, the period whereof does not count as service, the emoluments which he drew immediately before proceeding on such leave or being placed under suspension shall be the emoluments for the purposes of this rule.

Note 4 - If a Government servant immediately before his retirement or death while in service, was on earned leave, and earned an increment which was not withheld, such increment, though not actually drawn, shall form part of his emoluments.

Provided that the increment was earned during the currency of the earned leave not exceeding one hundred and twenty days, or during the first one hundred and twenty days of earned leave where such leave was for more than one hundred and twenty days.

Note 5 - Deleted

Note 6 - Pay drawn by a Government servant while on deputation to the Armed Forces of India shall be treated as emoluments.

Note 7 - Pay drawn by a Government servant while on foreign service shall not be treated as emoluments, but the pay which he would have drawn under the Government had he not been on foreign service shall alone be treated as emoluments.

Note 8 - Where a pensioner who is re-employed in Government service elects in terms of Clause (a) of sub-rule (1) of Rule 18 or clause (a) of sub-rule (1) of Rule 19 to retain his pension for earlier service and whose pay on reemployment has been reduced by an amount not exceeding his pension, the element of pension by which his pay is reduced shall be treated as emoluments.
Note 9 – Deleted.

Note 10 - When a Government servant has been transferred to an autonomous body consequent on the conversion of a Department of the Government into such a body and the Government servant so transferred opts to retain the pensionary benefits under the rules of the Government, the emoluments drawn under the autonomous body shall be treated as emoluments for the purpose of this rule.

Rule 34

34. Average Emoluments

Average emoluments shall be determined with reference to the emoluments drawn by a Government servant during the last ten months of his service.

Note 1 - If during the last ten months of his service, a Government servant had been absent from duty on leave for which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn had he not been absent from duty or suspended shall be taken into account for determining the average emoluments:

Provided that any increase in pay (other than the increment referred to in Note 3) which is not actually drawn shall not form part of his emoluments.

Note 2 - If, during the last ten months of his service, a Government servant had been absent from duty on extraordinary leave, or had been under suspension the period whereof does not count as service, the aforesaid period of leave or suspension shall be disregarded in the calculation of the average emoluments and equal period before the ten months shall be included.

Note 3 - In the case of a Government servant who was on earned leave during the last ten months of his service and earned an increment, which was not withheld, such increment though not actually drawn shall be included in the average emoluments:

Provided that the increment was earned during the currency of the earned leave not exceeding one hundred and twenty days or during the first one hundred and twenty days of earned leave where such leave was for more than one hundred and twenty days.”

As can be seen from the aforesaid Rules, F.R. 17 disables a Government servant from drawing pay and allowances attached to his tenure of a post with effect from the date on which he ceases to discharge the duties of that post. F.R. 24 makes it clear that an increment is a part of the pay and allowances that a Government servant is permitted to draw while he discharges duties of that post. Thus, although an increment may accrue to a Government servant on a particular day in a calendar year, he must be discharging the duties attached to the post as a pre-condition for drawing that increment. In other words, the twin conditions that must be satisfied for drawing an increment as per the Fundamental Rules are that (i) the Government servant must be in service on the date on which the increment falls due and (ii) he should have rendered satisfactory work and displayed good conduct during the one year period preceding the date on which the increment falls due. In the instant case, while it may be a fact that the respondents had the requisite one year of satisfactory work with good conduct, they did not satisfy the primary condition of being in service on the date on which the increment fell due.

6. We note in this connection that a Full Bench of the Andhra Pradesh High Court in **Principal Accountant General and Others v. C. Subba Rao – [2005 (2) ALT 25]** considered the very same issue against the back drop of the Fundamental Rules and the CCS (Pension) Rules. The analysis of the provisions of the said Rules is to be found in paragraphs 25 to 30 and 38 of the said judgment which reads as follows:

“**25.** A conspectus of the above Rules would lead to the following: A Government servant's qualifying service would commence from the date he takes charge of the post to which he is first appointed either substantially or in an officiating or temporary capacity (see Pension Rule 13). The same is however subject to Rule 14, which is to the effect that 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. That is to say as long as a Government servant continued to be a Government servant and paid from the consolidated fund of India or local fund administered by the Government, he cannot be said to be on duty.

26. A Government servant, as per Rule 35, shall be granted superannuation pension on his attaining age of compulsory retirement. Such Government servant shall be paid pension based on the qualifying service and based on the average emoluments drawn during the last ten months of his service. For the purpose of qualifying service and calculating average emoluments, one has to look to Rule 5 and Rule 34 of the Pension Rules. Rule 5(2) mandates that the day on which a Government servant retires shall be treated as his last working day. Reading Rule 5(2), Rules 33 and 34 of the Pension Rules, the conclusion is irresistible that a Government servant is said

to be on duty entitled for emoluments till his last working day when he would retire and thereafter a person ceases to be Government servant. After a Government servant retires on his last working day, such Government servant would not be entitled to any pay or any other benefits connected with pay.

27. As per Explanation to Rule 33 of the Pension Rules, only stagnation increment shall be treated as emoluments for calculation of retirement benefits and as per Rule 34, emoluments drawn by Government servant during the last ten months of his service are treated as emoluments. But any increase in pay, which is not actually drawn shall not form part of average emoluments, though as per Note 4 below Rule 33 and Note 3 below Rule 34, increment earned during earned leave during last ten months though not actually drawn shall form part of average emoluments. Except in the case increment earned during earned leave, no other increase can be treated as pay while determining "average emoluments". This is made clear by proviso to Note 4 below Rule 33 and Rule 34. It lays down that any increase in pay which is not actually drawn shall not form part of emoluments of Government servant.

28. Rule 33 used the phrase "pay which Government servant was receiving immediately before retirement", and proviso to Note 1 of Rule 33 employs words "pay not actually drawn" and Rule 34 uses phrase "emoluments drawn by a Government servant during the last ten months of service" shall be average emoluments. Similar language is used in proviso to Note 1 of Rule 34. The 'past tense' used in these provisions would show whatever is not actually drawn cannot form part of average emoluments for the purpose of pension. This by necessary implication mean that increment which falls due and payable after retirement cannot be considered for determining average emoluments for the purpose of pension as it would-be "increase of pay" which is not drawn and which is not paid. This legal position is further made clear by Rules 35, 36, 38, 39 and 40 and Rule 83 of the Pension Rules. Rule 83 of the Pension Rules deals with the date from which pension becomes payable and reads as under:

83. Date from which pension becomes payable .-(1) Except in the case of a Government servant to whom the provisions of Rule 37 apply and subject to the provisions of Rules 9 and 69, a pension other than family pension shall become payable from the date on which a Government servant ceases to be borne on the establishment.

(2) Pension including family pension shall be payable for the day on which its recipient dies.

29. In plain terms, Rule 83 of the Pension Rules postulates that pension shall become payable from the date on which a Government servant ceases to be borne on the establishment. That only means a Government servant gets the status of pensioner from the next day after date of retirement i.e., last day of the month on which he is retired.

30. As per Article 151 of CS Regulations, annual increment payable to a Government servant will accrue from the day following that day on which it is earned. The Government servant would get a right for annual increment only after conclusion of the year and therefore on the day when the increment falls due, it would not become payable, but it would become payable only from the next day. In a given case, if by reason of Rule 5 of the Pension Rules read with F.R. 56 if a Government servant retires on the last day of the month, his annual increment falls due on the next day, the same would become payable only from second day of the month in which the increment falls due. In that view of the matter as well, all the Government servants in these batch cases would not be entitled to claim any increment as they ceased to be Government servants on the mid-night of the last day of the month in which they attain the age of superannuation.

38. The common law principles as well as relevant provisions in General Clauses Act dealing with commencement and completion of the time as well as calculation of time - be it day, month or year - do not support the contention of the learned Counsel for respondents that the next day after the date of retirement should also be considered for the purpose of granting annual increment deeming the next day as the day of the retirement. We have already held that a Government servant retiring on the last working day of the month shall be deemed to have ceased to be Government employee with effect from midnight of that day and immediately after commencement of the next day, i.e., after midnight 12'O clock he becomes pensioner. Though

he is paid pension, he shall not be deemed to be on duty as a Government servant and therefore annual increment cannot be sanctioned to such retired Government servant.”

A similar view has been taken by the Division Bench of this Court also in **Union of India and Others v. K.R. Sanal Kumar and Another - [2008 (2) KHC 761]**, following the judgment of the Supreme Court in **Achhaibar Maurya v. State of U.P. And Others – [(2008) 2 SCC 639]**. At paragraphs 8 and 9 of the Kerala High Court judgment, it is observed as follows:

“8. We find that the recent judgment of the Apex Court in Achhaibar Maurya's case, 2008 KHC 4391 : 2008 (2) SCC 639 clearly applies to the facts of this case. There, the claim raised by a teacher who retired on 30/06/2003 was for getting Session benefits of the next session commencing on 01/07/2003. It was held that the appellant who was born on 01/07/1943 would retire on 30/06/2023. Their Lordships held that “a person retires automatically on the day when he completes the age of superannuation. A person attains a specified age on the day next before the anniversary of his birth day or in other words, on the day preceding that anniversary.” It was therefore held that the appellant was not entitled for the benefit of special benefit of the next session commencing on 01/07/2003. The decision of Apex Court in S. Banerjee v. Union of India, 1989 KHC 800 : 1990 SCC (L&S) 160 : AIR 1990 SC 285 : 1989 Supp (2) SCC 486 was distinguished.

9. We find that on the facts of this case, the said dictum will squarely apply here. As on 01/01/1986, the day when the annual increment fell due, the applicant was not in service. He became a pensioner already. He cannot draw any pay and allowances from 01/01/1996. In that view of the matter, he will not be entitled to claim any annual increment which fell due on 01/01/1996 as he had already retired from service. The employer employee relationship has already ceased. The view taken by the Tribunal, therefore, cannot be accepted.”

7. We are therefore of the view that the issue of whether a Government servant who retired on the last working day of the preceding month and whose annual increment falls due on the first of the succeeding month is entitled for sanction of annual increment for the purpose of pension and gratuity must be answered in favour of the the petitioners herein and against the respondents. We do so by setting aside the impugned orders of the Tribunal and allowing these O.P.(CAT)'s.

8. Before parting with these cases, we might only add that we are mindful of the fact that the decision of the Madras High Court in **P.Ayyamperumal [supra]** that was relied upon by the Tribunal and the SLP against which was dismissed by the Supreme Court, takes a different view. We are also aware that other High Courts have since followed the Madras High Court judgment [See Union of India and Others v. Pravesh Chandra Gupta and Others - [judgment dated 28.7.2021 of the Allahabad High Court in W.A.No.7911 of 2021], Mahesh Kumar and Another v. Union of India and Others - [judgment dated 23.12.2021 of the Allahabad High Court in W.A.No.17601 of 2021], Arun Chhibber v. Union of India and Others - [order dated 13.1.2020 of the Delhi High Court in W.P.(C).No.5539 of 2019], Union of India v. Lazmanbhai Kalabhai Chavda – [order dated 27.1.2021 of the Gujarat High Court in R/Special Civil Application No.10751 of 2020, Union of India and Another v. M. Siddaraj – [order dated 22.10.2020 of the Karnataka High Court in Writ Petition No.146967 of 2020 (S-CAT)] and SLP's against the said orders/judgments are pending consideration before the Supreme Court. We have chosen however to follow the Division bench judgment of our own Court, which, in our view, accords with the Scheme of the Fundamental Rules and the CCS (Pension) Rules, as enunciated by the Full Bench of the Andhra Pradesh High Court in **Principal Accountant General and Others v. C. Subba Rao – [2005 (2) ALT 25]**.

The O.P.(CAT)'s are allowed.