Before Permod Kohli, J.

CAPT. PARAMDEEP SINGH,—*Petitioner*

versus

UNION OF INDIA AND OTHERS,—*Respondents*

C.W.P No. 7283 of 1997

7th January, 2010

Constitution of India, 1950—Art.226—Army Pension Regulations—Reg. 173, Appendix II—Entitlement Rules for Casualty Pensionary Awards, 1982—Medical Board assessing disability of petitioner at 70%—Discharge from service—Claim for disability pension—Rejection of on ground that injury is not attributable to nor aggravated by military service—No basis for such an opinion by Government and seems contrary to findings recorded by Court of Inquiry and medical release board—Findings of Court of Inquiry that injury sustained by the petitioner is attributable to Military Service as he had a valid driving licence to drive in hilly areas and accident occurred due to brake failure—Petitioner not discharged on completion of his tenure—Material placed on record showing petitioner's release was not on account of expiry of his tenure but on account of disability by placing him in low medical category finding him unfit for Military service in field area—In terms of regulation 53, a person who is retired compulsorily or released on completion of tenure but suffers from disability attributable to or aggravated by military service, is also entitled to disability element of pension at discretion of the President of India—Rejection of claim of petitioner on such a flimsy ground is totally unwarranted in law and in fact—Rule 4 of Entitlement Rules provides that invalidating from service is a necessary condition for grant of disability pension—Petition allowed.

Held, that from the bare reading of Regulation 173 read with Appendix-II of the Army Pension Regulations, it appears that the petitioner's injury is attributable to military service, his disability being certified at 70% at the time of release, he is entitled to disability

pension. The impugned order, communication, dated 11th December, 1996, however, denies such pension to the petitioner on the ground that the injury is not attributable to nor aggravated by military service. This communication do not indicate any basis for such an opinion by the Government of India and seems to be contrary to the findings recorded by the Court of Inquiry and the medical release board.

(Para 16)

Further held, that the clear and categorical findings of the Court of Inquiry reveal that the petitioner had a valid driving licence to drive on the hilly areas. He was detailed for an official duty. The accident occurred due to brake failure. The final verdict of the Court specifically mentioned that the injury sustained by the petitioner is attributable to Military Service.

(Para 21)

Further held, that the stand of the respondents that the petitioner was discharged on account of expiry of his tenure and is, thus, not entitled to disability pension, is also to be rejected in view of the Rules 4 of the Entitlement Rules and Regulation 53 of the Army Regulations, Regulation 53 of the Army Regulations clearly provides that where an officer is retired on completion of tenure and he is suffering from any disability attributable to or aggravated by military service and recorded by service medical authority may also be granted disability element of pension at the discretion of the President.

(Para 26)

Further held, that the petitioner was not discharged on completion of his tenure. The entire material placed on record is pointer to the fact that the petitioner's release was not on account of expiry of his tenure, but on account of disability by placing him in low medical category finding him unfit for Military service in field area. It is under these circumstances that the petitioner has also claimed extension in service on sedentary/light duty being one of his prayers. In terms of regulation 53, a person who is retired compulsorily or released on completition of tenure but suffers from disability attributable to or aggravated by military service, is also entitled to disability element of pension at the discretion of the President of India. Thus, rejecting the claim of the petitioner on such a flimsy ground is totally unwarranted in law and on fact. Rule 4 of the Entitlement Rules, clearly provides that

invalidating from service is a necessary condition for grant of disability pension. The petitioner has been invalided out of service on account of disability by placing him in low medical category. His disability having been assessed at 70% by the release medical board, his claim for disability pension cannot be disputed.

(Para 26)

Paramdeep Singh, *petitioner in person.*

Ms. Geeta Singhwal, Advocate, *for respondent No. 1.*

PERMOD KOHLI, J.

(1) Questioning the denial of extension in service and grant of disability pension, the petitioner has filed this writ petition challenging both the orders Annexures P-2 and P-3, annexed hereto in this petition.

(2) Facts leading to the filing of this petitioner are briefly notice. The petitioner was commissioner in Indian Army as 2nd Lieutenant on 11th March, 1989. He was posted to on 503 ASC Battalion, Leh. Petitioner was deputed for an administrative duty.

(3) On 2nd December, 1989, the petitioner was proceeding from his Battalion to another Battalion 528 in the official vehicle. He was himself driving the vehicle. When the vehicle reached near Pathar Sahib Gurudwara, on Leh-Kargil road, it overturned on the hilly terrain. It is alleged by the petitioner that the said accident was on account of mechanical failure. The petitioner and other officials travelling in the vehicle were injured. The petitioner was evacuated to Military Hospital and thereafter to the Command Hospital, Western Command, Chandimandir Cantt.

(4) A Court of Inquiry was convened to inquire into the causes of accident. The Court of Inquiry gave following findings :—

"1. *On 2nd December, 1989 the Veh Jonga No. 84B 27680L of 503 ASC Bn was on bona fide duty. The Veh was going from 503 ASC Bn to Pathar Sahab (Witness No. 1, 2, 3, 4 and 7).*

2. *The Veh met with an accident near Pathar Sahab at about 1300 hrs. (Witness No. 1, 3 and 4)*

3. *The Jonga No. 84B 27680L met with an accident due to brake failure. (Witness No. 1, 3, 4, 8 and EME accident report form)*

4. *2/Lt Paramdeep Singh was driving the Veh alongwith 3 Ors (Witness No. 1, 2, 3, 4)*

   (a) No.13846234 Hav MT RS Yadav

   (b) No.13848867 Nk Jagat Bahadur

   (c) No.13894790 Sp Ashu Singh

5. *2/Lt Paramdeep Singh tried to stop the Veh but could not do so because of break failure. He tried to stop the Veh by bringing it against the hill side. The Veh hit the big boulder and turned over on the right side of the road about 300 Yds ahead of Pathar Sahab (Witness No. 1, 2, 3, 4 and 5)*

6. *2/Lt Paramdeep Singh sustained major injury on the right writ and the 3 Ors sustained minor bruises. There was no major injury to the 3 Ors. The offr was conscious through out the incident (Witness No. 1, 2, 3, 4 and 7).*

7. *2/Lt Paramdeep Singh was operated upon on 2nd December, 1989 at 153 GH for compound fracture of the right wrist and tendon and muscle repair of forearm (Witness No. 6).*

8. *The officer had passed the hill driving test held by 503 ASC Bn on 27th November, 1989. He possessed a Mil driving licence and a Civil Driving licence. (Extract attached)*

9. *CO 503 ASC Bn had permitted 2/Lt Paramdeep Singh to drive the Vehs. (Witness No. 7 and CTC of cert signed by CO)*

10. *There was no evidence of foul play."*

(5) On recording the aforesaid findings the Court gave the following final opinion :—

"1. The court is of the opinion that SS-33900K 2/Lt Paramdeep Singh of 503 ASC. He was driving the Veh on bona fide duty after having passed the hill driving test on 27th November, 1989.

2. *2/Lt Paramdeep Singh possesses a Mil driving licence : and civil driving licence.*

3. *The accident occurred due to sudden failure of the breaks and no body is to be blamed.*

4. *The injury caused to SS-33900K 2/Lt Paramdeep Singh is attributable to Mil Service in field.*

5. *The loss of Rs. 17266.00 to be borne by state.*

(6) The opinion of the Court of Inquiry was accepted by the General Officer Commanding 3 Inf Division with the following observations :—

> *"The injury caused to SS 33900K 2nd Lt Paramdeep Singh to attributable to MIL service in FD area."*

(7) Apart from Court of Inquiry, Form "IAFY-2008" was also prepared in consultation with the Medical Officer, declaring the injury sustained by the petitioner attributable to Military Service.

(8) The petitioner remained admitted in Command Hospital, Headquarter Western Command, Chandimandir till 15th March, 1990 and remained on sick leave from 15th March, 1990 to 30th April, 1990. On his discharge, the petitioner was examined by the medical board and was placed in medical category S1H1A3(U) (T-24) P1E1. He was further advised to undergo fresh medical board for his placement in the final medical category.

(9) On 15th October, 1990, another medical board was convened. The petitioner was placed in medical category S1H1A3 (U) (Permanent) P1E1 making him permanently unfit for service. The medical board, however, recommended the petitioner fit for sedentary/light duties and unfit for duties in field area and high altitude. The petitioner, who was a short service commissioned officer, was declared dis-entitled for permanent commission in Army. The petitioner opted for extension of service claiming to be eligible for such extension. The petitioner was, however, discharged and released from service on 11th March, 1994. The medical board assessed the disability of the petitioner at 70%, as is evident from the release order dated 20th October, 1993 (Annexure P-2).

(10) The petitioner applied for disability pension. His claim for disability pension has been rejected *vide* letter dated 11th December, 1996 (Annexure P-3).

(11) The above orders are subject-matter of challenge in the present petition.

(12) The Union of India in its disclaimer to the present writ petition attempted to justify the order of discharge as also refusal to extend the service tenure on the ground that the petitioner sustained injury while driving the Army vehicle in an accident. It is further stated that the accident occurred due to over-speeding and negligent driving for which administrative action was taken against the petitioner for recovery of 15% of the cost of damage caused to the vehicle. It is further stated that the injury sustained by the petitioner was not considered attributable to Military Service. The respondents also referred to the discharge of service as expiry of his contractual period of five years.

(13) Disability pension is permissive under Regulation 173 of the Army Pension Regulations read with Appendix – II.

(14) These provisions are quoted hereunder :—

"*Rule 173 :*

Unless otherwise specifically provided, disability pension may be granted to an individual who is invalided from service on account of disability which is attributable to or aggravated by military service and is assessed at 20% or over.

The questions whether the disability is attributable or aggravated by military service shall be determined under the Rules in Appendix--II.

Appendix II (Rules 2)

Rule 2 : Disablement or death shall be accepted as due to military service provided it is certified that :—

(a) the disablement is due to a wound, injury or disease which is

(i) attributable to military service

(ii) existed before or arose during military service and has been and remains aggravated thereby."

(15) Under the aforesaid regulations, disability pension becomes payable to an individual, who is invalided from service on account of disability attributable to or aggravated by military service with 20% or more disability. Appendix-II requires the disability to be certified on account of injury or disease attributable to military service or existed before or arose during military service and remains aggravated thereby.

(16) From the bare reading of the aforesaid regulations, it appears that the petitioner's injury is attributable to military service, his disability being certified at 70% at the time of release, he is entitled to disability persion. The impugned order (Annexure P-3), communication dated 11th December, 1996, however, denies such pension to the petitioner on the ground that the injury is not attributable to nor aggravated by military service. This communication do not indicate any basis for such an opinion by the Government of India and seems to be contrary to the findings recorded by the Court of Inquiry and the medical release board.

(17) The respondents have also notified the Entitlement Rules for Casualty Pensionary Awards, 1982. These Rules were promulgated by the Ministry of Defence and have been amended from time to time. The Rules have direct bearing on the issue under consideration.

(18) The relevant extract of these Rules in noticed hereunder :—

"*1. The Entitlement Rules are set out below apply to service personnel who become non-effective on or after 1st January, 1982. The cases arising on or after 1st January, 1982 may be considered under these rules provided that such a case is still outstanding on the date of issue of these rules. For the purpose of defining whether a case will be treated as outstanding or not, it may be clarified that where such a case has already been decided even at the initial stage, the same will be treated as having been decided. Such cases will not be reopened. These rules shall be read in conjunction with the Guide to Medical Officer (Military Pension) 1980; as amended.*

4. Invaliding from service is a necessary condition for grant of disability pension. An individual who at the time of his release under the Release Regulations, is a lower medical

category than that in which he was recruited will be treated as invalidated from service. JCO/OR and equivalents in other services who are placed permanently in a medical category other than 'A' and are discharged because no Alternative or Shelter Appointment can be provided, as well as those who having been retained in alternative employment but are discharged before the completion of their engagement will be deemed to have been invalidated out of service.

6. *Disablement of death shall be accepted as due to military service provided it is certified by appropriate medical authority that :*

   (a) *the disablement is due to a wound, injury or disease which—*

      (i) *is attributable to military service, or*

      (ii) *existed before or arose during military service and has been and remains aggravated thereby. This will also include the precipitating/hastening of the onset of a disability.*

8. *Attribuability/aggravation shall be conceded if casual connection between death/disablement and military service is certified by appropriate medical authority.*

ONUS OF PROOF

9. *The claimant shall not be called upon to prove the conditions of entitlements. He/she will receive the benefit of any reasonable doubt. This benefit will be given more liberally to the claimants in field/afloat service cases.*

DUTY

12. *A person subject to the disciplinary code of the Armed Forces is on "duty" :—*

   (a) *When performing an official task or a task, failure to do which would constitute an offence triable under the disciplinary code applicalbe to him.*

   (b) *When moving from one place of duty to another place of duty irrespecitve of the mode of movement.*

INJURIES

> *13. In respect of accidents or injuries, the following rules shall be observed :—*
>
> *(a) Injuries sustained when the man is "on duty" as defined, shall be deemed to have resulted from military service, but in cases injuries due to serious negligence/ misconduct the question of reducing the disability pension will be considered.*
>
> *(b) In cases of self-inflicted injuries whilst on duty, attributability shall not be conceded unless it is established that service factors were responsibile for such action in cases where attributability is conceded, the question of grant of disability pension is full or at reduced rate will be considered.*

ASSESSMENT

> *22. Assessment of degree of disability is entirely a matter of medical judgement and is the responsibility of the medical authorities. The degree of disablement due to service/duty of a member of the military forces shall be assessed by making a comparision between the conditions of the member as so disabled and the condition of a normal healthy person of same age and sex, without taking into account the earning capacity of the member in his disable condition in his own or any other specific trade or occupation, and without taking into account the effects of any individual factor or extraneous circumstances."*

(19) Aforesaid Rules were further followed by instructions issued from the Adjutant General Branch *vide* letter dated 29th September, 2006. The relevant extract from the aforesaid instructions, which relate to non-regular officers released in low medical category, reads as under :—

> *"The Personnel Services Directorate had taken up a case with the Min of Def and Government Orders have been issued on 30th August, 2006 accepting the proposal to grant service element for full service rendered by SSCOs/ECOs for disabilities accepted as attributable to or aggravated by Military Service for those officers who were released from service on or after the issue of the letter. Service*

element of disability pension in respect of non-regular commissioned officers who retired before the issue of these orders shall be revised prospectively in accordance with these orders. However, no arrears will be admissible in these cases."

(20) These instructions were issued pursuant to Ministry of Defence, Government of India's communication dated 30th August, 2006. The relevant extract reads as under :—

"No. 1(9)/2006/D (Pen-C)
Government of India
Ministry of Defence
Department of Ex-Servicemen Welfare
New Delhi, the 30th August, 2006

To

The Chief of the Army Staff
The Chief of the Naval Staff
The Chief of the Air Staff

Subject : *Grant of disability pension in respect of non-regular officers released in low medical category.*

Sir,

I am directed to say that the issue relating to counting of full length of service rendered by Emergency Commissioned Officers/Short Service Commissioned Officers in determining service element of disability pension to them has been under consideration of the Government for quite some time. The President is pleased to decide that non-regular officder viz. Emergency Commissioned Officers, Short Service Regular Commissioned Officers and Short Service Commissioned Officers, who are found in lower medical category at the time of release than the one in which they were recruited and whose disability is accepted as attributable to or aggravated by Military service, will be entitled to service element of disability pension after taking into account the full commissioned service rendered by them as in the case of Regular Commissioned Officers. The rate of service element will be the same as admissible

to the Regular Commissioned Officers. Since non regular officers have been brought at par with the Permanent Regular Commissioned Officers in the matter of grant of Disability pension, there will be no recruitment of exercising option by non regular commissioned officers as earlier prescribed under Para 1 of this Ministry's letter No. F 210795/74/Pen-C dated 30th November, 1977. The Special Army Instruction No. 6/S of 1965 and this Ministry's letter No. F210795/74/Pen-C, dated 30th November, 1977 will stand modified to that extent.

Service element of disability pension in respect of non-regular commissioned officers retired before the date of issue of these orders shall be revised prospectively in accordance with these orders in the case of aggravation, the benefit of service element as per these orders will be applicable only to those who retire on or after the date of issue of this letter. Past cases will not be re-opened."

(21) The stand of the respondents in the reply that the accident was caused due to negligence of the petitioner while driving Army vehicle, is not substantiated from any official record, to the contrary the findings recorded by the Court of Inquiry, the final opinion of the Court and the observations of the General Officer Commanding, clearly indicate absence of any negligence on the part of the petitioner. The clear and categorical findings of the Court of Inquiry reveal that the petitioner had a valid driving licence to drive on the hilly areas. He was detailed for an official duty. The accident occurred due to brake failure. The final verdict of the Court specifically mentioned that the injury sustained by the petitioner is attributable to Military service. The damage caused to the vehicle is also to be borne by the State. No material has been placed on record except bald statement in the reply that any disciplinary action was initiated against the petitioner for causing accident or the same was on account of his negligence. Nor the petitioner was found amiss in discharge of his duties in any manner. The petitioner has been discharged pursuant to the opion of the release medical board finding him unfit for Military service in the field area. The stand of the respondents that the petitioner's discharge is on account of expiry of his tenure of service, he being a Short Service Commissioned Officer, also is not supported by any decision from the competent authority. It is a matter of regret that such a stand has been taken by the respondents contrary to

their own record and the opinion of the Court of Inquiry, as also of the various medical boards held to examine the injury sustained by the petitioner and his continuance in service by placing him in low medical category. The legal preposition is settled in so far this aspect is concerned.

(22) In **R. K. Kapoor** *versus* **Union of India, (1)** the Division Bench of the Hon'ble Delhi High Court held that CDA(P) cannot sit over the opinion of the medical board in respect of disability.

(23) The Division Bench of this Court in the case of **Amar Nath** *versus* **Union of India and others, (2)** where the court, after discussing law in detail, held as under :—

> *"Once this certificate was issued in favour of the appellant entitling him to receive the disability pension, this benefit could not have been withdrawn by the Controller of Defence Accounts (P), Allahabad on his own without holding appellate medical board in accordance with law. Exhibit D.3 while rejecting the claim of the appellant referred to period of 10 years previous of 25th June, 1988 and disability being less that 20%. This was never put to the appellant prior to the passing of the order. If the appellant was entitled to the benefit in accordance with the rules on the strength of the disability certificate Ex. P.1, the appellant could not be divested of the same without following due process of law and after giving proper opportunity to the appellant which admittedly has not been done in the present case. The corollary to this main issue is as to whether the Controller of Defence Accounts (P), Allahabad at all was justified in assuming the jurisdiction which is not vested in it under the rules. Under the relevant rules and instructions, the respondents have the authority to constitute an Appellate Board and disturb the findings arrived at by the first medical board which again was not done, it would not be permissible to disturb the finding without taking recourse to the relevant rules and instructions governing the subject."*

(1) 2006 (4) S.C.T.541
(2) 1998 (2) S.C.T. 350 (P&H) = 1998 (1) All Instant Judgments 478

(24) In another Division Bench judgment of the Hon'ble Delhi High Court reported as **2006(4) SCT 545,** following observations have been made :—

"8. *Similarly, in cases where a court of enquiry has been held with regard to any injury of a person and it has been held by the Commanding Officer that the injury sustained by the petitioner was attributable to military service and the person was placed in low medical category, orders passed by the Chief Controller of Defence Accounts (Pension) summarily rejecting the disability claim without following the procedure, as mentioned in Shri Bhagwan's case (supra), suffers from infirmity and the same are hereby quashed.*"

(25) The stand of the respondents that the petitioner was discharged on account of expiry of his tenure and is, thus, not entitled to disability pension, is also to be rejected in view of the Rule 4 of the Entitlement Rules and Regulation 53 of the Army Regulations. Regulation 53 of the Army Regulation provides as under :—

"53. *Officers compulsorily retired on account of age or on completion of tenure. An officer compulsorily retired on account of age or on completion of tenure, if suffering on retirement from a disability attributable to or aggravated by military service and recorded by service medical authority may at the discretion of the President, be granted in addition to the retiring pension admissible, a disability element as if he/she had been retired on account of disability, according to accepted degree of disablement at the time of retirement.*"

(26) The aforesaid regulation clearly provides that where an officer is retired on completion of tenure and he is suffering from any disability attributable to or aggravated by military service and recorded by service medical authority may also be granted disability element of pension at the discretion of the President. In the present case, the petitioner was not discharged on completion of his tenure. The entire material placed on record is pointer to the fact that the petitioner's release was not on account of expiry of his tenure, but on account of disability by placing him in low medical category finding him unfit for Military service in field area. It is under these circumstances that the petitioner has also claimed extension in service on sedentary/light duty being one of his prayers. In terms of regulation 53, a person who is retired compulsorily or released on completion of tenure

but suffers from disability attributable to or aggravated by military service, is also entiled to disability element of pension at the discretion of the President of India. Thus, rejecting the claim of the petitioner on such a flimsy ground is totally unwarranted in law and on facts. Rule 4 of the Entitlement Rules, referred to above, clearly provides that invalidating from service is a necessary condition for grant of disability pension. The petitioner has been invalidated out of service on account of disability by placing him in low medical category. His disability having been assessed at 70% by the release medical board, his claim for disability pension cannot be disputed.

(27) The Entitlement Rules for Casualty Pensionary Awards, 1982, referred to hereinabove, deal in detail with the circumstances under which the disability is to be granted. While Rule 4 deals with the invalidating from service as a necessary condition for grant of disability pension, Rule 6 deals with the disablement due to wound injury attributable to military service. Rule 8 of the aforesaid Rules clearly provides that even if there is a casual connection between the disablement and military service as certified by the medical board, disability pension is payable. Rule 9 places onus of proof upon the authorities to establish that the disability is not attributable to military service.

(28) From the conjoint reading of the above quoted Rules and Regulations, it is abundantly clear that the claimant is not to be called upon to prove the conditions of the entitlement rather the benefit has to be given liberally and in case of doubt the benefit should go to the claimant.

(29) In the present case, there is no question of even a doubt rather the clear findings of the Court of Inquiry establish that the injury sustained by the petitioner is attributable to military service. Even the duty defined under Rule 12 of the aforesaid 1982 Awards is also attracted in the present case. The petitioner was on official duty when he sustained injury. In view of the above circumstances, the petitioner is entitled to disability pension. The petitioner has also claimed extension in service, however, during the course of arguments, the claim for extension in service was abandoned on account of pendency of this petition for number of years.

(30) This petition is accordingly allowed. Respondents are directed to grant disability pension to the petitioner and release the benefit within a period three months. However, the arrears shall be restricted to three years preceding the filing of the writ petition.

R.N.R.

Before M. M. Kumar and Jaswant Singh, J.J.

M/S HINDUSTAN POLYPACKS,—*Petitioner*

versus

STATE OF HARYANA AND ANOTHER,—*Respondents*

C.W.P. No. 14411 of 1998

14th December, 2009

Constitution of India, 1950—Art.226—Haryana General Sales Tax Act, 1973—S.13-B—Haryana General Sales Tax (Second Amendment) Rules, 1989—Rl.28A(2)—Claim for sales tax exemption—LLSC rejecting holding petitioner falling in negative list of industries as per Schedule III—HLSC also rejecting appeal of petitioner—Sub rule 4 (a) of Rule 28A of Rules postulates that petitioner could claim benefit of tax exemption either from date of commercial production or from date of issuance of exemption/ entitlement certificate as per his option—Such option is not irrevocable—Provisions of sub rule 4(a) of Rule 28A not mandatory especially when provision is compared with sub rule 3—Provisions of sub rule 3 provide that an option can be exercised by an eligible industrial unit either to avail benefit of tax exemption or deferment and option once exercised is to be treated as final—Petitioner's unit eligible in all respects on date when an application for grant of eligibility certificate was filed so as to avail benefit of sales tax exemption, therefore, exemption could be granted either from date of issuance of entitlement/exemption certificate or from date of commercial production—Merely because petitioner opting from date of commercial production when it was on negative list would not necessarily mean that it cannot be granted from date of issuance of entitlement/exemption certificate as rule is not mandatory—'LLSC' obliged to consider application of petitioner for grant of exemption from sales tax with effect from date of issuance of entitlement/ exemption certificate when bar of placing petitioner's industry on negative list removed—Petition allowed, orders passed by 'LLSC' and 'HLSC' held to be unsustainable in eyes of law and set aside.

Held, that sub rule 4(a) of Rule 28A of the Rules clearly postulates that the petitioner could claim benefit of tax exemption either from the date of commercial production or from the date of issuance of exemption/ entitlement certificate as per his option. The aforesaid option is not irrevocable. It can always be claimed by the petitioner either from the date of issuance of entitlement/exemption certificate or from the date of commercial production. The provisions of sub rule 4(a) of Rule 28A of the Rules are not mandatory especially when the provision is compared with sub-rule 3 of Rule 28A. A perusal of sub-rule 3 would show that an option can be exercised by an eligible industrial unit either to avail the benefit of tax exemption or deferment. It further provides that option once exercised is to be treated as final. The framer of the rule has not used the mandatory language in the succeeding sub-rule 4(a) by providing that option once exercised was to be treated as final.

(Para 19)

Further held, that the petitioner's unit is eligible in all respects on the date when an application for grant of eligibility certificate was filed so as to avail the benefit of sales tax exemption. Accordingly, the exemption could be granted either from the date of issuance of entitlement/exemption certificate or from the date of commercial production. Merely because the petitioner has opted from the date of commercial production, when it was on the negative list would not necessarily mean that it cannot be granted from the date of issuance of entitlement/exemption certificate as the rule is not mandatory. Therefore, 'LLSC' was obliged to consider the application of the petitioner for grant of exemption from sales tax with effect from the date of issuance of entitlement/exemption certificate when the bar of placing the petitioner's industry on the negative list has been removed Accordingly, it is held that the order passed by the 'LLSC' dated 28th October, 1994 and the order passed by the 'HLSC' dated 5th August, 1995 are unsustainable in the eyes of law and are liable to be set aside.

(Para 20)

Sandeep Goyal, Advocate, *for the petitioner.*

R. D. Sharma, DAG, Haryana, *for the respondents.*

M. M. KUMAR, J.

(1) This petition filed under Article 226 of the Constitution challenges order dated 28th October, 1994 (P-10) passed by the Lower Level Screening Committee (for brevity, 'LLSC') rejecting the claim of the petitioner for sales tax exemption on the ground that the petitioner's unit went into production prior to 11th February, 1994 and in view of notification issued by the Excise and Taxation Department, Haryana, dated 11th February, 1994 (P-9), it does not qualify for the said benefit. It has also been noticed by the LLSC that the petitioner's unit was prior to 11th February, 1994 in the negative list of industries as appended to Schedule III of the Haryana General Sales Tax Rules, 1975 (for brevity, 'the Rules'). Challenge has also been made to the order dated 5th August, 1998 (P-12) passed by the Higher Level Screening Committee (for brevity, 'HLSC') rejecting the appeal of the petitioner filed against the order dated 28th October, 1994.

(2) Brief facts of the case are that in the year 1988 the State of Haryana formulated an industrial policy and certain industries, which were set up after 1st April, 1988 were exempted from payment of sales tax on the goods manufactured by them. Since there was no express provision of exemption in the Haryana General Sales Tax Act, 1973 (for brevity, 'the HGST Act'), therefore, with a view to augment industrial development in the respondent State, Section 13-B was inserted in the HGST Act *vide* Haryana Act No. 26 of 1988, *inter alia,* empowering the State of Hayana to exempt any class of industry from payment of sales tax on the goods manufactured by them. On 17th May, 1989, the State of Haryana notified Haryana General Sales Tax (Second Amendment) Rules, 1989, amending the Rules. After Chapter IV of the existing Rules, Chapter IV-A was inserted with the heading of "Class of Industries, period and other conditions for exempting/deferring from payment of tax". In the said chapter, Rule 28A has also been incorporated in the Rules. Rule 28A(2) of the Rules defines meaning of various expressions including 'operative period', 'new industrial unit', 'eligible industrial unit', 'screening committee', medium and large scale industry', 'eligibility certificate', 'exemption certificate', 'notional sales tax liability' and 'negative list', which are relevant for the purposes of the issues raised in the instant petition. Rule 28A(4) deals with the benefit of tax exemption or deferment and provides that the same shall be given to an eligible industrial unit, holding exemption or entitlement certificate, as the

case may be, to the extent and for the period from year to year basis in various zones. The details of the quantum and period of tax exemption/tax deferment for new industrial units falling under Zone 'A', 'B' and 'C' as also relating to such units which intended to expand/diversification, has also been given in Rule 28A(4). Rule 28A(5) lays down a detailed procedure for availing benefit under this Rule whereas Rule 28A(7) talks about the procedure to be adopted for renewal of an exemption certificate from year to year basis. In Schedule-III under Rule 28A(2)(7) clause (o) the details of industries/class of industries have been given, which are on the negative list.

(3) The effect of clause (o) of sub-rule (2) of Rule 28A of the Rules is that now the Industries Department notifies periodically the list of class of industries which would not be entitled to the grant of incentives in the nature of sales tax exemption/deferment, capital investment subsidy and electricity duty etc. On the basis of such negative list, various agencies of the State of Haryana process the applications of the industrial units who intend to avail incentives. On 11th January, 1991, the Industries Department notified the class of industries which were not eligible for the grant of capital investment subsidy under the Industrial Policy of 1988 (P-1). It is pertinent to notice here that after promulgation of Rule 28A of the Rules, the Industries Department issued two Negative Lists on 3rd January, 1991 and 19th June, 1991, containing the class of industries which were ineligible for grant of sales tax exemption/deferment.

(4) In the year 1992, an other industrial policy was formulated by the State of Haryana, namely, 'New Industrial Policy of 1992'. A negative list of class of industries under the New Industrial Policy of 1992 was notified on 9th March, 1992, which has superseded the earlier negative lists (P-2). On 25th May, 1993, the State of Haryana in Industries Department has issued another notification notifying that the industries mentioned therein are placed in the negative list and they would not be entitled to any incentives including sales tax exemption/deferment. It has further been specifically mentioned that the said notification would be effective from the date of issue and the list contained therein would have no application to the industrial units set up under the Rural Industries Scheme (P-3). It has been claimed by the petitioner that the notification dated 25th May, 1993 has superseded the negative list which was notified on 9th March, 1992. At this stage it

is pertinent to mention that the petitioner is a partnership firm engaged in the business of manufacturing of 'HDPE/PP Woven Sacks and Polythene Bags and Sheets'. It has been asserted that the manufacturing unit of the petitioner was excluded from the negative list with effect from 25th May, 1993. In other words, the industries like that of the petitioner's, which were manufacturing polythene bags and sheets were made eligible by the State of Hayana with effect from 25th May, 1993 for grant of incentives including sales tax exemption/deferment under the New Industrial Policy of 1992.

(5) In pursuance to notification dated 25th May, 1993 issued by Industries Department the Excise and Taxation Department- respondent No. 1 initiated the process for amendment of Schedule-III of the Rules and a notification dated 13th October, 1993 was issued publishing the draft rules for amendment in Schedule-III and objections or suggestions were invited (P-4). Noticeably, the draft rules did not include the class of industries engaged in the manufacture of Polythene Bags and Sheets like that of the petitioner's unit to remain in the negative list. In the notification dated 13th October, 1993 intention was also shown to make the amendment in Schedule-III restropectively with effect from 25th May, 1993 (i.e. the day of enforcement of the notification dated 25th May, 1993 issued by Industries Department).

(6) The petitioner has claimed that inspired by the availability of incentives announced under the New Industrial Policy of 1992, the petitioner also thought of setting up an industrial unit at Karnal and after making a detailed project report submitted its applications to the concerned authorities. The petitioner was granted exemption from electricity duty from the date of commencement of production i.e. 20th December, 1993 (P-5), capital subsidy was granted on the generating set purchased by it (P-6), an industrial plot in industrial estate at Karnal was also allotted (P-7) and a loan of about Rs. 10 lacs for running the industry was also granted by the Haryana Financial Corporation on 24th September, 1993 (P-8). It has been claimed that all the abovementioned benefits were granted to the petitioner on the basis of the recommendations made by the General Manager, District Industries Centre, Karnal-respondent No. 4, who had recommended the case of the petitioner in accordance with the notifications dated 25th May, 1993 and 13th October, 1993 (P-3 and P-4). Thereafter the petitioner set up its industrial unit at Karnal and applied to respondent No. 4 for registration

as a small scale industrial Unit. It was provisionally registered as a small scale industry *vide* Registration No. 050503786, dated 24th August, 1993. Subsequently it was also granted regular registration No. 050526786, dated 27th December, 1993 by respondent No. 4. The commercial production in the industrial unit of the petitioner commenced on 20th December, 1993.

(7) On 11th February, 1994, the petitioner applied in the prescribed Form ST-70 to respondent No. 4 for grant of an eligibility certificate enabling it to avail the benefit of sales tax exemption under Rule 28A of the Rules which was within the prescribed period of 90 days from the date of commercial production. On 11th February, 1994 itself, the Excise and Taxation Department, Haryana, issued a notification amending Schedule-III prospectively with effect from 11th Februaryt, 1994 (P-9). As a result the class of industries manufacturing polythene bags and sheets stood excluded from the negative list contained in Schedule-III with effect from 11th February, 1994.

(8) On 28th October, 1994, respondent No. 4 informed the petitioner that its application for grant of sales tax exemption was considered by the 'LLSC' and rejected because the industrial unit of the petitioner fell in the negative list of industries as per Schedule-III of the Rules (P-10). On 24th November, 1994, the petitioner filed an appeal under Rule 28A(5)(f) of the Rules against order dated 28th October, 1994 before the 'HLSC' (P-11). After four years, the 'HLSC' rejected the appeal *vide* order dated 5th August, 1998 (P-12). The decision of the 'HLSC' was communicated to the counsel of the petitioner on 14th October, 1998 (P-13).

(9) In the written statement filed by respondent No. 1 the stand taken is that the incentive of sales tax exemption is merely a concession and it does not confer any legally enforceable right upon the petitioner. The notifications issued by the Excise and Taxation Department are final for the purpose of sales tax payment and recovery. It has been submitted that notification dated 17th May, 1989 issued by the Excise and Taxation Department is final and applicable to the present case. Notification dated 11th February, 1994 would have no application to the case of the petitioner because it is applicable to those industries which came into existence on

or after 11th February, 1994. It has been asserted that the commercial production was started by the petitioner's industry on 20th December, 1993 and at that time it was in the negative list, thus, not eligible for exemption of sales tax. It has been further stated that as per notification dated 17th May, 1989, for seeking sales tax exemption under Rule 28A of the Rules the operative period is from 1st April, 1988 to 31st March, 1997. However, the industries included in the negative list as per Schedule-III of the Rules are not entitled for the benefit of exemption. The petitioner firm is engaged in the manufacturing of Polythene bags and sheets, which is in the negative list and as such the petitioner is not entitled for the benefit of exemption of sales tax. Accordingly, the application and appeal of the petitioner has been rightly rejected by the 'LLSC' and 'HLSC' respectively. A separate written statement on similar lines has also been filed by respondent Nos. 2, 3 and 4.

(10) Mr. Sandeep Goyal, learned counsel for the petitioner has vehemently argued that the petitioner had established his industrial unit of Polythene bags and sheets in pursuance of new industrial policy announced in 1992 and the various concessions announced therein. According to the learned counsel it was granted exemption from electricity duty from the date of commencement of commercial production with effect from 20th December, 1993 and subsidy was also given on the generating set purchased by it. He has drawn our attention to various averments made in para 10 of the petition and argued that even industrial plot in Industrial Estate, Karnal was allotted *vide* Annexure P.7 and loan of about Rs. 10 lacs for running the industrial unit was given by the Haryana Financial Corporation (P.8) and those benefits were released to the petitioner on the basis of the recommendation made by the General Manager, District Industries Center. Therefore, once the petitioner has applied in the prescribed form ST 70 for grant of eligibility certificate and to avail the benefit of sales tax exemption on 11th February, 1994 then there was no reason for the respondents to deny the benefit especially when on 11th February, 1994 the industry concerning manufacturing of Polythene bags and sheets have been removed from the negative list. Learned counsel has submitted that the principle of promissory estoppel would be attracted to the facts of the present case and

in that regard he has placed reliance on the judgment of Hon'ble the Supreme Court in the case of **State of Bihar** *versus* **Suprabhat Steel Ltd. and others (1)** and **State of Punjab** *versus* **M/s Nestle India Ltd. (2)** and argued that in similar circumstances the principle of promissory estoppel were applied by the Hon'ble Supreme Court as would be evident from the reading of paras 24 of 43.

(11) Mr. Sandeep Goyal, learned counsel for the petitioner has further submitted that the manufacturers of polythene bags and sheets like the petitioner were removed from the negative list on 25th May, 1993 by the Industrial Department. He has emphasised that the Excise and Taxation Department likewise has published the draft rules *vide* notification dated 13th October, 1993 (P-4) inviting objections as to why the manufacturing industries of polythene bags and sheets, be not excluded from the negative list with effect from 25th May, 1993. However, it was illegally taken off the negative list prospectively *vide* notification dated 11th February, 1994 (P-9). It should have been done with effect from 25th May, 1993. According to the learned counsel the petitioner made an application on 11th February, 1994 itself seeking exemption under Rule 28A(5) within the specified period of 90 days from the date of commercial production. According to the learned counsel the operational period under clause (2)(A) of Rule 28A is 1st April, 1988 to 31st March, 1997 and a new unit within the meaning of clause 2(c) of Rule 28A of the Rules could always apply for exemption within 90 days of the commercial production. He has argued that the petitioner's unit went into commercial production on 20th December, 1993. Therefore, the application filed by the petitioner on 11th February, 1994 was within 90 days within the meaning of Rule 28A(5) of the Rules from the date of commercial production and it was made during the operative period. Therefore, the orders passed by the LLSC dated 28th October, 1994 (P-10) and order dated 5th August, 1998 passed by the HLSC (P-12) are liable to be set aside.

(12) Another submission made by the learned counsel for the petitioner is that the petitioner has not charged any tax from its customers, which would show the *bona fide* of the petitioner that all the time it was expecting that the claim made by it is meritorious and, therefore, no question of undue enrichment would arise.

(1) 1999 (152) S.T.C. 258
(2) 2004 (136) S.T.C. 35 = 2004 (6) S.C.C. 465

(13) Mr. R. D. Sharma, learned State counsel on the other hand has argued that although the petitioner has made an application within the specified period but it has exercised option to grant exemption with effect from 20th December, 1993 when the manufacturers of polythene bags and sheets were still in the negative list. Accordingly, any manufacturer of polythene bags and sheets would not be eligible on 20th December, 1993. He has further pointed out that there is option given by Rule 28A(4)(a) to apply either from the date of production or from the date of issuance of certificate. However, the petitioner's unit has chosen to apply from the date of production when it fell within the negative list and, therefore, it could not be granted exemption. In so far as the retrospective effect of draft rules is concerned, Mr. Sharma has submitted that the draft rules were merely a proposal and objections were invited. According to the learned counsel the draft rules were eventually notified on 11th February, 1994 (P-9) and the provision with regard to retrospective effect was not accepted by the Government. Therefore, it cannot be claimed that the draft rule, which provided for restrospective operation of the item like polythene bags and sheets excluding from the negative list, would operate from a retrospective date.

(14) After hearing the learned counsel for the parties and perusing the record we find that the entitlement of the petitioner to seek tax exemption from the payment of tax would be dependent on sub rules 3, 4 and 5 of Rule 28A of the Rules. It is imperative to read sub rule 3 and sub rule 4(a) of Rule 28A of the Rules which are as under :

(3) **"Option**—An eligible industrial unit may opt either to avail benefit of tax exemption or deferment. Option once exercise shall be final except that it can be changed once from exemption to deferment for the remaining period and balanced quantum of benefit.

(4) (a) Subject to other provisions of this rule, the benefit of tax exemption or deferment shall be given to an eligible industrial unit holding exemption or entitlement certificate, as the case may be to the extent, for the period, from year to year in various

zones from the date of commercial production or from the date of issue of entitlement/exemption certificate as may be opted as under :

Quantum and period of tax exemption/tax deferment

(i) New Industrial Units.

Name of Zone and the area comprised therein	Small scale	Medium scale Large scale unit	Time
1	2	3	4
xx xx xx	xx xx xx		
Zone "C" comprising Faridabad and Ballabgarh complex administration areas	100% of fixed capital investment	90% of fixed capital investment	5 years

xx xx xx xx xx

Provided that in the case of exemption the benefit shall extend to tax on gross turnover and in the case of deferment, it shall extend to tax on the taxable turnover of goods manufactured by the unit.]

Provided further that in case of expansion or diversification only expanded or diversified capacity of an existing unit shall be entitled to 24 {exemption or deferment} under this rule and notwithstanding anything to the contrary contained in these rules, an expanded or diversified capacity shall be considered as independent entity for the purpose of sales tax registration and every such industrial unit shall obtain a seperate registration certificate."

(15) A perusal of the above extracts of the rule would show that the benefit of tax exemption or deferment is available to an eligible industrial unit who has been issued exemption or entitlement certificate for the period

from year to year in various zones from the date of commercial production or from the date of issuance of entitlement/exemption certificate as may be opted. The eligible industrial unit is entitled to opt either to avail benefit of tax exemption or deferment as per the option exercised. It has come on record that the operative period for exemption or deferment is 1st April, 1988 to 31st March, 1997.

(16) There is then procedure for availing of benefit provided by sub-rule 5(a) of Rule 28-A of the Rules which reads as under :

> "5(a) Every Eligible Industrial Unit which is desirous of availing benefit under this rule shall make an application in form ST 70 in triplicate alongwith attested copies of documents mentioned therein to the General Manager District Industries Center within 90 days of the date of its going into commercial production or the date of coming into force of this rule whichever is later. No application shall be entertained if not preferred within time. An application with incomplete or incorrect particulars including the documents required to be attached therewith shall be deemed as having not been made if the applicant fails to complete it on an opportunity afforded to him in this behalf."

(17) According to the aforesaid rule every eligible industrial unit is required to make an application in form ST 70 alongwith attested copies of documents to the General Manager, District Industries Center within 90 days from the date of its coming into commercial production. No such application is to be entertained if it is not preferred within the stipulated time. Likewise an incomplete or application with incomplete particulars would be deemed to have not been made if the applicant fails to complete the same after an opportunity given.

(18) The petitioner had established its unit in pursuance to Industrial Policy of 1992 for the manufacturing of Polythene bags and sheets. The aforesaid industry was on the negative list on 9th March, 1992 but was taken off the negative list on 25th May, 1993 by Industrial Department. Eventually it was removed from the negative list with effect from 11th February, 1994 (P-9) by the Excise and Taxation Department by amending the Rule 28-A. Earlier to the amendment draft rules *vide* notification dated

13th October, 1993 (P-4) inviting objections were published as to why the manufacturing of Polythene bags and sheets be not excluded from the negative list with effect from 25th May, 1993. However, it was removed from the negative list with effect from 11th February, 1994 by taking a conscious decision. The petitioner has applied within 90 days from the date of its commercial production which has commenced from 20th December, 1993. It is also not disputed that the unit of the petitioner is a new unit within the meaning of clause 2(c) of Rule 28-A of the Rules. The claim of the petitioner has been declined by the 'LLSC' on 28th October, 1994 (P-1) solely on the ground that the petitioner's unit had gone into production prior to 11th February, 1994 and therefore it does not qualify for the aforesaid benefits. The aforesaid order has been upheld by the 'HLSC' vide order dated 5th August, 1998 (P-12). A reference has been made to the notification dated 11th February, 1994 (P-9) which has amended schedule III containing various items which are in the negative list and the plastic material which was shown in the negative list earlier (at item No. 18 of the notification dated 9th March, 1992, Annexure (P-2) has been deleted. It is true that production in the unit of the petitioner has commenced on 20th December, 1993 but an application was made by the petitioner on 11th February, 1994 when the Polythene bags and sheets etc. had already been removed from the negative list by a notification of even date.

(19) As has already been noticed in the preceding para sub- rule 4(a) of the Rule 28-A of the Rules clearly postulates that the petitioner could claim benefit of tax exemption either from the date of commercial production or from the date of issuance of exemption/entitlement certificate as per his option. The aforesaid option is not irrevocable. It can always be claimed by the petitioner either from the date of issuance of entitlement/ exemption certificate or from the date of commercial production. The provisions of sub-rule 4(a) of Rule 28-A of the Rules are not mandatory especially when the provision is compared with sub rule 3 of Rule 28-A. A perusal of sub-rule 3 would show that an option can be exercised by an eligible industrial unit either to avail the benefit of tax exemption or deferment. It further provides that option once exercised is to be treated as final. The framer of the rule has not used the mandatory language in the succeeding sub-rule 4(a) by providing that option once exercised was to be treated as final. It is further pertinent to notice that the expression 'shall' has been used in sub-

rule 3 whereas sub-rule 4(a) uses the expression 'may' which also show intenion of the framer of the rules that the option of the rules exercised under sub-rule 4(a) is not irrevocable. It is trite to observe that Rule 28-A of the rules is a beneficial provision granting concession to a particular type of industries in the State. The legislative intendment is clear from the phraseology of sub- rules 3 and 4(a) of Rule 28-A of the Rules. Wherever the framers of the rules intended the rule to be mandatory it has used the expression 'shall' and otherwise word 'may' has been used in sub-rule (3) of Rule 28-A of the Rules.

(20) The petitioners were attracted to set up their industry and infact have been granted various benefits like exemption from electricity duty from the date of commencement of production (P.5), subsidy on the generating set purchased by it (P.6), allotment of industrial plot in Industrial Estate, Karnal (P.7) and loan of about Rs. 10 lacs for running industry by HFC (P.8). Therefore, we are of the view that to deny the benefit on the ground that the petitioner's unit on the date of commercial production on 20th December, 1993 was on the negative list would not be just and fair especially when an option has been given to claim such benefits either from the date of commercial production or from the subsequent date when the eligibility certificate or exemption certificate is issued. It remains undisputed that the petitioner's unit is eligible in all respects on the date when an application for grant of eligibility certificate was filed so as to avail the benefit of sales tax exemption. Accordingly, the exemption could be granted either from the date of issuance of entitlement/exemption certificate or from the date of commercial production. Merely because the petitioner has opted from the date of commercial production, when it was on the negative list would not necessarily mean that it cannot be granted from the date of issuance of entitlement/exemption certificate as the rule is not mandatory. Therefore, we are of the view that 'LLSC' was obliged to consider the application of the petitioner for grant of exemption from sales tax with effect from the date of issuance of entitlement/exemption certificate when the bar of placing the petitioner's industry on the negative list has been removed. Accordingly it is held that the order passed by the 'LLSC' dated 28th October, 1994 (P.10) and the order passed by the 'HLSC' 5th August, 1995 (P.12) are unsustainable in the eyes of law and are liable to be set aside.

(21) As a consequence of the aforesaid discussion the order passed by the 'LLSC' dated 28th October, 1994 (P.10) and the order passed by the 'HLSC' 5th August, 1995 (P.12) are hereby quashed. The matter is sent back to the 'LLSC' to reconsider the claim of the petitioner by treating its application for grant of benefit of sales tax ememption under sub-rule 4(a) of Rule 28-A by not treating the claim from the date of commercial production. The 'LLSC' shall be at liberty to consider the claim of the petitioner from the date of application. The needful shall be done within a period of four months from the date of receipt of copy of this order.

R.N.R.

Before K. Kannan, J.

PUNJAB EX-SERVICEMEN CORPORATION,—*Petitioner*

versus

PRESIDING OFFICER, INDUSTRIAL TRIBUNAL, PUNJAB AND ANOTHER,—*Respondents*

C.W.P. No. 5624 of 2000

7th October, 2009

Constitution of India, 1950—Art. 226—Industrial Disputes Act, 1947—S. 25-F—Management keeping workmen on contract and extending period from time to time—Unfair labour practice—Tribunal rejecting demand of workmen for regularization merely on completion of 240 days during period of 12 calendar months—Tribunal directing consideration of case of each workman for regularization who had continuously been in service for a period of four years in accordance with scheme or instructions made or adopted by PESCO—Findings of Industrial Tribunal in favour of workmen pointing out to nature of contractual engagements and unfair labour practice in which management was indulging in and objection of management regarding maintainability holding untenable are perfectly justified-Petition dismissed with costs.

Held, that after examination of all the relevant details and the case law on the subject, the Industrial Tribunal had held in favour of the workmen pointing out to the nature of contractual engagements and the unfair labour practice in which the management was indulging in. It also held that the objection of the management that the reference was not maintainable was clearly untenable. The approach of the Industrial Tribunal is perfectly justified. All these years, since the time when the Tribunal has delivered its verdict, the PESCO has only dragged its feet through its mindless litigation and attempted to scuttle a justifiable legal process that was set in motion by the workmen through their union. In the meanwhile, it has also indulged in several precipitive acts which hightened the industrial tensions between the management and the workmen. It is in this context that the other demands or complaints of the workmen that they were all being victimized should be considered.

(Para 10)

Further held, that the writ petition is wholly vexatious. The objections taken as regards maintainability of reference which had been substantially answered by the Industrial Tribunal had not been urged before me. The learned counsel merely confined himself to the issue that the regularization could not be a matter of course any longer in view of the deposition of the law stated by the Hon'ble Supreme Court in **Secretary, State of Karnataka** *versus* **Uma Devi and others,** 1996(4) SCC 1. None of the decisions have any applicability to the factual situations obtaining in this case.

(Para 13)

P.K. Mutneja, Advocate with S.S. Sudan, Advocate, *for the petitioner.*

Ravi Kant Sharma, Advocate, *for the respondent No. 2.*

K. KANNAN, J.

I. Scope of enquiry :

(1) The Punjab Ex-Servicemen Corporation (hereinafter called as PESCO) challenges in the above writ petition the award of the Industrial Tribunal answering a reference in favour of the workmen accepting demand

Nos. 4 and 10 and rejecting the other demands. Demand No. 2 had become infructuous as the workman Iqbal Singh was reinstated. Demand Nos. 4 and 10 had been taken together and disposed of. Since the validity of the award of the Industrial Tribunal answering the reference is challenged among other grounds that the Tribunal had exceeded its jurisdiction, it becomes necessary to examine the demand, the subject of reference by the Government and how they have been dealt with by the Industrial Tribunal.

II. The cause for disputes :

(2) The writ petition confines itself only in so far as the Tribunal has accepted the demands Nos. 4 and 10, which are as under :–

> "**Demand No. 4 :** Whether the workmen of the establishment, who have completed 240 days of continuous service, are entitled to be regularized ? If so, with what detail ?
>
> '**Demand No. 10 :** Whether the management should stop harassment of the workmen employed in the branches as well as in the Head Office of PESCO ?

The demands essentially spring from the fact that the workmen were for number of years kept on contracts, periodically extended from time to time, although, according to the workmen, the nature of engagement was such that the work was always available and the management was deliberately adopting unfair labour practice by keeping them on tenterhooks and denying to them regular scales of pay with annual increments. The reference by the Government had merely reproduced all the demands of workmen for adjudication and on the basis of the objection taken by the management that the reference itself was bad and not maintainable, the Labour Court had framed an issue relating to the validity of the reference and the jurisdiction of the Tribunal to entertain the reference with regard to the contention that the claims of the workmen had been barred by law.

III. Examination by Industrial Tribunal as regards activities of PESCO :

(3) The Industrial Tribunal had set out in detail the constitution of PESCO and the various activities that it had undertaken to examine the nature of work that had been extracted from the workmen and whether

the management was justified in not having a scheme for regularization of the workmen. PESCO itself is a creature of statute enacted by the Punjab Government, with the general superintendence, direction and management of the affairs and business being vested in the Board of Directors in terms of Section 6 of the PESCO Act. As per Section 7 of the Act, the Board of Directors consisted of Chairman, Managing Director and Directors, Secretary of three connected departments of the Punjab Government, Director of Industries being *ex officio* and four other Directors being nominated by the Government from amongst the Ex-Servicemen. The Act laid down that the Chairman was required to be an Ex-Servicemen whereas the Managing Director had to be a Class-I Officer of the State or the Central Government but their appointment shall always to be made only by the State Government. The initial capital had been invested in PESCO by the State Government.

(4) In terms of Section 51(1) of the Act, the function of PESCO was to provide for the welfare and economic upliftment of the Ex- Servicemen in the State and Sub-Section 2 provided for planning and execution of programmes for agricultural development, marketing, small scale industries, transport and other business, trade or activity as the case may be approved by the Government. Sub-Section 3 provided that the PESCO shall have due regard to public interest, solvency and welfare of Ex-Servicemen. It was brought out through evidence that PESCO had several units, of which auto workshop and stitching centres had been registered separately under the Factories Act. It had undertaken dealership of Eicher Canter Automobiles for sale of the vehicles and for sale of spare parts. PESCO also had several service stations for vehicles of Maruti Udyog and a workshop for undertaking minor repair works. Apart from the abovesaid units and activities, PESCO was also the sole authorized dealer for the fabrication of bullet proof vehicles for the States of Punjab, Andhra Pradesh and Jammu and Kashmir. It was brought out through the evidence of Shri Lachhman Dass, the General Manager of PESCO that up to the time of trial , PESCO was running under profit and the balance sheets for the years 1991-92 to 1995-96 had been placed on record. In the light of the evidence placed before it and several activities admittedly carried on by the management, the Industrial Tribunal had examined the claim of the workmen. Evidence had been offered by the workmen that several other workmen had been initially appointed from

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November, 1994 for a period of one year on consolidated wages varying to Rs. 1250 to Rs. 3550 and all of them had completed 240 days of continuous service at the time of demand notice and they had also been continued in service, periodically extending the contracts. The Industrial Tribunal elicited and admission by the General Manager, Shri Lachhman Dass that the continuous service of the workmen had not been interrupted at any stage for three or four years running. The management had not given even notional breaks while continuing them. Setting forth the evidence and the admission contained in the evidence fo the management, the Industrial Tribunal had observed that the business activity was permanent and regular in nature and the services of the workmen concerned were obviously needed on regular basis for execution of its works and the practice adopted by the management by employing the workmen initially for a term of one year and continuing them from year to year without any break, is to say the least, unfair and amounted to exploitation of workmen.

IV. Decisions cited, examined :

(a) *Length of service, not always relevant for regularisation*

(5) Assailing the award of the Industrial Tribunal, the Petitioner-management relies on the judgment of the Hon'ble Supreme Court in **Manager, Reserve Bank of India, Bangalore** *versus* **S. Mani and others (1).** The case referred to the claim of certain workmen, who had been engaged as Ticca Mazdoors (engaged on contract/hired) between the period of 1980 and 1982 but when some of them were alleged to have produced forged school transfer certificates, complaints had been issued against them. They were rejected to be employed, when a request for re-employment of the workmen was not accepted by the management and an industrial dispute was raised. The Tribunal had found that the workmen had completed 240 days of service and a termination that was brought out without complying with provisions of Section 25-F of the Industrial Disputes Act was bad in law. The plea of regular service had been pressed forth during the hearing and it was on that context that the Hon'ble Supreme Court held that 240 days of continuous service by itself would not give rise to claim for permanence. It also clarified that a direction for reinstatement for non-compliance with the provisions of Section 25-F would

(1) (2005) 5 S.C.C. 100

restore to the workmen to the same status which they held before and that the workmen would continue to be Ticca Mazdoors. The Hon'ble Supreme Court was again dealing with the case where the management had maintained two lists. One list comprising of persons who had regular activities and a second list comprising of persons, who had been engaged merely as Ticca Mazdoors. It is not seen how that judgment should have any relevance for, in this case we are not concerned about status of the workmen who had been terminated and who were seeking for reinstatement as well as the regularization of service. The reference itself was for a subject that all the workmen had been engaged as contractual workers and the management was adopting a deliberate unfair labour practice of not providing for any regular service although the nature of activities and the availability of work were such that the engagement could have been on permanent basis. The workmen here are not demanding a regularization only because they have completed 240 days of service. On the other hand, they were showing the instances of the workmen, who completed 240 days and had been continuing in work for more than three or four years but put merely on contract for one year at a time and by the management periodically extending their services.

(b) Temporary nature of work, illustration — Question of fact

(6) Learned counsel also refers to a judgment of the Hon'ble Supreme Court in **Madhyamik Shiksha Parishad, U.P.** *versus* **Anil Kumar Kishra and others (2).** The said decision arose out of engagement by an eduactional institution of persons for preparation of certificates which were required to be filled up with details of the names of candidates, the name of the school, date of birth etc., when there was a backlog of certificates to be cleared and the services had been engaged to clear the backlog. When the backlog had been cleared and the preparation of the certificates in future had been computerized, the services of the workmen were not required any longer. The discontinuance from service was challenged. Repelling a contention for regularisation of the service, the Hon'ble Supreme Court held that completion of 240 days of working would not under law import the right of regularization. This judgment is again inapplicable in a case where the claim of the workmen was on a different basis as explained

(2) (2005) 5 S.C.C. 122

above namely of the availability of work and the nature of engagement was such that the management could not have kept them merely for short spells through contracts. In yet another judgment of the Hon'ble Supreme Court in **Gangadhar Pillai** *versus* **Siemens Ltd. (3),** the Hon'ble Supreme Court dealt with a typical situation where the workmen had raised a dispute that the managemnet was indulging in practice of engaging casual or temporary workers intermittently for a number of years. Applying the test for determination of the question as to whether an unfair labour practice had been resorted to, the Hon'ble Supreme Court held that it was essentially a question of fact. In that case though there had been breaks in service, the same were found to be not artificial. The Court found that the requirement of persons on temporary basis was writ large on the face of the nature of projects undertaken by the company. The workmen had been employed at each site office of the company which were separate establishments. The Court found the object of temporary employment to be *bona fide* and not to deprive of the employees from the benefit of permanent status. The Hon'ble Supreme Court itself had laid down that the issue will have to be taken as a pure question of fact of whether the nature of activity admitted of continuous work or it was purely temporary. In this case, the Industrial Tribunal has examined the profit making propensities of several of the units which PESCO was running, the objects of employing Ex-Servicemen, several activities which the management had been undertaking by registering some of the units as factories under the Factories Act, all of which clearly showed that the manner of engagement indulged by the workmen was a subterfuge to emasculate the workmen and their morale to obtain a fair deal in their employment as regards their security of tenure and their scales of pay. The Industrial Tribunal had on a consideration of all the relevant facts rejected the demand of the workmen for regularization merely for persons who had worked continuously for a period of 240 days during the period of 12 calendar months preceding the demand notice. It however directed to consider the case of each workman for regularization in accordance with the scheme or instruction, if any, made or adopted by it and in the absence thereof in accordance with the guiding principles laid down by the Hon'ble Supreme Court in **State of Haryana** *versus* **Piara Singh (4).**

(3) (2007) 1 S.C.C. 533
(4) AIR 1992 S.C. 2130

(7) The above decision of the Hon'ble Supreme Court, although not wholly approved of by the Hon'ble Supreme Court in the decision of Constitution Bench in **Secretary, State of Karnataka** *versus* **Uma Devi and others (5),** it was over-ruled to the extent that a Court could not direct regularization merely on completion of certain number of days. The decision has been rendered in the context of direction for regularisation in public employment. In this case, the Industrial Tribunal had itself rejected the claim of the workmen for regularization only by the fact that some of them had completed 240 days. It had allowed the management a flexibility to prepare a scheme which was just, fair and reasonable for considering the case for regularization who had continuously been in service for a period of four years preceding the date of the award and if no scheme or instructions had been made or not already in existence, it directed that it should do so within a period of six months from the publication of the award and to pay them wages/salary in the time scale of pay admissible to regular employees of PESCO in the category and if no regular employee in the category was there, then in the scale of pay admissible to an employee of the corresponding or similar category of the Punjab Government.

V. Finding : Engagement on contractual basis was an instance of unfair labour practice :

(8) In order that a particular practice should be characterized as unfair labour practice, the illustrations available through Item No. 10 of the 5th Schedule of the Industrial Disputes Act reads "To employ workmen as 'badlis' casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent workmen." Yet another provision of relevance is Item No. 5 of 5th Schedule that sets out through Clauses (a) and (b) that if a workman is discharged or dismissed by way of victimization, or not in good faith, but in colourable exercise of the employer's rights, the same will be an unfair labour practice on the part of the employer. The provision relating to unfair labour practice was inserted in the Act by the Central Act 46 of 1982 that was brought into force from 21st August, 1984. It is not as if a contractual employer only for a particular period is an anathema to the Scheme of the Act. Instances depending on the activities which are purely temporary such as when some projects have to be undertaken, which would be completed

(5) 1996 (4) S.C.C. 1

within a time frame, the Act provides for contractual employment through Clause (bb) introduced to Section 2(oo), inserted by Act 49 of 1984 and was brought into force with effect from 18th August, 1984 so that it shall always be permissible for the management to make appropriate classification of workmen, who could be engaged permanently in respect of areas where the activity is regular and permanent and another category for specific periods depending on the temporary character of such activities.

(9) The issue in this case is whether for an organization which is a creature of statute and whose permanence is thereby guaranteed and which engaged in activities that are meant to serve public interest as well as fostering the welfare of Ex-Servicemen, could employ their workmen merely for a brief period and extend the service periodically. Defence of our country and national security being sovereign functions, it is a matter of regional pride that Punjab stands foremost in offering its men of valour for the security of the nation working in Armed Forces. A perennial flow of Ex-Servicemen would require to be absorbed into civil society and their contribution to productivity is the immediate result in an organization created by a statute to foster their welfare. As already observed, the PESCO has been posting profits continuously and except for one or two units which are reported to have stopped, all other units and services which are extended through PESCO are fairly regular. The Industrial Tribunal examined the whole scheme of activities of the PESCO in the context of how the management was treating their workmen by employing them on contracts for various spells and periodically extending their contracts. In such a context, the Industrial Tribunal was perfectly justified in making reference to decisions in **Dilip Hanuman Trao Shrika and others** *versus* **Zila Parishad and others (6)** that sub clause (bb) of Section 2(oo) being in the nature of exception has to be construed strictly in favour of the workmen and the provision itself has to be construed in the light of what the Act defines as unfair labour practice that includes deliberate engagement of persons as temporary workers on contracts. The Industrial Tribunal also referred to a decision of this Hon'ble Court in **Balbir Singh** *versus* **Kurukshetra Bank Ltd. (7)** when it pointed out that sub clause (bb) of Section 2(oo) has to be interpreted to limit it to a case where work itself had been

(6) 1990 LIC 100
(7) 1990 I LLJ (P&H) = 1990–II–LLN 567 (P&H)

accomplished and the agreement for hiring for a specific period shall be shown as genuine. The provision is not intended to be a handy tool to unscrupulous employers to shunt out the workmen in the garb of non-renewal of the contract even if the work subsists, as if they were flotsam and jetsam that could be jettisoned fathoms deep. If contractual employment is resorted to as a mechanism to frustrate the claims of employees to become regular or permanent against jobs which continue or the nature of duties is such that the colour of contractual agreement is given to take it out from Section 2(oo) of the Industrial Disputes Act, it was held by the Allahabad High Court in **Shailendera Nath Shukla** *versus* **Vice Chancellor, Allahabad University (8)** then such agreement cannot be regarded as fair and *bona fide*.

(10) After examination of all the relevant details and the case law on the subject, the Industrial Tribunal had held in favour of the workmen pointing out to the nature of contractual engagements and the unfair labour practice in which the management was indulging in. It also held that the objection of the management that the reference was not maintainable was clearly untenable. In my view, the approach of the Industrial Tribunal is perfectly justified. All these years, since the time when the Tribunal has delivered its verdict, the PESCO has only dragged its feet through its mindless litigation and attempted to scuttle a justifiable legal process that was set in motion by the workmen through their union. In the meanwhile, it has also indulged in several precipitative acts which hightened the industrial tensions between the management and the workmen. It is in this context that the other demands or complaints of the workmen that they were all being victimized should be considered.

VI. Instances of victimisation/harrassment :

(11) Demand No. 10 was in omnibus fashion that the management should stop harassment of employees in the branches as well as in the head office of PESCO. Evidence were sought to be let into explain the nature of harassment felt by the workmen that whoever had joined or actively participated in labour union activities, they were systematically weeded out of the organisation. They pointed out to a case Shri K. Sada Sivam, President of the Union, who was terminated because of his having been instrumental in forming the union of the workmen. Another person, Shri P.S. Sohal, General Secretary of the Union gave details of the fact that the Union had been registered with effect from 4th October, 1995 and the management

(8) 1987 LIC 107

had scaled up their ways of victimization only from the date when the union had been registered. Yet another person Iqbal, Helper had joined the service on 24th June, 1992 for 89 days and as soon as he joined the Union, his services were terminated on 26th January, 1996. It is entirely a different matter that the said worker had been subsequently reinstated. The attitude of Capt. Lachhman Dass who was the Managing Director as regard formation of unions was reminiscent of his long association in the army where it would have been unacceptable for men in uniform to form unions but Ex-Servicemen engaged in commercial activity for profit were not in the same league. They would be perfectly justified in promoting their activities and expressing their grievances through labour unions. The demand complaining of victimization was examined by the Industrial Tribunal only in the context of how the workmen had faced several difficulties and how the management which was manned by retired army officers did not get adjusted to a new paradigm, clouded as they were, in their predilections of intolerance to any labour union activities.

VII. Award fully justified—Challenge in writ petition vexatious :

(12) The award of the Industrial Tribunal must have been really an eye-opener for the management to correct their own ways and better their industrial relations. They have allowed instead the bickerings to grow and the heart burns to escalate for the workmen by engaging them in a long drawn litigations. All that the Industrial Tribunal had done was to direct that the workmen participating in unions shall not be victimized. It could hardly be in doubt that it could not be a contentious issue but should have been pursued as an ideal industrial policy. The other demand that the workmen who had been employed for short spells on contract but had actually been continued for long number of years by periodical extensions was just as well reasonable that the workmen deserved consideration for security of tenure by evolving a policy of regularization. The direction from the Industrial Tribunal must have been taken up as wake-up call to spruce up their own ways and secure to the workmen what were due to them. Instead, the management is before this Court pleading that persons who had completed 240 days were not entitled to regularization. It was just not the plea of the workmen at all. A Corporation that owes its origin to a statute and which carries on production activities and reaping profits through the working of their staff ought to treat them with respect and esteem that they deserve. The Ex-Servicemen that have been associated with the Corporation are not

men of straw; not picked up from dirt; and if they wallowed in dirt, it was dust smeard with mother earth of men and women, who had made substantial sacrifices in their lives for the sake of the country.

(13) The writ petition is wholly vexatious. The objections taken as regards maintainability of reference which had been substantially answered by the Industrial Tribunal had not been urged before me. The learned counsel merely confined himself to the issue that the regularization could not be a matter of course any longer in view of the disposition of the law stated by the Hon'ble Supreme Court in Uma Devi referred to above. I have already pointed out that none of the decisions have any applicability to the factual situations obtaining in this case.

(14) The writ petition is dismissed with costs assessed at Rs. 10,000. The scheme directed to be framed for regularization by the Industrial Tribunal shall now be undertaken and completed within a period of four months.

R.N.R.

Before Jitendra Chauhan, J.

RAGHUBIR SINGH,—*Petitioner*

versus

STATE OF HARYANA,—*Respondent*

Crl. R. 664 of 2004

21st October, 2010

Punjab Sugarcane (Regulation of Purchase and Supply) Rules, 1958—Indian Penal Code, 1860—S. 420—Weight of sugarcane found to be deficient—FIR u/s 420 against owner of weighing bridge and one worker—Peititioner only in employment for weighing cane at weighing bridge—Sole beneficiary of weighing bridge is its owner a co-accused already acquitted—No intention of petitioner to deceive cane-growers—Ingredients of S. 420 IPC not made out against petitioner— Petition allowed, conviction and sentence awarded by Courts below set aside and petitioner ordered to be acquitted of charge set out against him.