19

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

PRINCIPAL BENCH : NEW DELHI

OA No.1693/2002 Date of decision: 17.7.2003

A.P.Lamba .. Applicant

(By Advocates: Sh. B.S.Jain)

versus

Union of India & Others .. Respondents

(By Advocates: Sh. Madhav Panikar)

CORAM:

Hon'ble Sh. Shanker Raju, Member(J)

1. To be referred to the reporter or not? Yes

2. Whether it needs to be circulated to other Benches of the Tribunal?

S. Raju

(Shanker Raju)
Member(J)

20

CENTRAL ADMINISTRATIVE TRIBUNAL. PRINCIPAL BENCH

OA No.1693/2002

New Delhi this the 17th day of July. 2003.

HON'BLE MR. SHANKER RAJU. MEMBER (JUDICIAL)

A.P. Lamba.
R/o R.H.No.13.
Vasupujya Society.
Satellite Road. Near Ramdev Nagar.
Ahmedabad-380 015. -Applicant

(By Advocate Shri B.S. Jain)

-Versus-

1. Union of India through
Secretary.
Deptt. of Personnel. Public Grievances
& Pension. North Block.
New Delhi.

2. Comptroller & Auditor General of India.
Bahadur Shah Zafar Marg.
New Delhi.

3. Principal Director of Audit.
Economic & Service Ministries.
A.G.C.R. Building. I.P. Estate.
New Delhi-110 002. -Respondents

(By Advocate Shri Madhav Panikar)

O R D E R

By Mr. Shanker Raju. Member (J):

Applicant impugns respondents' order dated 27.12.2000 and 13.11.2001 where his request for pro-rata benefits for the service rendered w.e.f. 18.7.1951 to 31.8.1963 before his appointment in ONGC has been rejected. Applicant h as sought quashment of the aforesaid order with direction to respondents to extend the benefits of OM dated 16.6.1967 to him as accorded to Sh. T.S. Thiruvengadam & Others. 1993 (24) ATC 102 by the Apex Court in its judgment dated 17.2.93 with all consequential benefits.

2. Applicant joined the office of A&G under Principal Director of Audit Economic and Service Ministries

as U.D.C. on 18.7.51 and was declared permanent on 11.3.57.

3. While working in the Government applicant applied for the post of Accountant in ONGC, a public sector undertaking through proper channel. His application was forwarded to ONGC. In pursuance of his selection applicant was relieved on 31.8.62 to join ONGC initially on deputation for one year on foreign terms. During this interregnum period of his deputation was paid by ONGC to AG and his GPF funds were transferred to ONGC.

4. Applicant joined ONGC on 5.9.62 and thereafter opted for retention in ONGC and tendered his resignation on 1.8.63 from the post of UDC held by him in substantive capacity which was accepted w.e.f. 31.8.63.

5. C&AG office was requested on 20.10.68 to send the service book of applicant and thereafter he superannuated from ONGC on 31.5.89. As he has been denied pensionary benefits by ONGC having rendered 10 years service in Central Government which entitles him to pro rata pension in the wake of Ministry of Finance OM dated 10.11.1960, according to which Central Government servants joining PSU in public interest were entitled to an amount equal to what the Govt. would have contributed had the officer been on contributory provident fund terms under the Govt. together with the interest thereon at the rat of 2% for the period of pensionable service rendered in the Government. The same was not received by applicant. Subsequently, government servants absorbed in Central Public Sector Undertaking on or after 8.11.68 were made

eligible for pro rata benefits. The aforesaid benefit was event extended through OM dated 21.4.72 to those who on their own volition joined PSU. The distinction between those who were formally made eligible to get pro rata pension and absorbed on or after 8.11.68 and the latter if they had joined on or after 21.4.72. This distinction was also removed vide OM dated 25.3.77 and all government servants who absorbed or had joined on their own volition in PSUs on or after 8.11.1968 were eligible for pro-rata retirement benefits but the actual financial benefit was allowed only from 1.8.1976.

6. Applicant on the basis of the decision of the Apex Court in D.S. Nakara v. Union of India, AIR 1973 SC 130 where the fixation of a date for retirement benefits has been held to be arbitrary, represented to respondents which was rejected on the basis of the decision of the Apex Court in Union of India v. V.R. Chadha, SLP (Civil) No.697 of 1995 case, giving rise to the present OA.

7. Learned counsel for applicant contends that in T.S. Thiruvengadam v. Union of India & Others, 1993 (24) ATC 102 in so far as applicability of OM dated 16.6.67 is concerned, to be applicable to those who are absorbed on or after June 16, 1972 the Apex Court observed that under Rule 37 of the CCS (Pension) Rules, 1972 there cannot be a distinction or classification for granting retiral benefits on the basis of cut off date and those who had earlier been absorbed fulfilling the conditions benefit of pro rata pension as per memorandum dated 16.6.97 are admissible. In the light of the aforesaid it is contended that once as per Thiruvengadam's case (supra) pro rata benefits have been

made applicable to those who had joined PSU even before 16.6.97. as amended on 19.6.1972 are entitled for pro rata pension subject to refund of the benefits along with interest.

8. In this backdrop it is stated by OM No.8/1/72(Estt.(C) which is in continuation of OM dated 5.7.68 regarding forwarding applications of Central Government servants in PSU the pro rata pension was made admissible to those who have been absorbed in PSU on their own volition on the basis of their applications.

9. By another OM dated 25.3.77 which is in continuation of OM of 1972 those who have joined the PSU on or after 8.11.68 and have been absorbed after 8.11.68 on their own volition are entitled to pro rata pension.

10. Referring to the aforesaid it is contended that the OM issued in 1967 has been modified by OM issued in 1972 as well as in 1977 would have to be read as part of OM issued in 1967 being a modification and the embargo of those who were absorbed till 1968 treating the similarly circumstance a particular class in the light of the decision in D.S. Nakara's case (supra) and in the light of Thiruvengadam's case (supra) cannot be discriminated and once they fulfilled the requirement they should be accorded pro rata benefits.

11. By referring to the decision of a Coordinate Bench in O.P. Sharma v. Union of India & Others. OA No.1275/2000 decided on 20.12.2000. it is contended taking resort to the aforesaid memorandum that those who got

24

absorbed before 8.11.68 on their own volition without any declaration of public interest are entitled to be accorded pro rata benefits. The aforesaid decision has been affirmed by the High Court of Delhi in CWP No.5871/2001 decided on 11.2.2002.

12. As an alternate argument it is contended that applicant was absorbed in PSU in public interest, as his benefits have been paid to the A&G, contribution as well as by the ONGC.

13. Referring to the decision in in V.R. Chadha's case it is stated that the same is per incuriam. Learned counsel Sh. Jain states that per incuriam is a decision where the particular point of law is not perceived by the court or present to its mind. It is further stated that a conclusion without reference to the relative provisions of law is weaker and further stated that decision in Chadha's case is per incuriam and as the same was based on unamended Rule 37 of the CCS (Pension) Rules, 1972 and the condition of public interest has already been removed, whereas the facts are different in the present case. It is also stated that decision of three-Judge Bench in Welfare Association of Absorbed Central Government Employees in Public Enterprises v. Union of India, 1996 (33) ATC 188 has clearly held that an officer who has sufficient experience and skill and his services are necessary for public enterprises as such officer when allowed to be absorbed in those Public Undertaking his deputation is deemed to be in public interest.

14. In the aforesaid conspectus it is stated that the decision in Thiruvengadam's case (supra) is applicable and shall be applied to the facts and circumstances of the case.

15. Whereas the learned counsel for the respondents Sh. Madhav Panikar denied the contentions and stated that unamended Rule 37 of CCS (Pension) Rules, 1972, a government servant who is absorbed in a PSU there should be a declaration by the Government to be in public interest to entitle him for pro rata pension. Applicant on his own volition chose to absorb in ONGC in his own interest. In absence of any declaration by the Government the aforesaid service cannot be accorded to him as h e has not fulfilled the conditions laid down as reflected by Apex Court in SLP No.695/95.

16. It is further contended by Sh. Panikar that the ratio of three-Judge Bench of Apex Court in Welfare Association's case (supra) would not apply as there was no skill involved for absorption of applicant in PSU as he was merely working as UDC. According to the learned counsel the cause of action had arisen to applicant in 1960 whereas OA has been filed in 2002 which is barred by latches. It is further stated that merely because a representation has been filed on the knowledge of a judgment would not give applicant a cause of action.

17. Respondents deny violation of Articles 14 and 16 of the Constitution of India. Applicant has tendered resignation from the post in Central Government to

join PSU and in absence of any declaration by the Government to be in public interest applicant is not entitled for pro rata pension.

18. In the rejoinder applicant reiterated his pleas taken in the OA.

19. I have carefully considered the rival contentions of the parties and perused the material on record.

20. Admittedly with the prior permission of Government applicant joined ONGC on 5.9.62 as Accountant in the ONGC on deputation on foreign terms for a period of one year. It is also not disputed that applicant had opted for absorption in ONGC and tendered his resignation vide letter dated 1.8.1963. Assistant Accounts Officer (Admn) on the approval of Accountant General accepted the resignation of applicant w.e.f. 31.8.83. Unamended Rule 37 of the CCS (Pension) Rules mandates as a pre-condition of absorption of a government servant who has been permitted to be absorbed in Service in a PSU on a declaration by the Government as to the absorption in public interest. Subsequently, Rule 37 of the Rules ibid has been amended whereas the requirement of absorption in public interest was deleted. OM of 21.4.1972 and 25.3.1977 has done away with the requirement of public interest and application on own volition and also absorption of those government servants in public enterprises who joined PSU on their own volition but subsequently were allowed to be absorbed. However, those who had joined PSU on their own volition on their absorption has taken place after 8.11.1968 but prior

to 24.1.1972 the benefit of proportionate pension was allowed from 1.8.76. A coordinate Bench of this Tribunal in O.P. Sharma's case in a case where applicant was relieved on 30.9.61 allowed pro rata pension on the basis of OM dated 21.4.72 as well as 25.3.77 holding that prior to 24.1.72 the absorption in those cases had to take place after 8.1.68 by OM dated 23.5.72. Distinction between those absorbed in public interest on their own volition was further reviewed and those who were absorbed on or after 8.11.68 but prior to 24.2.72 were given benefit of proportionate pension w.e.f 1.8.76. It was also held that if a government servant was absorbed on his own application between 8.11.68 to 24.1.72 he would be entitled for pro rata pension. Applicant therein who was absorbed on 3.10.61 relying upon the decision of the Apex Court in D.S. Nakara's case (supra) held that there cannot be a class within the class as such those who had been absorbed before 8.11.68 OM of 1972 was made applicable. Aforesaid decision attained finality by dismissal of Writ Petition No.5871/2001 by the High Court on 11.2.2002.

21. If one has regard to the aforesaid it is pertinent to quote the observations made by the Apex Court in D.S. Nakara's case, as follows:

> "The Government of India having decided that the deputationists to Public Enterprises are entitled to retirement benefits even if the said deputationists went on their own volition, would it be open to limit the benefit to only those who went on deputation after 8.11.68? What is the rationale or principle behind fixing the date 8.11.68 has not been satisfactorily explained anywhere. As posed by the Supreme Court, how does the fortuitous circumstances of going on deputation prior to a particular date permit totally unequal treatment. Applying the dicta of the Supreme Court in Nakar's case it would not be open to Govt., to limit the benefit to employees who went on deputation only after 8.11.68. Again it would be

useful to refer to the latest decision of the Supreme Court reported in R & L Marwaha Vs. Union of India wherein the question raised was whether an employee of an autonomous body established under the auspices of Central Government is entitled to claim the benefit of the period of service rendered by him in a pensionable post under the Central Government prior to his service being absorbed in the autonomous body for the purposes of his computing qualifying service for purposes of pension. By a Central Government Order No. O.M. No.28/10/84-Pension Unit dt. 20th August, 1984. the benefit of such a claim was made applicable only to those employees who retired from government/autonomous body after the issue of the said order viz.. 29.8.84. The Supreme Court held as follows:-

> "9. We do not also find much substance in the plea that this concession being a new one it can only be prospective in operation and cannot be extended to employees who have already retired. It is true that it is prospective in operation in the sense that the extra benefit can be claimed only after 29.8.84. that is the date of issue of the Government Order. But it certainly looks backward and takes into consideration the post event that is the period of service under the Central Government for purposes of computing qualifying service because such additional service can only be the service rendered prior to the date of issue of the Government order. By doing so the Government Order will not become an order having retrospective effect. It still continue to be prospective in operation. Whatsoever has rendered service during any past period would be entitled to claim the additional financial benefit of that service if he is alive on 29.8.84 under the Government order but which effect from 29.8.84."

The decision also confirms that the extension of a Government order cannot be prospective in the sense that it will apply only to those employees who joined the autonomous body after a particular date. Applying these decisions it would follow that the applicant is also entitled for the benefit of the Government of India's instructions contained in D.O.P. O.M. No. 28-16/4/76-Estts(C) dt. 25.3.1977."

22. I am of the considered view that by OM dated 1972 as well as 1977 the requirement of declaration of public interest by the Government has been done away and those who had been absorbed on their own volition OM of 1967 was made applicable irrespective of the date envisaged in OM of 1972. Applicant who had been permitted to be absorbed and had initially gone on foreign terms to ONGC

the service rendered from 18.7.51 to 31.8.62 applicant is entitled to pro rata pension and other retiral benefits but from 1.8.76 as provided in OM of 1972 ibid.

23. I also find that the similar controversy was dealt with by a coordinate Bench of this court in OA-1364/94 - Susheel Kumar v. Union of India as well as J.M. Paul v. Union of India, OA-152/93. The aforesaid decisions have been upheld by the Apex Court. Though no reasons have been assigned to dismiss the petition filed by respondents the same being non-speaking order cannot act as a precedent under Article 141 of the Constitution of India.

24. In so far as Thiruvengadam's case (supra) is concerned the applicability of memorandum dated 16.6.67 has been held even to those who were absorbed earlier on the ground that those who are absorbed earlier cannot be treated as a class to make any distinction which would be violative of Article 14 of the Constitution of India. However, in the aforesaid order it has been observed that those who are absorbed in service in Public Undertaking in public interest and are permitted to be absorbed in public interest are eligible to receive the pro rata pension.

25. In V.R. Chadha'a case (supra) the Apex Court dealing with the case where the pensioner was appointed on temporary basis while employed in government applied for the post of Accounts Executive whose application was forwarded through proper channel and on permanent absorption and selection in PSU on tendering his resignation he was relieved from duty. As his claim for pro rata pension was not accepted by the respondents on

file OA before the Tribunal his request was acceded to. In the aforesaid case Apex Court took note of the unamended Rule 37 which postulates declaration of public interest as one of the conditions apart from permission for absorption for grant of pro rata pension. In the conspectus of that case as the appointment in PSU was without obtaining necessary permission of the Government the decision in Thiruvengadam's case (supra) was distinguished on the ground that therein the declaration of public interest was satisfied.

26. A further decision of the High Court of Punjab in CWP-1599(C)/2000 in the case of K.N. Singh was relied upon where the petitioner applied for appointment in PSU and on resignation joined the service. In the conspectus of Rule 37 (unamended) and relying upon the decision in V.K. Mehta's case holding that resignation from service of Central Government entails forfeiture of service the claim was rejected for pro rata pension.

27. A decision of three-Judge Bench in Welfare Association's case (supra) while dealing with the issue of commutation observed that the service of officers having experience and Central Government which is essential for PSU and as such officers being allowed to be absorbed in those PSU their retirement is to be deemed in public interest.

28. A Division Bench of the Apex Court in Praduman Kumar Jain v. Union of India, 1994 (28) ATC 70 held that the resignation from government service with a

view to seek employment in Central/Public Undertaking with the prior permission of the Central Government does not entail forfeiture of qualifying service.

29. I am conscious of the doctrine of 'precedent'. A decision of the Division Bench of Apex Court where an earlier decision though distinguished and being the latest is a binding precedent under Article 141 of the Constitution of India. However, one must not loose sight of the doctrine of per incuriam. A three-Judge Bench of the Apex Court in Municipal Corporation of Delhi v. Gurnam Kaur, (1989) 1 SCC 101, while dealing with the doctrine of per incuriam held as follows:

> "11. Pronouncements of law, which are not part of the ratio decidendi are called as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das case and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P.J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th edn, explains the concept of sub silentio at p. 153 in these words:
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> A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour: but point B was not argued or considered by the court. In such circumstances,

37

although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

30. If one has regard to the aforesaid and having regard to the law laid down by the Apex Court in State of U.P. & Anr. v. M/s Synthetics and Chemicals Ltd. & Anr., JT 1991 (3) SC 268.

"41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase when the particular point of law involved in the decision is not perceived by the Court or present to its mind (Salmond 12th Edition). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. (1941 IKB 675), the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Guman Kaur (1989 (1) SCC 101). The Bench held that, 'precedents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgement without any occasion is not ratio decidendi. In Sharma Rao V. State of Pondicherry (AIR 1967 SC 1680) it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

31. If one has regard to the above, the decision in V.R. Chadha's case (supra) is per incuriam as well as sub silentio. The Apex Court has taken into consideration

the unamended Rule 37 of the CCS (Pension) Rules.. At the time when the controversy was settled by the Apex Court in the individual facts and circumstances the condition of public interest has already been removed through OM of 1972 as well as 1977. It is also one of the distinguishing features that in that case V.R. Chadha's case (supra) was not permitted to be absorbed.. He joined the Public Undertaking after resigning whereas in the instant case initially applicant was allowed foreign terms to join ONGC on deputation for a period of one year subsequently on his application he was permitted to be absorbed and had tendered resignation. If one has regard to the decision of the Apex Court in P.K. Jain's case such a resignation would not entail forfeiture of qualifying service and would be a mere technical resignation.

32. It is also not in dispute that on absorption of applicant. ONGC had already paid leave salary and pension contribution of applicant.

33. As per the requirements of Rule 37. which entitles applicant for pro rata pension is that he should have been permitted to be absorbed which is fulfilled in the present case.

34. In so far as public interest is concerned. as the earlier requirement of public interest has been done away by an OM issued in 1977 and was applied to those who were absorbed between 1962 to 1972 in view of the decision in Thiruvengadam's case on the basis of which OM of 1995 has been issued by the Government, there cannot be a distinction between the class and the Government cannot

create a class within the class without any reasonable classification and would certainly come within the purview of the unreasonable classification. This amounts to hostile discrimination, which cannot be countenanced if one has regard to the observations in D.S. Nakara's case (supra).

35. I am of the considered view that on the same analogy as has been applied to the OM of 1967 in so far as its applicability to the pre-absorbee in PSU prior to the cut off date same applies in the case of OM of 1972 as well as 1977 and as applicant was absorbed in 1962 having done away with the requirement of public interest the same would apply to the absorbees even prior to 1968 and on the ground of non-declaration of public interest applicant cannot be denied pro-rata benefits for which he is otherwise eligible on fulfilment of all the remaining conditions. Moreover, if a beneficial legislation has been made by the Government it cannot discriminate or create a class to deprive the government servant particularly those who are retirees in the matter of their retiral benefits. A technical plea cannot be an impediment for grant of benefits. Any cut off date which is no reasonable nexus with the object sought to be achieved certainly offends Article 14 of the Constitution of India.

36. As the decision in V.R. Chadha's case (supra) is per incuriam having regard to the OM dated 1977 where the requirement of public interest has been dispensed with taking resort to Welfare Association's case (supra) as well as decision in Thiruvengadam's case (supra) I have no hesitation to hold that the impugned order passed by the

respondents denying applicant pro-rata benefits is without application of mind to the Government of India's instructions issued in 1972 and 1977 and denial of pro rata benefits is in apparent violation of the Rules.

37. In the result, for the foregoing reasons, OA is allowed. Impugned order is quashed and set aside. Respondents are directed to accord to applicant pro rata benefits. However, he would be entitled to the same w.e.f. 1.8.1976 in so far as benefits are concerned. The aforesaid directions shall be complied with, within a period of three months from the date of receipt of a copy of this order. No costs.

S. Raju

(Shanker Raju)
Member (J)

'San.'