IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

PRINCIPAL BENCH : NEW DELHI

OA No.1514/2002 Date of decision: 29.7.2003

Sh. S.N. Juyal ... Applicant

(By Advocates: Sh. M.L.Ohri)

versus

Union of India & Others ... Respondents

(By Advocates: Sh. R.P.Aggarwal)

CORAM:

Hon'ble Sh. V.K.Majotra, Member(A)
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? Yes

S. Raju

(Shanker Raju)
Member(J)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.1514/2002

New Delhi this the 29th day of July, 2003.

HON'BLE MR. V.K. MAJOTRA, MEMBER (ADMNV)
HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

Shri S.N. Juyal,
CIV (P) Branch,
HQ BEG and Centre,
Roorkee/247667 -Applicant

(By Advocate Shri M.L. Ohri)

-Versus-

1. Union of India through
Secretary,
Ministry of Defence,
South Block, New Delhi.

2. The Secretary,
Ministry of Personnel, Public
Grievances and Pensions,
Department of Personnel &
Training, North Block,
New Delhi.

3. Engineer-in-Chief,
Army Head Quarters,
DHQ PO New Delhi.

4. Commandant,
BEG and Centre -Respondents
Roorkee 247667

(By Advocate Shri R.P. Aggarwal)

O R D E R

By Mr. Shanker Raju, Member (J):

Applicant impugns DOPT OM dated 19.11.1997 as well as order dated 24.3.99 passed by the respondents, whereby revised pension of Rs.1680/- has been deducted from the revised pay of applicant. Quashment of the above has been sought with direction to respondents to refund the pension and further not to deduct from his pay w.e.f. 1.1.1996.

2. Applicant retired as a Clerk from the Army on 31.12.1985 and was accorded monthly pension of Rs.552/- w.e.f. 1.1.86. He was re-employed as LDC on a civil post

on 16.10.86 and his pay was fixed at Rs.1400/- p.m., out of which a sum of Rs.537/- was deducted as being the un-ignorable portion of pension. DOPT vide OM dated 11.4.87 decided to deduct the enhanced pay from the re-employed pensioner w.e.f. 1.1.1986.

3. The aforesaid OM was challenged before the Apex Court. By the following observations in Union of India v. G. Vasudevan Pillay, 1995 (4) RSJ 320 OM was declared unconstitutional holding the earlier decision of not taking note of pension while fixing pay of ex-servicemen on re-employment based on good reasons:

> "15. Despite the aforesaid decision being of no aid in the present cases, we find no logic and basis for classifying the re-employment persons on the basis of their being on employment on 01.01.1986. Indeed, no justification has been canvassed before us. The decision which held the field before the impugned Memorandum is not taking note of pension while fixing pay of the ex-servicemen on re-employment, which was based on good reasons, had no good reason for its reversal, as enhanced pension was not confined to those who were in employment on 01.01.1986. The impugned decision is, therefore, arbitrary and is hit by Articles 14 and 16 of the Constitution. We, therefore, declare the same as void."

4. On implementation of the above decision DOPT vide OM dated 14.10.97 decided not to deduct from pay enhanced pension while fixing the pay of ex-servicemen. After recommendation of the 5th Central Pay Commission and on implementation the Government issued OM dated 9.11.97, inter alia, providing that an amount equivalent to revised pension (excluding ignorable portion of pension wherever permissible) effective from 1.1.1996 and thereafter shall be deducted from the pay of a government servant on fixation of pay of re-employed pensioner. Applicant's pay was fixed at Rs.4590/- and an amount of Rs.1680/- was

deducted as revised pension. Against this applicant preferred a representation, which was forwarded by the Lt. Col. Administrative Officer to the Engineer-in-Chief, Army Headquarters.

5. By an order dated 17.2.2000 request of applicant was rejected on the basis of clarification circulated by the Ministry of Defence on 24.3.1999, giving rise the present OA.

6. Learned counsel for applicant, Sh. M.L. Ohri contends that earlier the Apex Court upheld the decision of the Government of not taking note of pension while fixing pay of ex-servicemen on re-employment and found it to be based on good reasons. Finding no good reasons for its reversal OM of 11.9.97 has been declared unconstitutional. In this backdrop it is stated that the only difference is that on the same principle and reasons which have been declared irrelevant the Government now in the wake of recommendations of the 5th CPC re-iterated their earlier decision deducting enhanced pension from the pay of re-employed ex-servicemen which is against the ratio laid down by the Apex Court and binding on Central Government.

7. Any instruction over and above the decision of the Apex Court to make its implementation otiose being contrary is liable to be struck down. It is in this backdrop stated that an administrative instruction cannot infiltrate on to an arena covered by the judicial pronouncements. The learned counsel contends that DOPT OM is arbitrary, discriminatory and violative of Articles 14

and 16 of the Constitution of India. As applicant has retained option under Rule 19 (A) of the CCS (Pension) Rules, 1972 to retain the military pension the action of the respondents is double edged as, firstly his qualifying service rendered in Army has not been counted and secondly the benefit of pension which is revised has been deducted from his revised pay. According to Sh. Ohri as these instructions supplant Rule 19 of the Rules ibid and is contrary to it the same cannot stand scrutiny of law. It is contended by Sh. Ohri that though applicant has not opted the provisions of OM dated 7.11.97 but has opted for fixation of pay but that would not amount to an option for deduction of enhanced pension. According to him, the aforesaid OM does not provide that the pay of re-employed pensioner will be fixed at the minimum of the pay scale without giving the benefit of past service. Alleging discrimination vis-a-vis military pensioners getting absorbed in Public Sector Undertakings it is contended that no such deduction on revised pension is made effective therein.

8. It is lastly contended that pension is a deferred wage to re-employed military pensioners.

9. On the other hand, Sh. R.P. Aggarwal, learned counsel appearing for respondents contested the OA and vehemently opposed the contentions. According to him, as a policy decision OM dated 7.11.97 was issued by the Government according to which initial pay of re-employed government servants who retired with a pension or any other retirement benefits and whose pay was fixed on re-employment with reference to these benefits or ignoring

a part thereof, and who elects or is deemed to have elected to be governed by the revised scales from 1.1.1996 shall be fixed in accordance with the provisions contained in Rule 7 of the CCS (Revised) Pay, Rules, 1997. As per the above rules pay of applicant was fixed at Rs.4590/- and a sum of Rs.1680/- is deducted from his pay. According to him, pay of applicant has not been fixed as first entrant on issue of these orders, as such he is not entitled to the relief claimed.

10. Shri Aggarwal states that the decision of the Apex Court was on the issue of applicability of OM issued in September, 1987 as two persons who were in re-employment on 1.1.1986 and in this backdrop as there was no reasonable classification OM was set aside but as Om dated 19.11.87 is based on the recommendations of the 5th CPC accepted by the Government OM dated 14.10.87 is not applicable.

11. We have carefully considered the rival contentions of the parties and perused the material on record.

12. A policy decision of the Government has no immunity from judicial review if the policy decision is mala fide, arbitrary, discriminatory, violative of Articles 14 and 16 of the Constitution of India and is contrary to the public interest the same can be interfered with as held by the Apex Court in Ujar Sugar Workers Ltd. v. Delhi Admn. & Others, (2001) 3 SCC 635, Bangalore Medical Trust

v. Muddappa & Others, (1991) 4 SCC 54 and State of U.P. v. University College Pensioners Association, (1994) 2 SCC 729.

13. While dealing with the vires of OM dated 11.9.87 which laid down deduction of revised pension from fixation of pay for a re-enrolled ex-serviceman having regard to the earlier OM taking note of pension while fixing pay of the ex-servicemen on re-employment, which was based on good reasons, and as no good reasons have come-forth for reversal, OM was declared unconstitutional. Accordingly, by an OM dated 14.10.97 the implementation was carried out by the Government.

14. In so far as OM of 19.11.977 issued by the Government is concerned, the only difference which has been is it pertains to recommendations of 5th CPC to be effective from 1.1.96 and the reasons have remained unaltered as contained in OM dated 11.9.87. Once the Apex Court has found to include the enhanced pension on account of Army service to an ex-serviceman in absence of any reasons come-forth to justify such an action the OM cannot be sustained in law. A policy decision of the Government which has the effect of infiltrating on an arena covered by judicial orders like in the present case decision of the Apex Court (supra) the same cannot stand scrutiny of law, as held by the Apex Court in Anil Ratan Sarkar v. State of West Bengal, (2001) 5 SCC 327. Moreover, there cannot be a discrimination between those for whom compliance has been done by the respondents through OM dated 14.10.97 those who were beneficiaries in new employment on 1.1.1986, as applicant is similarly circumstance a re-employed pensioner

an ex-serviceman he cannot be meted out differential treatment without any reasonable basis. A decision of the Government has to pass the test of reasonableness laid down under Article 14 of the Constitution of India. Not only the reasonableness is to be established but a nexus with the object sought to be achieved should also been demonstrated. As no reasonable criteria has come-forth and established in absence of any justification the decision of the Apex Court holds good against the memorandum issued on 19.11.97.

15. The aforesaid memorandum is against the public policy and is against public interest as well. While fixing the pay of a re-employed it takes into account pension received by him as the same is not a bounty and is in the nature of deferred wage. This is also fortified on the ground that the qualifying service of such re-employment rendered in Army cannot be counted as a qualifying service. The same is in the nature of deferred wage. The aforesaid amount is not even remotely connected or any reasonable nexus with the amount of pay, re-enrolled person is expected to get in a civil post. Though pension on a qualifying service and fixation of pay are two different aspects, but having regard to Rule 19 of the Pension Rules, ibid on an open re-employment to render Army Service counted towards qualifying service or to continue to draw military pension in the former military pension a re-enrolled government servant earned to draw his pension and has to refund it whereas in the latter case his pay is to fix accordingly. Whatever has been drawn earlier as a pension is on the basis of rendering service, whereas on re-enrollment and on exercise of option to not to have

their earlier service counted fixation of pay and increments accorded by virtue of rendering service on re-enrollment same cannot be reduced by deducting the enhanced pension which a government servant is legally entitled and owed on account of his earlier service. Any administrative instruction which has no reasonable nexus and rational is contrary to Rule 19 and being an administrative instruction it cannot supplant the rules.

16. High Court of Delhi in Lt. Col. B.R. Malhotra v. Union of India & Others, 71 (1998) DLT 498 in a case where a Army man on absorption to Public Sector Undertaking, the following observations have been made:

> "5. Taking the first point raised by the petitioner regarding non-payment of disability pension, I find the defence raised by the respondent without substance. Pension is not a bounty nor an award. It is a deferred wage. Simply because the petitioner got absorbed in a Public Sector Undertaking and that too in public interest his deferred wage i.e., the pension earned by him could not be denied. The Supreme Court in the case of **Smt. Bhagwanti v. Union of India** reported in AIR 1989 Supreme Court 2088, held that pension is paid on the consideration of past service rendered by a Government servant. The pension is linked with past service and the avowed purpose of the Pension Rule is to provide sustenance in old age. Therefore, simply because petitioner was allowed to get absorbed in BEL after getting retired from the Army his deferred wage for which he became entitled could not be deprived to him."

17. If one has regard to the above, there cannot be discrimination vis-a-vis employees absorbed in Public Sector Undertakings and those civilians who on enrollment retired from government service. A hostile discrimination without any reasonableness is an anti thesis to the fair play and equity as well.

18. In so far as decision of the coordinate Bench in Brij Mohan v. Union of India, OA-3234/2001 decided on 27.5.2003 where the deduction has been found justified is concerned, though sticking to the doctrine of precedent and without disagreeing with the same and as the decision of the coordinate Bench is per incuriam of the decision of the Apex Court in Pillay's case (supra) relying upon the decision of the Apex Court as binding under Article 141 of the Constitution of India the same is to be ignored.

19. In so far as limitation is concerned, in the light of the decision of the Apex Court in M.R. Gupta v. Union of India, 1999 SCC (L&S) 1273 the fixation of pay and deduction thereof is a recurring cause of action effecting to the disadvantage of the salary of applicant every month being a continuing wrong OA is within limitation as envisaged under Section 21 of the Administrative Tribunals Act, 1985.

20. In the result, for the foregoing reasons, we do not find any justification and reasonableness in OM dated 19.11.97 in so far as it operates to deduct the enhanced pension from pay and declare it as ultra vires. Accordingly the OA is allowed. Impugned order dated 24.3.1999 is quashed and set aside. Respondents are directed not to deduct from the pay of applicant enhanced pension w.e.f. 1.1.96 and whatever has been deducted so far shall be refunded to applicant with arrears 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)

V.K. Majotra
(V.K. Majotra)
Member(A)

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