
CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.533/99

New Delhi this the 23rd day of February, 2001.

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

Amar N. Sharma,
S/o Sh. Govind Ram,
598 Sweet Shade,
Frederick,
MD 21703 USA.

...Applicant

(By Advocate Dr. D.C. Vohra)

-Versus-

1. Union of India through
the Foreign Secretary,
Ministry of External Affairs,
South Block,
New Delhi.
2. Embassy of India through
the Head of Chancery,
EI Washington,
C/o Ministry of External Affairs,
South Block,
New Delhi.

...Respondents

(By Advocate Shri N.S. Mehta)

O R D E R

By Mr. Shanker Raju, Member (J):

The applicant challenges an order dated 27.5.98 issued by the respondents, whereby the President in consultation with the UPSC imposed the penalty of withholding of entire pension and gratuity of the applicant on permanent basis, under Rule 9 (1) of the CCS (Pension) Rules, 1972 (hereinafter referred to as Pension Rules). The applicant prayed for a direction to the respondents to deem him as retired on 12.7.84 on the expiry of three months notice period under Rule 48 of the Pension Rules ibid and also sought entitlement for pensionary benefits since 12.7.84 along with an interest of 18%. The applicant was serving as a member of the Indian Foreign Service 'B' and during his tenure he had asked for extension of tenure

for a period of one year on account of completion of his children education but the same was denied to him. On 31.12.83, the applicant was relieved of his duties. Finding no positive response from respondent No.1 for extension of his tenure the applicant opted for voluntary retirement vide correspondence dated 21.3.84 and 12.4.84. In the meantime, the respondents without issuing ordinary passport revoked their official passports, it was informed to the applicant by the respondents on 13.2.85 that for the purpose of seeking voluntary retirement the applicant had to come to the Headquarter. According to the applicant he sought retirement under Rule 48-A of the Pensions Rules on expiry of three months notice on 12.7.84. Subsequently the applicant had been proceeded against in a disciplinary proceeding dated 19.12.88 for his misconduct of unauthorised absence and behaviour of unbecoming of a Government servant. Vide his report the enquiry officer held the applicant guilty of the charge on the basis of his admission but recommended for a lenient view. The applicant ultimately superannuated on 31.3.93 and thereafter the payment of provisional pension had not been paid to him. On 27.5.98 the President withheld the entire pension and gratuity of the applicant on permanent basis. The review petition made by the applicant remained unresponded. The applicant alternatively pleaded that as he had completed a qualifying service of 30 years, after expiry of three months given to the respondents on 12.4.84, he stood retired on 12.7.84 in the absence of any refusal by the Government or any withholding of permission to retire. In this conspectus, he further stated that as the disciplinary proceedings have been drawn against the applicant after his retirement without seeking the sanction

of the President would be illegal under Rule 9 (2) (b) of the Pension Rules. It is on drawing attention of the applicant to the records of the proceedings to his own admission that he had only completed a qualifying service of 29 years on 12.7.84 the applicant contended that his case is covered under Rule 48-A of Pension Rules as the appointing authority did not refuse permission of retirement before the expiry of the period of notice it had become effective from 12.7.84 and in that event initiation of disciplinary proceedings without prior sanction of the President renders it void, ab initio and unsustainable in law.

2. The respondents' counsel Shri N.S. Mehta, responding to the contention of the applicant contended that Rule 48 and Rule 48-A are not applicable to the applicant and relying upon the Ministry of External Affairs Notification dated 24.12.83 contended that when a member of service posted abroad or after having been transferred to India had not assumed charge of the post in India and fails to render a minimum of one year's service in India the Pension Rules 48 and 48-A would not apply in his case. It is further contended that proviso to Rule 48 shall not apply to a Government servant posted in foreign based office in the Ministries/Departments unless after having been transferred to India he has resumed the charge of the post and served in India for not less than one year. Likewise, respondents' counsel also relied upon 48-A to contend that unless these conditions are fulfilled this rule would not apply in the case of the applicant. The respondents' counsel further relied upon a memorandum dated 2.5.84 where the respondents had informed the applicant

with reference to his representation for voluntary retirement dated 12.4.84 to have applied from Headquarter and to return to India, failing which disciplinary proceedings may be initiated against the applicant. The learned counsel of the applicant contended that the notification dated 24.12.83 is neither admissible nor applicable as the Pension Rules cannot be modified or altered by the Ministry of External Affairs and it is only the nodal Ministry DOPT who have to accordingly modify the rules. It is further contended that the Pension Rules incorporating the provisions of resuming the charge and serving for one year at Headquarter before resorting to a right of voluntary retirement is in fact brought by an amendment dated 1.7.85 and would not apply retrospectively to the applicant. It was further stated that the notification dated 24.12.83 was published only in July 1985 and the proviso to Pension Rules been added by the said notification. The learned counsel of the respondents took exception to this contention and further contended that the notification dated 24.12.83 was published immediately and as a condition of service framed under Article 309 of the Constitution the same applies to the applicant. It is further contended that under this amendment of the rules a member of the service seeking voluntary retirement under FR 56-k shall be to give at least three months' notice in writing and Rules 48 and 48-A would not apply to his case unless the pre-conditions are discharged, i.e., resuming the charge at Headquarter and rendering a minimum period of one year.

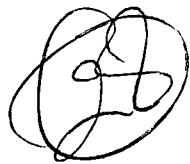
3. We have carefully gone through the rival contentions of the parties on this legal issue. In our view Rules 48 and 48-A of the Pension Rules ibid would not apply in the case of the applicant and rather the amended rules dated 24.12.83 are applicable to the case of the applicant. As the applicant despite communication of memo dated 2.5.84 had failed to discharge the pre-requisites, i.e., his return to India and further rendering one year's service before tendering a notice for voluntary retirement, the notice for voluntary retirement tendered by the applicant to the respondents on 12.4.84 would not have entailed automatic deemed retirement of the applicant after expiry of three months notice period on 12.7.84. We agree with the contention of the respondents that the notification dated 24.12.83 is legal and as the applicant had failed to fulfil the conditions laid down in para 3 of the notification he was not eligible for seeking voluntary retirement on 12.7.84. The request of the applicant had been rejected on review by the respondents on 13.2.85 correctly. As the notice for voluntary retirement of the applicant tendered to the respondents was not legal the applicant cannot be treated as retired on 19.12.88 when it has been proposed to hold a disciplinary proceedings against him. As such Rule 9 (2)(b) of the Pension Rules would have no application in the case of the applicant. In our view disciplinary proceedings had been rightly initiated against the applicant.

4. As regards the grievance of the applicant that though after conclusion of the enquiry the enquiry officer held him guilty of the article of charge framed against him but yet, in the finding of the enquiry officer

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there is no reference as to his being found guilty of either grave misconduct or negligence. The allegations against the applicant were regarding his unauthorised absence as well as failure to comply with the order of transfer. The enquiry officer vide his report dated 12.5.93 while referring to the fact that the applicant, though admitted the charge yet he had given certain explanation drawing out mitigating circumstances which had led to the alleged misconduct. In this conspectus the enquiry officer proved the charge and recommended for a lenient view. The impugned order whereby the President in consultation with the UPSC imposed the penalty of withholding of the entire pension and gratuity of the applicant on permanent basis had also not recorded any finding of either grave misconduct or negligence against the applicant. Rather the admission of the applicant to the charges is relied upon to impose the punishment. In this background the learned counsel of the applicant by referring to Rule 9 (1) of Pension Rules contended that the pension and gratuity may be withheld permanently or for a specified period, if in departmental proceedings the pensioner is found guilty of either grave misconduct or negligence during the period of service. It is contended that as neither the enquiry officer nor the President had recorded in the finding of grave misconduct or negligence against the applicant the punishment imposed is not legally sustainable. The applicant's counsel Sh. D.C. Vohra relied on the ratio of the Hon'ble Supreme Court in D.V. Kapoor v. Union of India, 1990 (14) ATC 906 where the allegations against the petitioner were of his unauthorised absence while being posted in the foreign service. There also the President had not recorded any finding of grave



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misconduct or grave negligence against the applicant and withheld the pensionary benefits of the petitioner therein. The Apex Court had come to the conclusion that the same cannot be done as a measure of punishment without recording finding of grave misconduct as per Rule 9 of the Pension Rules. The applicant further placed reliance on the ratio of OA-1421/95 decided on 4.10.96, J.K. Anand v. Union of India to contend that, that was also a case of unauthorised absence and in the absence of any finding of grave misconduct or negligence the punishment was held unsustainable. Though the applicant's counsel referred to a number of cases but in OA-1010/88 decided on 19.4.94, Narendra Kishore Roy v. Union of India & Others, the Tribunal in absence of a clear finding of the President regarding grave misconduct withheld the pension and gratuity on permanent basis, remanded back the matter to the President to consider afresh the circumstances of the case with a view to award an appropriate penalty of withholding of pension commensurate with the offence committed. The respondents' counsel contended that the unauthorised absence of the applicant and his refusal to transfer amounts to grave misconduct though not specified in the orders passed by the President and also claims that the judgements cited by the applicant are not applicable in the facts and circumstances of the case.

5. We have given careful thought to this contention of the applicant and perused the material on record. Rule 9 (1) though empowers the President to impose a penalty of permanent withholding of pension or gratuity on a retired Government employee but only when if it is found and highlighted in the order that the pensioner is

found guilty of either grave misconduct or negligence during the period of service. The ratio laid down by the Apex Court in D.V. Kapoor's case (supra) also holds that in absence of any finding regarding grave misconduct and as a condition precedent the order passed by the President is not legally sustainable. This consistent view taken by the Apex Court has been followed by the Tribunal in a number of case, to our mind, is the correct interpretation of Rule 9 (1) of the Pension Rules. As in the instant case neither the enquiry officer recorded the fact of grave misconduct nor the President while imposing a penalty upon the applicant has not acted in accordance with Rule 9 (1) of the Pension Rules ibid, we are in respectful agreement with the orders passed by the corrodinate Bench of this Tribunal in OA-1421/95 as well as OA-1010/88 by the Calcutta Bench.

6. We find that the Apex Court in D.V. Kapoor's case (supra) observed as follows:

"8. It is seen that the President has reserved to himself the right to withhold pension in whole or in part thereof whether permanently or for a specified period or he can recover from pension o the whole or part of any pecuniary loss caused by the government employee to the government subject to the minimum. The condition precedent is that in any departmental enquiry or the judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service of the original or on re-employment. The condition precedent thereto is that there should be a finding that the delinquent is guilty of grave misconduct or negligence in the discharge of public duty in office, as defined in Rule 8 (5), Explanation (b) which is an inclusive definition, i.e., the scope is wide of the mark dependent on the facts and circumstances in a given case. Myriad situations may arise depending on the ingenuity with which misconduct or irregularity is committed. It is not necessary to further probe into the scope and meaning of the words 'grave misconduct or

negligence' and under what circumstances the findings in this regard are held proved. It is suffice that charges inn this case are that the appellant was guilty of wilful misconduct in not reporting to duty after his transfer from Indian High Commission at London to the office of External Affairs Ministry, Government of India, New Delhi. The Inquiry Officer found that though the appellant derelicted his duty to report to duty, it was not wilful for the reasons that he could not move due to his wife's illness and he recommended to sympathetically consider the case of the appellant and the President accepted this finding, but decided to withhold gratuity and payment of pension in consultation with the Union Public Service Commision.

9. As seen the exercise of the power by the President is hedged with a condition precedent that a finding should be recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty while in office, subject of the charge. In the absence of such a finding the President is without authority of law to impose penalty of withholding pension as a measure of punishment either in whole or in part permanently or for a specified period, or to order recovery of the pecuniary loss in whole or in part from the pension of the employee, subject to minimum of Rs.60."

7. Applying the above ratio, we find that neither in the departmental proceedings the applicant is found to have been guilty of grave misconduct or negligence during the period of his service. The enquiry officer though found him guilty of the charge but by referring to the explanation tendered by the applicant recommended a sympathetic consideration of the case though the President accepted the findings but decided to withhold the entire gratuity and pension on permanent basis in consultation with the UPSC. In our view, in absence of any such finding, the President is without any authority of law to impose the penalty upon the applicant. As there is no finding that the applicant has committed grave misconduct

the exercise of power is illegal and in excess of the jurisdiction, as the condition precedent of grave misconduct and negligence was not proved.

8. Having regard to the above discussion, we are of the considered view that the impugned order passed by the President at Annexure A-1 is not legally sustainable and the same is quashed and set aside. The respondents are directed to release to the applicant his withheld pension and gratuity along with interest of 12% p.a. within a period of three months from the date of receipt of a copy of this order.

9. With these directions the OA is allowed, but without any order as to costs.

S. Raju

(Shanker Raju)
Member (J)

'San.'

V.K. Majotra

(V.K. Majotra)
Member (A)