CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

O.A. No. 2063 of 1989

New Delhi this the 28th day of November, 1994

Mr. Justice S.K. Dhaon, Vice-Chairman
Mr. B.K. Singh, Member

Shri Hardit Singh Ahuja
R/o 8225 BELL LANE
VIENNA VA 22180,
U.S.A. ...Applicant

By Advocate Shri D.C. Vohra

Versus

1. Union of India
through the Foreign Secretary,
Government of India,
Ministry of External Affairs,
South Block,
New Delhi.

2. Embassy of India,
Washington D.C.,
Through the Head of Chancery,
C/o Ministry of External Affairs,
South Block,
New Delhi. ...Respondents

By Sr. Advocate Shri N.S. Mehta

ORDER (ORAL)

Mr. Justice S.K. Dhaon, Vice-Chairman

The order dated 10.12.1984 purported to have been passed by the President in exercise of powers vested with him under Rule 29-A of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (the Rules), is being impugned in the present application.

The applicant, in departmental proceedings, was awarded a punishment of dismissal from service by the President. He preferred a Review Application. In those proceedings, the President modified the order of dismissal into an order of compulsory retirement. However, he imposed a condition that one-third of the monthly pension admissible to the applicant would

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be withheld permanently.

On 27.08.1979, the applicant while posted in the Indian Embassy at Washington, addressed an application to the Additional Secretary (Adm.), Ministry of External Affairs, South Block, New Delhi, whereby he purported to seek voluntary retirement after giving three months' notice with effect from 27.08.1979. On 17.10.79, a Memorandum was issued by the Deputy Secretary (Personnel) stating therein that the President had turned down the request of the applicant seeking voluntary retirement. It is also stated therein that formal departmental proceedings under Rule 14 of the Rules were contemplated against the applicant. It is also stated therein that the said proceedings could lead to imposition, upon the applicant, the penalty of dismissal or removal from service.

A counter-affidavit has been filed on behalf of the respondents. The contents of this affidavit have been verified by Shri K.P. Ernest, Director (Vigilance) in the office of the Ministry of External Affairs. Therein, the material averments are these. The memo dated 17.10.1979 aforementioned was sent to the applicant by Registered A/D at his address 5100, 8th Road, South Apartment No.312, Arlington VA on 01.11.1979 but returned undelivered with the US Postal Authorities remark "unclaimed". Later, the letter was sent to him at his new address 945, South Buchanan ST, Apartment No.82, Arlington, VA 22204, USA on 11.12.1979, the new address was furnished by the applicant in his letter dated 27.11.1979. This averment is

corroborated by a document dated 11.12.1979 which is a true copy of the Memorandum issued by Shri Gulzari Ial, Attache (Administration). In this Memorandum, it is recited that the enclosed Memorandum dated 17.10.1979 was sent to the applicant at his last known address at 5100, 8th Road, S #312 Arlington, Virginia on 01.11.1979 which was received back unclaimed. On 27.11.1979, the applicant addressed a communication to the Additional Secretary (Administration) inquiring therein the fate of his letter whereby he had sought voluntary retirement. In this letter, he has mentioned his address as 945, South Buchanan St. Apartment No.82, Arlington, VA 22202, U.S.A.

Rule 48-A of the Central Civil Services, Pension Rules (Pension Rules) enables a Government servant who had completed 20 years of qualifying service to seek voluntary retirement by giving a notice of not less than 3 months to the appointing authority to retire from service. Sub-rule (2) of Rule 48-A posits:

> "The notice of voluntary retirement shall require acceptance by the appointing authority".

It will be seen that the language employed by the rule making authority is rather strong and mandatory in character. It, therefore, follows that acceptance of the offer of voluntary retirement is a must. However, in the proviso to the said sub-rule, the rigour is relaxed and a penalty is imposed on the appointing authority for being lethargic or inactive. It is provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in

the notice, the retirement shall become effective from the date of expiry of the said period. It is thus evident that a deemed acceptance is contemplated after the expiry of the period specified in the notice seeking voluntary retirement.

Having regard to the facts and circumstances of this case, it is not necessary for us to consider the question as to whether a decision declining to accept the offer of voluntary retirement is enough to close the chapter. We assume for the purpose of this case that the issue of the communication by the appointing authority declining to accept the offer of retirement is necessary. We have already shown that there is sufficient material on record to indicate that on 01.11.1979, a communication was sent by the official in the Embassy at Washington to the applicant informing him of the decision taken on 17.10.1979. We see no reason to disbelieve the version of the respondents that the communication returned undelivered on account of the change of the address of the applicant. We have seen that the respondents acted rather promptly in sending another communication to the applicant on 17.11.1979 soon after they acquired knowledge of his new address.

The Government of India has laid down certain guidelines for the acceptance of a notice of voluntary retirement. They are contained in O.M. dated 26.08.1977, which materially provides

that such an acceptance may be generally given in all cases except those (a) in which disciplinary proceedings are pending or contemplated against the Government servant concerned for the imposition of a major penalty and the disciplinary authority, having regard to the circumstances of the case, is of the view that the imposition of the penalty of removal or dismissal from service would be warranted in the case, or (b) in which prosecution is contemplated or may have been launched in a court of law against the Government servant concerned.

We have already referred to the contents of the Memorandum dated 17.10.1979. A bare reading of the same will immediately show that it fully conforms to the exception (a). We have read and re-read the guidelines and in them, we do not find even a whisper that disciplinary proceedings should either be pending or under contemplation or a prosecution should have been launched or contemplated on the date on which the Government servant gives a notice seeking voluntary retirement. It is crystal clear from the language used by the authority issuing the instructions that either exception (a) or (b) may exist on the date on which the appointing authority is applying its mind on the request of a Government servant seeking voluntary retirement. To put it differently, the aforesaid exceptions may exist whenever the appointing authority is declining to accept the request of voluntary retirement.

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Reliance is placed by the applicant upon a judgement in OA No.2310/90 given by a two-Member Bench of this Tribunal(Hon'ble Sh.P.K.Kartha,Vice-Chairman(J) & Hon'ble Shri B.N.Dhoundiyal,Member(A)) on 23.10.1992. It is urged that the said judgement operates as a binding precedent for the proposition that a request by a Government servant for being given a voluntary retirement can be refused only if on the date of making of such a request, disciplinary proceedings were either contemplated against him or were pending. The facts of the said case, as material, were these.The requests dated 30.3.1979 and 2.5.1979 made by the Government servant concerned seeking a voluntary retirement were received by the authority concerned on 9.5.1979. The Ministry concerned vide its Memorandum dated 12.6.1979 refused to accept the request seeking voluntary retirement. Disciplinary proceedings under Rule 14 of the Rules were initiated against him on 14.6.1979. On 31.3.1984, an order was passed dismissing him from service. The order of dismissal was impugned in the said OA. The learned members observed:

> ".....There is nothing on record that the disciplinary proceedings were contemplated or pending against the applicant on 30.03.1979 or 2.5.1979. Disciplinary proceedings were initiated against the applicant on 14.6.1979,i.e., two days after the Ministry of External Affairs issued their Memorandum stating that they refused voluntary retirement to the applicant on the ground that formal departmental proceedings are contemplated against him...."

They further observed:

> "....In the facts and circumstances of the case, the action taken by the respondents was neither fair nor just."

For reasons stated hereafter, we are of the opinion that the judgement cannot be used as a precedent. First, although there is a reference to the Office Memorandum dated 26.8.1977, there is no discussion in the judgement whatsoever of the contents of the said OM. No reference whatsoever has been made to any rule or Office Memorandum from which the learned members drew the conclusion aforequoted. Secondly, the learned members themselves took care to confine the observations made by them to the facts and circumstances of the case which was before them. By necessary implication, the learned members conveyed the idea that any observation made by them in their judgement should not be used as a precedent. Thirdly, a proposition of law laid down in a judgement operates as a precedent. A conclusion on facts does not and cannot take the place of a precedent.

The Pension Rules are statutory in character. The contents of sub-rule(2) of Rule 48-A do not, in any manner, limit or circumscribe the discretion of the appointing authority to accept or not to accept a notice of voluntary retirement. It is a welll-settled law that departmental instructions supplement and do not supplant a statutory rule. The departmental instructions can merely fill up the gaps. The instructions as contained in the Office Memorandum dated 26.8.1977, as already shown, do not talk at all of the facts that in order to entitle the appointing authority to decline to accept a request of voluntary retirement, disciplinary proceedings against the Government servant concerned should be either contemplated or pending on the

date on which he made such a request. On the contrary, the contents of the Office Memorandum categorically stated that exceptions (a) or (b) may exist on the date of the consideration of the request for voluntary retirement. With respect, the learned members did not focus their attention at all to the provisions of sub-rule(2) of Rule 48-A and also to the legal position that by judicial interpretation they cannot introduce new ideas in the Office Memorandum dated 26.8.1977 particularly when the contents thereof were free from any imbiguity. Assuming that the learned members intended to lay down the law that in order to entitle the appointing authority to refuse a request for voluntary retirement, disciplinary proceedings should either be contemplated or pending against the Government servant concerned on the date on which he makes a request for voluntary retirement, the view taken by them is per incuriam.

We find force in the submission made by the learned counsel that the President has no jurisdiction to impose the condition that 1/3rd of the pension admissible to the applicant should be withheld permanently. Rule 11 of the Rules catalogues the major penalties which can be imposed upon a Government servant. Compulsory retirement is one of them. However, forfeiture of pension on permanent basis does not find any place in Rule 11. This is so for an obvious reason. The attack on pension is contemplated only in CCS (Pension) Rules. The power of punishment given under the Rules and under the Pension Rules operate in two different fields. The Pension Rules are applicable to a situation where disciplinary proceedings have been

initiated against a Government servant while in service and he retires during the pendency of those proceedings. Further, disciplinary proceedings are also contemplated against those who have already retired from service. In the present case, the applicant had neither retired during the pendency of the disciplinary proceedings nor did he retired thereafter.

The question is whether the order of the President converting the punishment of dismissal into a punishment of compulsory retirement with the condition that 1/3rd pension of the applicant shall stant forfeited on a permanent basis is severable. If it is not, the order must go as a whole and the President should be asked to pass a fresh order.

Having considered the matter with care, we have no hesitation in taking the view that the order is severable. We are saying so because the President, as already indicated, has no jurisdiction to withhold the pension. To repeat ourselves, his power to punish is confined to Rule 11. We, therefore, direct that the punishment of compulsory retirement imposed by the President on the applicant shall remain intact but the punishment of forfeiture of 1/3rd of his pension on a permanent basis shall not be enforced against him (the applicant).

Learned counsel has next urged that the respondents should be restrained from recovering a sum of Rs.7357/- from the applicant. This is the amount which was actually paid by the respondents to the applicant to send back his children from abroad under the Scheme of Children Holiday Passage.

We have before us a communication dated 27.04.1989 of the Administrative Officer (Pesion) indicating therein that the request of the applicant regarding non-recovery of Rs.7357/- is under consideration. Shri Mehta, the learned Senior counsel appearing for the respondents has very fairly stated that the applicant is being denied the aforesaid amount as he had not carried out the order of transfer. Be that as it may, the fact that the applicant was entitled to send back his children from Washington to India under the aforesaid Scheme and the fact that the said amount (Rs.7357/-) was spent by him for their passage from USA to India, is enough to enable us to direct the respondents not to recover the said amount from the applicant. Shri Mehta, has contended that the applicant has not claimed this relief in the O.A. We have gone through the contents of the relief clause and we find that no specific relief has been prayed for to that end. However, there is the usual prayer that the Tribunal may pass any other or further order as it deems fit and proper in the facts and circumstances of the case.

We find that the applicant prayed for an interim relief and under that head, he had sought an injunction restraining the respondents from recovering a sum of Rs.7357/- from him. While exercising powers under Article 226 of the Constitution, we have sufficient power to mould the relief to be granted. We feel that the relief should not be denied to the applicant

on a technical ground. We accordingly restrain the respondents from releasing a sum of Rs.7357/- from the applicant.

With these directions, this O.A. is disposed of finally but without any order as to costs.

(B.K. SINGH)
MEMBER (A)

(S.K. DHAON)
VICE CHAIRMAN

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