

16

**Central Administrative Tribunal
Principal Bench, New Delhi**

O.A.No.2616/2004

Thursday, this the 15th day of September 2005

Hon'ble Shri Mukesh Kumar Gupta, Member (J)

Shri BP Kaushik
B-7/27-28, Ground Floor
Sector-11, Rohini
Delhi-85

..Applicant

(By Advocate: Shri O.P. Gehlaut)

Versus

1. The Lt. Governor of
NCT of Delhi
Lt. Governor's House
Raj Niwas Marg
Delhi
2. Principal Secretary, Department
of Health & Family Welfare
Govt. of NCT of Delhi
Delhi Govt. Secretariat
Inder Prastha Estate
New Delhi-2
3. Executive Officer
A&U, Tibbia College & Allied Units
Govt. of NCT of Delhi
Karol Bagh, New Delhi-5

..Respondents

(By Advocate: Shri Vijay Pandita)

O R D E R (ORAL)

By the present OA, the applicant seeks grant of pension and pensionary benefits such as commutation of pension, gratuity, leave encashment, provident fund, Group insurance, etc. along with 18% interest from the date the same became due to the date of actual payment, along with costs. The applicant also challenges the validity of order dated 30.8.2004 (Annexure A-1) denying him such benefits stating that as he did not opt for pension scheme, therefore, he was not entitled to any other benefits.

2. The facts, which are required to be noticed, are that the applicant was appointed as Vaid in Ayurvedic Rasayanshala of A&U Tibbia College vide appointment

17

letter dated 29.7.1975. He joined the said post on 30.7.1975 and had been confirmed on the said post w.e.f. 30.7.1978 vide order dated 9.7.1990. Pursuant to the orders passed by the Department of Health and Family Welfare, Govt. of NCT of Delhi, the pay scale of Rs.2000-3500/- was revised to Rs.2200-4000/- w.e.f. 1.1.1986 vide orders issued in July 2000 and applicant's pay was refixed in the said scale. He attained the age of superannuation on 31.8.1997 as per order dated 26.3.1997. He was, however, reemployed on the said post from 1.9.1997 till 28.2.1998.

3. The Board of A&U Tibbia College in exercise of the powers vested in it under clause (c) of Section 16 of the Tibbia College Act, 1952 (for short "1952 Act") and with the prior approval of the Lt. Governor of NCT of Delhi issued notification dated 21.7.1997, published in Part-IV of Delhi Gazette, inserted Regulation No.15-D in the Regulations earlier notified on 19.9.1961. The said Regulation 15-D provided for a General Provident Fund-cum-pension-cum-gratuity scheme. The Board approved the implementation of the said scheme and issued a circular to all the employees calling for options in Form I attached to the said Regulation vide circular dated 23.10.1997. Subsequently, the applicant opted for the said scheme and submitted the option duly filled in on 3.11.1997. The said scheme was made applicable w.e.f. 26.2.1997 vide notification dated 25.11.1997 (Annexure A-11). Sub-regulations 17, 18, 19 and 20 of newly inserted Regulation 15-D provide for payment of pension, commutation of pension, death-cum-retirement gratuity, respectively while the leave encashment is governed under sub-regulation 39, and provident fund under sub-regulations 6 to 16. In furtherance to implementation of the pension scheme, the respondents required the Assistant Commissioner, Employees Provident Fund vide their letter dated 9.6.2000 to transfer employee's share of provident fund with accrued interest to PAO-XIV, Govt. of NCT of Delhi to consider and decide applicant's claim for pension. A reminder to this effect was also issued on 19.2.2004. The contention raised is that despite such facts, pension and pensionary benefits have

not been released for no justification and such an action of the respondents is illegal, arbitrary, unconstitutional and untenable in law.

4. The respondents contested the claim and stated that the OA is barred by limitation and that he has not come to this Tribunal with clean hands. During his service, the applicant was allotted quarter No. B-2/10 A&U Tibbia College, which he ought to have vacated immediately after the retirement. In spite of repeated requests and reminders, he did not vacate the said accommodation until 30.11.2002 and, therefore, a sum of Rs.2,90,154/- was outstanding against him on account of damages, etc. Another sum of Rs.19418/- was found due against him on various accounts while he was Incharge of Rasayanshala at the time of retirement. As per 1952 Act, the applicant is liable to pay interest on the amount due against him. The respondents stated that the applicant did not opt for the scheme, neither he became the member thereof, nor was he declared/appointed as a Government servant. The post of Vaid in the pay scale of Rs.8000-13500/- is a group 'A' post, which involves concurrence of UPSC. The scheme of 1997 was introduced during the transitory phase of taking of the A&U Tibbia College under the Delhi Tibbia College (Takeover Act), 1997 (for short "1997 Act") w.e.f. 1.5.1998. However, it was not denied that before taking over the college in 1998, the regulations notified in 1961 under clause (C) of Section 16 of 1952 Act were applicable and the staff had been made eligible for the aforesaid benefit under this clause. It was further stated that the respondents are responsible only for the legal dues and the applicant being not legally entitled for the pensionary benefits under the scheme of 1997, is not entitled to any relief.

5. The respondents have emphasized that the applicant had never opted for the said scheme of 1997 and, therefore, he was not eligible for the benefit under the said scheme. The recovery of Rs.19418/- was ordered because of audit objection raised by the Examiner Local Fund Accounts (ELFA) during the period when the applicant was Incharge of Rasayanshala. There was no

question of approaching other judicial forum for the recovery of Govt. dues, contended the respondents. 19

6. The applicant denied the contentions and pleas raised by the respondents by filing a detailed rejoinder, while reiterating submissions made in the OA.

7. I have heard the learned counsel for the parties and carefully perused the documents placed on record.

8. The short issue, which needs consideration in the present OA, is whether the applicant is entitled to the benefits under the scheme notified vide notification dated 21.7.1997 inserting Regulation 15-D, which came into force w.e.f. 26.2.1997, i.e., the date when the Lt. Governor, Govt. of NCT approved the said scheme or not. As noticed hereinabove, respondents' basic objection is that the applicant had never opted for the scheme, which has been seriously disputed by the applicant.

9. Before, I proceed further, it would be relevant to notice that the provisions of Regulation 15-D inserted vide notification dated 21.7.1997, relevant extracts of which read as under:-

"15-D GENERAL PROVIDENT FUND-CUM-PENSION-CUM-GRATUITY SCHEME.

(1) Application:

The provisions contained in this regulation shall apply to the employees of the Board specified as under:-

(i) Temporary employees after continuous service of one year shall subscribe in the General Provident Fund compulsorily;

(ii) Re-employed pensioners and permanent employees shall subscribe to the General Provident Fund compulsorily if they opt for the General Provident Fund-cum-Pension-cum-Gratuity Scheme (hereinafter referred to as "the Scheme"). Such option shall be given in Form I set-forth in Appendix VIII."

(emphasis supplied)

10. Sub-regulations 6 to 16 of the aforesaid Regulation deal with the opening of account of the subscriber and provide conditions and rates of subscription etc. Sub-regulation 7 deals with pension on superannuation, invalid and compensation pension and the said sub-regulation also states that the said benefits shall be admissible "at par with the corresponding provisions applicable to the employees of the University of Delhi". Sub-regulations 18, 19 and 20 deal with the calculation of pension, commutation of pension and DCRG. Similarly, sub-regulation 39 of the aforesaid Regulation 15-D provides for encashment of leave subject to a maximum of 240 days on retirement after attaining the age of superannuation, etc.

11. Under Section 3 of 1997 Act, which came into effect from 1.5.1998, it was provided that: "On and from the appointed day, the management of the College shall stand transferred to, and shall vest absolutely in, the Government". Section 4 of the said Act deals with the General effect of vesting. Sub-section (3) of Section 4, provides that: "Every liability of the Board in respect of any period prior to the appointed day shall be the liability of and shall be enforceable against the Government".

12. The emphasis was laid by the respondents on Section 7 of the said Act dealing with provisions relating to the employees of the college, which reads as under:-

"7. Where the services of a person, who has been immediately before the appointed day employed in the College, are in the opinion of the Government necessary having regard to the requirement of the College, he shall become, from the date of his appointment by the Government, an employee of the Government and shall hold office or service in the Government with the same rights and privileges as to pension, gratuity and other matters as would have been admissible to him if the rights in relation to such College had not been transferred to and vested in the Government and continue to do so unless and until his employment in the College is duly terminated or until his remuneration and terms and conditions of employment are duly altered by the Government:

Provided that such employees shall, in themselves, constitute a separate class and group of employees of the Government and shall not be equated to or merged with the other employees of the Government." (emphasis supplied)

13. Shri O.P. Gehlaut, learned counsel appearing for the applicant strenuously urged that once the Regulation 15-D, inserted vide notification dated 21.7.1997, which provided for General Provident Fund-cum-Pension-cum-Gratuity Scheme, came into effect on 26.2.1997 and applicant's having opted for the said scheme, the respondents were duty bound to release the benefits under the said scheme, inasmuch as he had submitted the option as per Appendix VIII Form I under the said Regulation 15-D (1) (ii) on 3.11.1997 vide diary no.2558 of the said date. It was further contended that the applicant was a permanent employee of the Delhi Tibbia College, as he was confirmed vide order dated 9.7.1990 w.e.f. 30.7.1978 and, therefore, fulfilled this condition prescribed under the said Regulation. The respondents had, as noticed hereinabove, seriously disputed the submission of the said option and denied that the applicant had ever submitted such an option.

Perusal of photo-copy of the option form so submitted by the applicant, copy of which was placed on record being Annexure AR-1 along with rejoinder, indeed, goes to show that the applicant had exercised such an option on 3.11.1997 vide diary no.2558 of the said date, which was also having a stamp of the said College. Not only this, the perusal of the pleadings also goes to show that on exercising such an option, the respondents required the Employee's Provident Organization to transfer the provident fund standing in the name of the applicant, in favour of PAO-XIV, Govt. of NCT Delhi vide communication dated 9.6.2000. So the basic dispute as to whether the applicant exercised such an option or not, in fact, stands conclusively proved that such an option had indeed been exercised by the applicant and the office stamp evidencing such submission was placed on record. The respondents have not disputed the said factum by filing either any additional affidavit or producing any other record.

14. Shri Vijay Pandita, learned counsel for the respondents urged that under Section 7 of the 1997 Act, the applicant shall first become the Government employee before he could claim rights and privileges as to pension, gratuity and other matters, and since the applicant was holding the group 'A' post, the concurrence of UPSC was necessary and such concurrence having not been obtained from the UPSC, the applicant could not be deemed to be a Govt. servant or Govt. officer and consequently was not entitled to any such benefit.

15. Shri Pandita, learned counsel strenuously urged that the word "from the date the appointment by the Government" appearing under the aforesaid Section 7 has to be read as if "from the date the fresh appointment by the Government". It is contended that unless he becomes an employee of the Government and also "fresh appointment", the applicant would not be entitled to any rights and privileges as to pension, gratuity and other benefits. This contention was seriously disputed by the applicant, who contended that the mandate of the said section being absolutely clear, the Court cannot read something more into the same. The word "his appointment by the Government" cannot be construed as if his "fresh appointment by the Government". It was further contended that in any case on the day when the said Act came into force, i.e. on 1.5.1998, the applicant had already attained the age of superannuation and stood retired, and as such there was no necessity to either seek a concurrence from the UPSC or a declaration that he had been appointed fresh by the Government to the post in question.

16. Learned counsel for respondents also placed a strong reliance on the proviso to the said Section 7 and contended that the services of persons, who had been immediately before the appointed date employed in the said college and in the opinion of the Government were necessary, were further required to be appointed by the Government as employee of the Government and were to be

treated as separate class and group of employees and further they were not required to be equated to or merged with the other employees of the Government.

17. On bestowing my careful consideration to all these aspects, I am of the considered view that proviso to Section 7 indeed carves out an exception and states that services of a person, who was the employees before the appointed date employed in a college, are to be treated as a separate class and group of employees and shall not be equated to or merged with the other employees of Government. The word "from the date of his appointment by the Government" cannot be read as suggested by the respondents. The language of the said part of the statute being clear and unambiguous, requires no addition and insertion of any word by the Court. In this view of the matter, I am unable to agree with the contentions raised by the respondents.

18. Shri Pandita, learned counsel for respondents also forcefully urged that the applicant was paid gratuity of a sum of Rs.1 lakh in view of the amended Regulation 15-A (4) amended vide notification dated 14.6.1995 (Annexure R-1). Prior to the said amendment, the gratuity payable was "equal to half a month's pay for each completed year of service subject to a maximum of 15 months' pay", which after the aforesaid amendment reads as: "*Gratuity payable shall be equal to half a month's pay for each completed year of service subject to a maximum of 16 $\frac{1}{2}$ months' pay or a sum of Rs.1 lakh, whichever is less*". It was further urged that the applicant was entitled to a sum of Rs.1,39,862/- on account of leave encashment. Since the applicant had been unauthorized occupant of the Govt. accommodation in question, he was liable to pay a sum of Rs.3,09,972/-, which he failed to deposit despite notice dated 25.2.2004 followed by reminder dated 14.8.2004. Further a sum of Rs.19,418/- was outstanding against the applicant on account of unsettled dues pertaining to Hindustani Dawakhana. It was further stated that for grant of pensionary benefits, such as pension, commutation of pension and family pension, one must be

declared a Government servant as per CCS (Pension) Rules, 1972 and since the applicant, who was of group 'A' category officer, had not been formally appointed in the Government for want of applicable rules having concurrence of the UPSC, he was not entitled to such benefits. It was further urged that under 1952 Act, the pension scheme was notified for the staff of A&U Tibbia College in 1997 and as per the said scheme, the staff was entitled for pension as per UGS norms. The UGC confirmed that the employees of the University/colleges under it are getting pensionary benefits as per CCS (Pension) Rules. There was no difficulty in releasing the pensionary benefits to the staff retired (who opted for this scheme) after the notification of this pension scheme, but before taking over of the college by the Government, the applicant had not opted for the scheme and hence he was allowed gratuity as per amended Regulation 15 A (4), and the retirement benefits to the staff retired after the takeover of the college are not released by the PAO on the ground that the staff had not been formally appointed in the Govt. and, therefore, such pensionary benefits under CCS (Pension) Rules cannot be released. It was further argued that since there was no formal order from the Government to make Govt. Rules and Regulations applicable to the staff of A&U Tibbia College, hence, legally there was no set of rules under which the services of the staff of Tibbia College could be regulated. Simply transferring of employer share of EPF to Govt. of NCT, Delhi cannot entitle the applicant for the triple benefit under the 1997 scheme.

19. Learned counsel for applicant, on the other hand, forcefully urged that the aforesaid contentions and the pleas have been made without any basis and substance. Notice dated 25.2.2004 had not been served upon the applicant. It was further contended that since no proper proceedings, as required under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 had been initiated and the due procedure prescribed therein being not followed, the applicant cannot be made liable to pay the damages, etc. For this purpose, my attention was



drawn to the notice dated 25.2.2004 (Annexure R-2), which did not contain the complete address of the applicant. On the other hand, it only stated that "Shri B.P. Kaushik, Ex. R.M.O., Tibbia College". It was further urged that the procedure prescribed under the said Act has not been followed before concluding that the applicant was unauthorized occupant of the said Government accommodation. It was further stated that the applicant since was reemployed for six months, i.e., upto 28.2.1998, he was not liable to make payment of damages. I may note at this stage that the respondents have not been able to produce any record or document to justify that before imposing the allege damage rent, etc., the procedure prescribed under the aforesaid Act had been initiated and followed and the applicant was provided due opportunity of hearing, as provided therein. As such, I am of the considered view that the respondents cannot be allowed to take advantage of their own wrong and non-conforming to the provisions of the said Act. It goes without saying that the necessary amount on account of such over-staying can be recovered by the respondents but that could be done only after the proper proceedings are taken this aspect. It is not disputed by the respondents that the applicant became entitled to certain benefits under the scheme of 1997 inserted on 21.7.1997 and made operative w.e.f. 26.2.1997, when the applicant was in service. Merely because the said College had been taken over immediately thereafter, the respondents cannot be allowed to argue that the benefits accrued under the said scheme, since had not been operated, the applicant would not be entitled to any such benefit. I may also note that the recovery of dues for unauthorized retention of official accommodation from gratuity is permissible, particularly when the same is recovered in terms of such statutory rules/regulations for which appropriate proceedings had been drawn as laid down by the Hon'ble Supreme Court in (2005) 5 SCC 245 **Secretary, ONGC Limited and another v. V.U. Warrier**, wherein it has been held that for unauthorized retention of official accommodation by the employee after his retirement, penal interest could be recovered from the gratuity, etc. in terms of statutory

rules/regulations. The employer can deduct such amount from gratuity payable to the employee only when he has been informed that penal rent would be recovered for not vacating the quarter within time. In the present case as already specifically held that there had been no proper notice issued to the applicant on this aspect and the procedure prescribed under the P.P. Act, 1971 had not been followed by the respondents, the question of recovery of damages did not arise.

20. As far as respondents' plea about the absence of formal order of the appointment is concerned, I have already dealt with this issue hereinabove and hold that there was no requirement of law or rules to appoint a person as a Government servant, particularly when he had already attained the age of superannuation prior to the said takeover, i.e., 1.5.1998. As far as respondents' contention that there was no formal order from the Government to make Govt. Rules and Regulations applicable to the staff of A&U Tibbia College is concerned, I may note that under the regulations inserted vide notification dated 21.7.1997, the staff of A&U Tibbia College were made entitled to pension and pensionary benefits based on corresponding provisions applicable to the employees of the University of Delhi. It is not disputed by the respondents that the corresponding provisions applicable to the employees of University of Delhi are CCS (Pension) Rules, 1972. Once such are the facts, I am unable to accede and agree to the contentions raised by the respondents that in the absence of specific formal order issued by the Government to make the rules applicable to the staff of A&U Tibbia College, the applicant was not entitled to pension and pensionary benefits. I am of the considered view that the amendment carried in the Regulations and newly inserted Regulation 15-D vide notification dated 21.7.1997 applicable w.e.f. 26.2.1997 created a vested right in the applicant for the benefit of General Provident Fund-cum-Pension-cum-Gratuity scheme, particularly when he had opted for such a scheme, which aspect I have already dealt with hereinabove.

21. In view of the discussions made hereinabove, I hold that:

(i) The applicant is entitled to the benefit under amended Regulation 15-D as he was a permanent employee of the A&U Tibbia College and had submitted his option in terms of Regulation 15-D (1) (ii) on 3.11.1997;

(ii) There was no requirement of rules/law or necessity that the applicant's appointment should be concurred by the UPSC and he be declared "as employee of the Government", in terms of Section 7 of 1997 Act, as before the said Act could come into force, the applicant had already attained the age of superannuation;

(iii) Merely because there was no specific/formal order issued by the Government to make Government Rules and Regulations applicable to the staff of A&U Tibbia College, the officials, like the applicant, cannot be denied the benefit of pension and pensionary scheme, which accrued to them; and

(iv) As the respondents have failed to prove that the damages were imposed upon the applicant for unauthorized occupation of the accommodation in question and due procedure as prescribed under the Public Premises (Eviction of Unauthorized Occupant) Act, 1971 had been followed, the respondents cannot be allowed to adjust/withhold the applicant's retrial benefits. However, it is made clear that such an amount could be recovered by the respondents after following due procedure of law and as per the mandate of the said

Act after following the same scrupulously.

Accordingly, I hold that the applicant would be entitled to pension and pensionary benefits in terms of Regulation 15-D and direct the respondents to release all such terminal benefits, including pension, gratuity, commutation, etc, within a period of three months from the date of receipt of a copy of this order.

22. The OA is accordingly allowed. No costs.



(Mukesh Kumar Gupta)
Member (J)

/sunil/