

**IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI**

199

O.A.NO. 2133/92.

DATE OF DECISION 12.8.1993

<u>SHRI R.C. MANCHANDA,</u>	<u>Petitioner</u>
<u>SHRI SURYA KANT,</u>	<u>Advocate for the Petitioner(s)</u>
<u>Versus</u>	
<u>UNION OF INDIA & OTHERS</u>	<u>Respondent</u>
<u>SHRI P.P. KHURANA,</u>	<u>Advocate for the Respondent(s)</u>

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The Hon'ble Mr. B.S. HEGDE, MEMBER (JUDICIAL)

The Hon'ble Mr.

1. Whether Reporters of local papers may be allowed to see the Judgement ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of the Judgement ?
4. Whether it needs to be circulated to other Benches of the Tribunal ?

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[Delivered by Hon'ble Shri B.S. Hegde, Member (Judicial)]

The applicant has filed this application under Section 19 of the Administrative Tribunals Act, 1985 praying for the following reliefs :-

- BSH*
- (1) To quash the orders dated 29.8.1991 and 27.2.1992 issued by the Director of Pension.
 - (2) To direct the respondents to fix the pension of the applicant on the basis of his salary as he was drawing from the

borrowing department as well as throughout the leave period in the scale of Rs. 5100-150-5700.

(3) To pay the arrears of difference of pension amount with interest.

2. The applicant joined Central Government Service on 11.7.1952 and after having worked in various capacities in the Central Public Works Department, he was promoted as Senior Architect in the scale of Rs. 1500-2000 with effect from 23.10.1972 and was drawing a basic salary of Rs. 2,000/- . The said post was assigned a new scale of Rs. 3700-5000 on the recommendation of the Fourth Pay Commission with effect from 1.1.1986. The applicant was appointed as Chief Architect, Design Cell, Ministry of Urban Development with effect from 23.10.1984 on deputation from his parent department in the pay scale of Rs. 5100-5700 on the basis of the Fourth Pay Commission recommendations and his basic pay was fixed at Rs. 5250/- with effect from 1.1.1986. After serving for nearly five years on deputation he was reverted on 31.5.1989 to his parent department i.e. Central Public Works Department vide order dated 8th May, 1989.

3. The applicant instead of joining his parent department on reversion made an application for grant of earned leave for four months with effect from 1.6.1989. However, he was granted only 58 days earned leave vide order dated 9.6.89.

4. The Learned Counsel for the applicant submits that on account of his ill-health, the applicant remained on medical leave w.e.f. 17.7.89 to 11.2.90 which was duly sanctioned by the competent authorities i.e. Ministry of Urban Development and the D.G.U., CPWD. Further on his request, the applicant remained on earned leave together with commuted leave on Medical grounds upto 31.8.1990. He further submitted that during the entire period of leave, the applicant was sanctioned leave salary at the rate of Rs. 5700/- p.m. as admissible under the rules on the basis of last pay drawn before proceeding on leave. The applicant retired from service on superannuation on 31.8.90.

5. The main contention of the applicant is that he could not join his parent department on reversion on account of his ill-health and he reached the superannuation while on leave. Though he was drawing a pay of Rs. 5700/- p.m. while on leave, his retired benefits

have been completed on the basis of Rs. 5,000/- his basic salary in utter disregard of the express provisions contained in the rules. Accordingly, he challenged the orders of the respondents vide letter dated 29.8.1991 as well as 27.2.1992 respectively rejecting his contention to refix his pension on the basis of Rs. 5700/-.

6. The respondents, in their reply, have stated that the officer retired on 31.8.1990, the average emoluments for pension purposes have been worked out on the basis of substantive pay over the period of last 10 months i.e. 1.11.89 to 31.8.90. Since the officer was on leave during this period for which leave salary was payable, the average emoluments were calculated with reference to pay which he would have drawn but for being on leave vide note 2 below Rule 33 of the CCS (Pension) Rules, 1972. Accordingly, the applicant's pension has been calculated on the basis of average emoluments by taking into account his pay as Senior Architect. The petitioner's grievance is that his pension may be fixed by taking into account the emoluments of his pay which he was drawing while working on deputation. His request was not agreed to by the Department of Pension. Further, they contend

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that the benefits of emoluments drawn in higher post can be given only if it is certified that the Government servant would have continued to hold the higher appointment but for his proceeding on leave. As such, the request of the applicant to take into account the emoluments of his pay while he was on deputation could not be agreed to.

7. In the light of the above averment, the question to be seen here is whether rule 33 or 34 of the CCS Pension Rules would be applicable to the facts of this case. Content of rules 33 and 34 are reproduced below :-

*** 33. EMOLUMENTS**

The expression "emoluments" means pay as defined in Rule 9(21) of the Fundamental Rules (including dearness pay, as determined by the order of the Government issued from time to time) which a Government servant was receiving immediately before his retirement or on the date of his death.

NOTE 1- If a Government servant immediately before his retirement or death while in service had been absent from duty on leave for which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn had he not been absent from duty or suspended shall be the emoluments for the purposes of this rule:

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Provided that any increase in pay (other than the increment referred to in Note (4) which is not actually drawn shall not form part of his emoluments.

NOTE 2- Where a Government servant immediately before his retirement or death while in service had proceeded on leave for which leave salary is payable after having held a higher appointment whether in an officiating or temporary capacity, the benefit of emoluments drawn in such higher appointment shall be given only if it is certified that the Government servant would have continued to hold the higher appointment but for his proceeding on leave.

NOTE 3- If a Government servant immediately before his retirement or death while in service had been absent from duty on extraordinary leave or had been under suspension, the period whereof does not count as service, the emoluments which he drew immediately before proceeding on such leave or being placed under suspension shall be the emoluments for the purposes of this rule".

"34. Average emoluments

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Average emoluments shall be determined with reference to the emoluments drawn by a Government servant during the last (ten months) of his service.

NOTE-1 - If during the last (ten months) of his service a Government servant had been absent from duty on leave for which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn had he not been absent from duty or suspended shall be taken into account for determining the average emoluments".

8. In this connection the applicant in his representation dated 25.7.1991 has brought to the notice of the respondents that in view of O.M. dated 30.12.1983 which prescribes the manner as to what should be the average emoluments for the leave period prior to retirement without return to parent Department while on reversion from deputation. It provides that "in such cases, the emoluments for the leave period for the purpose of calculating retirement benefit should be taken as what they would have been, had he not been absent from duty from the post he was holding under the borrowing department before he proceeded on such leave." Although the said O.M. covers the cases of those deputationists, who while under orders for reversion to their parent department (where the pay of the post might be different) gives notice to seek voluntary retirement, it is felt that the same treatment has to be extended to those retiring on superannuation on similar grounds, in keeping with the spirit of the orders. The G.I., M.F. O.M.No. 13(1)-E V/71, dt. 12.2.71 clearly indicates as to what should be the emoluments

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for retirement benefits in case of deputation from Centre to State. It provides that pay drawn by a deputationists during such period should be counted in full for pension.

9. The contention of the applicant is that rule 33(2) would not be applicable in this case. The question of getting a certificate from the competent authority from his borrowing department does not arise as he had been reverted as on 31.5.1989 on account of the abolition of the said establishments and he could not join his parent department on account of his ill-health and had to remain on leave which was a co-incident. It is an admitted fact that he had been drawing the higher pay while he was on leave and there is no dispute that he was drawing Rs. 5700/- ten months before his retirement. He further contends that rule 33(2) is not relevant in this case before it is intended to be applied only in those cases where Government servants are promoted temporarily against leave vacancies or those who would get promotion for short duration within their own department. It cannot be applied to the situation where the officers work on deputation on higher scale for a good number of years etc. In an

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identical provision exists in respect of All India Services below Rule 2(1)(a)(aa) Death-cum-Retirement Benefit Rules, 1958 where the term average emolument emoluments' means the average of the emoluments drawn by a member of the service during the last ten months of his service while a certificate has not been insisted upon while deciding the case of retirement of a member of All India Services in similar circumstances.

I have heard the arguments of both the counsel and perused the pleadings and records. The question to be seen here is that in the facts and circumstances of the case whether the rules 33(2) or 34 of CCS Pension Rules would be applicable to the facts of this case. In the light of the above averment, I am convinced that the case under review prima facie does not come within the purview of rule 33(2). In that event of the matter it should fall under rule 34. It is an admitted fact that he had drawn the scale of Rs. 5700 while on leave from the borrowing department till his retirement. Rule 34 clearly stipulates that if during the last 10 months

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months of his service the Government servant is absent from duty on leave for which leave salary is payable, the emoluments that he would have drawn had he not been absent from duty shall be taken into account for determining the average emoluments etc. Rule 34(4) of Swamy's Pension Compilation of CCS Pension Rules reads as follows :-

" Computation of average emoluments for the period of leave prior to retirement without return to parent department while on reversion from deputation. - The procedure for determining the emoluments and average emoluments for purpose of pension under the Central Civil Services (Pension) Rules, 1972, has been laid down under Rules 33 and 34. The position in respect of Government servants who is on deputation to the Armed Forces or foreign service or on deputation from one Department to another in this regard has also been clarified vide Notes 6 and 7 below Rule 33 ibid. There is, however, no provision as to what should be the pay for computing the average emoluments in respect of deputationist from one Department to another, who while under orders for reversion to parent Department instead of joining duty under parent Department (where the pay of the post might be different) gives notice to retire voluntarily and also applies for leave co-terminus with the period of notice. It has been decided

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that such cases, the emoluments for the leave period for the purpose of calculation of retirement benefits should be taken as what they would have been, had he not been absent from duty from the post he was holding under the borrowing Department before he proceeded on such leave."

11. In the light of the above, I am satisfied that the matter under review would squarely fall under rule 34 and it is the decision of the Government that such cases will have to be dealt with under rule 34 and not under rule 33(2) as contended by the respondents in the instant case. The question of seeking voluntary retirement does not arise. The leave applied for has been sanctioned by the competent authorities, both earned leave, medical leave and commutation leave and it is the undisputed fact that he had been drawing the pay-scale of Rs. 5700 which he was drawing the same from the borrowing department till his retirement. In that event of the matter, there cannot be any doubt that his case squarely fall under rule 34 of the CCS Pension Rules.

12. In the conspectus of the case, I hereby quash the orders dated 29.8.1991 as well as 27.2.1992 issued by the Director of Pension and direct the respondents, especially respondent No. 3, to refix the pension of

of the applicant keeping in view of the salary drawn by him while on leave before retirement i.e. Rs. 5700/-. Difference of pension, if any, may be paid to him as early as possible preferably within a period of three months of the receipt of this order. The O.A. is allowed with no order as to costs.

B.S. Hegde 12/8/93
(B.S. HEGDE)
MEMBER (JUDICIAL)