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**IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
NEW DELHI**

O.A. No. 2807/92  
T.A. No.

199

DATE OF DECISION 20.5.1993

Shri Komal Charan	Petitioner
Shri G.K. Aggarwal,	Advocate for the Petitioner(s)
<b>Versus</b>	
Union of India	Respondent
Shri M.L. Verma,	Advocate for the Respondent(s)

**CORAM**

The Hon'ble Mr. N.V. KRISHNAN, Vice-Chairman (A)  
The Hon'ble Mr. C.J. Roy, Member (J)

1. Whether Reporters of local papers may be allowed to see the Judgement? *yes*
2. To be referred to the Reporter or not? *yes.*

*C.J. Roy*  
(C.J. Roy)  
Member(J)

*N.V. Krishnan*  
(N.V. Krishnan)  
Vice-Chairman (A)

(7)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
PRINCIPAL BENCH: NEW DELHI

O.A.No.2807/92

Date of decision:20.5.1993

Shri Komal Charan

∴ Applicant

versus

Union of India & Others

∴ Respondents

CORAM

Hon'ble Mr. N.V.Krishnan, Vice-Chairman(A)

Hon'ble Mr. C.J.Roy, Member(J)

For the applicant .. Mr. G.K.Aggarwal, Counsel

For the respondents .. Mr. M.L. Verma, Counsel

1. Whether Reporters of local papers may be allowed to see the Judgement?

2. To be referred to the Reporter or not?

JUDGEMENT

. {(Delivered by Mr. C.J.Roy, Member(J))}

This is an application filed by the applicant, who was superannuated on 31.7.1990 at the age of 55 years. He claims that he was and is entitled to be in service as Lt. Col. in National Cadet Corps (NCC) till 31.7.1993 till the last day of the month in which he would attain the age of 58 years. Hence he has filed this application claiming relief for a direction that he is entitled to be in service in NCC till 31.7.93 with full back wages and arrears with interest and all attendant, subsequential, consequential benefits, including retiral benefits and that all orders to the contrary be set aside.

2. The facts of the case are that the applicant has served in Indian Army as Emergency Commission Officer before he was granted NCC Wholetime Commission on 14.10.67. He submits that he has joined as ECO right from 27.9.63.

3. The respondents have not filed the counter affidavit.

4. The applicant has also filed a copy of the judgement dated 12.4.1991 of the Principal Bench (An.A/1) disposing of those original applications, one of which was filed by the applicant himself, claiming the same relief. Therein, it was held as follows:

(i) the option exercised by the applicants and those who are similarly situated at the time of their reemployment pursuant to the Min. of Defence letter dated 4.9.78 is ab initio void and inoperative as it runs counter to the provisions of FR 56(a) which was then in existence and which stipulated that every Govt. servant shall retire from service at the age of 58 years. Administrative instruction of the nature contained in the letter of the Min. of Defence dated 4.8.78 or similar administrative instructions issued on earlier dates will not override the provisions of FR 56(a).

(ii) The applicants and those similarly situated would be entitled to the benefit of FR 56(a) notwithstanding the option given by them and that they shall retire from service only after they have attained the age of 58 years;

(iii) we, therefore, set aside and quash the impugned order dated 23.5.80 issued by the respondent the effect of which was that the applicants will have to retire at the age of 55 years; and

(iv) the respondents shall issue the necessary orders for giving effect to the aforesaid directions within a period of one month from the date of receipt of this order.

5. Against the above judgement, the respondents have filed an SLP in the Hon'ble Supreme Court by way of Civil Appeals No.2449-50 of 1992 (arising out of SLP(C) Nos.11385-86 of 1991), dated 14.5.92 in which the hon'ble Supreme Court set aside the impugned judgement of the Tribunal (AIR 1992 SC 1479 UOI Vs. Komal Charan). Nevertheless, this OA is filed claiming relief on the strength of Regulation 459 of the Civil Service Regulations, which was not considered by the Supreme Court.

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6. We have heard the learned counsel for the applicant Shri G.K. Aggarwal and the learned counsel for the respondents Shri M.L. Verma. It is argued by the applicant that the Hon'ble Supreme Court has not considered the relevant rules while delivering the judgement and relied only on para 5 of the Tribunal's judgement and that the Tribunal can rehear the case on the ambit of CSR-459 and decide this case in favour of the applicant. For this proposition, he relies on the judgement of the Supreme Court in Smt. Saiyada Mossarrat Vs. Hindustan Steel Ltd. & Others (1989) 1 SCC 272 and particularly on the following observation:

"The legislative competence of the Parliament to enact the Act had not been debated at all before the court in Hari Singh case as is evident from the circumstance that there was no discussion whatsoever as to under which entry of which list the subject matter of the Act would fall. Therefore, it would not be proper to shut out the petitioner from raising the plea by recourse to the argument that the point was concluded in that case"

7. As will be <sup>shown</sup> ~~stated~~ presently, we feel that this judgement is not useful to the applicant in the facts and circumstances of this case because the observations of the Hon'ble Supreme Court are clear in paras 6, 7 and 8 of the judgement in the SLP filed by the Union of India in the applicant's case.

8. While setting aside the Tribunal's order against the same party, the Hon'ble Supreme Court held that:

".....In the instant case, the NCC officers exercised their option under Govt. order and were accordingly granted whole-time NCC Commission. Relevant order clearly lays down age of superannuation at fifty five years with a further provision of extension to the age of fifty seven

years. Thus they cannot now repudiate the same and claim any additional benefit which they are not entitled to under any rule of law" (para 6)

"In view of our conclusion above we do not feel it necessary to refer to the other provisions of the NCC Act relied upon by Mr. Mukhoty, and we do not consider it either necessary or relevant to examine the question whether the Army Act applies to the respondents or not. In support of these appeals Mr. Additional Solicitor General has not placed any reliance on the Army Act and his contention has been that the provisions of the NCC Act, 1948, the rules framed thereunder and the letter dated 23.5.80 in pursuance of which the respondents were granted permanent commission, settled the question. The Corps has been established under Section 3 of the NCC Act, Section 9 of the Act authorises the Central Govt. to provide for the appointment of officer from amongst the members of the staff and university or school or otherwise. Section 13 of the Act authorises the Central Govt. to make rules to carry out the objects of the Act and without prejudice to the generality of this power to lay down the manner in which and the conditions subject to which a person or class of persons may be enrolled under the Act. Accordingly the Rules described as National Cadet Corps Rules, 1948 were framed. Proviso (iii) in Rule 16 vests the authority concerned with very wide power in this regard. Except for FR 56(a) relied upon in the impugned judgement, it has not been suggested on behalf of the respondents that they are entitled to continue in service upto the age of 58 years on the strength of any other provision. The Central Govt. has, therefore, full authority to appoint persons on such terms and conditions as it may choose to prescribe. The question of grant of permanent commission to NCC officers employed on wholetime basis was considered in all the relevant aspects and a decision was taken as mentioned in the aforementioned letter dated 23.5.80 and referred to in the letter of 24.5.80 sent under the signature of the Under Secretary to the Govt. of India to the DG, NCC, New Delhi. It was considered desirable that before a person was granted NCC permanent commission in terms of the above letter an opportunity should be given to him to consider the terms and conditions of the appointment and then indicate his choice by exercising his option in the form prescribed in Appendix B to the letter. The relevant order in clear terms lays down the age of superannuation at 55 years with a further provision of extension to the age of 57 years. The respondents exercised their option and were accordingly granted wholetime NCC commission. They cannot now repudiate the same and claim any additional benefit which they are not entitled to under any rule or law" (para 7)

".....It is true that there are no statutory rules at all dealing with the age of superannuation of the respondents but for that reason the age which is fixed for the civil servants governed by the FRs

can not be brought in. In the absence of a rule to the contrary, the Central Government is fully authorised to fix the age which it has done and which was accepted voluntarily by the respondents. They must now retire when they reach the age of fifty five years". (para 8)

9. The learned counsel for the applicant argues that while rendering the above judgement, the hon'ble Supreme Court has not considered provisions of CSR-459 which reads as under and therefore he is entitled to argue the same before us again.

(a) except as otherwise provided in this Article, every govt. servant shall retire on the day he attains the age of fifty eight years and a military officer serving in a civil department shall cease to be in civil employ on the date he attains the age of 58 years.

It is in this context that he relies on Saiyada Mossarrat case supra.

10. The facts of that case have been neatly summarised in para 1 of the Supreme Court's judgement, which is reproduced below:

A Seven Judge Constitution Bench decision in Hari Singh Case upholding the constitutionality of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (Act) notwithstanding, the petitioner has renewed the challenge by way of this petition under Article 32 of the Constitution of India. Of course, the epicentre of the present challenge has shifted and is now located in the plea that Parliament does not have the legislative competence to legislate on the subject of the impugned legislation/was not in focus in Hari Singh case.

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The judgement in Hari Singh's case is reported in Hari Singh Vs. Military Estate Officer (1972) 2 SCC 239. The reason why the Supreme Court, nevertheless, decided to consider this question can also be reproduced in its own words.

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4. The learned Solicitor General has raised a preliminary objection on the threshold. It is contended that the Constitution Bench in Hari Singh case has already pronounced that the legislature had the legislative competence to enact the impugned Act. Reliance in this context is placed on the following passage from the majority judgement of Ray, J: (SCC p.249, paras 21 and 22).

"Therefore, a validating law is upheld first by finding out whether the legislature possesses competence over the subject matter, and, secondly, whether by validation the legislature has removed the defect which the courts had found in the previous law.

"The legislature had legislative competence to enact the 1971 Act. It means that it could legislate on the subject of providing a speedy procedure for eviction of persons in authorised occupation of public premises."

5. Now a perusal of the judgement reveals that the debate centered on the issue as to whether Section 15 of the Act provided only one procedure for ejection of all persons in unauthorised occupation of the public premises or whether there was the further option to make recourse to the ordinary law. This Court has concluded that Section 15 of the Act provides only one procedure for ejection of persons in unauthorised occupation of the

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premises for public purposes, unlike Section 5 of the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959 which was held to be unconstitutional in Northern India Caterers Pvt. Ltd. Debate did not at all centre around the issue of legislative competence. While it is true that in Hari Singh case it has in terms been stated that the concerned legislature, that is to say the Parliament, has legislative competence to enact the impugned act, as is evident from the passage extracted hereinabove, it is equally true that the legislative competence of the Parliament to enact the Act does not appear to have been debated at all before the court as is evident from the circumstance that there is no discussion whatsoever as to under which entry of which list the subject matter of the Act would fall. In the present matter the petitioner has contended that the subject matter does not fall under any entry either in List I or List III but it squarely falls under entry 18 of the List II, that is to say, the State List. It has been argued that since the subject matter falls squarely under the State List and it does not fall under any entry under List I or List III, the Parliament has no competence to legislate in respect of the subject matter. Since this specific aspect was not debated before the Constitution Bench, it would not be proper to shut out the petitioner from raising the plea by recourse to the argument that the point was

concluded or not. Accordingly we will deal with this point in the light of the submissions urged before us bearing in mind that the Constitution Bench has categorically observed that the Parliament has legislative competence to enact the Act, albeit in the absence of any debate on this point. )

11. The important point to notice is that this new point was raised by a totally different petitioner. Hari Singh himself could not have raised this very point in a fresh petition after the judgement against him was ~~remitted~~<sup>rendered</sup> in (1972) 2 SCC 239, because that would have been barred by the principle of constructive resjudicata. This new point was raised by a third party, who was not a party to Hari Singh judgement. What is more, the Supreme Court has found that the issue raised was not considered on merits in Hari Singh's case.

12. In the present case, the applicant had an opportunity to raise the issue of CSR 459 not only before the Supreme Court but even earlier, before the Tribunal. He cannot be permitted to advance his arguments piecemeal. He could have argued even before the Tribunal that his right to retire at 58 is ~~provided~~<sup>tested</sup> not only by FR 56(a) but also by CSR-459. If he missed this chance, he could have raised the issue before the Supreme Court.

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13. We, therefore, consider that this case is hit by the principles of constructive resjudicata because the applicant had not chosen to urge the point, now raised, before the Hon'ble Supreme Court.

14. In these circumstances, we hold that that the applicant has not made out any case. The case is, therefore, dismissed with no orders as to costs.

*h. Roy*  
(C.J.ROY)  
Member(J)

*N.V. Krishnan*  
*29/5/93*  
(N.V.KRISHNAN)  
Vice-Chairman(A)