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Registration O.A. No.700 of 1986

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Applicant

....Opposite parties.

Hon. D.S. Misra, A.M.

(By Hon. Justice K. Nath, V.C.)

This application under Section 19 of the Administrative Tribunals Act XIII of 1985 is for issue of an order to quash an order dated 23.9.1986 contained in Annexure-2 of the opposite parties directing compulsory retirement of the applicant from the service of the Union under Fundamental Rule 56 (j) and to accord all benefits of the post held by the applicant.

2. The applicant Shri D.N.Arya was holding the post of an Income Tax Officer (Group 'A') at Moradabad U.P. and had attained the age of 50 years on 5.7.1981. The President of India passed the impugned order under Clause (j) of F.R. 56 to retire him with immediate effect.

3. It is not necessary to describe in detail all the points raised on the merits of the case because we find that, for reasons to follow, the petition succeeds on one admitted ground.

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4. The relevant portion of F.R. 56 (j) is as follows :-

" Notwithstanding anything contained in this Rule, the appropriate authority shall, if it is of the opinion that it is in public interest so to do, have the absolute right to retire any Govt. servant by giving him notice of not less than three months in writing or three months Pay & Allowances in lieu of such notice;"

5. It is the admitted case of the parties that the applicant had not been given three months notice.

6. The applicant's case is that it was the duty of the opposite parties, in the event of not giving three months notice in writing, to give three months Pay & Allowances in lieu of such notice as contemplated by the ~~later~~ part of the above provision contained in F.R. 56 (j). The material facts in this regard are as follows :

7. In the impugned order while directing the applicant to be retired with immediate effect, the President also directed that " Shri D.N.Arya, Income Tax Officer (Group 'A') shall be paid a sum of equivalent to the amount of his pay plus allowances for a period of three months calculated at the same rate of which he was drawing them immediately before his retirement." This order was communicated

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to the applicant through letter dated 29.9.86 contained in Annexure-1. The letter mentioned that the applicant had already been served with a copy of the President's order at Allahabad on 27.9.1986, ^{and} that the original order was enclosed with the letter which the applicant was expected to acknowledge. The letter informed the applicant that his order of retirement became effective from the 26.9.1986 (FN), the time at which he left Moradabad, and that he was entitled to receive salary for the period upto 25.9.1986 only. The letter then goes on to add as follows :-

" You shall also be paid an equivalent to the amount of his pay plus allowances for a period of three months calculated before your retirement. In other words, you would receive three months' gross salary in addition to your pay for the month of September upto 25.9.86. You are requested to come to Moradabad immediately on receipt of this letter to collect the cheque for the above amount".

8. It is also ^{the} admitted case of both the parties that the requisite demand draft was delivered to the applicant on 9.10.86 when he went to Moradabad.

9. The contention of the learned counsel for the applicant is that in terms of the President's order Annexure-2, the applicant was promised to be paid in future the requisite amount of three months' Pay & Allowances etc. and in the letter Annexure-1, whereby the original order of retirement was communicated, he

he was simply informed that he should proceed to Moradabad immediately on receipt of the letter to collect the cheque of the relevant amount which he would be paid in that manner. This, according to the learned counsel for the applicant, does not satisfy the requirements¹ of Rule 56 (j) that the Government servant may be retired on being given three months Pay & Allowances in lieu of notice.

10. The learned counsel for the opposite parties contends that the direction in the impugned order that the applicant would be paid three months' pay and allowances in lieu of notice, is enough compliance of the Rule and that it is not necessary to offer payment simultaneously with the issue of the order of retirement.

11. The learned counsel for the applicant has referred to two decisions of the Central Administrative Tribunal on the point. In the case of K.Thirumalai Vs. Collector of Central Excise ATR 1986(2) CAT 563 a Bench of the Tribunal at Madras dealt with a case where the order under F.R. 56 (j) directed that the employee "shall be paid a sum equal to the amount of the subsistence allowance for a period of three months calculated at the same rate at which he was drawing before his retirement". It was held that the payment of subsistence allowance did not satisfy the requirement of the Rule which required payment of Pay & Allowances. Although the decision referred

to a judgement of the Calcutta High Court which says that where Pay & Allowances were not given or tendered on or about the time of the service of the notice, ~~it was held in that case that~~ the order of retirement was illegal and without jurisdiction, the fact with which the Madras Bench of the Tribunal was dealing, did not concern the point of time at which the payment was to be made but concern² the amount which was being paid, hence the decision is distinguishable.

12. In the case of M.T.Keshava Iyengar Vs. Govt. of India ATR 1988(2) CAT 560 the Hyderabad Bench of this Tribunal was dealing with a case with payment of Pay & Allowances after making certain deductions. The Tribunal referred to the guidelines issued by the Govt. of India in the matter of application of F.R. 56(j) and held that the payment of pay & allowances in lieu of notice should be made simultaneously with the order of retirement. It was observed that the guidelines issued by the Govt. of India require a single payment to be made which should be co-terminus with the service of the order of retirement. The order of retirement was therefore struck down as illegal.

13. In the case before us a copy of the guidelines contained in Govt. of India, Ministry of Home Affairs, O.M. No.25013/14/77-Estt(A) dated 5.1.78 has been produced. The decisions of the

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Govt. of India are also set out and decision No.6 clearly mentions that where ^{the} Govt. servants are retired on payment of Pay & Allowances in lieu of notice period " the payment of Pay & Allowances in lieu of notice period should be made simultaneously with the order of retirement". The decision of the Govt. of India contained in the instructions in this regard admits of nodoubt, and says that the requisite payment " should be made simultaneously with the order of retirement". On the face of it, therefore, the payment of the requisite amount cannot be deferred to a later time after service of the order. The service of the order and the payment must be simultaneous.

14. We may briefly refer to the other decisions cited before us on both sides.

15. Shri Ashok Mohiley, learned counsel for the opposite parties referred to the provisions of Section 33(2), proviso, of the Industrial Disputes Act as an analogous provision and has cited certain decisions therefor. The proviso to Section 33(2) of the I.D. Act contemplates that no Workman would be discharged or dismissed etc. "unless they have been paid one month's wages and an application has been made by the employer to the authorities before which the proceeding is pending.....". In the case of Management of Delhi Transport Undertaking Vs. Industrial Tribunal, Delhi (1965) 10 FLR 236 at P.239, the Supreme Court held that it is enough for the employer to tender the amount, its actual receipt by the workman is not necessary. In the case of

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Straw Board Mfg. Co. Ltd. Vs. Govind (1962) 4 FLR 403 at page 406, the Supreme Court dealing with a case under Section 6(E)(2)(b) of the U.P. Industrial Disputes Act, which is ⁱⁿ pari materia with Section 33 of the I.D. Act (Central), held that the wages must be tendered and that its refusal by the employee is immaterial. In the case of Tata Iron & Steel Co. Ltd. Vs. S.N. Modak (1965) 11 FLR 61 at page 64, the Supreme Court observed that it is well settled ~~that~~ the requirements of the proviso to Section 33(2) of the I.D. Act, have to be satisfied by the employer on the basis that they form part of the same transaction and that the employer must either pay or offer the salary of one month to the employee before passing an order of discharge or dismissal. In the case of Presidency Talkies (P) Ltd. Vs. Presiding Officer, Labour Court 1968 FLR 360 at page 362, the Madras High Court held that the Management fulfills its obligation by making the offer even though the employee spurns it.

16. The above decisions, in our opinion, are of no help to the opposite parties. While it is true, according to these very decisions, that the employer fulfills his obligation by tendering wages and its refusal by the employee is immaterial, ^{the} obligation to tender the amount and the right to discharge the employee are recognised as being part of the same transaction and, in the case of Tata Iron & Steel Co. Ltd. Vs. S.M. Modak (supra), the Supreme Court ruled

that the offer must be made before passing of an order of discharge or dismissal. We may say that the minimum obligation is to offer payment alongwith the order of dismissal/discharge etc. atleast at the time when it is served upon the employee.

17. In the case of M/s Parle Products Pvt.Ltd. Vs. C.S. Saraswati & Another 1981 L&IC 704, the Bombay High Court observed that the tender of the wages may be made by sending it by money order. In other words, ^{and} the usual established course of tender of an amount, can be acceptable for the purposes of Section 33(2)(b) proviso, but in any case it has to be a tender; a mere promise to pay lateron would not satisfy the requirements of the provision.

18. In the case of M/s Filmistan (P) Ltd. Vs. Bal Krishna Bhiwa and Another 1972 (24)FLR 157, the Supreme Court reiterated the view taken in the case of Straw Board Mfg. Co. Ltd. Vs. Govind (supra) and held that the employer's conduct must show that the three things contemplated under the proviso to Section 33(2)(b) have been done by him as parts of the same transaction. The case did not concern so much with the payment of the amount as with the making of an obligation under the proviso.

19. The learned counsel for the opposite parties also referred to Section 25(F) (a) of the I.D. Act dealing with retrenchment which requires that one month's notice containing reasons of retrenchment or payment of wages for the period of

notice in lieu of notice must be made to the workman. The learned counsel referred to the case of Moinuddin and Others Vs. Union of India 1981 L&IC 697 where the workman had not only been asked to collect the amount before expiry of one month's notice, it was reinforced by a subsequent notice that the wages would be paid on the date of termination of service through emergent pay sheet. The workman having challenged the sufficiency of such tender/notice the High Court upheld the order of retrenchment. The important feature of the case is that not only the workman had been asked to receive the amount before the expiry of the period of notice, but it had also been directed that he would be paid the wages on the date of termination of service. In other words, the tender or the direction to pay was done before the retrenchment. The decision, therefore, does not lay down a law that the amount may be tendered or paid after the termination of the services has already been done. It is significant that at page 702, the Rajasthan High Court observed that a mere expression of readiness on the part of the employer to make payment of retrenchment compensation to the employee cannot be considered to be sufficient compliance. This observation, indeed, supports the case of the applicant because in this case all that the impugned order, contained in Annexure-2, and its communication, contained in Annexure-1, express is only a readiness on the part of the Govt. to make payment of the applicant's Pay & Allowances etc. at a later date when the applicant might have returned to his place of posting in Moradabad.

20. The learned counsel for the opposite parties referred to the cases of Director of Technical Education, Kanpur Vs. John Mohammed 1975 ALR 8 where a Division Bench of the Allahabad High Court, and the case of Raj Kumar Vs. Union of India 1975 SC 1116 where the Supreme Court dealt with cases of termination of services respectively of a State employee of U.P. and Central Government. It is enough to state that the terms of the rules providing^{ing} for termination of services of a temporary employee, are quite different from the provisions of F.R. 56(j) and therefore the decisions are of no help to make an interpretation of the provisions of the Fundamental Rules.

21. It is not necessary to set out in detail the various decisions relied upon by the learned counsel for the applicant in support of the contention that the payment of the applicant's salary should have accompanied the order of compulsory retirement atleast at the time when it was served upon him. We have already referred to cases which directly dealt with F.R. 56(j); the other decisions relate to the provisions of Section 25(F) of the I.D. Act on which we have already referred to the rulings cited on behalf of the opposite parties.

22. The learned counsel for the applicant further emphasized that the instructions contained in the Govt. of India's O.M. dated 5.1.78 are mandatory and in support thereof places reliance on the case of Union of India Vs. Chandra Mohan^{Nigam} 1977 SC 2411. That case related to an earlier set of instructions and not to the instructions with which we are dealing. The

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decision cannot be considered to lay down that all instructions are of a mandatory nature. We would agree with the learned counsel for the opposite parties that such of the instructions as are essentially in the nature of interpretation of a rule cannot be of a binding character. Only those instructions are of a binding nature as are laid down to fill, what is called, gaps in the rules. The question whether or not an amount payable in lieu of period of notice ought to be tendered at once or may be paid later on is essentially a matter of interpretation of the provisions of Rule 56(j). In that sense, the instruction contained in the O.M. cannot be treated to be of a mandatory nature, but there has been enough judicial interpretation of that provision as also of analogous provisions^u to establish that a tender of the amount must be made alongwith the order of compulsory retirement and it would satisfy the requirement of the rule if at the time of the service of the order the tender is effected. If that is not done, the provisions of the Rule must be held to have been violated and therefore the order of retirement would be illegal and invalid. We would like to mention that it has not been argued before us that the order of compulsory retirement, having not^u been accompanied by a tender of the amount either initially or at the time of service, would become effective on a subsequent date when the amount is actually tendered. The ^{controversy} ~~issue~~ before us has been confined throughout to

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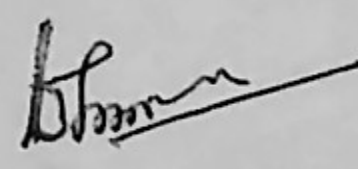
the effect of failure to tender the amount alongwith the order of retirement either simultaneously with the issue thereof or at the time of its service. The law as we find is that either the amount must accompany the order of compulsory retirement initially, or it must be tendered at the time when the order is served.


23. The learned counsel for the opposite parties lastly urged that the question of payment of Pay & Allowances etc. in lieu of notice had not been raised in so many words in the petition itself, and therefore the applicant is not entitled to raise it at the time of hearing. Shri B.P.Srivastava, the learned counsel for the applicant pointed out that the question arose from the very language of the impugned order Annexure-2 and its communication letter Annexure-1 which is the document^R of the opposite parties themselves and therefore it does not need specific pleading. We gave an opportunity to the counsel for the opposite parties, after the arguments had been partly heard, to state what the situation was. The case was adjourned for the purpose. Shri Mohiley obtained the requisite instructions and said that a demand draft of the amount had been delivered to the applicant on 9.10.86 when he went to Moradabad. This is consistent with the terms of Annexures 1 & 2. Indeed Annexure-2 said that the amount would be paid to the applicant when he would reach Moradabad. We do not think that in the face of these features of the case and the contents of

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Annexures 1 & 2, it was incumbent upon the applicant to plead the point specifically in the application. The decisions in the cases¹ of Bharat Bank Ltd. Vs. Employees of Bharat Bank 1950 SC 188, J&K Iron & Steel Co. Ltd. Vs. Iron Steel Mazdoor Union 1956 SC 231 and Hindustan Steel Ltd. Vs. State of West Bengal 1977 L&IC 1417 relied upon by the learned counsel for the opposite parties in this *regard* are not applicable to the facts and circumstances of the present case.

24. On a careful consideration of all the matters we hold that the order of compulsory retirement of the applicant contained in Annexure-2 and communicated to him vide Annexure-1 is invalid and illegal. We quash the orders Annexures 1 & 2 and hold that the applicant continues to be in the service of the opposite parties and is entitled to all the consequential benefits thereof. Parties shall bear their own costs.


Member (A)


Vice Chairman

Dated the 4th July ~~June~~, 1989.
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