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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH

O.A. No. C.A. 35/93 in M.A. 330/98 in O.A. 194/88
T.A. No.

DATE OF DECISION 30-9-93

Shri Charanjit Raj Petitioner

Shri M.S. Shah Advocate for the Petitioner(s)

Versus

Union of India and Others **Respondent**

Shri Akil Kureishi Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. N.B. Patel Vice Chairman

The Hon'ble Mr. V. Radhakrishnan Member (A)

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 ?

No.

(3)

Charanjit Raj
3, Momai Nagar
Near Bus Stand,
Gandhinagar, Jamnagar.

Applicant

Advocate Shri M.S. Shah

Versus

1. Mr. D.K. Srinivas
and/or his successor in office
the Assistant Collector
Office of the Assistant Collector
of Customs, Vijay Bhavan, Jamnagar.

2. Mr. B.R. Mehra
Collector of Customs & Central Excise
Customs and Central Excise, Collectorate,
Centre Point, Rajkot.

3. Mr. E.P. Vyas
Pay Officer, Customs and Central Excise
Allahabad Bank Building, Dhebar Road,
Rajkot.

Respondents

Advocate Shri Akil Kureshi

O R A L J U D G E M E N T

In

C.A. 35 of 1993

in

M.A. 330 of 1988

in

O.A. 194 of 1988

Date: 30-9-93

Per Hon'ble Shri N.B. Patel

Vice Chairman.

Heard Shri M.S. Shah and Mr. Kureshi. In view
of the special and peculiar circumstances of the case of the
applicant, namely, that he is in need of money as his daughter's
marriage is to take place shortly, the respondent no.2, is

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directed to release the amount withheld out of the retiral benefits of the applicant, within a period of three weeks from today, on the applicant filing a written undertaking before the respondent no.2, to the effect that if, ultimately, it is found that the amount which is now being paid to him was not payable to him, the same shall be repaid by him within a period of six months from the date of the decision of this Tribunal in the O.A., if such decision is adverse to the applicant subject to the right of the applicant to move the Supreme Court against adverse decision, if any, of this Tribunal and his obtaining appropriate orders from the Supreme Court. The applicant will also undertake that if the authorities so choose they will have a right to make recovery from his monthly pension by suitable instalments. This undertaking will also be subject to the same condition as stated above.

2. In view of the above directions, Mr. Shah does not press this Contempt Application and it stands disposed of accordingly. No order as to costs.


(V. Radhakrishnan)
Member (A)


(N.B. Patel)
Vice Chairman.

Date	Office Report	ORDER
10.4.95		<p>Present: Applicant in person</p> <p>Mr. Akil Kureshi, counsel for the respondents.</p> <p>..... Arguments heard. Judgment reserved.</p> <p><i>tl</i> <i>m</i> <i>l</i></p> <p>(V.Radhakrishnan) (N.B.Patel) (S.C.Mathur) Member (A) Vice Chairman Chairman</p> <p>18/4/95</p> <p>Judgement pronounced open Court on 18.4.95</p> <p><i>tl</i> <i>87</i> (V.Radhakrishnan) (N.B.Patel) Member (A) Vice Chairman</p>

F.B.
O.A. 1941/88
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338/88

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I.A. No. 8/95- Dismissed as withdrawn.
6. All other applications for interventions are dismissed.

SUPREME COURT OF INDIA
Civil Appeal Nos. 3543-46 of 1990

WITH
SLP Nos.

C.A. Nos.

C.C. Nos.

3734, 6225/90, 2211-17,	15777/91	
4372, 4442/91, 2926/92,	19992, 20074/91	
350/93, 9580/94	10912/92	19390/93
9579/94, 9575/94, 9213/94	9511/93, 8657-58/92	
9576/94, 9578/94,	2272, 2750/94	16598/92
3083/91, 9569, 9622-23/94	10520/93, 3157/90	
9625, 9503, 9220/94,	17702/93,	
9572/945145/90, 9557/94,	2025/93	
9221/94, 3547/90, 69/93	4308-9/92, 13176-79/92	
208, 142-44/90, 9750/94,	8519, 12270/93, 14348-54/92,	
9589-90, 9661-21/94,	14039-51, 14052-58/92,	
9321, 9568, 9604-10/94,	15447/93,	
9591-9603, 9611-17/94,	14653-57/93,	
1809-10/93, 9567/94,		
9235-39/94, 3949/93,		
4366-77/93, 4402, 4403/93,		
9224/94, 4227/93, 9212/94,	18382/93, 20902/93,	
9222/94, 4641, 5060/93,	22849,	22844/93,
9495/94, 7461/93,		23392/94,
9541-55/94, 9501/94,	1585-99/94, 2594/94,	
9504, 9223, 9556/94,	2270/90, 21761/93, 1925/94	
9502, 9495/94,	1791/94,	23737/94
9494, 9500, 9499/94,	6076, 6872/94,	24226/94,
9497, 2428, 2430/94,	7511/94, 23538/94	
4708-9, 9565/94,	11544/94,	25594
9498, 4945, 9574/94,	2995/94, 12456/91	
9581, 9573, 9562/94,	11580/91, 12454, 12455/91	
9567, 9564/94,	18694, 11432/91	

I.A. Nos. 16, 30-46 in SLP(C) No. 1585-95/94.
(With C.A. Nos. 3734/90, 6225/90, 2211-16/91, 2217/91, 4372/91, 4442/91, 2926/92,

350/93, SLP(C) Nos. 15777/89, 16185-93/91, 19992/91, 20074/91, 10912/92,
1794/93, C.A. No. 19390/93, C.A. No. 3083/91, SLP(C) Nos. 9511/93, 8657-58/92,
C.C. Nos. 16598/92, 20044/93, SLP(C) No. C.C. Nos. 23273/93, SLP(C) Nos.
2272/94, 2752/94, 10520/93, C.A. No. 145/90, SLP(C) Nos. 3157/90, 17702/93,
C.A. Nos. 3547/90, 69/93, 208/90, 142-44/90, SLP(C) Nos. 2025/93, 4308-09/92,
13176-79/92, 8519/93, 12270/93, 14348-54/92, 14039-51/92, 14052-58/92, C.A.
Nos. 1809/93, 1810/93, SLP(C) Nos. 15447/93, 14653-57/93, C.A. Nos. 3949/93,

4366/93, to 4377 of 1993-4402/93, 4403/93, SLP(C) No.18382/93, C.A. No.4227/93, SLP(C) No.20902/93, C.C. No.22844/93, C.A. Nos.4641/93, 5060/93, C.C. No.23392/94, C.A. No.7461/93, SLP(C) Nos. 1585-99/94, 2594/94, 2270/94, 21761/93, 1925/94, 1791/94, C.C. No.23737/94, SLP(C) No.2861/94, C.C.No.24226/94, SLP(C) No.6076/94, 6872/94, 7511/94, CA Nos.2428/94, 2430/94, C.C.No.23538/94, SLP(C) Nos. 8455-56/94, 11393/94, C.A. No.4708-09/94, SLP(C) No. 11544/94, C.C. No.25594/94 SLP(C) No. 2995/94, C.A. No. 4945/94, SLP(C) Nos. 12456/91, 11580/91, 5493/90, 12972/91, 12454/91, 12455/91, 18694/91, 4281/92, 11432/91, 6297/91) I.A. Nos.16,30-46 in SLP(C) No.1585-95/94.

Decided on 08-12-1994

Union of India & Ors.

Appellants

Versus

G. Vasudevan Pillay & Ors. etc. etc.

Respondents

PRESENT

The Hon'ble Mr. Justice Kuldip Singh
The Hon'ble Mr. Justice B.L. Hansaria

(A) Dearness Relief on Pension--Pension--Re-employment--Denial of dearness relief on pension to the ex-servicemen on their re- employment in a civil post--Denial held justified.

(B) Dearness Relief on Pension--Pension--Re-employment--Denial of dearness relief on pension on employment of dependents of pensioner/ex-servicemen--Denial held justified.

(C) Constitution of India, Articles 14 and 16--Dearness Relief on pension--Re-employment--Reduction of pay equivalent to enhance pension of those ex-servicemen who were holding civil post on 1-1-1986 following their re-employment not permissible as such a decision in this regard is violative of Articles 14 and 16 of the constitution.

JUDGMENT

Hansaria, J.:-- This conglomeration of appeals (some of which arise because of leave already granted and some come into existence because of leave being granted) require us to decide three questions:

(1) Whether the decision of the Union of India not to allow Dearness Relier (D.R.) on pension to the ex-serviceman on their re- employment in a civil post is in accordance with law or not;

(2) whether denial of D.R. on family pension on employment of dependents like widows of the ex-servicemen is justified or not; and

(3) reduction of pay equivalent to enhanced pension of those ex-servicemen who were holding civil posts on 01-01-86, following their re-employment, is permissible or not.

2. We would examine these question seriatim.

Disallowing of D.R. on pension on reemployment.

3. To answer the above question involved in some of the appeals, the background leading to the aforesaid decision may be briefly noted. To start with there was no provision for payment of D.R. to the pensioners. Various representations were made to the Third Pay Commission seeking some recommendations in this regard for protecting the pension of the Government employees from erosion on account of possible increases in the cost of living in future. The Commission considered this matter and also the question regarding the manner

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in which some relief could be provided to the future pensioners. After having noted the various suggestions which the Commission received in reply to its questionnaire, it recommended that all future pensioners, irrespective of the amount of pension drawn by them should be given relief @ 5% of their pension subject to a minimum of Rs. 5/- per mensem and maximum of Rs. 25/-. The Commission further recommended that the relief should be given as and when there is a 16 point rise in the 12 monthly average of the All India Working Class Consumer Price Index. This recommendation of the commission was accepted by the Central Government vide its Office Memorandum of even no. dated 6th April, 1974, making the relief available to those employees belonging to Class II, III and IV, who retired from Services prior to 01-01-73, as well as those who retired afterwards.

4. A decision was, however, taken subsequently not to pay D.R. to re-employed pensioners. This was made applicable to those ex-servicemen who had come to be re-employed in civil posts. Various writ Petitions and Original Applications were filed in different legal fora of the country, which came to be decided either by upholding the validity of the decision or by taking a contrary view. The parties who lost have preferred these appeals.

5. The learned Additional Solicitor general appearing for the Union of India submits that the decision merits our acceptance because of what has been stated in clause (ii) of Rule 55-A of Central Civil Services (Pension) Rules, 1972, as amended in 1991. We are, however, of the view that the decision cannot be so supported for the reason that the aforesaid Rules have application to the persons who were members of Central Civil Services. The ex-serviceman having apparently not been members of such Services, what has been provided in Rule 55-A(ii) cannot be invoked to deny D.R. on pension, family pension to the ex-serviceman on their re-employment.

6. Had the aforesaid been the only provision pressed into service to deny the D.R. to the ex-serviceman, we would have had no difficulty in striking down the decision inasmuch as the ex-servicemen having been allowed pension and D.R. on it in accordance with the conditions of service governing defence personnel, the provision contained in the aforesaid rule governing service condition of all together different class of servicemen could not have impinged on their right to get D.R. on the pension. Learned Additional Solicitor General, however, advances an alternative submission and the same is that there are even army instructions which, read with Office Memorandum of Ministry of Finance, will show that Dearness Relief of pension cannot be paid even to ex-servicemen on their re-employment. As this point could not be brought home to us well when the cases were heard, as relevant army instructions had not been brought on record, we, while reserving the judgment after close of hearing allowed filing of written submissions, which were done subsequently alongwith which large number of documents were filed to establish the point urged in the Court.

7. A perusal of the documents shows that the Office Memorandum dated 1-8-1975 of the Ministry of Finance, Department of Expenditure, which stated that a re-employed Central Government pensioner is not eligible to draw any relief during the period of re-employment, was made applicable by the Ministry of Defence vide letter of even number dated 28-10-1975 to Armed Forces pensioners also. These documents are pages 17 and 18 of the written submission, in which it has also been stated with formation of the Department of Pension and

Pensioners' Welfare under Ministry of Personnel, Public Grievances and Pension, all orders issued by the Ministry of Finance were made applicable to Armed Forces Pensioners as well. A reference has then been made to Office Memorandum dated 22-4-1987 on the subject of grant of Dearness Relief to pensioners on the recommendations of the Fourth Central Commission, sub-para-v of Annexure-1 to which states that Dearness Relief will be suspended when the Central Government pensioner is re-employed in the department/office of the Central Government.

8. The aforesaid shows that de hors what has been laid down in clause (ii) of Rule 55-A of the aforesaid Pension Rules, there are materials on records to show that any person, including ex-serviceman, would not be entitled to Dearness Relief on pension on his re-employment to any department/office of the Central Government.

9. It has, however, been strenuously contended by learned counsel appearing for the re-employed ex-servicemen that pension being a right (and not a bounty) available to a retired employee as held in Nakara, AIR 1983 SC 130, and DR being a part of pension, right to receive the same could not have been infringed merely because the incumbent sought re-employment to take care of the hardship which he might have otherwise faced after retirement. To sustain the submission, strength is sought to be derived from the decision of the Kerala High Court in Narayanan v. Union of India, 1994 (1) KLT 897, in which a view has been taken that the DR became an integral part of pension, because of which it could not have been discontinued on re-employment. As against this, the view of the Delhi High Court in Civil Writ No. 1699 of 1992 (disposed of on 23-2-1993) is that the DR is different from pension. For the disposal of the present cases it is not necessary to express any opinion on this aspect of the matter inasmuch as, according to us, even if Dearness Relief be an integral part of pension, we do not find any legal inhibition in disallowing the same in cases of those pensioners who get themselves re-employed after retirement. In our view this category of pensioners can rightfully be treated differently from those who do not get re-employed; and in the case of the re-employed pensioners it would be permissible in law to deny D.R. on pension inasmuch as the salary to be paid to them on re-employment takes care of erosion in the value of the money because of rise in prices, which lay at the back of grant of D.R., as they get Dearness Allowance on their pay which allowance is not available to those who do not get re-employed.

10. We, therefore, hold that the ex-servicemen were rightly debarred from Dearness Relief on their pensions after they got themselves re-employed to any civil post under the Government of India.

Denial of DR on family pension.

11. In some of the cases, we are concerned with the denial of Dearness Relief on family pension on employment of dependents like widows of the ex-servicemen. This decision has to be sustained in view of what has been stated above regarding denial of D.R. on pension on reemployment inasmuch as the official documents referred on that point also mention about denial of D.R. on family pension on employment. The rationale of this decision is getting of Dearness Allowance by the dependents on their pay, which is drawn following employment, because of which Dearness Relief on family pension can justly be denied, as has been done.

Reduction of enhanced pension from pay of those ex-servicemen who were

holding civil posts on 01-01-86 following their re-employment.

12. The aforesaid reduction, which is the subject matter of some appeals, is the fall out of Office Memorandum dated 11-9-87 according to which the pay of the ex-servicemen who were in employment in a civil post as on 01-01-86 following their re-employment, is required to be reduced by an amount equivalent to the enhanced pension made available pursuant to the report of the Fourth Pay Commission.

13. The ground of attack is that the aforesaid decision violates Articles 14 and 16 of the constitution inasmuch as there is no rational basis for classifying the employees for the aforesaid purpose on the basis of their being in employment on 01-01-86. This submission has been advanced because the reduction of the aforesaid nature has not been made in respect of those who have been in employment since 01-01-86. The additional affidavit filed on behalf of respondent no.1 in SLP(C) No. 17456/91 on 25-8-94 contains some names of those who were re-employed after 01-01-86 and are being paid both the revised pay and revised pension. This factual position has been admitted in the aforesaid written submission filed on behalf of the Union of India inasmuch as it has been stated in page 9 that the pensioners who are re-employed after 01-01-86 ~~by~~ the benefit of revised pay and also revised pension w.e.f. 01-01-86.

14. Reliance has been placed in support of aforesaid submission on a two Judge Bench decision of this Court, to which one of us (Kuldip Singh, J.) was a party. That decision was in the case of T.S. Thiruvengadam v. Secretary to Government of India, 1993(2) SCC 174.

The facts of that case are however, different inasmuch as there the Memorandum dated June 16, 1997 stating that revised pensionary benefits would be made available only to those Central Government servants who have been absorbed in public sector undertakings after that date was not found to be constitutional because the very object of bringing to the existence the revised terms and conditions by the Memorandum was to protect the pensionary benefits which the Central Government servants had earned before their absorption into the public sector undertakings. It was, therefore, held that restricting the applicability of the revised Memorandum only to those who are absorbed after coming into force of the same would not only defeat the ~~very~~ object and purpose of the Memorandum but would be contrary to fair play and justice also.

15. Despite the aforesaid decision being of no aid in the present cases, we find no logic and basis for classifying the re-employment persons on the basis of their being on employment on 01-01-86. Indeed, no justification has been canvassed before us. The decision which held the field before the impugned Memorandum in not taking note of pension while fixing pay of the ex-servicemen on re-employment, which was based on good reasons, had no good reason for its reversal, as enhanced pension was not confined to those who were in employment on 01-01-86. The impugned decision is, therefore, arbitrary and is hit by Articles 14 & 16 of the constitution. We, therefore, declare the same as void.

16. Our conclusions on the three questions noted in the opening paragraph are that denial of Dearness Relief on pension/family pension in cases of those ex-servicemen who got re-employment or whose dependents got employment is legal and just. The decision to reduce the enhanced pension from pay of those ex-servicemen only who were holding civil posts on 01-01-86 following their re-employment is, however, unconstitutional.

17. The appeals are disposed of accordingly. I.A. Nos. 16, 30-46 in appeals (arising out of S.L.P. (C) Nos. 1585-95/94) stand disposed of. No. order as to cost.

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CENTRAL ADM IN ISTRAT IVE TRIBUNAL
AHMEDABAD BENCH

AHMEDABAD, THE 18TH DAY OF APRIL 1995

MR. JUSTICE S. C. MATHUR, CHAIRMAN
MR. JUSTICE N.B. PATEL, VICE-CHAIRMAN (J)
MR. V. RADHAKRISHNAN, MEMBER (A)

(1) OA No. 194/88

1. Rudreshwar Singh Pathania
2. Ved Prakash
3. Bhagwan Dass
4. Dhrub Singh
5. M. Ramachandran
6. K. Balakrishnan
7. J.B. Patel
8. D.K. Parmar
9. Mehar Singh Nahar
10. Ramgopal Sharma
11. Hari Dutt
12. G. Gopinathan
13. K. Sadasivan
14. S.S. Lal
15. K.W. Pothan
16. S.S. Thomar
17. Tarlok Singh
18. Joga Singh Bal
19. Surendra Singh
20. Balasubramaniam
21. Charanjit Raj
22. J.P. Singh
23. G.R. Sharma
24. P.T. Chacko
25. R.G. Nair

All C/o Rudreshwar Singh Pathania,
Communication Assistant,
Office of the Collector of Customs
and Central Excise,
Opposite High Court, Ahmedabad APPLICANTS

(IN PERSON)

Vs.

1. Union of India
Through:
The Secretary,
Ministry of Finance,
Department of Revenue,
New Delhi.
2. Union of India
Through:
The Secretary,
Ministry of Personnel,
P.G. & Pensions,
Department of Personnel and
Training, New Delhi.
3. The Collector of Customs and
Central Excise, Opp. High Court
Ahmedabad.

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4. The Collector of Customs and
Central Excise, Baroda
5. The Collector of Customs and
Central Excise, Rajkot

RESPONDENTS

(BY ADVOCATE SHRI AKIL KURESHI)

(2) OA No. 338/89

1. K.S.Kharadi, Peon
2. A.R.Ninama, Peon
3. Khimsingh U, Chowkidar
4. K.D.Ninama, Chowkidar
5. A.R.Rajput, Chowkidar

Nos. 1 to 4 are working in the
Office of the Accountant General
(Audit) I, M.S.Building, Lal Darwaja,
Ahmedabad and No.5 is working in the
Office of the Deputy Accountant General
(A&E) M.S.Building,
Lal Darwaja, Ahmedabad

APPLICANTS

(IN PERSON)

Vs.

1. Union of India
Through:
The Secretary,
Ministry of Finance,
New Delhi.
2. Union of India, Through:
The Secretary, Ministry
of Personnel, P.G.& Pensions,
Department of Personnel and Training,
New Delhi.
3. The Comptroller and Auditor
General of India, New Delhi.
4. The Accountant General (Audit) I,
M.S.Building, Lal Darwaja,
Ahmedabad.
5. The Accountant General
(Accounts & Entitlement) II,
Rajkot.

RESPONDENTS

(BY ADVOCATE SHRI AKIL KURESHI)

JUDGEMENT

JUSTICE S.C.MATHUR:

This Full Bench has been constituted on a reference
made by the then Vice-Chairman of this Bench Shri N.V.
Krishnan who, hearing these applications as a third

member on account of difference of opinion between the Members of the Division Bench who first heard the applications, expressed disagreement with the Division Bench judgements of the Ernakulam Bench of the Tribunal.

2. In the Original Applications, the applicants have challenged the validity of Office Memorandum No.3/9/87-Esst(Pay II) dated 11.9.1987 issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions(Department of Personnel & Training) so far as it relates to the re-employed Armed Forces Pensioners. The dispute relates to re-fixation of pay of such Central Government employees consequent upon the upward revision of pay scales and pension with effect from 1.1.1986. The consequence of the impugned order is that the applicants are threatened with reduction in their pay and recovery of arrears . The facts necessary for the disposal of the applications are within a narrow compass and may be stated.

3. The applicants in both the applications held different positions in the Armed Forces of the Union below the Commissioned Officers' rank. On retirement from the Armed Forces, they obtained employment on civil posts in different departments of the Central Government. Their pay was fixed in the scale applicable to the post to which they were appointed in accordance with the rules existing at the time of their employment. Whenever there was revision of pay scales, their pay was also revised. Pay scales were revised with effect from 1.1.1986 on the recommendations of the Fourth Central Pay Commission. Pensions were also similarly revised. The applicants' pay as well as pension were upwardly revised. After this upward revision, Office Memorandum

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dated 11.9.1987 was issued which sought to make dent in the pay fixed earlier. The consequence of this Memorandum was that the applicants' pay was re-fixed with effect from 1.1.1986 by taking into account the revised pension. The Office Memorandum provided that the increase in pension of ex-servicemen may be adjusted by re-fixation of their pay. The applicants were aggrieved by this Memorandum and they preferred representation to the Government which was rejected. They have approached the Tribunal seeking quashing of the said Office Memorandum.

4. Annexure A-2 to O.A. No.194/88 shows that the applicants were re-employed in various years between 1974 and 1980. The 5 applicants in OA No.338/88 were re-employed on civilian posts in the years 1974, 1976 and 1981. Thus all the applicants in both the applications were re-employed prior to 25.1.1983.

5. Fixation of pension on re-employment after retirement is dealt with in several Office Memoranda. The Office Memorandum dated 16.1.1964 provides that in fixing the pay, pension to the extent of Rs.50 per mensem shall be ignored. In other words, if the re-employed person is getting pension not exceeding Rs. 50, the entire amount upto Rs.50 shall be ignored in fixing his pay in the scale. If on the other hand, his pension exceeds Rs.50 per mensem, the first Rs.50 will be ignored and the remaining portion of the pension will be taken into account in fixing the pay. By Office Memorandum dated 19.7.1978, the ignorable amount of pension was increased from Rs.50 to Rs.125 per mensem. Paragraphs 4 and 5 of this Office Memorandum provide as follows:

" 4. These orders will take effect from the date of issue and the existing limits of civil and military pensions to be ignored

pay

in fixing of re-employed pensioners will, therefore, cease to be applicable to cases of such pensioners as are re-employed on or after the date of issue of these orders. In the case of persons who are already on re-employment, the pay may be re-fixed on the basis of these orders with immediate effect provided they opt to come under these orders. If they so opt their terms would be determined afresh as if they have been re-employed for the first time from the date of these orders.

5. The option should be exercised in writing within a period of six months from the date of issue of these orders. The option once exercised shall be final."

On 8.2.1983 yet another Office Memorandum was issued, relevant portion of which reads as follows:

" It has been decided that in the case of those ex-servicemen retiring before attaining the age of 55, the pension as indicated below may be ignored in fixing their pay on re-employment in civil posts:-

- (i) in the case of serving officers, the first Rs .250 on pension;
- (ii) in the case of persons below Commissioned Officers' rank, the entire pension.

NOTE

2. These orders will take effect from 25th January, 1983 and the existing limits of military pensions to be ignored in fixing pay of re-employed pensioners will, therefore, cease to be applicable in cases of such pensioners as are re-employed on or after that date. In the case of the persons who are already on re-employment the pay may be re-fixed on the basis of these orders with immediate effect provided they opt to come under these orders. If they so opt, their terms would be determined afresh as if they have been re-employed for the first time from the date of these orders. The option should be exercised in writing within a period of six months from the date of these orders. The option once exercised shall be final...."

(Emphasised)

An important change brought about by this Memorandum is that in the case of non- Commissioned Officers, their entire pension was liable to be ignored while fixing their pay on the civilian post. The benefit of this Office Memorandum was available only on exercise of option to be brought within the purview of the Memorandum.

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The option was to be exercised within a period of six months from the date of the order. Obviously, those who did not exercise option were not entitled to the benefit conferred by this Memorandum. The applicants did not exercise the option. It appears that some dispute arose regarding re-fixation of pay in the Department of Atomic Energy, Madras. The Central Government issued a clarificatory Memorandum on 23.12.1983 in which it is mentioned "The Ministry of Defence have clarified that the pay of the pensioners re-employed before 25.1.1983, if they opt for fixation of their pay in terms of their O.M. dated 8.2.1983 will be re-fixed afresh as if they have been re-employed for the first time on 25.1.1983. As such, the orders have been interpreted correctly by the Department of Atomic Energy, Madras." The Central Government noticed that in certain cases the exercise of option may have resulted in prejudice to the re-employed ex-servicemen. Accordingly, by Order dated 2.5.1985 opportunity was given to such persons to withdraw their options. As already noticed, with effect from 1.1.1986 pay scales and pensions of Central Government employees were revised. The applicants' salary as well as pension got upward hike. On 9.12.1986, Office Memorandum was issued regarding fixation of pay as a result of the revision in pay scales and pensions with effect from 1.1.1986. Paras 2(i)/of this Office Memorandum reads as follows:

*2(i) The initial pay of a re-employed Government servant who elects or is deemed to have elected to be governed by the revised pay scale from the 1st day of January, 1986 shall be fixed in the following manner, namely:-

According to the provisions of Rule 7 of the C.C.S(R.P) Rules, 1986 if he is

- (1) a Government servant who retired without receiving a pension, gratuity or any other retirement benefit; and
- (2) a retired Government servant who received pension or any other retirement benefits but which were ignored while fixing pay on re-employment.

2(ii) The initial pay of a re-employed Government servant who retired with a pension or any other retirement benefit and whose pay was fixed on re-employment with reference to these benefits or ignoring a part thereof, and who elects or is deemed to have elected to be governed by the revised scales from the 1st day of January, 1986 shall be fixed in accordance with the provisions contained in Rule 7 of the Central Civil Services(Revised Pay) Rules, 1986.

In addition to the pay so fixed, the re-employed Government servant would continue to draw the retirement benefits he was permitted to draw in the pre-revised scales. However, any amount which was being deducted from his pay in the pre-revised scale in accordance with the provision of note 1 below para 1(c) of Ministry of Finance Office Memorandum No.F.8(34) Estt. III/57 dated the 25 November, 1958 shall continue to be deducted from the pay and the balance will be allowed as actual pay."

Thereafter, the impugned Office Memorandum dated 11.9.1987 was issued material portion of which reads as follows:

" It has been held that if the revised pension is not taken into consideration, certain unintended benefits are likely to accrue to re-employed pensioners as they will draw the revised amount of pension which would invariably be higher than the earlier amount of pension, in addition to pay already fixed on the basis of the pension granted to them earlier. The President is accordingly pleased to decide that pay of pensioners who were in re-employment on 1.1.86 and whose pay was fixed in accordance with the provisions of this Department OM dated 9.12.86 may be refixed w.e.f. 1.1.86 by taking into account the revised pension, likewise increase in the pension of ex-servicemen under separate orders of Ministry of Defence may also be adjusted by re-fixation of their pay in terms of provisions of this Department OM dated 9.12.86. Overpayments already made may be recovered/adjusted, as is deemed necessary. All re-employed pensioners would, therefore, be required to intimate to the heads of Offices in which they are working, the amount of revised pension sanctioned to them w.e.f. 1.1.86 for the purpose of re-fixation of their pay after taking into account their revised pension."

This Office Memorandum requires re-fixation of pay with effect from 1.1.1986 by taking into account the revised pension. It enjoins increase in pension of ex-servicemen to be adjusted while re-fixing their pay.

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6. In the applications, the applicants challenged the constitutional validity of the aforesaid Office Memorandum by submitting that this is discriminatory and, therefore, violative of Articles 14 and 16 of the Constitution. It is asserted in the applications that all the ex-servicemen employed prior to 25.1.1983 and subsequent thereto are similarly situated and they cannot be classified with a view to giving the benefit to one and denying the same to the other. The applicants, therefore, treated 25.1.1983 as the cut-off date for grant or denial of benefit conferred by the impugned Office Memorandum. It is also the case of the applicants that all re-employed pensioners irrespective of the dates of their re-employment constitute one class and they cannot be classified with reference to an illusory cut-off date.

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7. The applications were contested on behalf of the Central Government. They came up for hearing before a Division Bench comprising Hon'ble Sh.M.M.Singh, Member(A) and Hon'ble Sh.R.C.Bhatt, Member(J). The learned Judicial Member was of the opinion that the applicants were entitled to relief. In taking this view, he relied upon the following decisions of the Ernakulam Bench of the Tribunal :

- (1) TAK/404/87 (G.Vasudeva Pillay vs. Union of India & others)
- (2) OAK 263/88 (K.K.Unnikrishnan & ors. vs. Union of India & others) decided on 15.1.1990
- (3) OA K 507/88 (Kurian Joseph vs. Income Tax Officer Kottayam & others)

The learned Judicial Member was of the opinion that the impugned Office Memorandum dated 11.9.1987 deserved to be quashed and set aside and the respondents were liable to be restrained from deducting or recovering any amount from the salary and pension of the applicants.

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He was also of the opinion that the applicants were entitled to the relief of direction to the respondents to treat the applicants eligible to draw pension and salary in the manner drawn by those who were re-employed after 25.1.1983.

8. The learned Administrative Member was unable to agree with the conclusions of the learned Judicial Member. He was of the opinion that the judgements of the Ernakulam Bench were distinguishable and the Government had the right to re-fix pay once pay scales and pension were revised. He accordingly, opined that the applications were liable to be dismissed.

9. In view of the difference of opinion between the members of the Division Bench, the applications were referred to the third member Shri N.V.Krishnan who at that time was the Vice-Chairman of this Bench. Shri Krishnan agreed with some conclusions of the Judicial Member and with some conclusions of the Administrative Member. He did not agree in entirety with the conclusions either of arrived at by/the two members. He has summarised his views as follows:

(1) The Office Memorandum dated 8.2.1983 does not suffer from any legal or constitutional infirmity and, therefore, the judgement of the Ernakulam Bench in TAK No.404/87 requires consideration;

(2) The revision of pension from 1.1.1986 resulted in increase in pensions. In cases where certain amount of pension is taken into account for fixation of pay, the increase in pensions results in a corresponding increase of the non ignorable portion;

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- (3) A new situation is thus created and, therefore, such persons should be given a chance to opt for the 8.2.1983 Office Memorandum by agreeing to be treated as freshly re-employed from 1.1.1986;
- (4) Office Memorandum dated 11.9.1987 cannot be quashed unconditionally. It has to be read down incorporating a clause granting a fresh option;
- (5) The question whether there is overpayment or not should be decided after a chance for fresh option is granted; and
- (6) Recovery of overpayment due to non-adjustment of the increase in the non ignorable portion is justified.

10. The Ernakulam Bench had granted relief to the applicants primarily on the ground that the Office Memorandum dated 8.2.1983 created discrimination on the basis of date of re-employment viz. 25.1.1983. Shri N.V.Krishnan is of the opinion that no discrimination is brought about by the said Office Memorandum as it applies to all re-employed persons similarly placed. If the view of Shri Krishnan is accepted, the basis of the decision rendered at the Ernakulam Bench is knocked off. Shri Krishnan is also of the opinion that the requirements laid down in the Office Memorandum dated 11.9.1987 are not unconstitutional but there is an infirmity in the Office Memorandum inasmuch as it does not provide for an opportunity to the concerned employee to exercise fresh option to be covered by the Office Memorandum dated 8.2.1983. The opportunity to exercise fresh option, if any, was necessary to be given in view of the change which the situation had undergone between 8.2.1983 and 1.1.1986. The infirmity, however, in his opinion was not fatal to the Office Memorandum as it could be cured by invoking the principle of reading down and reading therein a clause requiring the concerned employee to exercise fresh option to be covered by Office Memorandum dated 8.2.1983. Accordingly, Shri Krishnan did not opine quashing of the Office Memorandum dated 11.9.1987 but opined reading it as mentioned hereinabove.

11. In the premise of the view taken by Sh Krishnan, it became necessary to examine the correctness of the view

taken by the Division Benches of Ernakulam Bench of the Tribunal. This could be done only by a Larger Bench of not less than three members. Further, Shri Krishnan's view was not resulting in a majority opinion in accordance with which Original Applications could be disposed of under Section 26 of the Administrative Tribunals Act, 1985. He, therefore, rightly directed that the papers be placed before the Chairman for appropriate directions. This is how the Original Applications have come up for final disposal before this Full Bench.

12. On behalf of the applicants written arguments had been filed on 6.7.1991. On 7.4.1995, an application was moved in which it was stated that the Original Applications may be decided on the basis of the written arguments already submitted and on the basis of the recent judgement of the Supreme Court in Civil Appeal No.3543-46 of 1990. At the time of oral hearing, no counsel appeared on behalf of the applicants. Some of the applicants appeared in person and stated that they have no oral arguments to advance. They invited our attention to the Supreme Court decision copy of which had been filed with the application dated 7.4.1995. The learned counsel for the Central Government invited our attention to the prayer clause in the applications and submitted that the applicants have not prayed for quashing of the Office Memorandum dated 8.2.1983 and they have not submitted their options required thereunder and, therefore, their pay cannot be fixed on the principle contained in the said Office Memorandum. Indeed we find that the only material prayer made in the applications is to quash the Office Memorandum dated 11.9.1987 so far as it relates to re-employed Armed Forces Pensioners. Rest of the reliefs are consequential thereto. In relief (B), the applicants seek to restrain the respondents from acting in any manner pursuant to the Office Memorandum dated 11.9.1987 and to restrain them from deducting and or recovering any amount from the salary and pension of the applicants pursuant thereto. In clause (C), it is prayed that the respondents be directed to treat the applicants as entitled to pay and pension as if this Office Memorandum had not been issued at all.

13. So far as constitutional validity of the Office Memorandum dated 11.9.1987 is concerned, it is no longer res integra in view of the decision rendered by their Lordships of the Supreme Court in Civil Appeal No.3543-46 of 1990(Union of India & others vs. G. Vasudevan Pillay and ors. etc. etc.) connected with other appeals and Special Leave Petitions. In para 1 of the judgement, their Lordships have enumerated three questions which arose for determination before them. The third question reads thus:

" reduction of pay equivalent to enhanced pension of those ex-servicemen who were holding civil posts on 01-01-86, following their re-employment, is permissible or not "

In para 15 of the judgement, their Lordships have observed:

"..... we find no logic and basis for classifying the re-employment persons on the basis of their being on employment on 01-01-86. Indeed, no justification has been canvassed before us. The decision which held the field before the impugned Memorandum in not taking note of pension while fixing pay of the ex-servicemen on re-employment, which was based on good reasons, had no good reason for its reversal, as enhanced pension was not confined to those who were in employment on 01-01-86. The impugned decision is, therefore, arbitrary and is hit by Articles 14 & 16 of the constitution. We, therefore, declare the same as void."

14. In the above judgement, their Lordships have found the impugned Office Memorandum to be invalid on a ground different from the one pleaded by the applicants. The applicants have not challenged the validity of the Memorandum on the ground that 1.1.1986 is the cut-off date. They have treated 25.1.1983 as the cut-off date. However, that is immaterial as once the impugned Memorandum is quashed, it becomes nonest and, therefore, there is no question of reading it down as suggested by Shri Krishnan.

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15. Once the Office Memorandum dated 11.9.1987 goes, the question that survives is how the pay of the applicants has to be fixed. The applicants' plea is that it should be fixed by completely ignoring the pension drawn by them for their services in the Armed Forces as provided in the Office Memorandum dated 8.2.1983 and for this they rely upon the judgements of the Ernakulam Bench referred to hereinabove, particularly the judgement in K.K.Unnikrishnan(supra). Indeed, that Bench had held "the entire amount of military pension of Rs.375/- should be ignored for the purposes of pay fixation of the applicant with effect from 1.1.1986 as if the applicant had opted for the O.M. of 8.2.1983" and had disposed of the application with the declaration that the applicants are eligible to draw pension and salary in the manner as are drawn by those who were re-employed after 25.1.1983." Until the Ernakulam Bench judgements are overruled, the respondents will have to follow them and fix the pay of the applicants in accordance with the declaration of law contained therein. Therefore, even though no prayer has been made in the present applications for quashing any part of the Office Memorandum dated 8.2.1983, we will have to examine the validity of the applicants' challenge in respect of the Office Memorandum dated 8.2.1983 and the correctness of the view taken by the Ernakulam Bench of the Tribunal.

16. The applicants did not challenge the entire Office Memorandum dated 8.2.1983. In fact, they relied only upon most part thereof. Their/grievance is that the benefit conferred thereunder has been denied to them while it has been allowed to those who came in employment

on or after 25.1.1983. If the benefit of the Office Memorandum has been denied to the applicants no one else ~~is to be blamed~~ except the applicants themselves. They had the opportunity to come thereunder by exercising option but they chose not to do it. The action of the respondents in calling options cannot be faulted. It appears that some stood to gain by opting to come under the Office Memorandum while some others stood to lose. It depended upon the quantum of pension drawn by each individual employee. This is amply reflected in the by Finance Ministry's letter dated 23.12.1983 and in applicants' own averments contained in para 6.5 which reads as follows:

" When the applicants had come to know that the fixation of their pay under the said Office Memorandum dated 8th February 1983 would not be beneficial and that they would be losers, they had not exercised their option under the said Office Memorandum. Some of the applicants who had exercised such option had withdrawn their option pursuant to a communication dated 2nd May 1985 issued by the Ministry of Finance."

In this situation it was but fair on the part of the administration not to apply the Office Memorandum dated 8.2.1983 to all and sundry but to confine it to those who chose to come thereunder. It may be that while calling for options two classes of re-employed ex-servicemen had come into existence and in this manner the Office Memorandum dated 8.2.1983 has created classification but it is settled law that all classifications are not unconstitutional and only those are unconstitutional which are not based on any intelligible differentia and have no nexus with the objective sought to be achieved.

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17. The objective of Office Memorandum dated 8.2.1983 was to give benefit to the employees. The object of inviting options which resulted in classification also was to give benefit of the employees. Thus the classification is based on intelligible differentia and it has nexus with the objective sought to be achieved.

18. In upholding the plea of discrimination, the Ernakulam Bench has relied upon the decision of the Supreme Court in D.S.NAKARA Vs. Union of India (1983 SCC (L&S) 145) . Brother Krishnan has rightly observed that Nakara's case has no application to the facts of the present case as the rule which came up for interpretation before their Lordships did not provide for exercise of option. He has also rightly observed that the Office Memorandum dated 8.2.1983 treats all re-employed ex-servicemen identically. Subject to option, it applies to all equally.

19. In view of the above, we are of the opinion that the view taken in the aforesaid three decisions of the Ernakulam Bench is not correct. The Office Memorandum dated 8.2.1983 is not violative of Article 14 of the Constitution on the grounds stated by the Ernakulam Bench.

20. In the Original Applications, the applicants have reproduced the following condition in the Office Memorandum dated 8.2.1983:

" If they opt, their terms would be determined afresh as if they have been re-employed for the first time from the date of these orders."

After reproducing this condition, the challenge is raised thus:

" This condition was unreasonable and therefore the said Office

Memorandum was challenged in the Courts of law by some ex-servicemen re-employed. This condition created a class among the re-employed ex-Servicemen. The ex-servicemen who were re-employed after 25th January 1983 and those who were re-employed prior to 25th January 1983 were classified into two segments. The former were sought to be given the benefit of the said Official Memorandum, but the latter were sought to be given the benefit of the Official Memorandum only on the condition that they should be prepared to lose their past increments earned and that they should be prepared to be treated as re-employed only on 25th January 1983".

21. From the above, it would appear that the applicants' grievance is that if they had opted to come under the Office Memorandum dated 8.2.1983 they would lose the increments earned by them since their employment on the civil posts as they will be treated as having been re-employed only on 25.1.1983. This challenge has been dealt with by Brother Krishnan as follows:

"The 8.2.83, O.M. related to fixation of initial pay on reemployment and not to fixation of pay in a revised scale. It is necessary to appreciate this important point of difference. Therefore, in its applicability to the existing reemployed pensioners also, it was made clear that, they would get the benefits of that O.M. only if they opt for it, the option being they are agreeable to be treated as re-employed from 8.2.83 only, so that their initial pay on reemployment could be fixed on that date, after ignoring their entire pension. In this respect all persons are treated equally by this O.M. Thus if the reemployment is on 25.1.1983 or thereafter, it is a fresh reemployment and the O.M. applies to it. If the reemployment is before 25.1.1983, and the employee opts for this O.M. he is treated as having been freshly reemployed on 8.2.1983. This is appropriate, because the purpose of the O.M. was to liberalize the method of fixing only initial pay on reemployment made on or after 25.1.83 or deemed to be so made. Therefore, with great respect to the Division Bench which decided TAK-404/87, there is nothing inequitable in the condition in the 8.2.83 O.M. viz."If they so opt, their terms would be determined as if they have been reemployed for the first time from the date of these orders.", because initial pay can be fixed only on the date of first reemployment."

We are in respectful agreement with the view expressed by Brother Krishnan.

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22. Our conclusion, therefore, is that no part of the Office Memorandum dated 8.2.1983 is invalid and the applicants are not entitled to the benefit conferred thereunder as they did not exercise the option to come thereunder. Accordingly, the applicants' pay in the revised scale will have to be fixed in accordance with the Office Memorandum dated 9.12.1986. The applicants' plea that their entire pension may be ignored in fixing their pay in the revised scale effective from 1.1.1986 cannot be accepted.

23. In view of the above, the Original Applications are partly allowed. In view of the fact that the Office Memorandum dated 11.9.1987 has been quashed by their Lordships of the Supreme Court, the applicants' pay in the revised scale shall not be fixed in accordance with the principle contained therein. Instead, the applicants' pay in the revised scale shall be fixed in accordance with the Office Memorandum dated 9.12.1986. The respondents are directed to act accordingly. If by determining applicants' pay in accordance with the Office Memorandum dated 9.12.1986 with effect from 1.1.1986 they had been overpaid, it will be open to the respondents to recover the excess amount. There shall be no order as to costs. Interim order, if any operating shall stand discharged.

[Signature]
(V.RADHAKRISHNAN)
MEMBER (A)

[Signature]
(N.B.PATEL)
VICE-CHAIRMAN (J)

[Signature]
(S.C.MATHUR)
CHAIRMAN

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O.A./194/88

CORAM : Hon'ble Mr. P.H. Trivedi .. Vice Chairman
Hon'ble Mr. P.M. Joshi .. Judicial Member

22/03/1988

Heard Mr. M. Radhakrishnan and Mr.P.N. Ajmera for Mr. J.D. Ajmera, learned advocates for the applicants and respondents respectively. Petition admitted. Issue notice on interim relief and on merit to be replied within 15 days and 45 days respectively. The case may be posted on 7th April, 1988 for interim relief.

The applicants will ask for permission for joining ^{all} the applicants in a single case.

Punt

(P H Trivedi)
Vice Chairman

Jm
(P M Joshi)
Judicial Member

*Mogera