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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH, JODHPUR

O.A. No. 231/2001
~~E.A.~~ No.

199

DATE OF DECISION 16.10.2002

VISHVA DEO

Petitioner

MR. P.R. SINGH

Advocate for the Petitioner (s)

Versus

U.O.I. & OTHERS

Respondent

MR. D.S. RAJVI

Advocate for the Respondent (s)

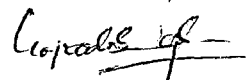
CORAM :

The Hon'ble Mr. GOPAL SINGH, ADMINISTRATIVE MEMBER

The Hon'ble Mr. J.K. KAUSHIK, JUDICIAL MEMBER

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


(J.K. KAUSHIK)
Judl. Member


(GOPAL SINGH)
Administrative Member

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CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH, JODHPUR

ORIGINAL APPLICATION NUMBER 231 OF 2001
DATE OF DECISION: THIS IS THE 16TH DAY OF OCT., 2002

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THE HON'BLE MR. GOPAL SINGH, ADMINISTRATIVE MEMBER

THE HON'BLE MR. J.K. KAUSHIK, JUDICIAL MEMBER

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Vishva Deo S/o Shri Sukhram, R/o House No. 154,
Subhash Chowk, Ratanada, Jodhpur, Ex-
Serviceman at present posted at
Nursing Orderly whereas working on the
post of Staff Nurse in Post & Telegraph
Dispensary, Jodhpur (Raj).
By Mr. P.R. Singh

.....Applicant.

versus

1. Union of India through the Secretary
(P&A), Govt. of India, Ministry of
Personnel, PG & Pensions (Department
of Personnel & Training), New Delhi.
2. The Deputy Director, General (Medical),
Lucknow, C.P.M.G. Ground,
Lucknow.
3. Senior Superintendent of Post Offices,
Jodhpur Division, Jodhpur.
4. Chief Medical Officer,
Post & Telegraph Dispensaries,
Ajmer & Jodhpur (HQ),
Jodhpur (Raj).

.....Respondents.

By Mr. D.S. Rajvi

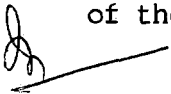
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ORDER

[PER MR. J.K. KAUSHIK]

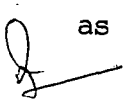
Applicant, Vishva Deo, has filed this O.A. under Section 19
of the Administrative Tribunals Act, 1985, with the prayer that the



respondents may be directed to grant the benefit of fixation of pay to the applicant in accordance with the Central Civil Service (Fixation of Pay) Re-employed Pensioners Orders, 1986 (for short "the Rules") and also, to regularise him on the post of Staff Nursing Assistant and he may be paid the salary for the post of Staff Nurse from the date he is working with due arrears along with interest. However, he has confined his prayer to the extent of first relief i.e. prayer relating to pay fixation as Nursing Assistant and sought liberty for filing a fresh O.A. in regard to the second relief.

2. The undisputed facts of this case are that the applicant is an Ex-Serviceman. He served in the Indian Army in Army Medical Corps from 8th January, 1968 to 1st February, 1988 as Nursing Assistant and retired from service on completion of twenty years of active service. He was re-employed on the post of Nursing Orderly on 6th January, 1992 in Post & Telegraph Dispensary. The post of Nursing Orderly is in the scale of Rs. 800-1150 and the applicant has been fixed at Rs. 800/- i.e. at the minimum of the scale as on the date of his re-employment. He has also been sanctioned military pension and he did not opt for inclusion of the military service in the civil service. Therefore, he is getting his normal pension as also got the other retiral benefits as admissible under the Rules.

3. Primary controversy involved in this case is in regard to the fixation of the pay of the applicant on the re-employed post of Nursing Orderly on the date of his re-employment i.e. 6th January, 1992. As per the contentions of the applicant, the pay of the applicant ought to have been fixed at the pay last drawn by him in the military service i.e. Rs. 1,140/- and to be fixed at Rs. 1,150/- as per the rules of fixation.



4. On the other hand, the contentions of the learned counsel for the respondents are that new rules called 'the Rules' as aforesaid, have been introduced with reference to all appointments made on or after 1st July, 1986. The Rules relating to Ex. Combatant Clerks and Storemen, are explained in Order 16 of the Rules whereas, the applicant was not of this category, as such, the applicant is eligible for benefit as per the Order (4) of the Rules and he is already getting the same. The further contention of the learned counsel for the respondents is that the applicant has not opted for inclusion of his military service in the civil service, as such, neither he exercised any option for re-fixation of his pay nor refunded the amount of Death-cum-Retirement-Gratuity (DCRG) with interest including service Gratuity, if any, with other benefits and, therefore, no legitimate right of the applicant has been denied.

5. The learned counsel for the applicant has placed reliance on the judgement of Apex Court in Director General of Posts and others vs. B. Ravindran and another reported in (1997) 1 SCC 641 and the judgement dated 7th December, 2001 in Union of India and others vs. Mool Singh and another passed by a Division Bench of Hon'ble High Court of Rajasthan in D.B.C. Writ Petition No. 3946/2001. The learned counsel for the applicant has submitted that the controversy in hand is fully covered by these judgements and the applicant's case is covered by Para 4-d of the Rules Read with other basic Orders in the matter and he is entitled to get his pay fixed at Rs. 1,150/- on the date of his re-deployment in the postal department. But, this amount shall be subjected to grant of one increment for each year of service rendered by him which is twenty in the present case and in this way, his pay can be fixed only at Rs. 1,130/- i.e.

after grant of twenty increments in the scale of Rs. 800-15-1010-20-1150.

6. We have considered the rival contentions involved in this case and have carefully perused the records of the case in addition to various judgements referred to by the learned counsel for the parties.

7. At the very out set, a frivolous objection has been adduced during arguments by the learned counsel for respondents that the applicant has not exercised his option for inclusion of his military service in the civil service. He has also not submitted any option for re-fixation of his pay or for refund of amount of DCRG with interest. In support of his contention he has referred to Annexure R/2 at page No. 38 of the paper book. A perusal of this Annexure indicates that applicant has not opted for inclusion of his military service with the civil service. This has got nothing with the pay fixation. In case, one gets his military pension added to the civil service he is required to return back his gratuity and he will not get the military pension. The service rendered by him in military would be counted as qualifying service on the re-employed post. There is no requirement of any option for pay fixation under Rule 4-D of the Rules. Thus, the contention of the learned counsel for the respondents is repealed and cannot be sustained.

8. The Rules of 1979 envisage that, all ex-servicemen within the meaning of Rules, any person who has served in any rank, whether as combatant or as a non-combatant in the Regular Army, Navy and Air Force of the Indian Union and who has retired from such service after earning his pension, is deemed to be an ex-serviceman for the purpose of re-employment. ~~The fixation in the Central services was~~

~~reserved for re-employment, such ex-servicemen subject to relaxation in age limit and educational qualification.~~

9. We would like to mention here that there are special provisions relating to fixation of pay in respect of Combatant Clerks appointed on the post of LDC, Storemen, Telephone Operator etc. The respondents have tried to mix-up those provisions with the general provision of fixation of pay on re-employment. It was also pointed out that the case of M.S. Rathore, was relating to the person who is appointed as Telephone Operator and the same provision would not apply to the person who is appointed to the post of Nursing Orderly.

As would be clear from this very judgement, we have exclusively dealt-with the case of Ex-Servicemen. The post of Nursing Orderly is included in the definition of Ex-Servicemen.

10. Pay fixation of an Ex.Army official on his re-employment in a civil post is governed by the Government of India, Ministry of Finance O.M. 8(34)-Estt-III/57 dated 25th November, 1958 which read as under :-

"OM dated 25.11.1958

1. The initial pay, on re-employment, should be fixed at the minimum stage of the scale of pay prescribed for the post in which an individual is re-employed. In cases, where it is felt that the fixation of initial pay at the minimum of the prescribed pay scale will cause undue hardship, the pay may be fixed at a higher stage by allowing one increment for each year of service which the Government servant has rendered before retirement in a post not lower than that in which he is re-employed."

11. The learned counsel for the applicant has submitted that the Apex Court in Director General of Posts and others vs. B. Ravindran and another (supra), has accepted the issue that the orders issued

in 1963, 1964, 1978 and 1983 were to give some more benefit to the re-employed pensioners/ex-servicemen. The effect of benefit was to be given at a stage prior to consideration of hardship. The ignorable part of the pension was to be ignored while totalling up the initial pay/pension in order to find out whether the retired pensioner thereby was likely to get more or less than what he was getting at the time of his retirement. To that extent the 1958 policy stood altered or modified. Though the said four orders did not directly deal with the aspect of hardship they did by widening the gap between the initial pay plus the non-ignorable part of the pension and the pay he drew before his retirement and thereby further necessitated giving of advance increments to alleviate hardship. He has also submitted that pursuant to orders issued in 1963 and 1964, corresponding amendments were made in Articles 521 and 526 of the Civil Service Regulations which continues to be in force by virtue of Article 313 of the Constitution. It has also been submitted that in the aforesaid case, Hon'ble the Supreme Court was examining the Circular dated 31st December, 1985 issued by the Postal Department whereby a clarification was issued with respect to mode of pay fixation of re-employed pensioner as under :-

" When a re-employed pensioner asks for refixation of pay under the 1983 orders, his pay has to be fixed at the minimum of the scale. The question of granting him advance increments arises only if there is any hardship. Hardship is seen from the point whether pay plus pension plus pension equivalent of gratuity (whether ignorable or not) is less than the last pay drawn at the time of retirement. If there is no hardship no advance increments can be granted."

This clarification has been held to be invalid and without any authority of law and the judgement of the Tribunal has been affirmed. The operative portion reads as under :-

"16. The subsequent orders issued in 1978 and 1983 were supplementary in nature and did have a binding force. Under

these circumstances, the Government could not have, under the guise of a clarificatory order, taken away the right which had accrued to such re-employed pensioners with retrospective effect by declaring that while considering hardship the last pay drawn at the time of retirement was to be compared with the initial pay plus pension whether ignorable or not. The 1985 clarificatory instructions were not only inconsistent with the relevant provisions of the Civil Service Regulations and the 1978 and 1983 orders but its effect was to supersede the said provision and the orders. The Tribunal was, therefore, right in holding the said instructions in so far as they directed to take into consideration the ignorable part of the pension also while considering hardship invalid and without any authority of law. These appeals are, therefore, dismissed with no order as to costs."

Thus, the position settled by the Apex Court in the aforesaid case is that ignorable part of pension cannot be taken into account while reckoning the hardship.

12. The learned counsel for the applicant has further submitted that placing reliance on the aforesaid judgement, Hon'ble the High Court in Union of India and others versus Mool Singh and another (supra), has followed the same ratio and has upheld the view taken by this Bench in O.A. No. 381/97 Mool Singh Rathore versus Union of India and others decided on 10th April, 2001.

We have perused the above judgement and a copy of the judgement is being placed on the record of this file. We find it expedient to re-produce the relevant part of the judgement from page nos. 7 to 11 as under :-

"Clause 4: Fixation of pay of re-employed pensioners -

(a) Re-employed pensioners shall be allowed to draw pay only in the prescribed scales of pay for the posts in which they are re-employed. No protection of the scales of pay of the posts held by them prior to retirement shall be given.

(b) (i) In cases where the entire pension and pensionary benefits are not ignored for pay fixation, the initial pay on re-employment shall be fixed at the same stage as the last



pay drawn before retirement. If there is no such stage in the re-employed post, the pay shall be fixed at the stage next above that pay. If the maximum of the pay scale in which a pensioner is re-employed is less than the last pay drawn by him before retirement, his initial pay shall be fixed at the maximum of the scale of pay of the re-employed post. Similarly, if the minimum of the scale of pay in which a pensioner is re-employed is more than the last pay drawn by him before retirement, his initial pay shall be fixed at the minimum of the scale of pay of the re-employed post. However, in all cases, the non-ignorable part of the pension shall be reduced from the pay so fixed.

(c) The re-employed pensioner will in addition to pay as fixed under para (b) above shall be permitted to draw separately any pension sanctioned to him and to retain any other form of retirement benefits.

(d) In the case of persons retiring before attaining the age of 55 years and who are re-employed; pension including pension equivalent of gratuity and other forms of retirement benefits shall be ignored for initial pay fixation to the following extent :-

(i) in the case of ex-servicemen who held posts below commissioned officer rank in the Defence Forces and in the case of civilians who held posts below Group 'A' posts at the time of their retirement, the entire pension and pension equivalent of retirement benefits shall be ignored.

" (ii) In the case of service officers belonging to the Defence Forces and Civilian pensioners who held Group 'A' posts at the time of their retirement, the first Rs. 500/- of the pension and pension equivalent of retirement benefits shall be ignored."

Having perused this provision, we are of the opinion that this provision does not carry the case of the petitioner any further. Clause (a) envisages that there is no protection of the scales of pay of the posts held by them prior to retirement shall be given.

Clause (b) classifies the cases in two categories, one is the case where the pension is fully ignored. So far as in the case of such ex-serviceman, who is re-employed on the post and his pension is fully ignored, sub-para (i) of Para (b) directly provides that the initial pay on re-employment shall be fixed at the minimum of the scale of pay of the re-employed post.

Other is the class of persons in whose case pension is not fully ignored. Such cases are governed by Para b(ii) of Clause 4.

Para (d) of sub-clause (b) states that any person who retires before attaining the age of 55 years and who is re-employed pension shall be ignored to the extent mentioned therein only.

Thus, it is clear that where a person who is retired

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before attaining the age of 55 years is re-employed, in fixing his pay on re-employment his pension is not to be fully ignored but is ignored only on the extent provided in para (d) of Clause 4 and his pay is to be fixed as per Clause b(ii), where he is re-employed. In such case Rule is not to fix the pay at the minimum of pay-scale applicable to the post. But he has to be fixed at the same stage at the last pay drawn before retirement.

Apparently the case of the applicant-respondent No.1, who is retired before attaining the age of 55 years after serving 15 years of active service and remaining on reserved list for two years 1982 is governed by the criteria laid in sub-clause (ii) of Clause (b).

Reading that provision makes the following criterion for fixation of pay on re-employment in clear terms : (i) that in cases where the entire pension and pensionary benefits are not ignored for pay fixation, the initial pay on re-employment shall be fixed at the same stage as the last pay drawn before retirement.

As per this general principal the respondent-applicant is entitled to be fixed at the same stage at the last pay drawn by him in his previous employment.

Exception to the general rule has been provided in the following manner : (i) where the maximum of the pay scale of pay in which a pensioner is re-employed is less than the last pay drawn by him before retirement, his initial pay shall be fixed at the maximum of the pay of re-employed post. Obviously, this is not exception in which applicant's case falls inasmuch as he has not been re-employed at the maximum of pay-scale which is less than last drawn pay maximum. We have noticed above that last drawn pay for the purpose of Rs. 270 whereas maximum of pay-scale in which he has been found Rs. 400/-. (ii) Similarly, if the minimum of the scale of pay in which a pensioner is re-employed is more than the last pay drawn by him before retirement, his initial pay shall be fixed at the minimum of the scale of pay of the re-employed post.

It is also clear that since the minimum of the pay-scale of the pay of the post in which pensioner is re-employed is not more than the last pay drawn by him before retirement. He cannot be fixed under this exception also inasmuch as minimum of the pay-scale of pay in which the pensioner has been re-employed is Rs. 260/-, whereas last drawn pay of the respondent-applicant was Rs. 270/- is more than that.

In these circumstances, as per the provisions of order of 1986 relied upon by the petitioners also the respondent-applicant was entitled to be fixed in the pay-scale of the post on which he was re-employed at the same stage at which he was last drawing the pay in his previous employment.

In view of this it cannot be said the order of Tribunal suffers from any error apparent from record which may justify issue of writ of certiorari by invoking extra-ordinary jurisdiction.

Accordingly, we do not find any force in this writ petition and the same is hereby dismissed with no order as to costs."

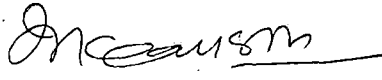
The aforesaid portion of the judgement fully covers the controversy involved in this case except to the extent that in this case, the applicant is entitled to the relief he could get maximum benefit of twenty advance increments with which his minimum pay can be fixed at Rs. 1,130/- only and not at the stage which he was getting at the time of his retirement from military service.

13. We have no hesitation in following the aforesaid judgements and decide this O.A. on similar lines. However, we have come across a recent judgement of the Apex Court in Director ESI Corporation, New Delhi and another versus M.P. John and others, reported in AIR 1999 SC 448, wherein, their lordships has placed reliance on the clarificatory orders identical to the one i.e. Office Memorandum dated 30th December, 1985. The said Memorandum has already been held invalid and without any authority of law by the very Apex Court in the case of Director General of Posts and others versus B. Ravindran and another (supra). We also observed that in B.Ravindran's case, the OMs of 1963 and 1964 and the corresponding amendments made under Articles 521 and 526 were in issue. But, all these facts/law position was unfortunately, not brought to the notice of the Apex Court in Director General ESI Corporation, New Delhi and another versus M.P. John and others (supra) and thus, that case is distinguishable and is thus per incurium. In this view of the matter, we have no option except to follow the law laid down by the Apex Court in Director General of Post and others versus B. Ravindran and another wherein, their lordships after considering all the O.Ms and subsequent developments, held the O.M. dated 30th December, 1985, as invalid. As per the general rule of the

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precedent, we are required to follow the latest judgement in case there are two judgements of equal judges Benches of Apex Court. But, in the present case, we find ourself it difficult rather unable to ad-here to the general principle of precedent especially for the reason that the very O.M. on which the complete latest judgement is based, has been declared invalid and without authority of law and this very fact was not brought to the notice of the said Bench of Apex Court who delivered the latest judgement which could be aptly described as judgement in personam.

14. In view of the foregoing discussions, we find much force in the O.A. and the O.A. is allowed. The Respondents are directed to fix the pay of the applicant in accordance with the O.M. dated 25th November, 1958 as amended upto-date and the Central Civil Service (Fixation of Pay) Re-employed Pensioners Orders, 1986, by granting all twenty advance increments for having twenty completed years of service in the Army. He shall also be entitled to all consequential benefits i.e. arrears of difference of pay etc. This order shall be implemented within a period of three months from the date of receipt of a copy of this order. There shall be no order as to costs.


[J.K. Kaushik]
Judl. Member


[Gopal Singh]
Administrative Member

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mehta