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CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH, JODHPUR

Original Application No. 40/2003
Date of Decision : This the 29th day of October, 2003

Hon'ble Mr. J.K. Kaushik, Judicial Member

Bhadu Ram S/o Shri Rama Ram
Aged 61 years, Retd. FGM HS II, MES.,
Air Force, Jaisalmer,
R/o Vill. Bada Bagh, Post Amer Sagar,
District Jaisalmer.
(By Advocate Mr. Vijay Mehta, for applicant)

.....Applicant.

Versus

1. Union of India, through the Secretary to Government, Ministry of Defence, Raksha Bhawan, New Delhi.
1. Garrison Engineer, MES, Air Force Jaisalmer.
2. Controller of Defence Accounts, Southern Command, Pune.
(By Advocate Mr. S.K. Vyas, for respondents)

...Respondents.

ORDER

BY THE COURT:

Shri Bhadu Ram, has filed this O.A. assailing the order dated 4.10.2002 (Annex.A/1) with a further direction to make payment of pension and gratuity up to the date of actual retirement and also for restraining the respondents from making any recovery.

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2. The brief facts of the case are that the applicant was in the service of the respondents and last served on the post of FGM HS II in Military Engineering Service, Air Force, Jaisalmer. He was superannuated w.e.f. 30.6.2001 vide order dated 14.6.2001 (Annex.A/2). An Application No. 249 of 2002 was earlier filed and was pending at the time of filing of this O.A. During the pendency of that case, certain retrial benefits of the applicant were released. However, the period of service from 1.7.1998 to 30.6.2001 was treated as irregular retention in service and, therefore, the salary for that period has been recovered and gratuity and pension were paid after excluding the said period. No reasons have been disclosed and the applicant was also not given any opportunity of prior notice before passing of the said order. The O.A. has been filed on diverse grounds but, I shall discuss the one which have been stressed at a little later.

3. The respondents have contested the case and have filed a detailed reply to the O.A. wherein it has been very specifically narrated that the actual date of birth of the applicant as noted in his service record is 8.6.1938 but, another certificate was produced by giving his date of birth as 15.3.1944 and the matter was taken up with the Chief Engineer, Air Force, Ahmedabad in the year 1997. Thereafter, it was found that applicant would have retired on 30.6.1998. The applicant was accordingly placed in pension list w.e.f. 1.7.2001 and his retrial benefits were to be withheld till regularisation of his case for irregular retention in service beyond the date of superannuation i.e.

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1.7.1998 to 30.6.2001. His terminal benefits were subsequently released after with- holding the salary for the period of irregular retention in service and, therefore, the applicant is not entitled for pay and allowances. The same cannot be treated as qualifying service. The matter regarding the over age relaxation at the time of his appointment and relaxation in retention of the period beyond superannuation is still pending with the Government of India. A short rejoinder has also been filed controverting the facts brought out in the reply.

4. With the consent of the parties, case was taken up for final hearing at the admission stage and I have heard the learned counsel for the parties and have carefully perused the pleadings and the records of this case. The relevant records including the service book of the applicant was also made available which have also been perused by me.

5. At the very outset, the learned counsel for the applicant has submitted that the applicant would have no objection if the date of birth of the applicant is taken to be as 8.6.1938 as contended by the respondents and he would not claim any pension or retrial benefits on the basis of which working after the date of his superannuation i.e. 30.6.1998, basing on the date of birth being relied upon by the respondents themselves. The learned counsel for the applicant has contended that he would restrict his claim only regarding to the recovery part of the matter for the period after the said date of superannuation till he continued in service i.e. from 1.7.1998 to 30.6.2001.



He has submitted that the respondents cannot be allowed to make any recovery for this period since there was absolutely no mis-representation on the part of the applicant and the applicant was continued in service probably by keeping the matter under investigation. He has also submitted that the law position is settled by now that until and unless there is any misrepresentation on the part of the employee, no recovery can be affected against him even if the action is taken to rectify the mistake of fixation of the pay resulting in over payment etc. The same ratio applies to the instant case. He has next contended that the applicant has physically performed the duties and as per the settled position of law one would be entitled for due salary and allowances for such period. He has also cited the following decisions in support of his contentions:

- (i) AIR 1978 SC 851 Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi & Ors.
- (ii) 2002 (95) FLR 514 A.R. Ghosh Vs. State of Raj. And Anr.
- (iii) JT 2002 (5) SC 355 Lakshmi Narayan Mukhopadhyay Vs. Union of India and Ors.
- (iv) Number of decisions relating to recovery of amount of over-payment due to wrong fixation of pay or pensionary benefits, from amount of gratuity and that too without any prior notice.

6. On the contrary, the learned counsel for the respondents did not dispute the factual aspect of the matter but, he has reiterated the ground of defence set out in the reply of the respondents and has submitted that the complete chapter was opened only when the applicant submitted another medical certificate in the year 1997 indicating his date of birth as 15.3.1944



and certain time has been taken in investigating the matter. It is also submitted that the matter relating to regularisation of this period is still under consideration of the competent authority and the case is still pending with the Government of India. He has invited my attention to the contents of Paras 7 and 11 of the reply and has submitted that the action will be taken after the receipt of the decision of the Government in the matter.

7. I have considered the rival contentions raised on behalf of both the parties. The matter has been cut short by restricting the reliefs and the controversy only remains as regards whether the applicant would be entitled to the salary and other allowances for the period from 1.7.1998 to 30.6.2001 during which the applicant has worked beyond the age of superannuation. The learned counsel for the applicant has submitted that there was no misrepresentation on the part of the applicant in the matter, however, there is no pleadings to this effect and in the pleadings the main stress has been that there was infraction of principles of natural justice. There has been confusion regarding the actual date of birth of the applicant and a specific query had to be made to the learned counsel for the applicant who, aptly reacted and accepted actual date of birth of the applicant as submitted in the service book i.e. 8.6.1938. But, it is not clear as to once the date of birth as narrated in the service book is acceptable to the applicant why he continued to be in service and did not object to his retention in service on reaching the age of superannuation i.e. after 30.6.1998. From the records, we do not find

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that there has been anything on applicant's part as regards objecting his working after the said date. On the other hand, the respondents are also silent in this respect. In my considered opinion, this case does not seem to be a simple case of retention in service solely on the fault of the respondents. The cutting/over-writing in the service book smacks subreption. Thus, I find that sufficient material is not available on the records to give a clear finding on this point.

8. As regards the authorities cited by the learned counsel for the applicant, I think there is hardly any necessity to take the exercise of considering the same in view of order I propose to make.

9. It may be noted that in case applicant was not at all at fault and did not know his actual date of birth, it could be said to be a case where there was no misrepresentation from the side of applicant and there was a mistake on the part of the officials of the respondents. In that case, continuance of applicant in service after the age of superannuation may be considered as re-employment and he would be entitled to the salary and allowances as may be admissible on re-employment, for said period. But, in case it is otherwise, the complete action shall be illegal and the applicant may not be entitled to any payment for the period he has worked after superannuation (1997(2) SLJ SC 130, Radha Kishan Vs. UOI & Ors. Refers. However, it has been specifically pleaded in the defence as set out in reply of the respondents that the matter is still pending with the Government for decision regarding the issues relating

to the age relaxation of the applicant at the time of his appointment as well as in respect of the period of working beyond the date of superannuation. Instead of resolving the controversy on the basis of insufficient material, I am of the view that it would be appropriate to remand the case to the respondents for appropriate decision. In this view of the matter, I pass the order as under :

"The O.A. is partly allowed. The impugned order at Annexure A/1 dated 16/10/2002 is hereby quashed. The respondents are directed to decide the pending matter regarding regularisation of retention of applicant in service for the period from 1.7.1998 to 30.6.2001, after hearing the applicant, within a period of two months from the date of receipt of a certified copy of this order. Consequences to follow and in case the applicant is aggrieved from the aforesaid decision, he shall be at liberty to agitate the matter afresh. No costs."

J. K. Kaushik

[J. K. Kaushik]

Judicial Member

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Part II and III destroyed
in my presence on
under the supervision of
Section Officer () as per
order dated

Section Officer (Record)