

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 531 of 1990.
~~Ex Axx No.~~

DATE OF DECISION 15.7.1991

V.F.Chacko Applicant (s)

Mr.MR. Rajendran Nair Advocate for the Applicant (s)

Versus

Union of India represented by Sec Respondent (s)
Ministry of Finance (Dep'tt. of Revenue)
New Delhi and others

Mr.NN Sugunapalan, SCGSC Advocate for the Respondent (s)
through proxy counsel.

CORAM:

The Hon'ble Mr. S.P. MUKERJI - VICE CHAIRMAN

The Hon'ble Mr. A.V. HARIDASAN - JUDICIAL MEMBER

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement? No
4. To be circulated to all Benches of the Tribunal? No

JUDGEMENT

(Hon'ble Mr. S.P.Mukerji, Vice Chairman)

In this application dated 26.6.1990 filed under Section 19 of the Administrative Tribunals Act the applicant who as a reemployed ex-sericeman retiring from ^{the} Collectorate of Central Excise and Customs has prayed that the impugned order dated 30.11.89 revising his pay with effect from 1.1.86 and directing recovery of the over-payment and also refusing gratuity, the impugned order dated 8.12.89 at Annexure V adjusting over-payment against his gratuity and the impugned order dated 4.6.90 directing him to credit an amount of Rs. 6042/- should be set aside and the respondents directed to disburse the Death-cum-Retirement Gratuity ^(DCRG) sanctioned to him. He has also prayed that relief on military pension, refixation of pay with effect from 25.1.83 as also of DCRG and Pension on the basis of his refixed pay should be disbursed to him with arrears with 12 per cent rate of interest.

2. The facts of the case are as follows. Having retired from the Army in 1978 the applicant was re-employed as Communication Assistant in the Department of Central Excise with effect from 10.2.78 in the scale of Rs.425-800. He retired from that Department on 30.11.1987. On 31.12.85 he was drawing Rs. 700/- as basic pay. With effect from 1.1.86 on revision of pay scale to Rs. 1400-2600 his pay was also fixed at Rs. 2300/- with effect from 1.1.86. His military pension was also revised to Rs. 1284/- with effect from 1.1.86. His grievance is that his pay was ^{subsequently} refixed at Rs. 1201/- with effect from 1.1.86 after deducting Rs. 1159/- ie., the non-ignorable part of pension (1284-125) vide Annexure A.I and it was also directed that the excess amount paid to him be recovered/adjusted from the DCRG amount. The excess amount was calculated at Rs. 27,661 and the applicant was directed vide Annexure-II to refund Rs. 21,056/- after adjusting Rs. 6605/- of DCRG. By a further order dated 30.11.89 at Annexure A-IV his pay with effect from 1.1.86 was also reduced to Rs. 1587/- after deducting Rs. 663/- ie., the amount by which his pension was increased with effect from 1.1.86. The over payment was fixed at Rs. 15,814/- and gratuity of Rs. 11,800 was found admissible to him. He was asked to refund Rs. 6042/- towards over payment vide Annexure A.V. The applicant has challenged the Circular dated 11.9.87 on the basis of which his pay was refixed by taking into account the revised pension. He has referred to the O.M. of 8.2.83 by which the entire amount of military pension of ex-servicemen was to be ignored on re-employment in case ^{of} personnel below the Commissioned Officers rank. Those who were already re-employed were directed to submit option but due to fear of loss of increments the applicant did not opt to come over to the 1983 order. He has referred to the order of the Tribunal in T.A.K.404/87 and similar cases wherein it was directed that ex-servicemen who were reemployed as on 8.2.83 should also be given an opportunity ^{to} submit option and get their pay refixed. He has further

argued that the Gratuity is a part of pension and cannot be withheld or adjusted against the alleged over- payments. He claims that his entire military pension unrevised as well as revised should be ignored for the purpose of refixation of his pay and that the impugned order refusing his pay with retrospective effect without giving him notice is null and void ~~and~~ being against the principles of natural justice. He has also challenged the O.M. of 11.9.87 as violative of Articles 14 and 16 of the Constitution as it allows ignoring of entire military pension to those who were re-employed after 8.2.83 while denying the same facility to those who were reemployed on or before that date. The applicant has also claimed relief on pension during the period of his re-employment.

3. The respondents have conceded that on his reemployment with effect from 10.2.78 the pay of the applicant was fixed at Rs. 485/- by allowing one increment for each year of service which he had rendered before retirement from the Army in a post not lower than that in which he is reemployed. In addition to this pay he was permitted to draw military pension which was Rs. 449/- at the time of his discharge, Rs. 621/- with effect from 1.4.79 and Rs. 1284/- with effect from 1.1.86. He was also allowed to draw allowances attached to the civilian pay. They have conceded that with effect from 1.1.86 his revised pay in the re-employed post was fixed at Rs. 2260/- but in accordance with the Department of Personnel's O.M. of 11.9.87 (Annexure.R.3) it was reduced to Rs. 1587/- ie., by the amount by which his pension was increased with effect from 1.1.86. On his retirement from Government Service on 30.11.87 his pension was calculated at Rs. 375/- and DCRG at Rs. 11,800/ by taking into account the unreduced pay. The DCRG of Rs. 11,800 was adjusted against the outstanding dues of Rs. 17,842/- against which he has still to pay Rs. 6042/-. Respondents have cited para-71 of CCS (Pension)

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Rules according to which dues like HBA, Conveyance Allowance, over payment of pay and allowances can be adjusted from DCRG. They have stated that in calculating his pension and DCRG his full basic pay before reducing the element of enhanced military pension was taken into account and relief sanctioned from time to time on his pension is also admissible to him. They have also stated that the applicant can also draw his full revised military pension and relief sanctioned thereon. They have justified revision of his pay with effect from 1.1.86 by the increase in his military pension by the O.M of 11.9.87. They have argued that when his pay was revised with effect from 1.1.86 the amount of allowance that he was drawing on the unrevised pay was given full weightage. Since this allowance included certain elements ^{of} allowance on his military pension, on increase of his military pension some reduction in the pay had to be made and this deduction of ^{pay} ~~was equal~~ to the amount by which the military pension was increased on revision. They have also justified non-allowance of reliefs on military pension during the period of his re-employment under para 354 of Central Treasury Rules Vol.I. They have also stated that since the applicant did not opt to come under the Ministry of Defence O.M. of 24.10.83 he cannot claim total exemption of military pension for calculating his reemployment pay from 1983 onwards.

4. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. So far as admissibility of relief on military pension during the period of re-employment is concerned, a Full Bench of this Tribunal presided over by the Hon'ble Chairman by majority judgment dated 12.7.1989 in T.A.K.732/87 and other cases held as follows:

"Where pension is ignored in part or in its entirety for consideration infixing the pay of re-employed ex-servicemen who retired from military service before attaining the age of 55 years, the relief including adhoc relief, relatable to the ignorable part of the pension cannot be suspended, withheld or recovered, so long as the dearness allowance received by such re-employed pensioner has been determined on the basis of pay which has been reckoned without consideration of the ignorable part of the pension. The impugned orders viz. O.M.No.F.22(87)-EV(A)/75 dated 13.2.1976, O.M.No.F.10(26)-B(TR)/76 dated 29.12.76, O.M.No.F.13(8)-EV(A)/76 dated 11.2.77 and O.M.No.M.23013/152/79/MF/CGA/VI(Pt)/1118 dated 26.3.1984 for suspension and recovery of relief and adhoc relief on pension will stand modified and interpreted on the above lines. The cases referred to the Larger Bench are remitted back to the Division Bench of Ernakulam for disposal in details in accordance with law and taking into account the aforesaid interpretation given by one of us (Shri S.P.Mukerji, Vice Chairman)"

Accordingly in the applicant's case also the relief including adhoc relief on the ignorable part of his military pension has to be allowed to him during the period of his reemployment.

5. Now we come to the second point about the entitlement of the applicant to get his entire military pension ignored for the purposes of pay fixation in accordance with the O.M. of 8.2.83. The applicant has been denied the benefit of this O.M. on the ground that he had not opted to come over ^{to} this O.M. In accordance with this O.M. anybody who was in reemployment ^{on} on that day exercising option to come over to the O.M. would get his reemployment pay refixed from that date and lose increments already earned. In various judgments to which one of us (Shri S.P.Mukerji) was a party we have been holding that such option is not valid in the eye of law and equity and fixing of any arbitrary date for conferring the benefit of the aforesaid O.M. will be discriminatory. In the judgment of the Tribunal dated 31.10.89 to which one of us (Shri S.P.Mukerji) was a party in T.A.K.404/87 the Bench observed as follows:

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"8. We have given our anxious consideration to the rival contentions of both the parties and have also examined the applicability of the principle enunciated by the Supreme Court in the case of D.S.Nakara. We feel that re-employed military pensioners cannot be discriminated on the basis of the date of re-employment just as pensioners cannot be discriminated on the basis of the date of retirement, as has been laid down by the Supreme Court in Nakara's case. The difficulty arises as regards the computation of re-employment pay of such pensioners before and after the issue of the aforesaid O.M. of 19.7.78 or of 8th February, 1983. For the sake of convenience let us take the O.M. of 8th February, 1983. The petitioners who were not Commissioned Officers would be entitled to get their entire military pension ignored with effect from 8th February 1983 by virtue of the O.M. of that date if they had been re-employed after 8th February, 1983. Since they had been re-employed before that date, in order to get the benefit of this O.M. they would have to opt for this O.M. and in that case their re-employment pay will be fixed as if they have been reemployed with effect from 8th February, 1983. This means that their previous service on re-employment during which period they had earned a number of increments, would be totally lost to them. That is, if one of the petitioners had been re-employed in 1979 and had earned four increments in the re-employment post, his pay in February, 1983 will be refixed as if he was re-employed for the first time in February, 1983. In other words, if there is another re-employed military pensioner who is recruited for the first time without any previous reemployment service, the petitioner and the newly re-employed military pensioner will be treated alike, like fresh starters in the post."

Accordingly in the case before us we hold that the applicant is entitled to get his entire military pension ignored for the purpose of his pay fixation from 8.2.83^{but} without any arrears.

6. The third and the last point in this case is regarding reduction of the revised pay with effect from 1.1.86 by the amount by which the military pension was increased with effect from that date even when the entire military pension was to be ignored before 1.1.86. The O.M. of 11.9.87 on the basis of which the respondents have reduced the revised pay of the applicant by the amount by which his military pension was increased even when as held by the Tribunal as above his entire military pension stood to be ignored as on 31.12.85, ~~and~~ has been under challenge in a number of cases before this Bench of the Tribunal. In the various judgments to some of which one of us has been a party, it has been held that where the total amount of military pension was to be ignored for the purpose of fixation of reemployment pay

it has to be ignored even if the military pension is revised with effect from 1.1.86. The following extracts from the judgment dated 20.12.90 to which one of us (Shri S.P.Mukerji) was a party in O.A.144/90 will be pertinently relevant:

"4. Let us start with the Department of Personnel and Training's O.M.No.3/7/86-Estt(Pay.II) dated 9th December, 1986 (Annexure R.3(e) in O.A.710/89) by which the re-employed pensioners also were given the benefit of revised pay scales with effect from 1st January, 1986. Para 2 of this O.M. is extracted below:-

"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 CCS(RP) 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 the re-employment with reference to these benefit 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 as he was permitted to draw in the pre-revised scales. However, any amount which was being deducted from his pay in the prerevised scale in accordance with the provisions of Note 1 below para 1 (c) of Ministry of Finance Office Memorandum No.F8(34)Estt.III/57 dated the 25th November, 1958 shall continue to be deducted from the pay and the balance will be allowed as actual pay.

" After pay in the revised scale is fixed in the manner indicated above, increments will be allowed in the manner laid down in Rule 8 of CCS (RP) Rules, 1986." (emphasis added).

" From the above it is clear that vide para 2(i) above for those re-employed pensioners who did not get any retirement benefit or whose pension was totally ignored, for purposes of pay fixation on re-employment, their re-employment pay on revision will be fixed like any other Central Govt. servant without any deduction because of pension. In respect of the re-employed pensioners

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whose full or part of pension was to be taken into account for pay fixation on re-employment vide para 2(ii) above, their re-employment pay in the revised scales would continue to be subjected to adjustment by deduction on the basis of the non-ignorable part of the unrevised pension. It may be remembered that the aforesaid O.M. of 9th December, 1986 was issued when it was decided to give revised pay scales to the re-employed pensioners, but when their pension had not been revised. Subsequently when the pension also was revised with effect from 1.1.86, the impugned order dated 11th September, 1987 (Annexure.A.1) was issued. For the facility of reference, the order is quoted in full as follows:-

"Subject: Applicability of C.C.S(RP) Rules, 1986 and C.C.S(RP) Amendment Rule 1987 to persons re-employed in Government service after retirement, whose pay is debitable to Civil Estimates.

"The undersigned is directed to invite attention to this Department of O.M. of even No. dated 9th December, 1986 whereby persons reemployed in Civil posts under the Government after retirement and who were in the reemployment as on 1.1.1986 were allowed to draw pay in the revised scales under CCS(RP) Rules, 1986. A point has arisen as to whether consequent on the revision of pension of the employees with effect from 1.1.1986, the revised pension should be taken into reckoning for the purpose of fixation of pay of such re-employed persons in the revised scale.

"2. The matter has been considered. 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 O.M. dated 9.12.1986 may be refixed with effect from 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 refixation of their pay in terms of provisions of this department O.M. datd 9.12.1986. Over payments 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 with effect from 1.1.1986 for the purpose of refixation of their pay after taking into account their revised pension.

"3. In so far as the application of these orders to the persons serving in the Indian Accounts and Audit Department is concerned, these orders are issued in consultation with the Comptroller and Auditor General." (emphasis added).

"Since the order of 11th September, 1987 directs adjustment of the pension of ex-servicemen by re-fixation of their re-employment pay in terms of the O.M. of 9th Decembr, 1986 the respondents cannot reintroduce through the back door, the ignorable part of the pension which continued to be ignored by the O.M. of 9th December, 1986. The question of deduction of pension from the re-employment revised pay arises only in respect of those re-employed ex-servicemen who fall within sub-para 2(ii) of the O.M. of 9t December, 1986. Since the applicants before us had their entire amount of pension ignored by virtue of the 1983 order, which has not been superseded by the impugned order of 11th Sept.

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"1987, they fall within the application of sub-para 2(i) of the O.M. of 9th December, 1986 wherein there is no mention of adjustment of pension by deduction from pay as has been mentioned in sub-para 2(ii) thereof. The above conclusion is supported by the Ministry of Finance's letter No.A-38015/72/88-Ad.IX dated 5th April, 1989 (a copy of which is placed on the case file) as quoted below:-

"Sub: Refixation of pay of re-employed military pensioners as per CCS(RP) Rules, 1986-regarding.

I am directed to refer to your letter F.No.250/1/Estt/Rep/89 dated 6.1.1989 on the above subject and to say that matter has been examined in consultation with department of Personnel & Training and P&FW who have held the views that as far as the application in O.M.No.3/9/87-Estt(P.II) is concerned increase in pension w.e.f. 1.1.86 has to be adjusted from the pay fixed in the revised scale excepting those where pension is not at all reckonable factor e.g. those governed under O.M.No.2(1)/83-D(civ.1 dated 8.2.83 of the Ministry of Defence. Any over payments already made also required to be recovered.

2. Regarding fresh opportunity to exercise option under Clause (b) of sub-rule (i) of Rule 19 of CCS (Pension) Rules 1972, the Department of Pension & Pensioners Welfare had stated that option once exercised is final and cannot be changed. The petitioner may be informed accordingly."

"from the above clarificatory order it is crystal clear that where pension is to be ignored there is not to be any adjustment of re-employment pay in the revised scale. By the same logic where the part and not the whole of military pension is to be ignored for pay fixation, the same is to be ignored in the revised pension for purposes of pay fixation in the revised pay scale.

"5. Even otherwise, the contention of the respondents that one should not get the double benefit of revised pension and revised pay simultaneously is not valid, when military pension as such has to be ignored in part or full as the case may be. That the ignorable part of pension is irrelevant and 'non est' for the purposes of pension relief or advance increment for re-employed pensioners, has been so held by two Larger Benches of this Tribunal in their judgment dated 28.7.1989 in TAK 732/87 etc. for pension relief and in judgment dated 13.3.90 in O.A.3/89 etc. for advance increments. Fortified in ratio by these two judgments of the Larger Benches, and in letter by the Ministry of Finance's O.M. of 5th April, 1989, we have no hesitation in reiterating our earlier finding that reemployed military pensioners whose full or part of the pension was to be ignored before 1.1.86 will continue to have the whole or part of their revised military pension ignored for the purposes of refixation of their re-employment pay in the revised scales after 1.1.1986. We, however, find nothing wrong in the O.M. of 11th September, 1987 which seems to have been misinterpreted and wrongly applied in the case before us.

"6. In the conspectus of facts and circumstances we allow this application and set aside the impugned memo dated 21.8.89 at Annexure A2 issued to the eleventh applicant and similar memos issued to the other applicants and all action taken thereunder to refix the pay of the applicants with effect from 1.1.86 and direct the respondents to refix the pay of the applicants in the revised pay scale with effect from 1.1.86 by ignoring the total amount of military pension drawn by them even after revision."

7. Considering the facts and circumstances of the case before us we are bound by the ratio, dicta and findings of the aforesaid judgments.

8. It is true that the findings of this Bench in all the aforesaid cases and issues have been appealed against before the Hon'ble Supreme Court in SLPs and in some cases our orders have been stayed by the Hon'ble Supreme Court. But we feel that unless they are set aside, we are bound by the ratio and dicta enunciated in those cases. In Roshan Jagdish Lal Duggal and others Vs. Punjab State Electricity Board, Patiala and others, 1984(2) SLR 731, the High Court of Punjab and Haryana observed that pendency of an appeal before the Supreme Court does not render an order of the High Court 'non est' even where the High Court's order in appeal had been stayed by the Supreme Court. The order of the High Court was still to be treated as a binding precedent. The Delhi High Court also in Jagmohan v. State, 1980 Criminal Law Journal 742 observed that mere pendency of appeal before the Hon'ble Supreme Court does not take away the binding nature of the High Court's decision unless and until it is set aside by the Hon'ble Supreme Court. In Alpana V. Mehta v. Maharashtra State Board of Secondary Education and another, AIR 1984 SC 1827 the Supreme Court upheld the contention of the appellant that the Bombay High Court was not justified in dismissing her writ petition on the sole ground that operation of the earlier judgement of that High Court on the basis of which the writ petition had been filed, had been stayed by the Supreme Court. The above view has been upheld by the Full Bench of the Principal Bench of the Tribunal in its judgment dated 13th February, 1991 in O.A.184/90 (Shri Ganga Ram & Another V. Union of India) and 3 other O.A.s. In those cases the issue before the Full Bench was whether the judgment delivered by another Full Bench in Rasila Ram's case about the jurisdiction of the Tribunal which had been stayed by the Supreme Court in an S.L.P. filed by the Government, remains valid as a binding precedent or whether the interim order passed by the Supreme Court nullified the judgment of the Full Bench or its effect was



to be confined only in respect of the judgment pronounced in the case of Rasila Ram. The Full Bench observed that the interim order passed by the Supreme Court in the S.L.P. in Rasila Ram's case not being a speaking order does not make any declaration of law and "consequently, it is not a binding order under Article 141 of the Constitution". The Full Bench further observed that until the decision of the Full Bench in Rasila Ram's case is set aside, reversed or modified by the Supreme Court it remains effective. In view of the unambiguous finding of the Full Bench of the Tribunal, we have no hesitation in following the dicta of our judgments in this case also so long as those judgments have not been set aside, modified or reversed by the Hon'ble Supreme Court.

9. In the facts and circumstances, we allow the application, set aside the impugned orders and direct as follows:

(a) The applicant is declared to be entitled to adhoc and regular relief on the ignorable part of pension during the period of his re-employment and if any amount has been withheld or recovered the same should be refunded to him within a period of three months from the date of communication of this order;


(b) The reemployment pay of the applicant with effect from 8.2.83 should be notionally fixed on the basis of the total amount of military pension being ignored and his revised re-employment pay with effect from the date of issue of the O.M. is to be determined by giving him the benefits of notional increments over and above the notional pay so fixed on the date of his reemployment. No arrears of pay on the basis of notional pay fixation would be given for the period prior to the date of issue of the O.M.

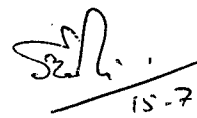
(c) The applicant's re-employment pay with effect from 1.1.86 should be re-fixed by ignoring the total amount of his military pension both revised as well as unrevised. Any recovery made pursuant to reduction of his pay with effect from 1.1.86 by the amount of increase in his military pension should be refunded to him.



(d) The pension and retirement gratuity and other retiral benefits should be redetermined for the applicant on the basis of the aforesaid directions and arrears paid to him within a period of three months from the date of communication of this order.

(e) There will be no order as to costs.


15/7/91
(A.V. Haridasan)
Judicial Member


15-7-91
(S.P. Mukerji)
Vice Chairman

15.7.91

Ks.