

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM

O.A. No.
T.A. No.

193/90

199

DATE OF DECISION 28.2. 1991

Chandrasekharan V.P and another Applicant (s)

M/s.M.R Rajendran Nair & Advocate for the Applicant (s)
Paul Varghese Versus

Union of India represented by Respondent (s)
Secretary to Government, Ministry
of Finance ,New Delhi and 4 others

Mr.C.Kochunni Nair, ACGSC for R.K-3 Advocate for the Respondent (s)
Mr.Raju Abraham for R-5

CORAM:

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

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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? *Yes*
4. To be circulated to all Benches of the Tribunal? *Yes*

JUDGEMENT

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

In this application dated 5.3.1990 filed under Section 19 of the Administrative Tribunals Act the two applicants who are ex-servicemen re-employed in the Office of the Assistant Commissioner and the Deputy Commissioner of Income Tax , Calicut under the Commissioner of Income Tax, Cochin, have prayed that the impugned order dated 11th September 1987 taking into account the revised military pension for the purposes of pay fixation in the revised pay scale with effect from 1.1.86 should be set aside and the applicants declared to be entitled to enhanced pension and revised pay scale of the UDCs. They have further prayed that the respondents be directed to disburse to them relief on the ignorable part of the military pension along with the arrears. Their further prayer is that the benefits of the orders dated 19.7.78 at Annexure-I and dated 24th October, 1983 at Annexure-II regarding ignoring

their military pension for the purpose of pay fixation on re-employment should be given to them as if they had opted for the same. The brief facts of the case are as follows.

2. The first applicant retired from the Army on 24.2.71 with a military pension of Rs.62/- and Rs.12/- as the pension equivalent of gratuity. On 10.8.82 he was re-employed as an L.D.C in the Department of Income Tax in the pay scale of Rs.110-180. The second applicant retired from the Army on 31.8.68 and was re-employed in the Income Tax Department as an L.D.C in the scale of Rs.110-180 with effect from 17.2.72. Both of them have since been promoted as U.D.C. In accordance with the basic order dated 25.11.58 their pay on re-employment is to be fixed so that the pay plus military pension and pension equivalent of gratuity did not exceed the last military pay drawn by them. Initially since 1964, Rs.50/- of the military pension of ex-servicemen who retired before attaining the age of 55 years was to be ignored for the purposes of initial pay fixation on the aforesaid formula. The ignorable part of pension was later enhanced from Rs.50/- to Rs.125/- vide the order dated 19.7.78 at Annexure-I. However, in that order it was mentioned that those who had already been re-employed would have to opt for coming over to the 1978 order and on their option their pay would be fixed de novo by ignoring Rs.125/- of the military pension as if they had been re-employed for the first time^{in 1978.} Consequently they would lose the increments that they would have earned from the date of their re-employment in 1972 till 1978. Still another order was issued on 8.2.83 (Annexure-II) ignoring the entire military pension of the Non-Commissioned Officers like the applicants for the purposes of pay fixation, but again the condition of option with re-fixation

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as if they were re-employed afresh in 1983 was imposed. To avoid the loss of increments the applicants did not opt to come under the orders at Annexures -I and II. By the order issued on 9.12.86 revised pay scale for UDCs on the recommendation of the Fourth Pay Commission was made applicable to re-employed ex-servicemen with effect from 1.1.86 and by another order their military pension was also increased to Rs.375/- per month with effect from 1.1.86. On 11.9.87 the Government issued the impugned order at Annexure-III that the re-employed pensioners who were allowed revised pay scales as also revised pension with effect from 1.1.86 cannot get the revised pension ignored for the purposes of pay fixation. On the basis of this order the respondents reduced the revised re-employment pay by the increase in the revised pension over the last military pension drawn by them before 1.1.86 and started recovering the arrears of over payments. Their representations were rejected. The applicants have referred to the judgments of this Tribunal in O.A 263/88 and O.A 507/88 wherein it was held that re-employed ex-servicemen are entitled to revised pay and revised pension as also relief on pension during re-employment. They have also referred to the judgment of this Tribunal in TAK 404/87 the applicants in which were given opportunity to opt for coming over to the O.Ms of 1978 and 1983.

3. In their counter affidavit the respondents have stated that an S.L.P has been filed before the Supreme Court against the judgment of this Tribunal in O.A 404/87 and connected cases. They have also argued that relief on pension cannot be granted as it will be giving them double benefits. They have argued that since the applicants did not exercise any option to come over to 1983 order at Annexure-II their entire pension could not be ignored.

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With the revision of pension and fixing a minimum pension of Rs.375/- the applicants cannot be allowed to draw double benefits of revised pay and revised pension.

4. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. The applicants have claimed three reliefs as follows:-

- (a) Grant of enhanced pension and revised salary by quashing the order dated 11th September 1987 at Annexure-III.
- (b) Grant of relief on ignorable part of pension with arrears during the period of re-employment, and
- (c) Re-fixation of their pay by granting them the benefit of the orders at Annexures I and II by which the ignorable part of military pension was increased to Rs.125/- and entire pension respectively.

5. So far as the second relief is concerned a Full Bench of this Tribunal in T.A.K 732/87 etc. by a majority judgment dated 20th July 1989, to which one of us was a party, held as follows:-

"Where pension is ignored in part or in its entirety for consideration in fixing 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/ME/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)."

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Accordingly in the instant case the applicants will be entitled to the relief including adhoc relief on the ignorable part of pension which was Rs.50/- upto 18th July 1978(vide Annexure-I) and increased to Rs.125/- from 19th July 1978 and the entire pension with effect from 24th October 1983(Annexure-II). The question, however, remains that since the applicants did not opt for getting the benefits of Annexures I and II, whether they would be entitled to the benefits of these orders. This question was examined by a Division Bench of this Tribunal in its judgment dated 31.10.89, to which one of us again was a party in TAK 404/87 and other cases. The following observations^{extracted} from that judgment will be relevant:-

"9. If however, for the petitioner who was re-employed in 1979 when the ignorable pension was Rs.125/-. is allowed to get his re-employment pay in 1979 revised by ignoring the entire pension (vide the O.M of 1983) and given increments for the period from 1979 to 1983 and his pay in 1983 revised on that basis, will it be giving retrospective effect to the O.M of February, 1983? . Following the dicta of Nakara's case, if no arrears of pay on revision are paid to the petitioner between 1979 and 1983 but his pay in 1979 is fixed notionally to determine his actual pay in 1983 it will not be tantamount to giving retrospective effect to the O.M. The following extracts from the judgment in Nakara's case may be relevant:-

" 49. But we make it abundantly clear that arrears are not required to be made because to that extent the scheme is prospective. All pensioners whenever they retired would be covered by the liberalised pensions scheme, because the scheme is a scheme for payment of pension to a pensioner governed by 1972 Rules. The date of retirement is relevant. But the revised scheme would be operative from the date mentioned in the scheme and would bring under its umbrella all existing pensioners and those who retired subsequent to that date. In case of pensioners who retired prior to the specified date, their pension would be computed afresh and would be payable in future commencing from the specified date. No arrears would be payable."

"10. The Supreme Court in Nakara's case compared the position of pensioners vis-a-vis the Liberalised Pension Scheme with the position of serving Government servants vis-a-vis the scheme of revised pay scales. The following further extracts from the same judgment will be relevant:-

"Revised pay-scales are introduced from a certain date. All existing employees are brought on to the revised scales by adopting a theory of fitments and increments for past service. In other words, benefit of revised scale is not limited to those who enter service subsequent to the date fixed for introducing revised scales but the benefit is extended to all those in service prior to that date. This is just and fair. Now if pension as we view it, is some kind of retirement wages for past service, can it be denied to those who retired earlier, revised retirement benefits being available to future retirees only. Therefore, there is no substance in the contention that the Court by its approach would be making the scheme retroactive, because it is implicit in theory of wages".

From the above it is clear that the Supreme Court were keen that no discrimination should be made between the pensioners based on the date of retirement. It was also felt that notional fixation of pension on the date of retirement even though it may be anterior to the promulgation of Liberalised Pension Scheme without giving them arrears for the past period (between the date of retirement and date of promulgation of scheme) will not be giving retrospective effect to the Scheme and will not violate its prospective nature. In the case of revision of pay scale from a particular date even old entrants are allowed revision of pay scale from a particular date and the benefit of increments which they had earned during the past period is also duly accounted for. It therefore seems to us inequitable that the re-employed pensioners who had been re-employed prior to February, 1983 should be forced to lose the benefit of their past service by exercising option on a "take it or leave it basis."

11. We feel that for those ex-servicemen who had been re-employed prior to the issue of the O.M their re-employment pay should be determined notionally on the date of their re-employment by applying the enhanced limit of ignorable pension and their pay as on 8th February, 1983 reckoned by giving them the benefit of earning increments over and above the notional pay so fixed. Their actual pay will be revised accordingly with effect from the date of issue of the relevant O.M without any arrears based on notional pay fixation for the past period."

The Division Bench, accordingly gave the relief as follows:-

"If the petitioners have opted for the O.M of 19.7.78 and/or 8.2.83 indicating enhanced limits of ignorable pension, their re-employment pay on the date of their re-employment should be notionally fixed on the basis of the enhanced limits and their revised re-employment pay with effect from the date of issue of the O.M will be determined by giving them the benefits of notional increments over and above the notional pay so fixed on the date of their re-employment. 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. Those petitioners, if any, who have not opted for these O.Ms, should be given an opportunity to opt for the same and if they do so, their actual pay from the date of issue of the O.M, should be determined on the above lines."

Accordingly in this case also the applicants should be given an opportunity to opt for the benefits of Annexures I and II and their pay notionally fixed with effect from 1.1.86 and earlier as if they had opted for the O.M, but without arrears of pay for the period prior to the issue of the O.Ms at Annexures I and II. This will also take care of the 3rd relief claimed by the applicant. As regards quashing of the order at Annexure-III and grant of enhanced pension and enhanced salary with effect from 1.1.86, this question was examined in details in a number of cases notably in O.A 144/90 which was decided by the judgment of a Division Bench of this Tribunal dated 20.12.90 , to which one of us was a party. The following extracts from that judgment will be very relevant and pertinent:-

" 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 R3(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 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 as 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 provisions of Note 1 below para 1(c) of Ministry of Finance Office Memorandum No.F8(34)Estt.111/57, dated the 25th November, 1953, 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 C.C.S(R.P) 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 Government servant without any deduction because of pension. In respect of the re-employed pensioners 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 A1) 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 O.M of even No. dated 9th December, 1986 whereby persons re-employed in Civil posts under the Government after retirement and who were in the re-employment 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

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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 1.1.1986 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 1.1.1986 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. dated 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 Officers in which they are working, the amount of revised pension sanctioned to them with effect from 1.1.86 for the purpose of refixation of their pay after taking into account their revised pension.

"3. In so far as the application for 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 December 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 9th 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 September 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: Re-fixation 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 the matter has been examined

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in consultation with departments of Personne 1 & Training and P&FW who have held the views that as far as the application of 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 8.2.1983 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." (emphasis added)

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 re-employed 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 re-fixation 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."

the OM of 11th September 1986 at ²

In view of the above, Annexure-III need not be quashed, but the applicants are to be declared to be entitled to getting the entire amount of revised pension with effect from 1.1.86 in addition to the revised pay if they opt for the order at Annexure-II dated 24th October 1983 and get the entire amount of military pension ignored.

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As regards the contention of the respondents that an S.L.P has been filed against the judgment of this Tribunal in TAK 404/87 we feel that that should not stand in the way of our relying on the aforesaid and similar judgments of this Tribunal, even though those judgments have been stayed. The ratio of those judgments will continue to be applicable to this case also until they are set aside by the Hon'ble Supreme Court. 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 Alpna V.Mehta vs. Maharashtra State Board of Secondary Education and another, AIR 1984 SC 187 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 judgment of that High Court on the basis of which the writ petition had been filed, had been stayed by the Supreme Court.

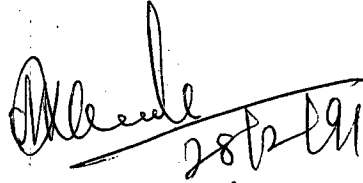
6. In the conspectus of facts and circumstances we allow this application on the lines and extent indicated below:-


- (a) The applicants are declared to be entitled to adhoc and regular relief on the ignorable part of the pension during the period of their re-employment

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and if any amount has been with-held or recovered the same should be refunded to them within a period of three months from the date of communication of this order. The relevant impugned orders and instructions will stand modified or interpreted accordingly.

- (b) The applicants are directed to exercise their option, if so advised, to get the benefits of the O.M dated 19th July, 1978(Annexure-I) and the O.M dated 24th October, 1983(Annexure -II) within a period of one month from the date of communication of this order and if they so opt, the respondents are directed to re-fix their re-employment pay with effect from the date of issue of the O.Ms without loss of increments earned by them right from the dates of their original re-employment, but without any arrears of pay for the period prior to the dates of issue of the O.Ms. The relief on ignorable part of pension to which they would be entitled under (a) above will also be determined on the basis of the options, so exercised.
- (c) The respondents are directed to re-fix the pay of the applicants with effect from 1.1.86 in the revised pay scale by ignoring the total amount of military pension drawn by them even after the revision, if the applicants opt for the benefits at Annexure-II under (b) above. Their ignorable military pension should not be taken into account for grant of increments during the period of their re-employment. Any amount with-held or recovered on account of wrong re-fixation of the pay by adjustment of the military pension during the period of their re-employment, should be refunded to them.
- (d) Action on the above points (a), (b) and (c) should be completed within a period of four months from the date of communication of this order.
- (e) There will be no order as to costs.


(A.V. Haridasan)
Judicial Member


(S.P. Mukerji)
Vice Chairman