

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW BOMBAY BENCH

O.A.64/87

Bhaskar Narayan Darvekar,
37, Bakul,
Avadhoot Society,
Vishnunagar,
Dombivli(West) - 421 202. .. Applicant

vs.

1. The Secretary,
Department of Personnel
& Administrative Reforms,
Parliament Street,
Patel Sadan,
New Delhi - 110 001.
2. Office of the Comptroller and
Auditor General of India,
10, Bahadur Shah Jaffar Marg,
New Delhi - 110 001.
3. Office of the Accountant
General(C.A.)
Central Govt. Buildings,
Ground Floor,
Maharshi Karve Marg,
Bombay - 400 020. .. Respondents

Coram: Hon'ble Member(A) Shri P. Srinivasan
Hon'ble Member(J) Shri M.B. Mujumdar

Appearances:

1. Applicant in person.
2. Shri P.M. Pradhan
Advocate for the Respondents.

Pronounced on

JUDGMENT

Date: 28-7-88

(Per P. Srinivasan, Member(A))

The applicant who was working as an Audit Officer(Commercial) in the Indian Audit and Accounts Department in the Office of the Accountant General(Commercial Audit)Bombay was sent on deputation to the Maharashtra Water Supply and Sewerage Board, Bombay(The Board) as Deputy Chief Accounts Officer with effect from 16-8-1980. At the time he was drawing the maximum of the pay scale of Audit Officer which was Rs.1,200/-pm. The scale of pay of Deputy Chief Accounts Officer in the Board was Rs.1500-50-1550-75-1925. On joining the Board as Deputy Chief Accounts Officer he elected to draw pay in the scale

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of that post and so his pay was fixed at Rs.1500, the minimum of that scale. He continued on deputation till 15-8-1984. With effect from 16-8-1984 he was permanently absorbed in the Board. The Comptroller and Auditor General of India (CAG) conveyed the approval of the Govt. of India to the permanent absorption of the applicant in the Board with effect from 16-8-1984, by a communication dtd. 7-1-1985. Along with this communication a set of terms and conditions of permanent absorption of the applicant was also conveyed. Condition 10 of the said terms and conditions reads as follows:

"10. Fixation of pay on absorption.

His pay will be fixed on absorption as for a re-employed pensioner with effect from the date he became entitled to draw the pro-rata retirement benefits."

It is common ground among the parties to this dispute that the effect of this condition was that from 16-8-84 the pay of the applicant in the post of Deputy Chief Accounts Officer in the Board was to be refixed at the bottom of the scale of that post i.e. at Rs.1500. It is also not disputed that under the said condition No.10, the amount of pension to which the applicant would be entitled from the Govt. of India as a result of the absorption and the pension equivalent of gratuity which he would receive from Govt. of India on such absorption would both be deducted from the pay to be drawn by him in the Board with effect from 16-8-1984. The first contention of the applicant is that the said condition No.10 was illegal and should be struck down.

2. The applicant who argued his case himself submitted that the Govt. of India had not issued comprehensive instruction covering terms and conditions on which a Central Govt. servant could be absorbed in a State Govt. undertaking.

The Board was

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The Board is an undertaking of the Govt. of Maharashtra. However, instructions had been issued by O.M.dtd.9-1-1984 limited to the retirement benefits to be extended to the Central Govt. servants by the Govt. of India on their absorption in a State Govt. undertaking. This O.M., according to the applicant, did not extent to fixation of pay in the State Govt. undertaking on absorption. This being so, the condition regulating fixation of such pay could not be imposed by the Govt. of India while permitting the absorption of the applicant in the service of the Board. The applicant further drew our attention to another O.M.dtd. 31-1-1986 according to which a Central Govt. servant selected for a post in a central public enterprise would be free to negotiate his emoluments with that enterprise. It was discrimination not to allow such freedom to a person who is selected for appointment in an undertaking controlled by a State Government, as in this case. Therefore condition No.10 imposed in the present case amounted to discrimination against the applicant in terms of articles 14 and 16 of the Constitution. The applicant therefore pleaded that the said condition No.10 should be strucked down as illegal and the applicant be allowed to draw pay with effect from 16-8-1984 with four increments already earned by him in that scale from 1980 to 1984 i.e. at Rs.1,775/-pm without any deduction of pension or pension equivalent of gratuity.

3. Shri Pradhan, learned counsel for the respondents, submitted that in the absence of comprehensive instructions governing the terms and condition of absorption of the Central govt. servants in a state govt. undertaking, the central govt. could impose such conditions on a case by case basis. There was nothing in law which stood in the way.

way of the central govt. imposing certain conditions for allowing one of its servants to be absorbed in a state govt. undertaking merely because there were no general instructions. In this case, the Govt., in its wisdom felt that the condition which was ~~earlier~~ being imposed on central govt. servants absorbed in central govt. undertakings should be imposed ~~as a condition for allowing the applicant's absorption in the Board~~ in the case of the applicant as well.

If the applicant agreed to be absorbed in the state govt. undertaking subject to that condition he could join that organisation permanently, but if he did not he would have to go back to his parent organisation. Merely because the applicant had worked in the Board for four years prior to his absorption and had earned four increments during this period, there was no rule that his pay should not again be refixed at the bottom of the scale as a condition for absorption. The O.M. dtd. 31-1-1986 to which the applicant has made reference no doubt liberalised the terms on which a central govt. servant could be appointed in ~~an~~ central govt. undertaking by providing that he would be free to negotiate his emoluments with the said undertaking on absorption. But that was to take effect only in respect of central govt. servants permanently absorbed by a central govt. undertaking on or after 6-3-1985. Moreover that O.M. related to absorption by a central govt. undertaking and not by a state govt. undertaking. It was the right of the government to impose such conditions as it thought fit when allowing ~~its~~ one of its employees to be absorbed in the ~~a~~ state govt. ^{undertaking} in the absence of general instructions on the subjects and that was what was done in this case. In any case on the date of the applicant's absorption i.e. 16-8-1984, there was no question of discrimination between persons like him and others absorbed in a central govt. undertaking because the liberalised provision in the case of a central govt. undertaking came into force much later.

4. We have considered the rival contention very carefully. As we have already mentioned, there is no dispute that general terms and conditions for absorption of a central govt. servant in a state govt. undertaking had not been prescribed on the date with effect from which the applicant was absorbed. We are not able to accept the contention of the applicant that in the absence of such general terms and conditions, ^{the} central government could not impose on the applicant an onerous condition that his pay on absorption should be the minimum of ^{the} his scale of the post in which he was absorbed. We agree with Shri Pradhan that in the absence of the general conditions, conditions can be imposed in individual cases of absorption. What the government did here was to impose the same condition which, at the time, was also applicable to absorptions by a central govt. undertaking. The applicant was free to accept absorption on this condition or to go back to his parent cadre. Obviously it was to his advantage to continue with the Board, since the starting pay of the post in which he was absorbed (Rs.1500) was higher than the pay which he was drawing in his parent cadre (Rs.1200). The applicant had reached the maximum of his pay scale in his parent department with no prospects of increments thereafter. No doubt between 1980, when he was deputed to the Board, and 1984 he had earned 4 increments in the post which he held in the Board. But if the Govt. of India chose to impose the condition as to how his pay should be refixed on absorption and as a result he lost the benefit of those increments from the date of his absorption, it was unfortunate for the applicant but we cannot hold it to be illegal. It is now well settled that while the initial appointment of a govt. servant is on the basis of contract, ^{the} thereafter his conditions of service including absorption in another body are governed by rules to be framed by the government from time to time. The applicant could, if he found the condition onerous, choose to go back to his parent department and that is all he is entitled to.

If he wanted to continue in the Board on permanent absorption he ~~cannot~~ ^{could} insist that he should get the full benefits of increments of pay already earned for ~~that~~ what would amount to wanting to have the cake and ~~to~~ eat it too. We also agree with Shri Pradhan that the O.M.dtd. 31-1-1986, liberalising the conditions of absorption of a govt. servant in a central govt. undertaking with effect from 6-3-1985 has no application in the present case. There is no question of discrimination because in the first place the liberalisation took effect after the absorption of the applicant and secondly because deputation to a central govt. undertaking is not necessarily the same as deputation to a state govt. undertaking and for that reason the two are not comparable. We, therefore, see nothing illegal in condition No.10 imposed by the government and we reject the applicant's contention in this regard.

5. On his absorption in the Board, the central govt. did not allow the applicant the benefit of encashment of ~~his~~ ^M earned leave standing to his credit on the said date. The second objection of the applicant is that he should have been allowed such encashment, as he had 180 days of earned leave to his credit on 16-8-1984. It is common ground that there is no specific reference to encashment of leave in the terms and conditions imposed by the central govt. ~~by~~ while approving the absorption of the applicant in the Board. The applicant contended that when ^{M Submitted} a ^{Central Government Servant is} person absorbed in a central govt. undertaking he is allowed to carry forward earned leave to his credit ^{as} on the date of his absorption. Under an O.M. dtd. 8-4-1976 consolidating the terms and conditions of permanent transfer of central govt. servants to central govt. undertakings, carry forward of leave standing to the credit of such govt. servants in their new employment is allowed. ~~The~~

The procedure prescribed appears at Para 7 on page 439 of Swamy's Pension Compilation, 11th Edition. According to this procedure the organisation in which the Govt. servant is absorbed should "take over the liability in regard to leave on average pay/Earned Leave that the optee has to his credit at the time of leaving Government service and in return Government shall pay to the statutory body/autonomous organisation a lump sum equal to leave salary for the leave on average pay/earned leave due to the govt. servant on the date of his permanent absorption in such body/organisation"

The applicant drew our attention to the O.M.dtd.9-1-1984 to which we have also made reference earlier(see page 461 Pension of Swamy's compilation 11th edition). The said O.M. provides that all central govt. employees who ~~were~~ ^{are} deputed to public sector undertakings controlled by state Govt\$ and are subsequently absorbed in such an undertaking, with the prior permission of the parent department of Central Govt. "may be allowed pro rata retirement benefits(except the benefit of carry forward of leave)as are admissible to permanent central govt. employees ~~of~~ absorbed permanently under ~~the~~ autonomous bodies controlled or financed wholly or substantially by the Central Government in accordance with the instructions laid down in the Ministry of Finance O.M.No.26(18)-E.V(B)/75 dtd.the 8th April,1976 as amended from time to time". Thus the benefit of carry forward of leave allowed to central govt. servants absorbed in central govt. undertakings or autonomous body^{is} is denied to those absorbed in state govt. undertakings. If such carry forward is not allowed they should be paid the amount of leave salary by way of encashment on such absorption. According to the applicant, Govt. could not deny both ^{the benefit of} ~~of~~ leave and ^{the} encashment ^{is} to those absorbed in a state undertaking. The benefit of encashment of leave ~~was~~ ^{if it was unfair for} being allowed to central govt. servants compulsorily retired under FR 56(j) or who themselves choose to retire by giving notice. It was therefore submitted that ^{it was unfair for} the same benefit is not extended to the applicant who is also, for all practical purpose

treated as having retired from service from the date of his absorption.

6. Shri Pradhan resisted the claim of the applicant. He pointed out that unless under the rules, a person is entitled to encashment of leave, he can make ~~an~~ ^{the} claim for such encashment. Under Rule 39 of the Pension Rules, ^{of a} Govt. servant retiring on attaining the normal age prescribed for retirement was eligible to encashment of leave standing to his credit at that time. The applicant did not retire on attaining the age for of superannuation. He therefore cannot claim encashment under Rule 39. In respect of persons compulsorily retired from service and those who seek voluntary retirement before the age of superannuation, encashment of leave is allowed by special provision. Even though persons absorbed in a State Govt. undertaking are treated for the purpose of retirement benefits as having retired from service, they do not fall under Rule 39 of the Pension Rules nor ~~has~~ ^{been} any special provisions ~~be~~ made in their cases to entitle them to encashment of leave. In the absence of any such rule ^{or provision,} therefore, the applicant cannot claim encashment of leave as a matter of right.

7. We have considered the rival contention carefully. The first thing to be noted is that the terms and conditions conveyed to the applicant make no reference to encashment of leave. The next thing to be noticed is that under the Govt. of India's O.M. dtd. 9-1-1984 Central Govt. servants absorbed in State undertakings are not eligible for carry forward of leave to their credit on the date of their absorption ^{in accordance with} ~~according to~~ the procedure applicable to those absorbed in Central Govt. undertakings. The third point is that Rule 39(2) of the Pension Rules dealing with encashment of leave is not applicable to Govt. servants who retire before attaining the age of superannuation. It is also to be noticed that encashment of leave is made applicable by special provisions

in the rules themselves ^M :- 9 :-

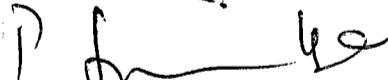
to those Govt. servants who are retired compulsorily by the Govt. prior to the attainment of age of superannuation ^{M To those} as also ^M who seek voluntary retirement ~~before by special provision made in this regard in the rules themselves.~~ ^M

The applicant therefore cannot draw any support from ~~the any~~ such specific rules ~~as such~~. At the same time, as we have already observed, Govt. can impose any condition for allowing its servants to be absorbed in a State Govt. undertaking, there being no general circular or instructions on the subject. The terms and condition on which applicant's absorption was approved did not lay down any condition regarding encashment of leave in specific terms. Here we may also observe that ^{of such a} the condition had been incorporated allowing the applicant the benefit of encashment of leave, ^{M Could} the applicant ~~cannot~~ be denied the same because there is no specific rule under which he would be eligible to that benefit. Therefore when considered as a condition of the applicant's absorption in the service of the Board it is not necessary to refer to ^{M any} the specific rules in the pension rules governing encashment of earned leave. We are therefore concerned as to whether such a condition should be implied in the present case or whether such a condition should have been inserted in the terms and conditions communicated to the applicant. When a person goes on deputation to a Central Govt. undertaking and he is later on absorbed he is entitled to have his leave carried forward in his new employment. That right is denied in specific terms by Government's O.M. dtd. 9-1-1984 to persons like the applicant absorbed in a State Govt. undertaking. As we have already mentioned the procedure for carry forward involves payment by the Central Govt. ^{M of an} all the amount equal to leave salary to the organisation ^{No} in which the Govt. servant is absorbed. ^M such payment was therefore made in the present case by the Central Govt. to the Board. Should the applicant, in the circumstances be denied the benefit of encashment of leave to his credit ?

If he had earned leave during his service which he had not utilised it was clearly to the advantage of the Govt. The principle behind the encashment of leave, as we understand, is that the concerned Govt. servant having worked continuously without availing leave to which he was entitled, he should be compensated for such leave by being paid in cash. In this case after his absorption, the question of the applicant availing the leave already earned by him from the Govt. or from the Board does not arise. We do not see any reason why he should not be paid leave salary for that period on his absorption particularly when he is treated as having retired from service for all other purposes.

8. In the light of the above observations we direct the respondents to pay the applicant the cash equivalent of leave salary for earned leave, if any, at his credit on the date ^{of M} on his absorption, subject to a maximum of 180 days which was the maximum operating at that time. The leave salary will of course be worked out in accordance with the rules ^{on the subject. M}

9. In result, the application is partly allowed to the extent indicated in the immediately ^{preceding M} previous paragraph. Parties to bear their own costs.


(P. SRINIVASAN)
Member(A)


(M.B. MUJUMDAR)
Member(J)

NOTE: Judgment pronounced in the open Court on 28.7.1988


28-7-1988
(M.B. MUJUMDAR)
MEMBER(J).