

Reserved on 1.5.2018

Central Administrative Tribunal, Allahabad Bench,
Allahabad

Original Application No.330/00151/2017

This the 9th day of May, 2018

Hon'ble Mr. Justice Dinesh Gupta, Chairman

Mr. Ajay aged about 50 years, Additional Commissioner of Income Tax (Since compulsorily retired) Residing at Radhabhallav, Rupani, Near – Bankey Bihari Mandir, Vrindavan, Uttar Pradesh, PIN- 281121.

Applicant

By Advocate: **Sri R.R. Shetty and Sri Ashish Srivastava**

Versus

1. Union of India through the Secretary, Department of Revenue, Ministry of Finance, North Block, New Delhi-110001.
2. The Chairman, Central Board of Direct Taxes, North Block, New Delhi.
3. Member (Personnel & Vigilance) Central Board of Direct Taxes, North Block, New Delhi-110001.
4. Principal Director General of Income Tax (HRD) 2nd Floor, ICADR Building, Plot No. 6, Vasant Kunj, Institutional Area, Phase II, New Delhi-110070.

Respondents

By Advocate: **Sri L.P.Tiwari**

By Hon'ble Mr. Justice Dinesh Gupta, Chairman

The applicant had filed O.A. No. 330/00151/2017 before this Tribunal with the following reliefs:-

- a) that this Hon'ble Tribunal be pleased to call for the original records relating to the facts of the case and after perusal thereof, be pleased to quash and set aside the order of compulsory retirement from the service issued

under Article 56 (J) and reinstate the applicant forthwith in service w.e.f. 25/07/2016 being the date on which the applicant stood compulsory retired.

b) that all consequential benefits including promotion to the rank of Commissioner be granted to the applicant along with all consequential benefits including back wages.

c) that exemplary costs be provided to the applicant.

d) any other and further reliefs as may be deemed appropriate in the facts and circumstances of the case be granted.

2. The O.A. was heard on 31.8.2017 by the bench comprising of Hon'ble Ms. Jasmine Ahmad, Member (J) and Hon'ble Mr. Gokul Chandra Pati, Member (A) and the order was reserved.

3. Hon'ble Mrs. Jasmine Ahmed, Member (J) has dictated the order and sent his pre-delivery order to Hon'ble Mr. Gokul Chandra Pati, Member (A) by which she proposed to allow the O.A. and directed as follows:-

"21. In the light of out aforesaid findings, we have no hesitation in arriving at a conclusion that the decision to retire the applicant under FR 56 (j) is not tenable in law and thus we quash and set aside the same. We also quash and set aside the order dated 29th September, 2016 rejecting the representation of the applicant.

We further direct the Respondent Union of India to reinstate the applicant in service with effect from the date of compulsory retirement from service along with all consequential benefits including seniority. It is made clear that the amount received by the applicant in lieu of 3 months notice amounting to Rs. 4,75,335/- shall be adjusted from the emoluments, including back wages, payable to the applicant. The applicant will be reinstated within 4 weeks from the date of the receipt of a certified copy of the judgment along with full back wages subject to the amount paid to him in lieu of notice. There shall be no order as to costs."

4. Hon'ble Mr. Gokul Chandra Pati, Member (A) disagreed with the final findings of the order passed by the Hon'ble Ms. Jasmine Ahmed, Member (J) and prepared his own order dated 5.12.2017 and directed as follows:-

"24. In view of above, in my view based on the materials available on record, the O.A. has no force to warrant any interference by this Tribunal with the impugned order dated 2.7.2016 (Annexure A-1) compulsorily retiring the applicant.

25. However, it is noticed that as per the DOPT circular dated 11.10.1976, as extracted in paragraph 8, the Ministry is required to examine the representation of the applicant to see whether any new facts or any new aspect of a fact which was not taken into account at the time of taking the decision by Government. Since nothing about the facts or reasons mentioned by the applicant in his representation dated 8.8.2016 and 26.8.2016 submitted to Government has been mentioned in the impugned order dated 29.9.2016, it is a deviation from the DOPT circular dated 11.10.1976. For these reasons, in my opinion, ends of justice will be met in this case, if the impugned order dated 22.09.2016 disposing of the representation of the applicant by the Government is set aside, with a direction to the respondents to reconsider the representation dated 08.08.2016 and 26.08.2016 submitted by the applicant to Government and to take a decision on the said representation as per the DOPT circular dated 11.10.1976."

5. Since there was difference of opinion in regard to O.A. No. 330/00151/2017 between Hon'ble Member (J) and Hon'ble Member (A), the Hon'ble Member (J) has

made point of reference being the senior member and directed the Registrar, CAT, Allahabad Bench to place the matter before the Hon'ble Chairman for needful direction.

6. Dy. Registrar (J), CAT, Allahabad Bench has written a letter dated 30.1.2018 to the Dy. Registrar (JA), CAT, Principal Bench for constitution of Bench to hear the point of reference under Section 26 of AT Act, 1985. The terms of reference formulated by the Hon'ble Member (J) is as under:-

“Whether in the facts of the case, the impugned order dated 22.7.2016 compulsorily retiring the applicant from service under FR 56 (j) is legally sustainable.”

7. In pursuance of letter dated 30.1.2018, Principal Bench vide letter dated 12.2.2018 has informed that Hon'ble Chairman has been pleased to nominate me as third member to resolve the difference of opinion raised by the Division Bench comprising of Hon'ble Mrs. Jasmine Ahmed, Member (J) and Hon'ble Mr. Gokul Chandra Pati, Member (A) in O.A. No.330/00151/2017 of CAT, Allahabad Bench, Allahabad.

8. Heard the learned counsel for applicant Sri R.R. Shetty and Sri Ashish Srivastava and learned counsel for respondents Sri L.P. Tiwari and perused the pleadings available on record.

9. The brief history of the case is that earlier a memorandum of charge dated 27.2.2007 under Rule 16 of the CCS (CCA) Rules, 1965 was issued to the applicant in which certain charges were levelled against the applicant. The Finance Minister, who is the Disciplinary Authority (DA) held the charges proved and on the advice of the UPSC, a penalty of 'reduction to a lower stage in the time scale of pay by one stage for a period of three years, without cumulative effect and not adversely affecting his pension is imposed on the applicant.

10. Applicant earlier filed O.A. No. 837/2010 challenging the charge sheet dated 27.2.2007 and penalty order dated 25.10.2010 which was allowed by this Tribunal vide order dated 13th May, 2011 and respondents did not pursue the matter further and did not file any writ petition and implemented the order passed by this Tribunal.

11. The applicant was also issued an Administrative warning dated 6.4.2009 to the effect that the applicant should be more careful and diligent in performance of his duties and warning was placed in the service record of the applicant. It is stated in the warning that the applicant who was the then Joint Commissioner was a supervisory officer, who had to grant statutory approval to his subordinate for the Block Assessment orders but

the applicant displayed casual and negligent attitude in performing his duties and was hence warned.

12. Vide order dated 22nd July, 2016, the applicant was retired from Govt. service with immediate effect from the afternoon of 25.7.2016 on his completing 50 years of age under clause (j) of Rule 56 of the Fundamental Rules.

13. The matter was placed before the Review Committee and the Review Committee held its meeting on 9.2.2016 and reviewed the case of applicant and after reviewing entire service records, work performance and vigilance profile, the review Committee came to the conclusion that the applicant is a fit case for action under FR 56(j) and after considering the recommendations of the Review Committee, the appropriate authority passed the order dated 22.7.2016 for retiring the applicant w.e.f. afternoon of 25.7.2016 under FR 56 (j) in public interest. The applicant was thereafter asked to submit his representation. The applicant submitted his representation and the Representative Committee vide its order dated 29th September, 2016 rejected the representation of the applicant and upheld the decision of the appropriate authority.

14. The applicant by means of present O.A. prayed for quashing the order of compulsory retirement from the

service issued under Article 56 (j) as well as order passed by the Representative Committee dated 29th September, 2016.

15. Hon'ble Mrs. Jasmine Ahmed, Member (J) vide its order has quashed the order dated 22nd July, 2016 by which the applicant was retired under Rule 56 (j) and also quash the order dated 29th September, 2016 by which the representation committee did not find any need to interfere in the decision of appropriate authority. Whereas Hon'ble Mr. Gokul Chandra Pati, Member (J) has only quashed the impugned order dated 22.09.2016 by which representation of the applicant was disposed of by the Government, with a direction to the respondents to reconsider the representation dated 08.08.2016 and 26.08.2016 submitted by the applicant to Government and to take a decision on the said representation as per the DOPT circular dated 11.10.1976.

16. During the course of arguments Learned counsel for applicant submitted that reasoning of the Hon'ble Administrative Member regarding the tenability of taking the administrative warning without the same being referred/reflected in any subsequent ACT/APAR is not only violative of the CVC Manual but is also against the principles of sound reasoning. It has been pointed out that the administrative warning was in respect of alleged lack of supervision in respect of assessment

orders passed by the deputy of the applicant. Though the order of the deputy of the applicant was upset by the Commissioner under his revisionary jurisdiction, the ITAT set aside the order of the Commissioner, thereby upholding the assessment orders of the deputy of the applicant and the supervisory power exercised by the applicant. The said order having become final and the said order being a judicial order cannot be superseded by the administrative order like the Administrative warning dated 6.4.2009. The said warning was not passed against the applicant in pursuance to any disciplinary proceedings but was passed ex-parte only in an administrative capacity. It is further stated that the reasoning given by the Hon'ble Administrative Member for taking into consideration the fact simpliciter that the name of the applicant was in the agreed list for 5 years is clearly flawed and is unsustainable in law. It is further stated that Hon'ble Member has relied upon old judgments of the year 1971, 1992 and 1965 without referring or distinguishing the later judgments of 1998, 1993, 1990 and 2001 relied upon in the judgment of the Judicial Member. Learned counsel for applicant stated that the applicant has an exemplary service record and he has been graded as 'Outstanding' on 11 occasions and as 'Very Good' on the rest of 16 years. It is also submitted that on all these occasions, his integrity has

been found to be unquestionable and above board. It is further stated that in the integrity column, it is mentioned that applicant is a man of integrity, honest, beyond doubt, an officer of impeccable integrity, outstanding etc. On the basis of above submissions, learned counsel for applicant contended that the order of compulsorily retirement under FR 56(j) is totally arbitrary.

17. Learned counsel for respondents submitted that applicant has been retired from the Govt. service under FR 56 (j) and after review of his entire service records in terms of instructions issued by the DOP&T vide O.M. dated 11.9.2015. It is further submitted that FR 56 (j) provides absolute right to the appropriate authority to retire a Govt. servant, who is in Group A service after he has attained the age of 50 years.

18. In the present case, the department initiated action to review Govt. employees covered under FR 56 (j). The department had also constituted committee (Internal Committee, Review Committee and the Representation Committee) to ensure that powers vested in the appropriate authority are exercised fairly and impartially. The Internal Committee Chaired by Pr. DGIT (HRD) met on 29.12.2015 and identified 29 officers, who are Group 'A' non-ACC appointees, who will be completing the age of 50 years during April-June 2016.

The overall service details such as APAR of last 10 years, Vigilance inputs from Pr. DGIT (Vigilance) CBDT, inputs regarding administrative misdemeanors, etc. were scrutinized and fact sheets prepared individually for 29 offices which were placed before the Review Committee.

19. The meeting of the Review Committee was held on 9.2.2016 under FR 56(j). On the basis of facts brought out by the Internal Committee and the decision taken by the Review Committee, 27 officers out of 29 reviewed were found fit to continue in service and not required to be proceedings against under FR 56(j). However, after reviewing entire service records, vigilance profile and work performance of two officers, including the applicant in the present O.A., the review committee found their continuance in the service as undesirable and recommended their names for action under FR 56(j).

20. After considering the report of the Review Committee, the Finance Minister approved a proposal to retire the applicant with immediate effect from the afternoon of 25.7.2016 on completion of 50 years of age by giving him three month's pay in lieu of notice period. Accordingly, the applicant was retired from service vide order dated 22.7.2016 which was duly served on the applicant on 25.7.2016.

21. Applicant made a representation dated 8.8.2016 and an addendum to his representation dated 26.8.2016

and the same were forwarded to the representation committee for consideration vide O.M. dated 30.8.2016 and 2.9.2016.

22. Representation committee after detailed deliberations, gave its findings and found no reason to interfere in the decision of appropriate authority and held that the action under FR 56 (j) is clearly justified in respect of the applicant.

23. It is clear that the order dated 29.9.2016 was passed based on the five reasons:-

“(i) Review Committee recommended the name of Shri Ajay Pandey, after going into his overall service records and conduct in totality, where actions of the officer raise questions about his integrity, effectiveness and supervisory abilities.

(ii) That due to reservations about integrity, the name of Shri Ajay Pandey was placed in the ‘Agreed list’.

(iii) That though there is no adverse entry in the ACR/APAR of the officer, the fact remains that he was served a recordable warning on 06.04.2009 in consultation with the Central Vigilance Commission, which has been duly recorded in his service book at Page 20, Vol. II.

(iv) That action under FR 56(j) is not punitive in nature and after considering entire service record and overall conduct during service, decisions are taken with a view that the services of the concerned Government servant are no longer useful to the general administration, in the public interest.

(v) The Review Committee have laid out detailed reasons and grounds on which decision to prematurely retire Shri Ajay Pandey has been taken in public interest. The records suggest that

the decision has been taken in reasoned manner and do not suggest prejudice or arbitrariness."

24. DOP&T circular dated 21.3.2014 deals with the cases under FR 56 (j). Para 4, 5 and 6 is quoted below:-

"4. In order to ensure that the powers vested in the appropriate authority are exercised fairly and impartially and not arbitrarily, following procedures and guidelines have been prescribed for reviewing the cases of government employees covered under the aforesaid rules:

- The cases of Government servants covered by FR 56 (j) or FR 56 (l) or Rule 48(1)(b) of the CCS (Pension) Rules should be reviewed six months before they attain the age of 50/55 years or complete 30 years service / 30 years of qualifying service, whichever occurs earlier,
- Committees shall be constituted in each Ministry / Department / Office, to which all such cases shall be referred for recommendation as to whether the Officer concerned should be retained in service or retired from service in the public interest.

5. The criteria to be followed by the Committee in making their recommendations would be as follows:-

- (a) Government employees whose integrity is doubtful, will be retired.
- (b) Government employees who are found to be ineffective will also be retired. The basic consideration in identifying such employee should be the fitness/competence of the employee to continue in the post which he/she is holding. Contd... 3
DoPT O.M.No.25013/1/2013-Estt (A) dated March, 2014 : 3 :
- (c) While the entire service record of an Officer should be considered at the time of review, no employee

should ordinarily be retired on grounds of ineffectiveness if his service during the preceding 5 years or where he has been promoted to a higher post during that 5 year period, his service in the highest post, has been found satisfactory. Consideration is ordinarily to be confined to the preceding 5 years or to the period in the higher post, in case of promotion within the period of 5 years, only when retirement is sought to be made on grounds of ineffectiveness. There is no such stipulation, however where the employee is to be retired on grounds of doubtful integrity.

(d) No employee should ordinarily be retired on ground of ineffectiveness, if, in any event, he would be retiring on superannuation within a period of one year from the date of consideration of his case.

Ordinarily no employee should be retired on grounds of ineffectiveness if he is retiring on superannuation within a period of one year from the date of consideration of the case. It is clarified that in a case where there is a sudden and steep fall in the competence, efficiency or effectiveness of an officer, it would be open to review his case for premature retirement.. The above instruction is relevant only when an employee is proposed to be retired on the ground of ineffectiveness, but not on the ground of doubtful integrity. The damage to public interest could be marginal if an old employee, in the last year of service, is found ineffective; but the damage may be incalculable if he is found corrupt and demands or obtains illegal gratification during the said period for the tasks he is duty bound to perform.

6. The Supreme Court had not only upheld the validity of FR 56(j) but also held that no show-cause notice need be issued to any Government servant before a notice of retirement is issued to him under the aforesaid provisions. The appropriate authority defined in Note 1 below FR 56 should bonafide form an opinion that is in the public interest to retire the Government servant in exercise of the powers conferred by that provision and this decision should not be an arbitrary decision or should not be based on collateral grounds. Accordingly, in every case where it is proposed to retire a Government servant in exercise of the powers conferred by the said rule, the appropriate authority should record in the file its opinion that it is necessary to retire the Government servant in pursuance of the aforesaid rule in the public interest. The order to be served of the Government servant would of course be on the form prescribed for the purpose..."

25. After giving a thoughtful consideration to the arguments raised by the learned counsel for the parties, it is true that the order passed by the appropriate authority is not punitive but when a person at the age of 50 years has been compulsorily retired, it definitely reflects certain stigma on his service career and therefore, the courts and O.M. of Department of Personnel & Training were constituted and certain criteria and guidelines were issued on the basis of which compulsory retirement is to be carried out.

26. It is clear that Rule 56 (j)/(i) has not made any procedure to be followed. It was only O.M. issued by the DOP&T dated 21.3.2014 which formulated the different committees and issued guidelines. It is no doubt that in

the present case, the Internal Committee short listed 29 officers including the applicant and referred the matter to the Reviewing Committee who after considering the entire record of the officer, only recommended two officer including the applicant for compulsory retirement under Rule 56 (j) and rest of the officers were recommended for remain in service. On the recommendation of the Review Committee, the appropriate authority passed the order of compulsory retirement of the applicant. However, report of the Review Committee was not supplied to the applicant. Though, it is no where mentioned that findings of the Review Committee should be supplied to the applicant but in my mind, it should be supplied to the applicant so as to follow the principle of natural justice. In the instant case, there were certain mentions in the review committee findings which were against the applicant and on the basis of same, the applicant was compulsorily retired by the appropriate authority but the copy of the findings of the Review Committee was not supplied to the applicant either before passing the order of compulsory retirement or after passing of the order. Even copy of the Review Committee findings was not supplied to the applicant and applicant was simply asked to submit his representation. On putting a question to myself , I could not find a specific reason for not providing copy of the Review Committee's findings to

the applicant and asked the applicant to submit his representation. When the applicant has no knowledge what is the material against him, he cannot make a proper representation. Asking the representation from the applicant without providing material against him is nothing but asking a person to grapple in dark without any source of light. Principal of natural justice enumerated by the Courts in various decisions which clearly provides that a person should not be condemned unheard and an ample opportunity should have been provided to the applicant to defend his case. In the present case, I am of the view that before asking the applicant to submit a representation against the order of compulsory retirement, he should have been provided a copy of the findings of the Review Committee. It is also important to mention here that Representation Committee considered the findings of the Review Committee, although the applicant was not given any opportunity to place before representation committee any material in support of his claim or to controvert the findings of the Review Committee. Thus, in my view, it is necessary that applicant may first be provided a copy of the findings of the Review Committee and then he may be asked to file a representation. Only then, Representation Committee can consider the

representation of the applicant fairly and in impartial manner.

27. So far as the order passed by the Representation Committee is concerned, both the Hon'ble Members have agreed on principle that since the order of the Representation Committee has not contained the specific facts and pleas taken by the applicant in his representation, were of the view that order passed by the Representation Committee should be quashed. The only difference of opinion between both the members is that Hon'ble Mrs. Jasmine Ahmed, Member (J) is of the opinion that the order of compulsory retirement dated 22.7.2016 should also be quashed whereas Hon'ble Mr. Gokul Chandra Pati, Member (A) is of the view that only the order dated 29th September, 2016 should be quashed and the matter be remitted to the Representation Committee for reconsideration who pass a reasoned and speaking order after taking into consideration of the representation of the applicant.

28. It is also important to mention that as per circular dated 21.3.2014 issued by the DOP&T which formulated certain guidelines for appropriate authority to take a decision on compulsory retirement. The guide-lines clearly provides that before passing the order of compulsory retirement, the appropriate authority will

take into consideration the integrity of the officers, fitness/competence and for that purpose the Tribunal is of the view that before passing the order of compulsory retirement, the appropriate authority should consider the ACR of that officer. In the present case, the ACRs of the applicant are not only outstanding but integrity of the applicant is also beyond reasonable. Further, in the remark column, the authorities found the officer 'effective control on administrative side' which clearly shows that administrative warning issued to the applicant on the basis of lack of administrative knowledge was without any basis. Further, no employee should be retired on the ground of ineffectiveness if during the preceding 5 years, he has been promoted. In the present case, applicant has been given promotion within the last five years also.

29. On careful perusal of the order dated 22.7.2016, it is clear that the appropriate authority while passing the order dated 22.7.2016 has not given any reasons for compulsory retirement of the applicant but simply passed the order of compulsory retirement of the applicant. Only the order of Representation Committee contains the facts and grounds taken by the Review Committee for making their recommendations to the appropriate authority for compulsory retirement. The counsel for applicant has vehemently submitted that the

order dated 29th September, 2016 attacking the findings of the review committee shown in the impugned order and tried to convince the court that no grounds are mentioned in the review committee findings except to arrive at a decision to retire the applicant compulsorily under Rule 56(j). The respondent on the other hand also assailed the order of representation committee. Thus, in my mind , it is only order dated 29th September 2016 passed by the representation committee is the impugned order. The order dated 22.7.2016 is a simple order of compulsorily retiring the applicant. The order of the representation committee was passed by giving their reasons. Since I have already mentioned earlier that order of representation committee cannot sustain as it has been passed without supplying the material against the applicant, as such this order is liable to be quashed as held by both the Hon'ble Members and the matter requires reconsideration by Representation Committee who will provide a copy of the findings of the Review Committee to the applicant and thereafter ask the applicant to file an additional representation and only after receipt of the additional representation, the representation committee will consider the findings of the review committee, representation of the applicant and observations of the orders passed by Hon'ble Member (J) as well as Hon'ble Member (A) and third

Member and then only pass a reasoned and speaking order so as to justify the compulsory retirement of the applicant.

30. In view of the above, I am of the view that the impugned order dated 29th September, 2016 passed by the Representation Committee is not sustainable in the eyes of law and is liable to be quashed and the applicant be given opportunity to make an additional representation which could only be possible in case the applicant should be provided the findings of the Review Committee.

31. So far as reference made by the Hon'ble Member (J) is concerned, since I have already mentioned that the order dated 22.7.2016 has not contained any grounds to compulsory retire the applicant. The grounds are only mentioned in the order dated 29th September, 2016. Thus, there is no need to go into the question whether the order dated 22.7.2016 is liable to be quashed or not. Reference made by the Hon'ble Member (J) is ordered accordingly. The matter is now remitted to the respondents who will provide a copy of the findings of the review committee to the applicant within two weeks from the date of receipt of certified copy of this order and ask the applicant to submit an addendum representation within 3 weeks other than the

representations already moved and thereafter, representation committee will consider the representation of the applicant taking into consideration the recommendations of the review committee, observations of the Hon'ble Member (J) and Hon'ble Member (A) and third member and material in their order and only thereafter pass a reasoned and speaking order within 3 weeks. Since the matter is quite old, Tribunal expect that respondents will complete this exercise as expeditious within the time framed by the Tribunal. No order as to costs.

(JUSTICE DINESH GUPTA)
CHAIRMAN

HLS/-

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