

CENTRAL ADMINISTRATIVE TRIBUNAL,
CHANDIGARH BENCH

O.A.NO.060/00335/2018

Orders pronounced on:31.05.2019
(Orders reserved on:23.05.2019)

CORAM: **HON'BLE MR. SANJEEV KAUSHIK, MEMBER (J).**

Maj. Narinder Singh (Retd.)

Son of Late Maj. Sharam Singh,

Aged about 84 years,

r/o House No. 96, Sector-71, S.A.S. Nagar,

Mohali (Punjab)-160071 (Group A).

...

Applicant

(BY MR. S.S.PATHANIA, ADVOCATE).

Versus

1. Union of India, Ministry of Defence, South block, New Delhi-110011 through its Secretary,
2. Director General, National Cadet Corps, West Block-VI, R. K Puram, New Delhi-110066.
3. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahbad (U.P)-211014.

(BY MR. K.K.THAKUR, ADVOCATE)

4. Chief Manager, Punjab National Bank (CPPC), Site No. 15, Ferozepur Road (near West Mall), Ludhiana (Punjab)-141012.

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Respondents

(BY MR. ARVIND RAJOTIA, ADVOCATE)

ORDER
HON'BLE MR. SANJEEV KAUSHIK, MEMBER (J)

1. The applicant has filed this Original Application (O.A) under section 19 of the Administrative Tribunals Act, 1985, seeking a declaration that he is entitled to be considered at par with his counterpart Substantive Majors / Lt. Commanders / Sqn leaders with more than 21 years of service in Defence Service and to be placed in Pay-Band-IV for the purpose of pensionary benefits; declare order dated 5.12.2017, Annexure A-8, as illegal and direct respondent no. 4 to reverse / credit the illegally effected recovery of Rs.13,00,000/- to his account and that his pension cannot be reduced etc.

2. The facts of the case, which led to filing of the instant O.A, are that the applicant was commissioned in Indian Army as Emergency Commission Officer (ECO) as Second Lieutenant (2nd Lt) on 30.6.1963, during the Chinese Aggression. He took part in Indo-Pak war during 1965. Service conditions of applicants and likes of him were governed by Instructions (SAI) No. 9/S/74. The applicant and likes of him, numbering about 300, were released from Army. The applicant was released on 15.9.1967 and was granted NCC permanent commission (NCC Whole Time Commission (WTO) on 26.12.1967, on the recommendations of a Screening Board, which was approved by Ministry of Defence. Thus, a special cadre namely NCC (WTOs) was created. The officers, like regular Armed Force Officers in NCC took active part in Para sailing, trekking, Para trooping, live ammunition training live ammunition firing etc. like their regular counters of Army.

They were also designated as regular Armed Forces officers like Lt. Capt. Major, Lt. Col. Likewise and equivalent in Navy and Air Force. The pay and allowances and other concessions were also admissible like regular Armed Force officers. Whenever posted at military stations, they were treated at par with regular Armed Force Officers and provided Military accommodation from defence pool, travel facilities, such as Railway warrants and Form D etc. were also authorized. These officers were also entitled medical facilities in military Hospitals and Canteen facilities at par with regular defence officers. The applicant and other similarly situated NCC commissioned officers were paid from the Defence Estates and were governed by aforesaid instructions.

3. The applicant further pleads that having joined cadre on 26.12.1967, he was promoted as Major in March, 1978 and retired as such on 31.1.1989, with qualifying service of 25 years, 3 months and 16 days. At that time, he was drawing a sum of Rs.3800/- as basic pay and Rs.600/- per month as rank pay, as per PPO dated 16.5.1989 (Annexure A-1). Though NCC Commissioned officers were governed by CCS (Pension) Rules, 1972, but they were paid pension from defence estimates at par with officers of Army/Navy/Air Force. On implementation of 4th and 5th Central Pay Commission (CPC) recommendations also, they were paid salary at par with regular defence officers. Applicant was drawing pension as a Major, as per PPO issued in 2001, Annexure A-2. As per Circular No. 14 dated 2.1.2013 (Annexure A-3), pension of post and pre 2006 retiree substantive Major and equivalent ranks in Navy and Air Force was ordered to be revised. The applicant was drawing pay in scale of Rs.2200-

5000 with rank pay of Rs.6000 and was entitled to pay scale of Lt. Col. with rank pay of Major for pension as on 1.1.2006. At the time of his retirement, the applicant was drawing Rs.3800 as basic pay and Rs.600 as rank pay and thus his minimum pay should have been at Rs.37400 + R.8000 GP and Rs.6000 as Military Service Pay for calculation of his pension and as much he was entitled to pension of Rs.25,700 per month w.e.f. 1.1.2006. The decision was ultimately taken to place rank of Lt Col. in pay band-IV by issuance of letter dated 21.5.2009 (Annexure A-4) stating that pay structure of the rank of Lt. Col. in Army (other than MNS officers) and equivalent rank in navy and Air Force has been further revised and placed in Pay Band -IV i.e. R.37,400-67000 with grade pay of Rs.8000 and MSP of Rs.6000/-. However, applicant was not granted equivalent pension or which he kept on persuading the respondents. Vide PPO, Annexure A-5, dated 27.9.2017, the pension of applicant was reduced to Rs.38,358/- per month from Rs.46,787/- per month and he was granted reduced pension since then. Ultimately, order dated 5.12.2017 (Annexure A-8) recovery from the applicant of excess payment in terms of Circular dated 7.12.2009, was started, hence the O.A.

4. The respondents No.1 to 3 have filed a reply. They submit that applicant who was appointed in NCC after his release from Indian Army. He was not entitled for benefit which he availed as admissible to the regular incumbent in Indian Army. After having clarification in this behalf from Dy. CDA (P) vide letter dated 27.01.2010 and letter dated 13.01.2014 issued by Government of India, Ministry of Defence it was been decided with regard to pay

scales of Ex NCC Whole Time Officers in the rank of Lt. Col. for the purpose of Pensionary benefits. It was decided to fix the pension of the applicant and it was fixed at Rs.14,925/- and the amount which was paid to the applicant over and above his entitlement, was also ordered to be recovered from his pension.

5. Respondent No.4 (Bank) has also filed a reply stating that w.e.f. 1.1.2006, applicant was entitled for basic pay of Rs.14,925 whereas by mistake, bank disbursed the same @ Rs.18,205/- per month. Further w.e.f. 1.1.2016, applicant was entitled to basic pay of Rs.38,358 plus 20% (Rs.7,672/-) old age i.e. Rs.56,144 thus, excess amount of Rs.5,46,699.59 was disbursed to him as per table, Annexure R-1. In fact, applicant vide representation dated 19.11.2017 (Annexure R-2), requested to deduct the amount. Bank can make recovery, as per Clause 159 of Book of Instruction (Operations) Volume 4 and RBI Master Circular, which prescribes that as soon as excess / wrong payment made to a pension comes to notice, it should be adjusted against amount standing to his/her credit to the extent possible including lump sum arrears payment. If entire amount of over payment cannot be adjusted from account, the pensioner may be asked to pay balance amount of over payment forthwith. In case of inability to pay it, the same can be adjusted in future pension payments etc. Again instructions were issued that entire amount of over payment be credited to government account in lump sum immediately. Moreover, such recovery is permissible as per undertaking of applicant and in view of law laid down in Civil Appeal No. 3500 of 2006 titled **HIGH COURT OF PUNJAB & HARYANA & OTHERS JAGDEV SINGH.**

6. The applicant has also filed rejoinders to the both the replies.

7. We have heard Mr. S.S. Pathania, counsel for the applicant and Mr. K.K. Thakur and Mr. Avind Rajotia, learned counsel for the respondents.

8. Learned counsel for the applicant challenged the validity of impugned order on two grounds, namely, that same is illegal, arbitrary and has been passed without considering that applicant has already been entitled for same benefit as admissible to his counterpart in regular commission in Armed Forces and further the impugned order has been passed in violation of principles of natural justice and without putting him to any notice and recovery having been made behind his back is liable to be quashed and set aside. Thus, effecting recovery for alleged excess amount is also bad in law. To support, he placed reliance upon the judgment passed by the Hon'ble Supreme Court in case of **STATE OF PUNJAB & ORS VS RAFIQ MASIH (WHITE WASHER)** (2014(8) SCC 883).

9. Per contra, Sh. K.K. Thakur, learned counsel for the respondents No. 1 to 3 and Mr. Arvind Rajotia, learned counsel for R.No.4 have reiterated what has been stated in the written statement as referred to above.

10. I have given our thoughtful consideration to the entire matter and have perused the pleadings as available on record.

11. The plea of the learned counsel for the applicant that he was not given any notice or impugned order was passed behind his back does not appear to be true in view of Annexure R-2, attached by respondent no.4, which is a representation of

applicant himself in which he has clearly stated that "balance of my amount in the bank which is about Rs.14,00,000/- may be deducted". Not only that, Annexure R-3 is a notice dated 16.2.1989 in which applicant had authorized bank to make recovery of over payment from his account. In fact he had also given an affidavit to that effect on 16.2.1989, Annexure R-4.

12. The plea taken by the applicant that the respondents have not followed the principles of natural justice and as such impugned action cannot be approved of is also not tenable on the touchstone of prejudice theory. There are enumerable cases where Courts discard principles of natural justice after satisfying that the outcome of the case could not make any difference even if natural justice is fully observed. It is based on 'Useless formality' theory, as on the admitted facts only one conclusion is possible, so the Court would not insist on the observance of the principles of natural justice because it would be futile to order its observance.

13. In case reported as 2007 (4) SCC 54, **ASHOK KUMAR SONKAR VS. UNION OF INDIA & ORS.**, the Hon'ble Supreme Court held that principles of natural justice cannot be applied in a vacuum. They cannot be put in any straitjacket formula. It may not be applicable in a given case unless a prejudice is shown. It is not necessary where it would be a futile exercise. A court of law does not insist on compliance with useless formality. It will not issue any such direction where the result would remain the same, in view of the fact situation prevailing or in terms of the legal consequences. The Hon'ble Supreme Court in **DHARMARATHMAKARA RAI BAHADUR ARCOT RAMASWAMY**

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APPELLATE TRIBUNAL in (1999) 7 SCC 332. Thus, in cases where grant of opportunity in terms of the principles of natural justice does not improve the situation, “useless formality” theory is pressed into service, In this case a lecturer, who had been granted leave for doing M. Phil, in violation of leave condition, had joined Ph. D course. She was given notice and after considering her reply, wherein she had admitted joining Ph. D course, her service was terminated. She challenged the termination order before Karnataka Private Educational Institutions (discipline and Control) Act, 1975 subsequently it is appealed to HC where termination was held invalid, but SC held that opportunity to show cause was not necessary where facts are undisputed and the affected person could not fourth any valid defence.

14. The learned counsel for the applicant placed reliance upon decision in the case of **STATE OF PUNJAB ETC. VS. RAFIQ MASIH ETC.** (2015) 4 SCC 334, to argue that if recovery is going to cause hardship to certain category of employees, it should not be made.

15. It is well known fact that after the aforesaid decision, the Hon’ble Apex Court in the case of **HIGH COURT OF PUNJAB & HARYANA & OTHERS VS. JAGDEV SINGH** reported in (2016) 14 SCC 267 has held that recovery is permissible. In this case, the court held that “The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be

refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.". The respondents have pleaded that applicant had given in writing to make recovery if any mistake is found later on in fixation of pension and that being so, we do not find any fault in action of respondents, more so when he has retired as a Group A officer.

16. In any case, the case can be dealt with from another angle. The issue as raised in this case was considered by this Bench of the Tribunal in a number of cases including in OA No. 063/00130/2015 titled **LT. COL. UP.C. SOOD (RETD.) VS. UOI ETC.** decided on 3.7.2017, elaborately and it has been conclusively held as under :-

"To understand and to decide the issue involved in this O.A, we have to trace the history whether argument raised by learned counsel for the applicant that is he entitled for same benefit as admissible to his counterpart in Army or not? Concededly, the applicant who retired as Captain from Indian Army and was appointed in the same rank and granted the regular commission in NCC on 18.11.1969 and was posed as Administrative Officer where he earned various promotions and retired as Lt. Col. on 31.08.1994. It is not disputed by the respondents that when the applicant was appointed in NCC he was appointed as WTO as per terms and conditions of circular dated 23.05.1980. Army issued instruction no. 9/S/74 dated 19.12.1974 wherein under Clause 14, it has been stated that the provision of this instruction do not apply to NCC officers, officers of the Regular Reserve, TA officer and re-employed officer for whom, separate instructions will be issued. Subsequent to that Government of India, Ministry of Defence issued another letter dated 16.01.1976 to the Director General, National Cadet Corps, New Delhi wherein it is stated that President is pleased to decide that the pay and allowances of NCC officers employed on whole time basis in NCC, will be revised and regulated in accordance with the provisions of SAI 9/S/74. The relevant para reads as under:-

"I am directed to refer to para 6 Appendix A to this Ministry's letter No. 5413/NCC/PERS (D)/755-III/D (GS.III) dated 21.12.1963 and paras 4(a)(i) Appendix 'A' to this Ministry's letter No. 0051/62/NCC PERS (A)/3281/GS/9/(6) S-III dated 11.12.1961 and to state that in pursuance of the recommendations of the third pay commission and Govt. Decision thereon, the President is pleased to decide that the Pay and Allowances of NCC Officers employed on whole time basis in NCC, will be revised and regulated in accordance with the provisions of SAI 9/S/74. Subject to deduction of a sum of Rs. 50 P.M from the above rates of pay on account of abolition of special disturbance allowances from 01.01.1973.

Subsequent to that Government of India issued another letter dated 23.05.1980 wherein terms and conditions of service of NCC Whole Time Officers granting NCC permanent commission under Govt. of India letter dated 04.08.1978 were framed. Clause 6 deals with Pay and Allowances and clause 8 deals with Pension, Family Pension, Death cum retirement Gratuity and other terminal benefits and same reads as under:-

'Clause 6- Pay and Allowances

(a) These officers will be governed by SAI 9/S/74 for the purpose of pay and allowances subject to deduction of Rs. 50/- pm due to abolition of special disturbance allowance with effect from 01.01.1973.

(b) Kit Maintenance Allowance will be admissible at the rate of Rs. 50/- per month.

(c) High Altitude and uncongenial Climate Allowance as laid down in SAI 9/S/74, will not be admissible to these officers.

(d) Outfit Allowance will not be admissible to these officers.' Clause 8' Pension, Family Pension, Death-cum-Retirement Gratuity and other terminal benefits.

These officers will be governed by Central Civil Service (Pension) Rules, 1972, as amended from time to time.' Clause 6 of above letter makes it clear that these NCC officers will be governed by SAI 9/S/74 for the purpose of pay and allowances subject to deduction of Rs. 50/- p.m due to abolition of special disturbance allowance w.e.f. 01.01.1973. With regard to pension and family pension, it cleared that NCC officers will be governed by the Central Civil Service (Pension) Rules, 1972. This issue has already been decided by the Hon'ble Supreme Court in case of Union of India & Another Vs. Lt. Col. Komal Charan & Ors. (AIR 1992 SC 1479) wherein also it is held that NCC officers are governed under Army instructions and only with regard to pension, family pension and DCRG, they will be governed under Central Civil Service (Pension) Rules, 1972. In accordance with letter dated 23.05.1980, pay and other allowances of the applicant was fixed from time to time which were made available to the corresponding post in the Indian Army. Circular No. 144 dated 27.01.2010 (Annexure A-7) issued by Dy. CDA (P) cannot be said to have been issued by the competent authority because PCDA, Allahabad is not competent authority to issue any instruction with regard to service condition of the applicant. The Government of India, Ministry of Defence has taken decision vide letter date 13.01.2014 (Annexure A-15) to place these officers like the applicant in Pay Band III then pay band-IV what they were getting as per own their letter dated 21.05.2009 and placing them in pay scale of Rs. 15600-39100 with corresponding grade pay of Rs. 7600 for the purpose of revision of pensionary benefits w.e.f. 01.01.2006. Pursuant to this, they have decided to recover the amount which the applicant was getting on account of revision of pay scale by placing him in Pay Band IV. At the retirement of the applicant, his pension was also fixed accordingly. He was enjoying those benefits for almost 20 years when the respondents have passed the impugned order. It is to be noted herein that as per Government of India letter dated 20.05.2009 issued to the Chief of Army Staff, Naval Staff & Air Staff, the applicant was also granted the benefit while implementing the government's decision of their recommendations of 6th CPC-revision of pension of pre-01.01.2006 retiree pensioners/family pensioners.

10. There cannot be any doubt whatsoever that an executive instruction unless issued for the benefit of the employees cannot be given retrospective effect and retroactive operation. This issue has already been dealt by Hon'ble Supreme Court in the case of Daljit Singh Narula Vs. The State of Haryana and Ors. 1979 (1) SLR 420, the head note is as follows:-

'Constitution of India, Articles 226, 309 and 311 Conditions of service determined by executive order Cannot be altered by executive order retrospectively to the prejudice of civil Servant Sanction to revised scale of pay Cancellation of sanction can operate only prospectively. The Hon'ble Supreme Court in the case of K. Narayanan (supra), has held as follows:-

Retrospectively- It is an exception Rule making authority should not be permitted normally to act in the past Even where the Statute permits framing of rule with retrospective effect the exercise of power must not operate discriminately or in violation of any constitutional right so as to affect vested right. In the case of C.R. Rangadhamaiah (supra), the Hon'ble Supreme Court has held as follows:-

'Retrospective effect given to the amendments Notifications/amendments dated 5.12.1988 reduced the amount of pension payable to the employees who had already retired from service on the date of issuance of the said notifications - Impugned notifications/amendments in so far they have been given the retrospective effect are violative of rights guaranteed under Article 19(1) and 31(1) of the Constitution Further amendments are also violative of Articles 14 and 16 of the Constitution being arbitrary and unreasonable No infirmity in the full bench decision in declaring the amended provisions as void to the extent they have been given retrospective effect Respondents entitled to get pension on the basis of Rule 2544 (g) as it existed on the date of their retirement. In the case of Ex. Capt. K.C. Arora (supra), the Hon'ble Supreme Court has held as follows:-

'..Amendment in the rules with retrospective effect affecting prejudicially the persons who had acquired rights relating to their seniority, increments and Pension Amendment in the rules with retrospective effect taking away such acquired rights Though Governor competent to frame rules with retrospective effect but the same cannot take away the acquired rights Amendment in the rules ultra vires the constitution.' In Pradyut Kumar Chakraborty Vs. State of West Bengal (FMAT No. 2654/1994) decided on 28.09.1994, it is held that:-

'By reasons of the impugned order dated 20.01.1994, the Secretary, Board of Revenue rejected the prayer of the petitioner on the ground that the State of West Bengal has issued a memorandum bearing No. 200 (60)/EMP/2E-31/93 dated 03.09.1993. The contention of the learned counsel for the appellant is that the said letter should not have been given retrospective effect. The contention of the learned counsel appears to be correct. Keeping in view the fact that the father of the petitioner was permitted to retire with effect from 16.02.1990, in terms of Annexure E aforementioned, which was relevant for the purpose of consideration, was the Rules and the Circular letter issued by the State at the relevant time. It is now well known that an executive direction cannot be given retrospective effect. Only a Rule framed under the Proviso to Article 309 of the Constitution of India can be given retrospective effect.' In N.C. Singhal Vs. Director General, Armed Forces, it has been stated that:-

'The appellant submitted that his conditions of service were governed by the Army Instruction No. I/S of 1954 and according to para 13 thereof, the whole of his previous full pay commissioned service must count for pay, and that Army Instruction No. 176 which came into force with retrospective from October 1962, in the case of A.M.C Reserve Officers called 10 colour service during emergency in the matter of ante-date, for promotion, T.A., leave and pay, cannot affect his condition of service which were governed in this behalf by para 13 of Army Instruction No. I/S of 1954.

We think that the appellant's conditions of service were governed by para 13 of Army Instruction No. I/S/ of 1954 and his previous full pay commissioned service should be taken in the matter of 'ante-date' for the purpose of his pay. The condition of service in this regard was not liable to be altered or modified to the prejudice of the appellant by a subsequent administrative (Army) instruction which was given retrospective effect from 26, October, 1962.'

11. When we consider the facts of the present case in the light of the law as enumerated above, we allow the present O.A and invalidate the action of the respondents in making their impugned letter dated 13.01.2014 effect retrospectively. Accordingly, letter dated 13.01.2014 making this letter implemented from retrospective date is hereby quashed and set aside. Consequent orders passed in furtherance thereto are also hereby quashed. The respondents are also directed to disburse the recovered amount to the applicant, if any made, within a period of four weeks from the date of receipt of certified copy of the order."

17. The Court has thus held that the applicant's conditions of service were governed by para 13 of Army Instruction No. I/S/ of 1954 and his previous full pay commissioned service should be taken in the matter of 'ante-date' for the purpose of his pay. The condition of service in this regard was not liable to be altered or modified to the prejudice of the appellant by a subsequent administrative (Army) instruction which was given retrospective effect from 26, October, 1962. Thus, the applicant was entitled to the benefit even otherwise and cannot be withdrawn from him. The point of law settled in aforesaid case applies on all fours to the facts of this case.

18. In the wake of the above discussion, the present OA is partly allowed. The impugned order is quashed and set aside. The respondents are directed to refund the recovered amount from

the applicant, within a period of two months from the date of receipt of a copy of this order. The parties are, however, left to bear their own costs.

(SANJEEV KAUSHIK)
MEMBER (J)

PLACE: CHANDIGARH.
DATED: 31.05.2019

HC*

