

**IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH: HYDERABAD**

Original Application No.21/1109/2016, 26/2017 & 1116/2016

**Reserved on: 06.12.2018
Order pronounced on: 10.12.2018**

OA No. 1109/2016

Between:

R.V. Ramana, S/o. late R. Mallaiah,
Aged 66 years, Deputy Commissioner of Income Tax (Retd),
O/o. Chief Commissioner of Income Tax, A.P. Hyderabad,
R/o. H. No. 7-1-636/30/F-102, Park View Apartments,
Model Colony, S.R. Nagar, ESI, Hyderabad – 500 038

...Applicant

And

1. Union of India, Ministry of Finance,
Rep. by its Finance Secretary, New Delhi.
2. Union of India,
Ministry of Personnel, Public Grievances & Pensions,
Rep. by its Secretary,
Department of Pensions and Pensioners Welfare,
New Delhi.
3. The Chief Commissioner of Income Tax,
Andhra Pradesh & Telangana, Hyderabad.
4. The Chief Commissioner of Income Tax,
Andhra Pradesh, Hyderabad.

...Respondents

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| Counsel for the Applicant | ... | Mr.A. Rajendra Babu |
| Counsel for the Respondents | ... | Mrs.B. Gayatri Varma, Sr. PC for CG |

OA No. 26/2017

Between:

B. Rama Chandra Murthy, S/o. late B. Mallikarjuna Sarma,
Aged 63 years, Senior Private Secretary (Retd.),
O/o. Chief Commissioner of Income Tax, A.P. Hyderabad,
R/o. Flat No. 205, G Block, Satyanarayana Enclave,
Madinaguda, Miyapur, Hyderabad.

...Applicant

And

1. Union of India, Ministry of Finance,
Rep. by its Finance Secretary, New Delhi.
2. Union of India,
Ministry of Personnel, Public Grievances & Pensions,
Rep. by its Secretary,
Department of Pensions and Pensioners Welfare,
New Delhi.
3. The Principal Chief Commissioner of Income Tax,
Andhra Pradesh & Telangana, Hyderabad.
4. The Chief Commissioner of Income Tax,
Hyderabad.
5. The Addl. Commissioner of Income Tax,
Range II, Hyderabad.

...Respondents

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|-----------------------------|-----|-----------------------------------|
| Counsel for the Applicant | ... | Mr.A. Rajendra Babu |
| Counsel for the Respondents | ... | Mr.M. Brahma Reddy, Sr. PC for CG |

OA No. 1116/2016

Between:

1. S.S.V. Sudarshana Sastry, S/o. Lakshimpathy,
Aged 62 years, Income Tax Officer (Retd.)
O/o. Director of Income Tax (Intelligence), Hyderabad,
R/o. Plot No. 17, Seeta Ram nagar,
Sikh Village, Secunderabad – 500 009.
2. H. Vasudeva aRao, S/o. Suryanarayana Murthy,
Aged 62 years, Income Tax Officer (Retd.)
O/o. Additional Commissioner of Income Tax Range II, Hyderabad,
R/o. Door No. 3-8-427/2, Road No.3, Suryodaya colony,
L.B. Nagar, Hyderabad – 500 068.

...Applicants

And

1. Union of India, Ministry of Finance,
Rep. by its Finance Secretary, New Delhi.
2. Union of India,
Ministry of Personnel, Public Grievances & Pensions,
Rep. by its Secretary,
Department of Pensions and Pensioners Welfare,
New Delhi.

3. The Principal Chief Commissioner of Income Tax,
Andhra Pradesh & Telangana, Hyderabad.
4. The Director of Income Tax (Intelligence),
Hyderabad.
5. The Addl. Commissioner of Income Tax,
Range II, Hyderabad.

...Respondents

Counsel for the Applicant ... Mr.A. Rajendra Babu
Counsel for the Respondents ... Mrs. L. Pranathi Reddy, Addl. CGSC

CORAM:

Hon'ble Mr. B.V. Sudhakar ... ***Member (Admn.)***

ORDER

{As per Hon'ble Mr. B.V. Sudhakar, Member (Admn.)}

2. These three OAs are filed for not granting enhanced DA as per the law laid down by the Hon'ble Supreme Court, Full Bench of the High Court of Andhra Pradesh and the various orders passed by this Tribunal. As the respondents and the issue are the same, this common order is passed.

3. Brief facts of the case are that the applicants were appointed in the respondents organisation in various capacities and retired on different dates as given below.

| S.No | O.A No. | No. Of Applicants | Dt. of Retirement |
|------|-----------|-------------------|----------------------|
| 1 | 1109/2016 | 1 | 31.12.2010 |
| 2 | 1116/2016 | 2 | 31.12.2013/30.6.2014 |
| 3 | 26/2017 | 1 | 30.6.2013 |

The applicant in OA 1109/2006 represented on 15.4.2011 & 30.6.2011 seeking enhanced DA while calculating retiral benefits based on the orders of this Tribunal in OAs 553/2003, 555/2003 dated 3.10.2008 but they were rejected on the grounds that the applicant was not a party in the cited OAs and neither

there were orders from the G.O.I to provide the relief sought. Again the applicant represented on 26.10.2015 citing the favourable orders dt.24.06.2015 granted by this Tribunal in OAs 213/2014, 1096/2013 & batch but there is stoic silence on behalf of the respondents. Similarly the applicants in OA 1116/2016 submitted representations dated 26.10.2015 quoting the full bench judgment of the Hon'ble High Court of Andhra Pradesh in W.P No. 22042/2003 & batch dt.27.01.2005 but of no avail. The applicant in OA 26/2017 did the same by representing for relief of enhanced DA citing the full bench judgment on 27.10.2015 but the respondents continued their silence. Aggrieved over the same the O.As have been filed.

4. The contentions of the applicants are that the a Full Bench of the Hon'ble High Court of Andhra Pradesh in W.P No.22042/2003 & batch dt 27.1.2005 while dealing with the case of C. Subba Rao vs Principal Accountant General, A.P has declared that a person who retires on the last working day would not be entitled for any benefit falling due on the next day and payable next day thereafter and would acquire the status of pensioner and he would be entitled for all the benefits given to a pensioner with effect from the first day of succeeding month. The said ratio was laid down by the full bench of the Hon'ble High Court of Andhra Pradesh, in consonance with the Judgment of the Hon'ble Supreme Court in S. Banerjee Vs. Union of India, AIR 1990 SC 285. In tune with these judicial pronouncements this Tribunal allowed OAs 553/2003 and 555/2003. The respondents carried the matter up to the Hon'ble Supreme Court but the SLPs filed were dismissed. Similarly situated employees when they approached this Tribunal in OA 213/2014, OA 1096/2013 & batch seeking similar relief, the OAs were allowed based on the Hon'ble Supreme Court judgment. Not extending the same relief to the

applicants is discriminative and illegal as per the learned counsel for the applicants.

5. The respondents resist the contentions of the applicant by stating that the question of permitting enhanced DA to retired employees on the first day of the month succeeding the date of retirement has been litigated in several OAs namely 941,942 & 419 of 2011 plus 1096/2013 & 213/2014 and that there stand was in accordance with F.R 56 (a), F.R 17 and as per rule 10 of CCS (RP) Rules 2008. Further as per clause 4.3 of O.M dt 2.9.2008 of Dept. of Pension & Pensioners Welfare and as per clause 33 of CCS (Pension) Rules 1972, in all kinds of Gratuity Payment, DA admissible on the date of retirement shall continue to be treated as emoluments for the purpose of calculating pensionary benefits. Coming to encashment of leave, the provisions of Rule 39 (a) & (b) of CCS (Leave) Rules 1972 state that the leave encashment has to be calculated on the basis of pay and DA admissible on the date of retirement. This Tribunal in consideration of the said rules and as per law, has dismissed the OAs 941 & 942 of 2011. Review petitions filed thereof were also dismissed. However, this Tribunal in OA 1096 of 2013 and 213 of 2014 vide order dated 24.6.2015 seeking similar relief were allowed. Nevertheless, the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh has granted interim suspension of the order passed by this Tribunal in OA 213/2014 vide WPMP No. 6073/2016 in WP 4742 of 2016, which the respondents pray should be treated as part of the reply statement. In view of the facts the OA is not maintainable is the strong contention of the respondents.

6. Heard both the counsel whose arguments resonated those already submitted in writing. The learned counsel for the applicants has been emphatic that the full bench of the Hon'ble High Court of the State of Telangana and the State of Andhra Pradesh has allowed the benefit of enhanced DA and also the Hon'ble Supreme Court having dismissed the SLP on the subject, the respondents have to implement the judgment without further procrastination. The learned standing counsel on behalf of the respondents has submitted that the Division bench of the Hon'ble High Court of the State of Telangana and the State of Andhra Pradesh has granted interim suspension of the orders of this Tribunal in OA 213/2104 in W.P.M.P No. 6073/2016 in WP 4742/2016 and therefore the Tribunal may issue orders subject to the outcome of the W.P wherein stay was granted.

7. On detailed perusal of the records, it is seen that the respondents have harped on the following rules which need to be discussed to weigh the pros and cons of the issue and take a final view. The rules are :

A. Fundamental Rule (FR) 56 (a) :

Respondents claim that as per Fundamental Rule, FR 56 (a), every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years [a Government servant whose date of birth is the first of the month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years]. Therefore he ceases to be a serving employee and becomes a pensioner on the afternoon of the retirement day.

The answer lies in understanding as to how a day is defined in law. As per common law principles, a day commences with one mid night and ends

with the next midnight and denotes a period of 24 hours. The Hon'ble Supreme Court in S.Bannerji vs Union of India, reported in AIR 1990 SC 285 was considering a case where, an officer of the Supreme Court sought voluntary retirement from the forenoon of 01-01-1986 and that was the day when higher DA was made available to the employees of the Supreme Court. Rules provided that in the case of voluntary retirement, the date of retirement would be considered as a non working day. The Court has held that the rule should be construed to mean that person retiring voluntarily under Rule 56 J to 56 M were disentitled to receive the pay on the date of retirement but the fact that they become entitled to any concession available as on that day and accordingly held that the retired person was entitled to DA for the purpose of working out the terminal benefits. Rule 5 (2) of the Pension Rules which deals with regulation of claims to pension or family pension also states that the day on which a Government servant retires or is retired or is discharged or is allowed to resign from service, as the case may be, shall be treated as his last working day. In other words the employee would become a pensioner only the next day since the last day of retirement is a working day enjoining upon the employee to discharge the duties assigned to the post he holds.

B. Fundamental Rule (FR) 17.

Respondents have quoted that F.R. 17.(1), which states that subject to any exceptions specifically made in these rules an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties.

The contention of the respondents is that as per F.R 17(1) the applicant is ineligible to draw the pay and allowances attached to a post, the moment he ceases to discharge the duties of that post. By implication the argument of the respondents is that since the applicant has retired on the afternoon of the last day of the month when he attained the age of 60 years, he would not hold any post and therefore would not be eligible to draw pay and allowances. The Tribunal is in agreement to the extent that the applicant is not eligible for pay once he retires, but he is eligible for pension and from when he is eligible has been clearly laid down by the Hon'ble Supreme Court Judgment in the case of S. Bannerji.

C. Rule 10 of CCS (RP) rules 2008

The rule states that there will be one uniform date of annual increment ie 1st July of every year.

In the present case we are dealing with the enhanced DA and not the annual increment and therefore rule quoted does not come to the rescue of the respondents

D. Para 4.3 of Dept. of Pension and Pensioners Welfare O.M .No 38/37/08-P&PW (A) dt 2.9.2008 and Govt. of India, decision No.4 below Rule 33 of CCS (Pension) Rules, 1972.

The argument of the respondents is that as per the referred memos, in all kinds of Gratuity payments, DA admissible on the date of retirement shall continue to be treated as emoluments for the purpose of calculating pensionary benefits. Accordingly the pay and DA admissible on the respective date of retirement of the applicants is to be taken into account while calculating each

applicant's pension, DCRG etc. Thus the rules quoted by the respondents do not provide any succour to them as has been explained above.

E. Now turning attention to the aspect of law, keeping in view, the assertion of the respondents that this Tribunal has dismissed OAs 941 & 942 of 2011, wherein similar relief was sought after examining the rules and the case law on the subject.

The issue in question has been a subject matter of quite a few OAs adjudicated by this Tribunal. The two important aspects which fell for consideration of this Tribunal were

- i) Whether a Government servant who retires on the last working day of the preceding month and whose annual increment falls due on the first of the succeeding month is entitled for sanction of annual increment for the purpose of pension and gratuity?
- ii) Whether a retired Government servant is entitled for revised rate of D.A which comes into force after such Government servant retires from service on attaining the age of superannuation?

In the present OA the prayer is in regard to the issue at (ii) above. This Tribunal in OAs 553/2003 & 555/2003 has allowed both (i) and (ii) when prayed for. The orders of the Tribunal on being challenged in the Hon'ble High Court of Andhra Pradesh, when placed before a full bench, the order i.e. (i) above, in regard to grant of increment on the first date succeeding the date of retirement was set aside while upholding the order issued in respect of grant of enhanced DA on the date following the date of retirement i.e. (ii) above, which in fact is the prayer in the present OA. The full bench of the Hon'ble

High Court of Andhra Pradesh has decided the issue of enhanced DA as under:

“The question would arise only in Writ Petition No 22042 of 2003 as the respondent therein also claimed DA instalments at 49%. As held by us supra, a Government servant who would be retiring on the last day of the month would cease to be the Government Servant by mid-night of that day and he would acquire status of pensioner and therefore he would be entitled for all the benefits given to a pensioner with effect from first day of the succeeding month. In Banerjee case (supra), the Supreme Court laid down that as soon as first day of the succeeding month commenced, petitioner retired and gave the benefit of enhanced DA. The same view has been consistently followed in subsequent decisions as well. To that extent it must be held that the learned Tribunal has taken correct view.”

F. Based on the above ratio of the full bench of the Hon’ble High Court, this Tribunal did allow the OAs 553/2003 & 555/2003 ordering for enhanced D.A. Thereafter, OAs 941 & 942 of 2011 praying for similar relief were adjudicated and dismissed by this Tribunal, based on the Hon’ble Supreme Court observation in Chief General Manager, Telecom, BSNL & anr vs K.J.George & ors in CA No. 2907/2005 and 2908/2005 dt 22.2.2007 submitted by the respondents, which reads as under:

“We are unable to countenance with the decision of the Tribunal and the High Court. As already noticed that they were retired with effect from 16.12.1995 and 3.12.1995 respectively but because of the provision of FR 56, they were allowed to retire till the last date of the month, the grace period of which was granted to them for the purpose of pay and allowances only. Legally, they were retired on 16.12.1995 and 3.12.1995 respectively and therefore, by no stretch of imagination it can be held that their pensionary benefits can be reckoned from 1.1.1996. The relationship of the employer and employee terminates in the afternoon of 16.12.1995 and 3.12.1995 respectively.

Therefore, the order passed by the Tribunal cannot be sustained at all.”

G. One another judgment of Hon'ble Supreme Court relied upon by the Tribunal, while dismissing the OA s 941 & 942 is in Achhaibar Maurya vs State of Uttar Pradesh & Others in CA No 5877/07 in 2008 (1) SCC (L&S) 519). The appellant in the said case who was born on 1.7.1943 and was to retire on 30.6.2003 as per Rule 29 (1) of Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 had contended that he should have been continued in service upto 30.6.2004 in terms of the proviso to the said rule which reads as follows:

“Provided that a teacher who retires during an academic session (July 1 to June 30) shall continue to work till the end of the academic session, that is, June 30 and such period of service will be deemed as extended period of employment.”

Academic session was defined to mean the period from 1st July to 30th June.

The Hon'ble Apex Court held that the applicant retired on 30th June 2003 on attaining the age of 60 years ie at the end of the current academic session which ended on 30.6.2003 and was not entitled to the “session's benefit ” of next session commencing on 1.7.2003. In para 7 of the judgment, the Hon'ble Supreme Court has observed as follows:

“7. The question in regard to the determination of age of superannuation of an employee is governed by the Rules. Indisputably, the terms and conditions of service of an Assistant Teacher are governed by the provisions of the 1972 Act and the rules framed under the sub section (1) of Section 19 thereof. The Rules were amended on or about 12.6.1989. In terms of Rule 29, a teacher is to retire on the date on which he had completed 60 years on the last day of month when the person is born. ”

It was further held in para -10 of the said judgment that a

“10. cut off date fixed by a statute may not be struck down unless it is held to be arbitrary. What would, therefore, be an employee's last working date would depend on the wordings of the Rules.” The wordings in CCS (Pension) Rules 1972 and FR 56 and CCS (Leave) Rules are very clear with regard to date of retirement.

H. The Hon'ble Supreme Court in the cited case had also considered the judgment in *S.Banerjee vs Union of India* which was relied upon by the full bench of the Hon'ble of Andhra Pradesh in WP No. 22042 /2003. In para 11 of the judgment in *Achhaibar Maurya vs Stae of Uttar Pradesh (supra)* the Hon'ble Supreme Court observed as follows :

“ 11. In S. Banerjee vs Union of India, whereupon reliance has been placed, the fact situation obtaining was completely different. In that case, the appellant filed an application for voluntary retirement which was accepted from the forenoon of 1.1.1986. In that view of the matter, he was found to be entitled to the benefit of para 17.3 of the recommendations of the Pay Commission.”

Keeping in view the observations of the Hon'ble Supreme Court in *Union of India vs K.J. George* and *Achhaibar Maurya vs State of Uttar Pradesh* and others, the Tribunal dismissed the OAs 941 and 942 of 2011.

I. The contest did not end here. Another batch of OAs 213/2014, 1096/2013 & OA Nos. 1518, 1529, 1530, 1531 of 2012 again fell for consideration by this Tribunal seeking relief of extending the benefit of enhanced DA on the date succeeding the date of retirement as was allowed by this Tribunal in OAs 552 & 554 of 2003. The judgment rendered in OA 552 of 2003 filed by B.Chandrashekar Rao and Others was challenged in the Hon'ble High Court of Andhra Pradesh in 26506 of 2012. The Hon'ble High Court upheld the order of this Tribunal in granting enhanced DA sought keeping in view the judgment of the Full Bench of the Hon'ble High Court in W.P No 22042 of 2003 and dismissed the writ petition. Thereafter the respondents carried the matter in appeal and filed SLP (C) No. 16237 of 2013 before the Hon'ble Supreme Court of India against the judgment in W.P no 26506 of 2012 passed by the Hon'ble High Court of Andhra Pradesh. The SLP no 16237 of 2013 arising out of W.P no 26506/2012 was dismissed by the

Hon'ble Supreme Court on 27.10.2014 by declining to interfere with the judgment of the Hon'ble High Court keeping the question of law open. This Tribunal did dismiss OAs 941 & 942 of 2011 keeping in view the judgment of the Hon'ble Supreme Court in Chief General Manager, Telecom, BSNL vs K.J .George in CA No 2907 dt 22.2.2007 in which the Hon'ble Apex Court has held that the relationship of the employer and employee terminates on the date of the retirement of the employee. With the new development of the Hon'ble Apex Court upholding the verdict in OA 552 /2003 in SLP (C) No 16237/2013 dt 27.10.2014, for grant of enhanced DA, upheld by the Hon'ble High Court in W.P no 26506/2012 the Tribunal allowed the OAs 213/2014, 1096/2013, 1518/2012, 1529/2012, 1530/2012 & 1531/2012.

J. The contest continued with the respondents once again challenging the above verdict of the Tribunal in different writ petitions. In one of the Writ petitions bearing the number 4742/2016 filed against OA No.213 of 2014, the Hon'ble High Court of the State of Telangana and the State of Andhra Pradesh has ordered interim suspension of the Tribunal verdict dated 24.6.2015 issued in OA 213/2014 vide orders of the Hon'ble High Court dated 1.4.2016. In view of the interim suspension cited above, the respondents pray for dismissal of the OAs filed. Per contra the learned counsel for the applicants has submitted the judgment of the Hon'ble High Court of Andhra Pradesh in writ petition number 8681 of 1982 dated 27.1.1983, 1994 (1) ALT 227 (DB) wherein it was observed that

“ when a judgment of the High Court is the subject matter of an appeal and the said judgment is suspended, the only effect of such suspension is that the judgment cannot be executed or implemented. But so long as the Full Bench Judgment stands, the dicta laid down therein is binding on all Courts including Single Judges and Division Benches of this Court. The dicta laid down therein cannot be ignored unless the

Court after hearing a particular case doubts the correctness of the dicta and thinks it appropriate that it should be reconsidered”

The ex parte order of suspension does not vitiate the Law declared by the Hon’ble full bench of the High Court confirmed by the Hon’ble Supreme Court of India to dispose of all the OAs is the fervent plea of the applicants.

K. In so far as the contention of the respondents that when a stay order in an identical case is under currency, the OAs should be dismissed has no merit.

For, the Apex Court in the case of ***Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn., (1992) 3 SCC 1***, has explained as under:-

“While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. This means that if an order passed by the Appellate Authority is quashed and the matter is remanded, the result would be that the appeal which had been disposed of by the said order of the Appellate Authority would be restored and it can be said to be pending before the Appellate Authority after the quashing of the order of the Appellate Authority. The same cannot be said with regard to an order staying the operation of the order of the Appellate Authority because in spite of the said order, the order of the Appellate Authority continues to exist in law and so long as it exists, it cannot be said that the appeal which has been disposed of by the said order has not been disposed of and is still pending. “

The above makes it amply clear that notwithstanding the stay of operation of an order, the order does not cease to exist for, and it continues to subsist till it is either quashed or modified by the higher Court. As such, any order though under stay granted by the High Court, could well be followed as a precedent but with a rider that any order passed would be subject to outcome of the other case.

L. In view of the rule position and the keeping in view the various observations of the Superior Judicial forums on the subject, this Tribunal is of the view, that since the observation of the Full bench of the Hon'ble High Court has been upheld by the Supreme Court, keeping the question of law open, the respondents are directed to consider as under:

- i) To re-fix the pension of the applicants as per the enhanced eligible D.A from the dates they have become pensioners and pay the arrears along with consequential benefits subject to the outcome of the judgment of the Hon'ble High Court in W.P no.4742/2016 filed against OA no 213 of 2014.
- ii) In case the verdict of the Hon'ble High Court is in favour of the applicants, the respondents to work out the arrears of pension calculated on enhanced D.A from the first day of retirement till the date of payment, at the highest Bank rate of interest allowed for term deposits of 3 years and beyond by S.B.I prevailing as on the date of the verdict of the Hon'ble High Court.

M. The OAs are allowed with the above directions. No order to costs.

(B.V. SUDHAKAR)
MEMBER (ADMN.)

Dated, the 10th day of December, 2018

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