

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA No.3160/2003

New Delhi this the 13th day of December, 2004.

HON'BLE MR. V.K. MAJOTRA, VICE-CHAIRMAN (A)
HON'BLE MR. SHANKER RAJU, MEMBER (J)

M.L. Mehta,
A-81, Preet Vihar,
Delhi-110 092.

-Applicant

(By Advocate Shri Rakesh Dhingra)

-Versus-

Union of India,
Through Secretary,
Department of Expenditure,
Ministry of Finance,
North Block,
New Delhi.

-Respondents

(By Advocates Shri Naveen Chawla with Sh. Rishikant)

O R D E R (ORAL)

Mr. Shanker Raju, Hon'ble Member (J):

Applicant impugns office order dated 9.8.2001 read with revised letter dated 20.8.2002 as well as revised Pension Payment Order (PPO), whereby his pension has been reduced to his detriment with consequent recovery.

2. Applicant was lastly promoted as Adviser (Cost) which was equivalent to Joint Secretary on 8.12.1993 and had retired on superannuation on 3.4.1996. Applicant was upgraded as Additional Chief Adviser in the pay scale equivalent to Additional Secretary, w.e.f. 1.4.1996 on 27.7.1999 and by a corrigendum orders were modified to take effect from 1.1.1996. Accordingly on

12

15.10.1999 as a consequence of upgradation applicant's pension was revised.

3. By an order dated 9.8.2001 order of upgradation with corrigendum were rescinded and a revised PPO was issued. On representation as no reply has come-forth, present OA has been filed.

4. Learned counsel for applicant by placing reliance on a decision of the Apex Court in **State of U.P. v. Brahm Datt Sharma**, (1987) 2 SCC 179 to contend that deduction of pension causes civil consequences, not following the principles of natural justice and by an opportunity of hearing the order is nullity.

5. As regards delay and reasonable opportunity, reliance has been placed on the decision of the Apex Court in **Bhagwan Shukla v. Union of India**, 1994 SCC (L&S) 1320 and on the issue of retrospectively revising the PPO affecting the right of a government employee which is held to be invalid by a Constitution Bench in **Chairman, Railway Board v. C.R. Rangadhamaiah**, (1997) 6 SCC 623 has been relied upon.

6. Learned counsel for applicant contended that before reduction of pension no reasonable opportunity has been afforded and further contended that as per OM dated 30.6.1999 as upgradation of applicant did not involve assumption of higher responsibilities or changes in the eligibility criteria as per clause 4 (a) of the OM ibid the same has been rightly extended retrospectively from 1.1.96. In this conspectus it is contended that in the wake of decision in OA-2388/2001 decided on 1.5.2002 in **S.V. Nagarajan v. Union of India & Anr.** the aforesaid contention



raised above has been fortified, holding that the upgradation is covered under clause 4 (a) of the OM ibid and as such the orders are set aside. It is contended that on all fours case of applicant is covered by the aforesaid ratio.

7. Learned counsel further stated by placing reliance on Rule 70 of the CCS (Pension) Rules, 1972 (for short, the Pension Rules), to contend that after the pension has been authorized and finally assessed, apart from a misconduct under Rules 8 and 9 of the Pension Rules revision of pension to the disadvantage of the pensioner shall be ordered only if there is detection of a clerical error but not on other grounds and the Head of the Office can revise it even after two years and that too on detection of clerical error with the concurrence of the Department of Personnel and Training. In the above backdrop it is stated that as there is no clerical error detected, revision of pension is not permissible under the Pension Rules.

8. On the other hand, respondents' counsel vehemently opposed the contentions and stated that a mistake committed by the Government and an inadvertent error can be rectified at any stage and does not pre-requisite accord of a reasonable opportunity under the principles of natural justice.

9. Placing reliance on a decision of the Apex Court in **Union of India v. Rakesh Kumar**, 2001 (4) SCC 309 it is contended that if one has no right to pension and it is granted erroneously it cannot be perpetuated and hardship would not be a ground to mitigate it.

10. Learned counsel has also relied upon the decision of the Apex Court in **V. Gangaram v. Regional Joint Director & others**,

5

1997 (6) SCC 139 to contend that excess amount paid by mistake can be recovered from pension in installments not to cause any undue hardship.

11. The learned counsel further stated that the orders passed in OA-2388/2001 had already been assailed before the High Court of Delhi. Though no stay has been granted and as the issue is in seise with the High Court it would be pre-mature for this Tribunal to have the interpretation of clauses 4 (a) and (b) of the OM ibid and this would be subject to the Writ Petition No.6640/2002 pending before the High Court of Delhi.

12. We have carefully considered the rival contentions of the parties and perused the material on record. Principle of per incuriam is no more res integra, according to which if a decision of the Apex Court, which is a binding precedent under Article 141 of the Constitution of India, has decided the issue without considering the statutory rules, the same is not binding as per incuriam.

13. It is also trite law that a mistake committed by the Government can be rectified but it is equally established law that if one has not played any fraud or misrepresentation attributed in the mistake committed by the Government he should not be suffered consequences of it, though the learned counsel for respondents stated that a proposal has been made to waive of the recovery from applicant.

14. Fairness and principles of audi alteram partem are sine qua non of an administrative as well as quasi judicial action. It is established law that if civil consequences ensue upon a

government servant or even on a pensioner he is to be afforded a reasonable opportunity to show cause before such an action is taken. A post-decisional hearing is not the valid compliance.

15. In the above conspectus though the issue whether applicant's upgradation was to be operated under clause 4 (a) or 4 (b) of the OM ibid decided by the Tribunal is sub judice before the High Court of Delhi, yet it is proven fact that before reducing the pension of applicant he has not been put to notice and afforded a reasonable opportunity which is not in consonance with the principles of natural justice and on this count the action of the respondents is not legally sustainable. We are fortified in our view by the decision of the Apex Court in **Brahm Datt Sharma** (supra) where the following observations have been made:

"Though the Regulations do not expressly provide for affording opportunity to the government servant before order for the reduction in the pension is issued, but the principles of natural justice ordain that opportunity of hearing must be afforded to the government servant before any order is passed. Article 311 (2) is not attracted, nonetheless the government servant is entitled to opportunity of hearing as the order of reduction in pension affects his right to receive full pension."

16. Another aspect of the matter, which requires consideration is Rule 70 of the Pension Rules, which is reproduced as under:

"70. Revision of pension after authorization

- (1) Subject to the provisions of Rules 8 and 9, pension once authorized after final assessment shall not be revised to the disadvantage of the Government servant, unless such revision becomes necessary on account of detection of a clerical error subsequently:

Provided that no revision of pension to the disadvantage of the pensioner shall be ordered by the Head of Office without the concurrence of the

16
Department of Personnel and Administrative Reforms if the clerical error is detected after a period of two years from the date of authorization of pension.

(2) For the purpose of sub-rule (1), the retired Government servant concerned shall be served with a notice by the Head of Office requiring him to refund the excess payment of pension within a period of two months from the date of receipt of notice by him.

(3) In case the Government servant fails to comply with the notice, the Head of Office shall, by order in writing, direct that such excess payment, shall be adjusted in instalments by short payments of pension in future, in one or more instalments, as the Head of Office may direct."

17. If one has regard to the above, any action of reduction of pension on wrong fixation, by no stretch of imagination can be nomenclatured as a clerical error. What is permissible under the statutory rules framed under Article 309 of the Constitution of India, which operate the field and binding, no reduction to the disadvantage of the petitioner after the pension has been assessed and finalized is permissible unless a clerical error is detected, but if the error is not clerical, reserving the right of applicant to establish his claim under clause 4 (a) of the OM ibid is an error or mistake on the part of the Government in our considered view reduction of pension is not permissible to the disadvantage of applicant.

18. The decision of the Apex Court in **Rakesh Kumar** (supra) though dealt with the pensionary benefits of BSF personnel where CCS (Pension) Rules are applicable but there the persons were not eligible for want of 20 years of service and moreover, Rule 70 of the Pension Rules, which is a statutory rule, was not considered. The decision, accordingly, is per incuriam and would not be applicable.

17

19. As regards decision in **V. Gangaram** (supra) the same applies on a mistake while the petitioner was in service of entitlement to the increments has nothing to do with the pension and once the specific rule, i.e., Rule 70 of the Pension Rules precludes revision to the disadvantage other than on detected clerical error the decision would have no application.

20. In **Shyam Babu Verma v. Union of India**, 1994 (2) SLJ SC 99 the apex Court has ruled that when there is no mistake, fraud or misrepresentation committed by government servant no recovery is permissible.

21. A Single Bench of Punjab & Haryana High Court in **Santokh Singh & Ors. v. State of Punjab & Ors.**, 2004 (3) ATJ 289, relying upon the decision of the Apex Court in **P.H. Reddy v. NTRD**, 2002 (2) SCT 987 and **Sahib Ram v. State of Haryana**, 1994 (5) SLR 753 quashed the order, effecting recovery of excess payment.

22. Moreover, we find that the decision of the Tribunal in OA-2388/2001 has neither been stayed nor modified or annulled by the High Court and still a precedent to be followed.

23. For the foregoing reasons, OA is partly allowed. Impugned orders are quashed and set aside. Respondents are directed to restore applicant his revised pension. They are restrained from effecting any recovery from the pension of applicant and if any recovery is effected the same shall be restored back to him. He shall also be entitled to all consequential benefits. The aforesaid directions shall be complied with by the respondents within a period of two months from the date of receipt of a copy of this order.

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24. However, this shall not preclude the respondents from taking appropriate proceedings against applicant in accordance with law.

25. As regards pending Writ Petition before the High Court of Delhi, the law shall take its own course. No costs.

S. Raju
(Shanker Raju)
Member

V.K. Majotra
(V.K. Majotra) 13/12/07
Vice-Chairman(A)

'San.'