

(1999) 10 DEL CK 0066
In the Delhi High Court
Case No : CWP. No. 2510 of 1998

D.S. Balhara (Lt. Commander)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 12-10-1999

Acts Referred:

Citation : (2000) 1 AD 339 : (1999) 82 DLT 832

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Mr. M.K. Gupta, for the Appellant; Ms. Jyoti Singh, for the Respondent

Judgement

A.K. Sikri, J.—Petitioner is an ex-serviceman. He served Indian Navy and was discharged from there on 31.10.92 on attaining the age of superannuation i.e. 50 years. At the time of his retirement from Indian Navy, his Basic-Pay was Rs. 4,050/- per month + DA Rs. 2,485/- + Rank Pay Rs. 600/-. However, without any break and from very next day i.e. 1.11.92, petitioner was re-employed in the same rank i.e. Lt. Commander and in the same establishment. The re-employment was for a period of one year and was extended every year on the yearly basis till he completed the age of 56 years on 12.10.98. Petitioner has filed this petition alleging that on reemployment w.e.f. 01.11.92 his pay was not correctly fixed, which was fixed as under:

Basic Pay = Rs. 4,050 D.A. = Rs. 2,905 Rank Pay = Rs. 600 ----- Rs.
7,555 Minus Pension Rs. 2,258 ----- Total Rs. 5,297 -----

2. The grievance of the petitioner was that while fixing his pay in the aforesaid manner, the respondents have deducted full pension, which has been fixed at Rs. 2,258/- and the benefit of ignorable part of pension and Contributory Provident Fund (CPF), which was available to reemployed Ex-Military Personnel has not been extended to him. He contends that instead of deducting full pension, ignorable part of pension and CPF, which is Rs. 1500/- w.e.f 1.1.96 should have

been excluded from Rs. 2,258/- and only an amount of Rs. 758/- should have been deducted.

3. To understand the controversy raised by the petitioner, it would be appropriate to refer to certain decisions of the Government of India issued from time to time for fixation of pay of Ex-Military Personnel on their re-employment. Normally, when the Government Servant retires and is thereafter re-employed in Government Department/Under taking etc. while fixing his pay on such re-employment, the pension he draws as a result of his retirement from earlier service is to be excluded. However, in respect of Ex-Military Personnel, Government of India has issued memos from time to time to the effect that part of such pension drawn by such ex-servicemen is to be ignored and only remaining part of pension is to be deducted while fixing pay in new service on re-employment. The first O.M. on the subject was issued by the Government of India, Ministry of Finance on 16.1.1964, according to which pension up to Rs. 50/- per month was to be ignored. The said amount was raised to Rs. 125/- vide O.M No. F5(14)/E. III(B)/77 dated 9.7.1978. Then same O.M. No. 2(1)/83/D(Civil) dated 8.2.83, which was issued by Minister of defense. As per this, in case of commissioned Officers, first Rs. 250/- of pension and in case of personnel below Commissioned Officer rank, the entire pension was to be ignored while fixing their pay on re-employment. This was followed by another O.M. dated 21.4.1986 of the Ministry of defense where in it was stipulated that in case of service officers, the first Rs. 500/- of pension and in case of personnel below Commissioned rank, the entire pension should be ignored while fixing their pay on re-employment in Armed Forces. It was clarified by O.M. dated 2.3.1983 by the Ministry of defense that the aforesaid O.M. dated 8.2.1983 shall be applicable in case of retired service pensioners when re-employed in Armed Forces also. Thus the position up to this date was that a part of pension or whole pension as the case may be, was ignorable when retired service pensioner was re-employed either in Civilian post and in Armed Forces. However, departure was made in the year 1991 when Ministry of defense issued Circular No. 1(48)/87/D(Pay/Services) dated 31.1.1991 while mentioning how the pay of such re-employed officer is to be fixed. Para-5 of this Circular dated 31.1.1991 is stipulated as under :

"The provisions of Ministry of defense letter No. 1(11)/83/D (Pay/Services) dated 2.3.83, as amended vide letter of even number dated 21.4.1986 which provides for ignoring a part of the pension in fixing pay of retired defense Service Officers shall not be applicable to officers re-employed in Armed Forces once after 1.1.1986".

4. Decision contained in Circular letter dated 31.1.1991 would demonstrate that, if a retired defense Service Officer was re-employed in Armed Forces then entire pension being drawn by him was to be deducted while fixing his pay on re-employment and no part of it was to be ignored. The justification for this decision contained in Para-5 of Circular dated 31.1.1991, is found in the Note dated

23.10.1996 of the Ministry, of defense. The relevant portion of which reads as under:

"The view taken by DOP&T/ministry of Finance was that since no notional maximum or minimum for each rank can be prescribed for the purpose, it has to be ensured that an Army Officer on re-employment in the Army in a rank 2 or 3 lowered than his rank in earlier service should get total pay packet, including pension, less than the total pay drawn while serving in a higher rank. The amount should be less at least by an amount equivalent to the difference in rank pay, viz., rank pay drawn during service and rank pay on re-employment in a lower rank. Accordingly, the formulated method where in the pay will be the last pay drawn in the rank of the post of which he has been reappointed minus the whole of the pension. This is the justification for removing ignoring of a part of the pension in part fixation on re-employment in the Armed Forces".

5. This is ignorable part of pension is enhanced to Rs. 1500/-w.e.f. 1.1.96 vide O.M. dated 7.11.1997.

6. The case of the petitioner is that circular dated 31.1.1991 has resulted in discrimination by not applying the Office Memorandum dated 2.3.83 and other O.Ms. issued by the Government thereafter to those ex-serviceman who are re-employed in Military service where by no part of the pension is to be ignored. According to the petitioner, if an ex-serviceman is re-employed in a civilian post then pension up to Rs.1500/- is ignored whereas, if such an ex-serviceman is re-employed in Armed Forces, entire pension is to be deducted while fixing is pay. This is petitioner contends is discriminatory and arbitrary inasmuch as ex-servicemen on re-employment in Military Service is discriminated against another ex-serviceman re-employed on Civilian side in Government and Public Sector Undertaking. According to him, if two defense Officers retired from defense Service with same rank and pay and re-employed to the equal rank with same pay but one is reemployed on civilian side and other in Military, the person who is employed on civilian side will get a pay Rs.1500/- more than the person who is employed in Military service. It is contended that there is no reasonable classification based on any intelligible differential having nexus to the objectives sought to be achieved and, Therefore, vocative of Article 14 of the Constitution of India. Petitioner submits that both types of officers form same class and, Therefore, could not be discriminated in respect of their pay fixation on re-employment. Both types of officers belong to Armed forces and merely because one is reemployed on civilian side should not be better placed than the other who is re-employed in defense Services Petitioner also relies upon the judgment of Supreme Court in the case of D.S. Nakara and Others Vs. Union of India (UOI), .

7. Advancing the aforesaid argument, the petitioner also relied upon recommendations of 4th Central Pay Commission as well as 5th Central Pay Commission. The petitioner states that the genesis and root of the problem lies in the executive order dated 31.1.1991, which has been perpetuated further in 1997. It is also stated that para 12 of Central Civil Services (fixation of pay of re-

employed pensioners) orders 1986 contains the provision for Contributory Provident Fund. It is stated that para 12 of the aforesaid orders, 1986 is based on the recommendations of 4th Central Pay Commission, which does not make any distinction between ex-serviceman re-employed in Civil or Armed Forces. The petitioner also states that no distinction between the re-employment in Civil side or Armed Forces was ever drawn either by the 4th Central Pay Commission or 5th Central Pay Commission. The petitioner also argues that the Central Government has accepted the recommendations made by the 5th Central Pay Commission and issued OM dated 7.11.1997, according to which the ignorable part of pension has been enhanced from Rs. 500/- per month to Rs. 1500/- per month. The said Om is made applicable for ex-serviceman holding civil posts on their re-employment.

8. On the basis of the aforesaid submissions, the petitioner has prayed for quashing of Para-5 of Circular Letter dated 31.1.91 and communications dated 18.9.97 and 2.3.98 by which his representatives were rejected. consequently, he has sought direction that respondents should fix his pay and allowance w.e.f. 1.11.92 by ignoring Rs. 500/- of pension as applicable prior to 1.1.96 and Rs. 1500/- w.e.f. 1.1.96 and arrears be paid to him along with interest 18% P.A. He has also prayed for direction to grant the benefit of CPF with all its consequences.

9. The facts disclosed above would demonstrate that what is to be decided in this writ petition is as to whether the decision of Government of India contained in Circular Letter dated 31.1.1991 not extending the benefit of ignorable pension to those retired defense Officers re-employed in defense services while extending the same to those retired defense Officers while re-employed in civilian post in Government or Public Sector Undertakings is arbitrary and discriminatory.

10. The respondents in the counter-affidavit admitted that before issuance of aforesaid Circular letter dated 31.1.1991, defense Services Personnel, retiring before attaining the age of 55 years and getting re-employment in the Armed Forces were given the benefit of ignoring service part of pension while getting their pay fixed on reemployment. However, vide Circular letter dated 31-1-1991 this benefit of ignoring part of pension is no longer applicable in the cases of military officer reemployed in Armed Forces. Initially this Circular dated 31.1.1991 was made applicable w.e.f. 1.1.1986 and thus was given retrospective application. However, subsequently it was amended vide another letter No.1(48)/87/D(Pay/Services) dated 18.12.91 making the orders dated 31.1.1991 applicable prospective i.e. 31.1.1991 only. It is stated that there are differences between the terms and conditions of re-employment in Armed Forces and Civil side/Public Sector Undertakings. The respondents have highlighted these differences in differences in different portions of the counter-affidavit. By consolidating them at one place, these differences are enumerated as under:

(a) Retired defense Services Officer re-employed in the armed Forces are appointed in the same rank or in one rank below to the rank held prior to retirement and their last pay drawn, which obviously would be higher taking into

consideration the seniority at the time of retirement, is protected. In other words, while fixing the pay on re-employment the Basic Pay last drawn is protected. On the other hand, the re-employed pensioners when re-employed in Civil Side/PSUs are only allowed to draw pay in the prescribed scales of pay for the posts in which they are re-employed. No protection of the scales of pay of the posts held by them prior to retirement is generally available.

(b) Naval officers below the age of 52 years on the date of retirement, are re-employed for a period of 3 years. The officers above the age of 52 years on the date of retirement may serve up to the age of 56 years. However, on re-employment in Civil/PSUs, the retired/released personnel generally may serve up to the age of super annuation i.e. 58 years (Now 60 years). The re-employed period in civil side is longer than the reemployed period in Armed Forces. The distinction is only by virtue of the kind of job that the two categories of personnel, i.e. retired defense personnel re-employed in Armed Forces and ex-servicemen and civilian Government employees re-employed Civil/PSUs, are required to perform. They, Therefore, are governed by separate set of rules depending upon the job requirements. Thus no discriminatory treatment has been meted to the petitioner.

(c) The retired/released Armed Forces personnel reemployed in Armed Forces are governed by Govt. of India, Ministry of defense letter No. 1(48)/87/D(Pay/Services) dated 31, Jan. 91 (Annexure I) and Navy Instructions 5/S/58 (Annexure VI) on the other hand the ex-servicemen and Civil Govt. servants re-employed in civil side/PSUs are governed by separate set of rules of the Department/PSU concerned and Central Civil Services (fixation of Pay of re-employed pensioners) Orders 1986 (Annexure VII). Since defense personnel are a separate class of personnel by itself, the Govt. issued orders as appropriate vide letter dated 31 Jan. 91. These orders are neither discriminatory in nature nor are violative of the Fundamental Rights of the petitioner, under Articles 14 and 16 of the Constitution.

(d) The clarification amplifies that since no notional maximum or minimum for each rank can be prescribed for the purpose, it is to be ensured that total pay of an officer should be protected even if re-employed in a rank 2 or 3 lower than his rank in the service earlier. Accordingly the pay of re-employed officer will be the last pay drawn in the integrated scale plus rank pay of the rank of the post to which he has been reappointed minus the whole of the pension. This is the justification for withdrawing the benefit of a part of the pension in case of the officers re-employed in the Armed Forces. The aforesaid justification is indeed relevant to the petitioner. The petitioner in fact was re-employed in the same rank held by him at the time of his retirement and his last pay has been protected while fixing his pay.

11. It is also submitted by the respondents that although 5th Central Pay Commission in its report had recommended that ignorable part of pension be enhanced from Rs. 500/- to Rs. 1500/- per month, but Pay Commission is merely

a recommendatory body and it is not obligatory on the part of the Government to accept the recommendations of Pay Commission in toto. In any case, vide Memo No. 3/4/97-Estt. (Pay-II) dated 7.11.1997 DOPT has enhanced ignorable part of pension from Rs. 500/- to Rs. 1500/- per month but the same is applicable to ex-servicemen re-employed in civil side and not in respect of those re-employed in Armed Forces.

12. The respondents also submitted that although there is a provision of Contributory Provident Fund (CPF) in para 12 of "Central Civil Service fixation of pay of Re-employed Pensioners order 1986". It is clear from para 2 of the aforesaid order that these orders are not applicable to retired/released Armed Forces personnel re-employed in the armed Forces. The pay and allowances of the retired/released Armed Forces personnel re-employed in the Armed Forces are governed by Govt. of India, Ministry of defense letter No. 1 (48)/87/D (Pay/ Services) dated 31st January, 1991. There is no provision of Contributory Provident Fund for re-employed Officers in the Armed Forces as those Officers continue to be governed by the defense Services Officers Provident Fund Rules, as was the case even during their active service.

13. It was also stated that petitioner had made representations which were duly considered and rejected as no force was found in the same.

14. The question to be determined as noticed above can be reformulated in the following words :

Whether an ex-Army man re-employed in defense Services can compare himself with ex-Army man re-employed in civilian post in Government or Public Sector Undertaking and, therefore.

Whether ignoring part of pension while fixing the pay in later case and deducting entire pension while fixing the pay in former case is discriminatory?

15. If, classification made by the respondents is based on some intelligible differential which has any nexus with the objectives sought to be achieved, then such classification is permissible under the law. On the other hand, if two categories of persons from same class, different treatment meted out to them would be treated as discriminatory and offend equality class mentioned in Article 14 of the Constitution of India Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classifications, being founded on intelligible differential which distinguishes persons or things that are grouped together from those that are left out of the group and that the differentia must have rational nexus sought to be achieved by the statute in question. It is now well settled that to pass the test of permissible classification two conditions must be fulfilled, namely: (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the classification must have a rational relation to the object sought to be achieved by the statute in question.

16. In the case of *State of West Bengal and Another Vs. Rash Behari Sarkar and Another*, , Supreme Court held that even amongst the likes the Legislature or the Executive may classification distinction which are real. So long as the classification is reasonable it cannot be struck down as arbitrary. Likes can be treated differently for good and valid reasons. While the theory of classification should not be carried too far test in denudes the very concept of equality of its true substance, but this does not and should not mean invalidation of a proper classification designed to achieve the objective underlying the enactment. Restating the aforesaid principles as test of a valid classification, in *Mohan Kumar Singhania Vs . Union of India* reported in : AIR1992SC1 . Supreme Court held that classification need not be perfect and rules of classification can be framed for securing requisite standard of efficiency in service. What is to be kept in mind is that every classification is likely in some degree to produce some inequality but that may not be a ground to invalidate or strike down such classification. Let us quote Supreme Court in its own words:-

"Article 14 declares that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The cherished principle underlying the above article is that there should be no discrimination between one person and another if as regards the subject matter of the legislation, their position is the same. In other words, its action must not be arbitrary, but must be based on some valid principle, which it install must not be irrational or discriminatory. That differential treatment does not per se constitute violation of Art. 14 and it denies equal protection only when there is no rational or reasonable basis for the differentiation. Thus Art. 14 condemns discrimination and forbids class legislative corporation but permits classification founded on intelligible different is having a rational relationship with the object sought to be achieved by the Act/Rule/Regulation in question. The Government is legitimately empowered to frame rules of classification for securing the requisite standard of efficiency in services and the classification need not scientifically be perfect or logically complete.

17. In the present case, it is the question of pay fixation of two categories of persons, who were both ex-servicemen before their retirement but one is re-employed in defense service and other is re-employed in civilian service. Thus admittedly on their re-employment they belong to two different sets of service. Once that is so, it is the feature of these two services which are to be taken into consideration. A retired defense services officer re-employed in Armed Forces remains in the same service. In fact the petitioner here was appointed on very next day, after his retirement, on the same post. Therefore, in his case more important thing is protection of his last drawn salary. While fixing his salary on re-employment in Armed Forces entire pension drawn by him, which he is drawing from same defense service, is excluded in order to see that his last drawn salary remains the same. In fact, if a part of pension is ignored and whole of the pension drawn by him is not deducted, this would put him in a more advantageous position while remaining in same Armed forces, as his salary

would become higher than what he was drawing while in service. Thus the result would be that a defense Service Officer on re-employment would be getting higher service than an officer while in service and it would create anomalous situation and may be a cause of grievance to those who are in regular service. What is to be kept in mind that on re-employment in the same forces, such retired defense Service Officer remains in the same service and works along with same set of persons with whom he was working before his retirement. Therefore, more important thing, on re-employment is to protect his last drawn salary, which is protected and not to make anomalous situation by giving him higher salary after his retirement. Position would be totally different when retired defense Service officer is reemployed in civil side. On re-employment these retired defense Service Officers are allowed to draw pay in the prescribed scale of pay for the post in which they are re-employed in civil side. No protection of scale of pay of post held by them prior to retirement is generally available. Such retired defense Service Officer when re-employed in a civil side may get a post very much lower in rank or may get a post very much higher in rank, than the post on which he was serving while in defense Service, if comparison is made nationally on the basis of pay. On the other hand, a retired defense Service Officer re-employed in Armed Forces services, since he is appointed by same employer, is generally given same rank or one rank below the rank held prior to retirement. Moreover, in case of such officer re-employed in Civil side he severs his link with Armed Forces and is in a totally new set-up with new employer and with different environment and different conditions of service. Therefore, two officers one re-employed in Armed Forces and other re-employed as a civilian in Public Sector Undertakings etc. clearly belong to two different categories. The aforesaid discussion also explains the justifications in extending benefit of ignoring part pension in case of re-employed person in civilian post in Government as there is no question of their protection of salary on such re-employment. Therefore, I am of the view that the reasons given by the respondents in support of its Circular Letter dated 31.1.91 which does not extend the benefit of ignorable pension to those retired defense Officer re-employed in defense Services while extending the same to those retired defense Officers who are re-employed in civilian post in Government or Public Sector Undertakings are valid, just and proper.

18. In view of my aforesaid discussion, I do not find any justification in the prayers made by the petitioner in this writ petition. The circular letter dated 31.1.91, particularly, para-5 thereof, which is assailed in this petition, is legal and valid and cannot be termed as arbitrary, discriminatory or violative of Article 14 of the Constitution of India. Pay of the petitioner has rightly been fixed. The writ petition, accordingly, fails and is, Therefore, dismissed. There shall be no orders as to costs.