

(1999) 10 DEL CK 0086

In the Delhi High Court

Case No : Civil Writ Petition No. 6573 of 1998 with CM. No's. 12200/98 and 9521 of 1999

Lt. Genl. R.C. Kochhar

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 29-10-1999

Acts Referred:

Citation : (2000) 52 DRJ 3

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

Bench : Single Bench

Advocate : Mukul Rohtagi, Munish Kochhar, Inderjit Sharma and Rajan Sharma, for the Appellant; Jyoti Singh, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, J.—Petitioner was working as Lt. General in the Armed Forces Medical Services (hereinafter referred to as AFMS, for short). His age of retirement was 60 years. He was going to attain the age of 60 years in May, 1998 and Therefore in normal course he was to retire from service w.e.f. 31st May, 1998 (AN). As noticed below, Government of India has taken decision to increase the age of retirement by 2 years. However, the peculiar circumstances in which the said decision has been adopted by Ministry of defense and the matter is still under consideration, the petitioner was made to retire on "1st May, 1998, although pending such decision on the question of enhancement of age of retirement, Ministry of defense has deferred the retirement of all officers of the rank of Lieutenant General and equitable in AFMS who were due to retire on 31st July, 1998 and thereafter. Thus those officers similarly situated as the petitioner who were due to retire on completing the age of 60 years on 31st July, 1998 or thereafter are enjoying the benefit of extension of two years service but the case of the petitioner is solitary one who was made to retire on 31st May, 1998 on attaining the age of 60 years. Feeling aggrieved by the action of the respondents the petitioner has filed this petition stating that he is the only person who is left

out and discriminated against.

2. Now let me state the facts in detail. Petitioner claims that he is Master of Surgery (E&T) from Delhi University and stood first and was awarded gold medal. He underwent training in Cancer in the Institute of Oncology, U.K. in 1976-78 and attended various conferences in India and abroad. He was also post Graduate Examiner of 30 different Universities in India and was awarded Dr. Amir Chand Award for best Research work on high altitude. He has made 45 publications in various National and International journals. Petitioner further claims that in 1971 he was promoted as Brigadier, in 1993 he was promoted as Major General and in May, 1997 he was promoted as Lieutenant General, which post he was occupying on the date of his retirement.

3. The normal age of retirement of medical and scientific specialist in the armed forces inter alias of the persons in the rank of Lieutenant General is 60 years and on this basis petitioner was to retire w.e.f, 31st May, 1998 (AN) on his attaining the age of 60 years. However, in May, 1998 itself, on the recommendation of Vth Central Pay Commission, Government of India took a decision to enhance the retirement age by two years and issued Office Memorandum No. 25012/H/97-Estt (A) dated 13th May, 1998 to this effect. As per this, those Government servants who were to retire at the age of 58 years their age of retirement was extended to 60 years and those who were retiring at the age 01 60 years, it was extended to 62 years. Para 11 of this Office Memorandum is reproduced below:-

"The undersigned is directed to say that recommendations made by the Fifth Central Pay commission in paragraphs 128.16 and 128.17 relating to age of retirement for Central Government employees have been examined carefully and the President is pleased to direct that:-

(a) Except as otherwise provided specifically, every Government servant whose age of retirement is currently 58 years shall now retire from service on the afternoon of the last day of the month in which he/she attains the age of sixty years. However, Government servants whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years;

(b) There shall be complete ban on extension in service beyond the age of superannuation except in the case of medical and scientific specialists, who can be granted extension in service, on a case to case basis, up to the age of 62 years. Officers connected with budget work and full-time Members of the Committee likely to be wound up shortly may be given extension in service for a maximum period of three months in public interest, on a case to case basis.

4. As per para 3 of the said Office Memorandum, the aforesaid orders were to come into force w.e.f. date of notification of the amendment to the relevant rules and regulations. This para itself further stated that the amendment to Fundamental Rules 56 have been issued separately on the same date. Notification No. 25012/2/97 - Esstt. (A) dated 13th May, 1998 in this respect is

annexed as Annexure P-2 to this writ petition. Para 6 of the Office Memorandum dated 13th May, 1998 is relevant for the purpose of this case and it would be useful to reproduce the same at this stage:-

6. "It has been also decided that the age of retirement of the personnel Para-Military Forces, be enhanced by two years. Necessary orders and amendment to the respective rules, etc. will be issued by the Ministry of defense and Ministry of Home Affairs, as the case may be, in consultation with Department of Personnel & Training."

5. Thereafter Ministry of defense issued Circular letter dated 30th May, 1998, referring to para 6 of the aforesaid Office Memorandum dated 13th May, 1998 and stating that modalities of the implementation of orders regarding retirement age of army personnel by two years were under active consideration of the Government and the orders on the same would be issued shortly. Pending such orders, President of India had decided to defer the age of retirement of all army personnel who were to retire on 31st May, 1998 and thereafter except the following categories:-

- (a) the Subedar Maj. Risaldar who have completed their tenure of appointment as per the existing policy;
- (b) those proceeding on voluntary retirement;
- (c) those seeking retirement on compassionate grounds;
- (d) JCOs, NCOs, ORs who do not opt for further engagement;
- (e) those who have already retired;
- (f) those who are on extension in service beyond the stipulated retirement age on the date of issue of these orders; and
- (g) Lt. Gen. and equivalent of Armed Forces Medical Services who have attained their stipulated age of retirement viz. 60 years.

6. Para 3 of this circular letter further stipulates that as and when final orders are issued the same will be deemed to have been issued from the date of issue of this letter and the relevant rules/regulations would be amended accordingly, It means that whenever orders are issued enhancing age of retirement they are to become effective from 30th May, 1998.

7. Thus, in this circular letter dated 30th May, 1998 decision was taken to defer the retirement of all army personnel who were to retire on 31st May, 1998 except certain categories mentioned in the said circular letter which included "Lt. Gen. and equivalent of AFMS who have attained their stipulated age of retirement viz. 60 years". Case of the petitioner falls in this category. Therefore, in his case retirement was not deferred and he stood retired on 31st May, 1998. However, Ministry of defense thereafter issued another circular letter dated 29th July, 1998 stating that the modalities of implementation of orders regarding

retirement age of armed forces personnel by two years based on Government decision was under active consideration and orders on the same were to be issued shortly. But in the meantime, President of India was pleased to defer retirement of all the officers of the rank of Lieutenant General and equivalent of AFMS and Remount Veterinary Corps who were due to retire on 31st July, 1998 and thereafter on attaining their stipulated age of retirement namely, 60 years. Thus by this letter even the retirement of Lieutenant General and equivalent of AFMS was deferred even when they had attained the stipulated age of retirement, i.e. 60 years. However, this was made applicable in respect of those concerned officers who were to retire on 31st July, 1998.

8. The effect of the aforesaid circular is that retirement of even the officers of the rank of Lieutenant General and equivalent in AFMS (to which category the petitioner belongs) has been deferred until final decision is taken in the matter and those who were to retire on 31st July, 1998 or thereafter are allowed to remain in service. However, those who attained the age of 60 years on 31st May, 1998 and 30th June, 1998 were made to retire. It has been admitted at the Bar that petitioner's is the solitary case which falls in this category and who was retired on 31st May, 1998. This is also clear from another letter dated 9th July, 1998 issued by Government of India, Ministry of defense. In this letter it is mentioned that based on the assumption that extension beyond 60 years was made only for certain special categories of personnel (including medical scientists) to be decided on case to case basis and based on this premise one Lieutenant general (obviously the petitioner) was allowed to retire on 31st May, 1998 on reaching 60 years of age. In order to see that this is not repeated, Chiefs of Staff had reconsidered the aspect of enhancement of retirement age and the decision was conveyed in para 3 of letter No. DMW/34104/3/PPO dated 9th July, 1998 which reads as under:-

The Chiefs of Staff have reconsidered the aspect of enhancement of retirement ages in respect of AMC, ADC, MNS and AMC (NT) officers and have now recommended that two years extension, may be made applicable across the board to all officers as tabulated below: -

Sl. No.	Rank Existing	Proposed
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Retirement Age	Retirement Age
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1.	Lt. Gen/VADM/Air Marshall	60 62
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2-6	XXX XXX XXX	
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9. Since it was only the petitioner who was made to retire at the age of 60 years and was deprived of the benefit of 2 years extension, he made representation dated July, 1998 requesting that his case may be considered sympathetically and he be reinstated in service. As his request solicited no response, the present petition is filed by the petitioner.

10. Mr. Mukul Rohtagi, learned senior counsel able assisted by Mr. Inderjit

Sharma appearing on behalf of the petitioner highlighted the aforesaid facts and stated that decision was taken vide Office Memorandum dated 13th May, 1998 itself for implementing enhanced age of retirement by two years as is clear from para 6 thereof. Only necessary orders were to be issued by the Ministry of defense. If Ministry of defense has not issued the orders in time and delayed the issuance of the orders, the petitioner cannot be made to suffer. It was further argued that even on 30th May, 1998 when the matter was still under consideration orders were issued for deferment of the retirement of all army personnel who were to retire on 31st May, 1998 but it wrongly excluded, at that time, Lieutenant General and equivalent of AFMS who were to retire on attaining the age of retirement, namely, 60 years. Realizing this mistake, the decision was taken, as is clear from letter dated 9th July, 1998, enhancing the age of retirement of officers like the petitioner from 60 years to 62 years and based thereon circular letter dated 29th July, 1998 was issued. Thus all those persons, like the petitioner, who were to retire on 31st July, 1998 and thereafter were not retired. This led to a situation whereby petitioner was discriminated against and was made to retire on 31st May, 1998. It was contended that once the respondent realised their mistake and enhanced retirement age of all officers of the rank of lieutenant general and equivalent in AFMS such orders should have been made effective from 31st May, 1998 instead of 31st July, 1998. In the alternative, it was argued, that in any case petitioner was the only person who was prejudiced and was made to retire at the age of 60 years, the respondents should have taken corrective steps to consider his case also as it was within the discretion of the respondents, even in terms of para 2(b) of Office Memorandum dated 13th May, 1998 to take decision on case to case basis. The action of the respondents, Mr. Mukul Rohtagi submitted, lacked fairness and was arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution of India inasmuch as no distinction could be made between persons like the petitioner who was made to retire on 31st May, 1998 and other persons of his rank who were to retire on 31st July, 1998 when decision had been taken to enhance the age of retirement much before 31st May, 1998 i.e. on 13th May, 1998. It was submitted that delayed action of the respondents in Realizing their mistake and coming out with circular dated 29th July, 1998 could not deprive the petitioner the benefit of enhancement of the age of retirement.

11. Ms. Jyoti Singh, learned counsel appearing on behalf of the respondent on the other hand, contended that a perusal of Office Memorandum No. 25012/H/97-Estt. (A) dated 13th May, 1998 would show that those Government servant whose age of retirement was earlier 58 years it was extended to 60 years but it was made clear that para 2(a) starts with the words "except as otherwise provided specifically". In sub-para (b) it was very clearly mentioned that there shall be complete ban on the extension in service beyond the age of superannuation except in the case of medical and scientific specialist who can be granted extension in service, on case to case basis, up to the age of 62 years. Therefore, according to her, no decision was taken for medical; and scientific

specialist to enhance the age of retirement up to 62 years in general but it was to be decided on case to case basis. It was further submitted that there is no decision taken to enhance the retirement age of army personnel even till date. Circular letter dated 30th May, 1998 also mentions that the matter is under active consideration and in the meantime decision was taken to defer the retirement of army personnel who were to retire on 31st May, 1998 but alternant general and equivalent of AFMS who were to attain their stipulated age of retirement namely, 60 years were specifically excluded. This is how the petitioner was retired on 31st May, 1998. Even as per circular dated 29th July, 1998 the matter was still under consideration and decision was taken to defer the retirement of lieutenant general and equivalent of AFMS who were due to retire on 31st July, 1998. Therefore, it was submitted, that in so far as persons like the petitioner are concerned decision was taken only after his retirement i.e vide circular letter dated 29th July, 1998 to defer the retirement of those retiring on 31st July, 1998 or thereafter and since there was no decision prior to this date it will not be; applicable in the case of the petitioner. On this basis it was argued that petitioner cannot take advantage of this circular letters and he was rightly retired on 31st May, 1998.

12. On my specific query, it was pointed out that the matter regarding enhancement of retirement age was still under consideration and no final decision has been so far.

13. The facts mentioned above would reveal the emergency of following position.

(a) On the recommendation of Vth Central Pay Commission, Government of India took the decision contained in OM dated 13th May, 1998 to enhance the age of retirement from 58 year to 60 years in respect of Government servants.

(b) In so far as cases of medical and scientific specialist in Government service were concerned, where retirement age was already 60 years, it was decided that extension could be granted to them on case to case basis.

(c) Retirement age of armed forces and central para military forces were decided to be enhanced by two years and Ministry of defense were asked to issue necessary orders and amend respective rules in consultation with the Department of Personnel and Training.

(d) On 13th May, 1998 itself notification was issued amending FR 56 enhancing the age of retirement of Government servants from 58 years to 60 years.

(e) In terms of para 6 of the OM dated 13th May, 1998 Ministry of defense took up the matter for consideration to enhance the age of retirement of army personnel. However, pending such consideration it was decided to defer the retirement of army personnel who were to retire on 31st May, 1998 and thereafter. However, these orders were not to be applied to certain categories which inter alias included the lieutenant general and equivalent in AFMS in whose case the stipulated age of retirement was 60 years.

(f) It was further provided in circular letter dated 30th May, 1998 that as and when final orders are issued the same will be effective from the date of said letter i.e. 30th May, 1998.

(g) In so far as those officers whose age of retirement was 60 years, like the petitioner, they were excluded initially from the purview of circular letter dated 30th May, 1998 on the presumption that in their cases extension beyond 60 years will be decided on case to case basis which was drawn from para 2(b) of the OM dated 13th May, 1998. On this understanding, petitioner was allowed to retire on 31st May, 1998. It seems this understanding was not correct because of para 6 of the same OM dated 13th May, 1998 and that is why Chiefs of Staff considered this aspect and decided to enhance the retirement age of other officers including lieutenant general in AFMS from 60 years to 62 years. This is clear from a reading of para 2 and 3 of letter dated 9th July, 1998, which are reproduced below :-.

2. Army Headquarters views on the subject as highlighted by the above quoted letter, were based on the assumption that extension beyond 60 years was meant only for certain special categories of personnel (including medical specialists) to be decided on a case to case basis. Further, it is understood that, based on this premise, one Lt. Gen. was allowed to retire on 31st May, 1998 on reaching 60 years of age.

The Chiefs of Staff have reconsidered the aspect of enhancement of retirement ages in respect of AMC, ADC, MNS and AMC (NT) officers and have now recommended that two years extension, may be made applicable across the board to all officers as tabulated hereinbelow:-

Sl. No. Rank Existing Retirement Age Proposed Retirement Age

1. Lt. Gen/VADM/Air Marshall 60 62

2-6 XXX XXX XXX

(h) Based on the aforesaid decision of Chiefs of Staff, circular dated 29th July, 1998 was issued to the effect that officers of the rank of lieutenant general and equivalent in AFMS who were to retire on 31st July, 1998 or thereafter on attaining the age of 60 years be not retired and their retirement age be deferred after stipulated age of retirement namely, 60 years.

14. The aforesaid sequence clearly shows that although the matter of enhancement of retirement age of armed forces personnel by two years is still under consideration of the Government, benefit of two years is extended to all types of armed forces personnel. Although lieutenant general and equivalent in AFMS, to which category petitioner belongs, were excluded initially but in respect of these officers also decision was taken not to retire them on attaining the age of 60 years. It transpired later that the category to which petitioner belonged should not have been excluded as well. Therefore, the matter was reconsidered and it was realised that such persons should also get the benefit of enhanced age

of retirement. However, although benefit was extended to such categories but it was made effective only from 31st July, 1998. In this whole process, the petitioner was left out as he had already retired on 31st May, 1998.

15. I am conscious of the principle that employer has right to fix the cut of date i.e. date from which a particular decision would come into effect and there are number judgments to this effect. But circular letter dated 29th July, 1998 issued in this respect cannot be read in isolation and all the facts are to be taken into consideration cumulatively, including the circumstances and the background in which the said circular letter came to be issued. It is clear from the aforesaid discussion that initial exclusion of the category of lieutenant general in AFMS by the respondents was on the assumption that extension beyond 60 years was meant only for certain special categories of personnel (including medical specialists) to be decided on case to case basis (i.e. in terms of took into consideration only para 2(b) of the Office Memorandum dated 13th May, 1998). However, later on it was realised that in terms of para 6 of Office Memorandum dated 13th May, 1998 there could be general extension of the retirement age of all armed forces personnel by two years. Once this is realized and corrected steps taken consequent upon which circular dated 29th July, 1998 is issued, persons like the petitioner should not have been left out and it should have been made effective from 31st May, 1998 instead of 31st July, 1998. Position would have been different if for the first time decision was taken for enhancement of the age of retirement of armed forces personnel on 29th July, 1998 and made effective from 31st July, 1998. However, decision taken in 29th July, 1998 is equal to the decision which was taken vide Office Memorandum dated 13th May, 1998. Therefore, this would be a case where ratio of the judgment of D.S. Nakara and Others Vs. Union of India (UOI), can be applied. Once corrective steps are taken but made effective from prospective date i.e. 31st July, 1998 instead of 31st May, 1998 it creates discrimination. Fixing the date of 31st July, 1998 would Therefore be arbitrary and violative of Article 14 of the Constitution of India. At the cost of repetition it is stressed that substantive decision is taken vide Office Memorandum dated 13th May, 1998 and in particular para 6 thereof which gives the benefit to the petitioner. If the Government realised the correct position on a later date and remedied the defect it should not affect the petitioner prejudicially as respondents cannot take advantage of their own wrong. Moreover, fixing of date of 31st July, 1998 has no nexus with the objective sought to be achieved and classifying persons in two categories i.e. one to retire before 31st July, 1998 and others to retire on 31st July, 1998 and thereafter, when they form same class in view of the facts noted above, would be discriminatory. More so, when the genesis of both the orders dated 30th May, 1998 is same i.e. both derive their sustenance from Office Memorandum dated 13th May, 1998. Therefore the benefit of letter dated 29th July, 1998 should have been extended to the petitioner also and not doing is unfair and violative of what is popularly known as Wendsbury's principle of fairness.

16. The matter can be seen from another angle also. Decision is taken on 13th

May, 1998 itself as is clear from para 6 of Office Memorandum dated 13th May, 1998 which enhanced age of retirement of personnel of armed forces by two years. Once that decision is taken which was taken before the retirement of the petitioner the only formality was to pass necessary orders and amend respective rules. If the respondents deferred the passing of necessary orders, those who retired in the meantime should not be made to suffer. More so, when petitioner is only person who has become a victim of delayed corrective decision which comes ultimately in the form of circular dated 29th July, 1998.

17. There is another aspect of the matter which cannot be lost sight of. Even if it is presumed that decision was taken for the first time vide circular letter dated 29th July, 1998 and before this date para 2(b) of Office Memorandum dated 13th May, 1998, was applicable respondents were still empowered to grant extension on case to case basis. Thus when such anomaly came to the notice of the respondents it was open to the respondents, even in terms of para 2(b) of Office Memorandum dated 13th May, 1998 to give benefit to the petitioner by considering his case and giving him extension up to the age of 62 years, going by the fact that all those persons who are similarly situated as the petitioner are given the benefit of extension by general order issued in the circular letter dated 29th July, 1998. Such a solitary case as that of the petitioner who is deprived of the benefit of general order in view of peculiar circumstances could be remedied by the respondents when it was brought to their notice by taking this course of action.

18. After my aforesaid conclusion normally I would have directed the competent authority to consider the case of the petitioner for extension. However since one year and five months have already passed and the total period of benefit which the petitioner would get is only two years, it would be futile to refer the matter to the respondents for fresh consideration at this stage. Interest of justice would subserve in giving direction to the respondents to give benefit of enhanced retirement age of 62 years to the petitioner in terms of Office Memorandum dated 13th May, 1998 read with circular letter dated 29th July, 1998. Consequences of that would be that the petitioner would be treated as in service, as if he was not retired w.e.f. 31st May, 1998. Rule is Therefore made absolute. This writ petition is allowed. Direction is issued to the respondents to allow the petitioner to resume duties and give him charge of the post of Lieutenant General in AFMS and allow him to work as such 31st May, 2000 i.e. till he attains the age of 62 years. He shall also be paid salary and allowances w.e.f. 31st May, 1998.

19. The writ petition is allowed in the aforesaid terms. There shall be no order as to costs.