

(2010) 12 DEL CK 0082

In the Delhi High Court

Case No : CM No's. 21641-642 of 2010 and W.P. (C) 2722 of 2000

Sarwan Ram Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 20-12-2010

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 18, 19(1)

Citation : (2010) 12 DEL CK 0082

Hon'ble Judges : J.R. Midha, J;Gita Mittal, J

Bench : Division Bench

Advocate : Chittaranjan Hati, for the Appellant; Jatan Singh and Ashok Singh, for the Respondent

Judgement

Gita Mittal, J.

CM Nos. 21641-642/2010

Notice. Having regard to the prayer made in these applications, no reply is necessary. We have accordingly heard learned Counsel for the parties.

For the reasons stated in the applications, the same are allowed.

The Petitioner is permitted to incorporate para-3(vi) mentioned in CM No. 21641/2010 as additional ground as well as the additional prayer made as (i) in CM No. 21642/2010 in the writ petition.

W.P.(C) No. 2722/2000

1. This writ petition has been filed by the Petitioner aggrieved by the failure of the Respondents to give the benefits of his previous service with the Indian Army for the purpose of computation of pension which he would be entitled to upon retirement from the Sashastra Seema Bal ("SSB" hereafter) which he joined on re-employment.

2. The factual narration giving rise to the present writ petition is in narrow

compass.

3. The Petitioner is stated to have joined Indian Army on 26th April, 1951 and retired therefrom after having rendered 16 years of service on 2nd May 1969 on attaining the age of 55 years. With effect from 29th August, 1970, the Petitioner was initially re-employed with erstwhile 5th HP SSB Battalion (later known as GC SSB Shamshi) as Head Constable/GD in the pay scale of `110-3-131-4-143-EB-4-155. According to the Respondents, by an order dated 5th June, 1970 his pay was fixed at `110/- which was the minimum. It has further been stated by the Respondents that for the purpose of fixation of his pay, the Respondents had ignored the entire pension and pensionary benefits which were admissible to the Petitioner for the service rendered by him in the army in keeping with the provisions of the Central Civil Services (Fixation of Pay on Re-employment Pensioner) orders.

4. So far as the further service of the Petitioner is concerned, it is an admitted position that the Petitioner was granted extension on yearly basis as well as annual increment as per entitlement till 1976. The Petitioner was also confirmed as Head Constable/GD with effect from 1st May, 1976 in the SSB against the post after having been found him so eligible by the Screening Committee.

5. So far as the pension which the Petitioner had received from the military is concerned, it is also an admitted position that the Petitioner had exercised the option available to him under Rule 19 (1)(b) of the Central Civil Services Rules and had surrendered the service benefits which had enured to him upon his superannuation from army service. The competent authority is stated to have accepted such surrender.

6. So far as the pension which was admissible to the Petitioner upon his retirement from the SSB is concerned, the Respondents have proceeded in the matter based on the option which was exercised by the Petitioner under Rule 19 (1)(b) of the Central Civil Services Rules. So far as Rule 19 (1)(b) is concerned, the same provided thus:

Rule 19. Counting of military service rendered before civil employment

(1) A Government servant who is re-employed in a civil service or post before attaining the age of superannuation and who, before such re-employment, had rendered military service, may, on his confirmation in a civil service or post, opt either-

(b) to cease to draw his pension and refund-

(i) the pension already drawn, and

(ii) the value received for the commutation of a part of military pension, and

(iii) the amount of (retirement gratuity) including service gratuity, if any

and count previous military service as qualifying service, in which case the

service so allowed to count shall be restricted to a service within or outside the employee's unit or department in India or elsewhere which is paid from the Consolidated Fund of India or for which pensionary contribution has been received by the Government:

Provided that-

(i) the pension drawn prior to the date of re-employment shall not be required to be refunded,

(ii) the element of pension which was ignored for fixation of his pay including the element of pension which was not taken into account for fixation of pay on re-employment shall be refunded by him.

(iii) the element of pension equivalent of gratuity including the element of commuted part of pension, if any, which was taken into account for fixation of pay shall be set off against the amount of retirement gratuity and the commuted value of pension and the balance, if any, shall be refunded by him.

7. The Petitioner's grievance however is that upon exercising the option available to him under Rule 19 (1)(b) of the Central Civil Services (Pension) Rules, the Respondents were liable to re-fix the pay of the Petitioner as an ex-serviceman in terms of the office memorandum dated 22nd January, 1991 which has not been done so. 8. For the purpose of effective adjudication in the matter, the instructions contained in office memorandum deserve to be considered in extenso and the same reads as follow:

OFFICE MEMORANDUM

Subject: Re-fixation of pay on opting for combined service for pension under Rule 18 & Rule 19 of CCS (Pension) Rules, 1972.

The undersigned is directed to say that as per Ministry of Finance O.M. No. 8(32)Est./60 dated 18.7.60 and para 6 of this Department O.M. No. 3/1/85-Estt. (Pay.II) dated 31.7.86, the pay of Government servants who are in receipt of compensation/invalid pension and re-employed in civil posts and who submit option for combined service for pension (under Rule 18 of CCS (Pension) Rules, 1972), is refixed from the date of re-employment in terms of relevant provisions of Ministry of Finance O.M. No. 8(34)/E.III/57, dated 25.11.58 or this Department O.M. dated 31.7.86, as the case may be, by assuming that they are not in receipt of any pension.

2. However, at present there are no orders on refixation of pay of ex-servicemen who can similarly give an option for combined service for pension under Rule 19 of the CCS(Pension) Rules, 1972 by surrendering their pensionary benefits. This issue has been considered and it has been decided that pay of such ex-serviceman who were re-employed prior to 1.7.86 and who being eligible, have opted for combined service for pension in terms of Rule 19 of CCS(Pension) Rules, 1972, shall also be refixed from the date of re-employment in terms of

Ministry of Finance O.M. dated 25.11.1958, as amended from time to time, by assuming that there were not in receipt of any pension. In respect of ex-servicemen re-employed on or after 1.7.86, and who have similarly opted for combined service for pension under Rule 19 of CCS (Pension) Rules, pay shall be refixed from the date of re-employment in the manner given in para 15 of this Department O.M. dated 31.7.86 *ibid*. However, this refixation will be done only after the pensionary benefits have been refunded in full as per provision of Rule 19 *ibid* of CCS (Pension) Rules, 1972.

In so far as persons serving in the Indian Audit & Accounts Department are concerned, this issues in consultation with the Comptroller & Auditor General of India.

Sd/-

(T.O. Thomas)

UNDER SECRETARY TO THE GOVT. OF INDIA

It is noteworthy that this office memorandum related specifically to cases such as that of the Petitioner who had exercised option under Rule 19 (1)(b) of the Central Civil Services Rules.

9. We find that the Respondents have taken a stand that the Petitioner's pay was fixed in terms with the recommendations of the 3rd and 4th Pay Commission and that there was no provision for granting increments taking into consideration the service rendered by the Petitioner.

10. Perusal of the office memorandum dated 22nd January, 1991 shows that so far as the re-fixation of pay of the Ex-serviceman who had exercised the option under Rule 19 (1)(b) of the Central Civil Services (Pension) Rules, 1972 by surrendering the pensionary benefits is concerned, it was liable to be re-fixed from the date of re-employment in terms of the office memorandum dated 25th November, 1958 issued by the Ministry of Finance as was amended from time to time. For this purpose, it was further mandated that the Respondents were required to assume that the re-employed ex-serviceman was not in receipt of any pension.

11. The Petitioner having been re-employed as an Ex-serviceman with the SSB on 29th August, 1970, his pension was, therefore, liable to be re-fixed in terms of the mandate of the office memorandum dated 22nd January, 1991 and he would be entitled to all benefits as could be admissible to him thereunder.

12. As per the counter affidavit, the Respondents have considered the fixation of the Petitioner's pension premised on the recommendations of the 3rd and 4th Pay Commission which admittedly came in effect on 1st January, 1986. There is admittedly no consideration on the Petitioner's pension re-fixation in terms of the office memorandum dated 22nd January, 1991. There is, therefore, substance in the Petitioner's grievance in the present writ petition.

13. We may note an objection taken by Mr. Jatan Singh, learned Standing Counsel for the Union of India that the prayer of the Petitioner before this Court is grossly delayed and the writ petition deserves to be thrown out on the ground of delays and laches. We may notice that so far as the fixation of pay and pension is concerned, it remains the duty of the employer to fix the same correctly. No employee should be compelled to approach the court for seeking its fixation.

14. The Petitioner has also placed before this Court the rejection of the Petitioner's representations by the Respondents as late as on 9th April, 1999 and 30th June, 1999.

It is noteworthy that pension is payable monthly. Wrong fixation and payment of such wrongly fixed pension would give a recurring and continuous cause of action to the retired personnel. The Petitioner having approached the Respondents for redressal of his grievance, they were bound to have considered the same as per the applicable rules and corrected the position without requiring him to come to court.

15. Even otherwise, the Petitioner retired only in the position of a soldier. There would be several issues relating to impediment to access to justice. Even otherwise, there is nothing on record to show that the Petitioner was possessed of adequate means; that he was placed in such a position that he could have come to court and deliberately chose not to do so. 16. We also find that this writ petition was filed in the year 2000 and has also remained pending in court for a long period of 10 years. Other than taking the plea in the counter affidavit, the Respondents ever have not pressed the aforementioned objection.

For all these reasons, we find no substance in the objection of the Respondents.

In view of the above, we direct as follows:

(i) The Respondents shall consider the case of the Petitioner for re-fixation of his pension in terms of the office memorandum dated 22nd January, 1991 and any other applicable rules and regulations within a period of six weeks from today. The order which is passed as well as computation of the Petitioner's pension on such re-fixation shall be immediately communicated to the Petitioner.

(ii) In case, the Petitioner is still aggrieved by the order which is passed by the Respondents, it shall be open to him to assail the same by any appropriate legal remedy.

(iii) In case, the Respondents find any amount is payable to the Petitioner upon such re-fixation, the same shall be forthwith released to the Petitioner, in any case within a period of four weeks from the passing of the order.

(iv) The Petitioner shall be entitled to costs of the present writ petition which are quantified at Rs. 10,000/-