
(2011) 02 DEL CK 0127
In the Delhi High Court
Case No : Writ Petition (C) 7410 of 2009

Sri Krishan

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-02-2011

Acts Referred:

Citation : (2011) 02 DEL CK 0127

Hon'ble Judges : Suresh Kait, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : O.P. Khadaria, in W.P. C 7410/2009 and Sarwa Mitter, in W.P. C 996/2010, for the Appellant; Anuj Aggarwal and Gaurav Khanna for respondents in W.P. (C) 7410/2009 and Ruchir Mishra in W.P. (C) 996/2010, for the Respondent

Judgement

Pradeep Nandrajog, J.—The factual background of the claims in the 2 writ petitions is the same.

2. A Government of India circular dated 27.12.1995 was read, in fact misread, as if irrespective of having rendered 20 years service, upon rendering 10 years" service members of para-military forces were eligible for pension upon voluntarily retiring or resigning.

3. The mistake was detected on 15.1.1998 when a circular was issued that all those who had not put in 20 years" service were not eligible for pension as the same would be contrary to the CCS (Pension) Rules 1972.

4. Pensions which were sanctioned and paid were not only stopped but were sought to be recovered and litigation resulted which came to be settled by the decision of the Supreme Court reported as Union of India and Others Vs. Rakesh Kumar etc., with the view taken that there could be no estoppels against a Statute and that any representation by the Authorities which was in the face of the CCS (Pension) Rules 1972 would not bind the BSF Authorities.

5. Immediately, writ petitions were filed in the Supreme Court seeking virtually

the same relief which was declined by the Supreme Court in the afore-noted decision, which resulted in the Supreme Court rendering an opinion reported as Raj Kumar and Others Vs. Union of India (UOI) and Another,

6. Noting that the writ Petitioners had no case in law, but equities were in their favour, making it expressly clear in para 18 of the decision, that the Supreme Court was issuing directions in exercise of its power of complete justice under Article 142 of the Constitution, the Supreme Court directed that all persons who had retired on the belief that they would be paid pension, could opt to rejoin but would have to refund the pension which they had received.

7. It may be noted that the Supreme Court issued no directions as to what would happen to the period post acceptance of the resignation/offer of voluntary retirement by the jawans, till they were reinstated if they exercise the option to be reinstated. Those who did not opt for reinstatement were held not entitled to any pension, but it was held that no recoveries would be made.

8. Petitioners are in the category of those employees who sought to be re-inducted in service and have been taken back. Needless to state, they were taken back to the posts they were holding when they resigned.

9. In view of the fact that the Supreme Court has categorically directed that those who rejoin would have to refund the pension received, the claim in the writ petitions that the Respondents be prohibited from effecting recoveries from their salary to make good the pension received by the Petitioners and paid by the Respondents has obviously to be rejected.

10. The claim in the writ petitions to prohibit the Respondents from not recovering the pension received by the Petitioners is accordingly rejected.

11. 2 other problems have been projected by the Petitioners. The first is that persons junior to them, who continued to serve, have earned promotions. The Petitioners want a promotion with effect from the date persons junior to them were promoted. They also want their seniority to be protected. The second problem they highlight is of the period they did not serve being adjusted towards firstly earned leave, remainder towards half-pay leave and the balance as leave without pay i.e. EOL (Extra Ordinary Leave) and as a consequence as per FR-26 the date of increment being shifted to when they joined back.

12. Let us make it very clear that learned Counsel for the Petitioners have clearly stated that the Petitioners are not asking for salary for the said period, notwithstanding a claim being made to this effect in WP(C) 996/2010; a claim which even otherwise cannot succeed for the simple reason when the Supreme Court directed that even pension received for said period has to be refunded, it would run contrary to the direction issued by the Supreme Court if any Court would direct the salary to be released.

13. It has to be kept in mind by this Court that the persons similarly situate as Petitioners were held entitled to no relief in law by the Supreme Court, but

limited relief was granted by the Supreme Court in exercise of its power under Article 142 of the Constitution of India i.e. the power of doing complete justice.

14. With respect to the 2 problems faced by the Petitioners, we find that the Government of India has issued directions, which have been circulated to all the units by the DIG Establishment on 17.10.2008, as per which all persons who were re-inducted will retain previous seniority but would earn promotion to the next rank after undergoing mandatory courses.

15. Learned Counsel for the Respondents state that on the issue of seniority of the Petitioners and their entitlement for promotion, the Respondents may be bound down to the communication dated 17.10.2008, copy whereof we find has been annexed as Annexure R-2 to a Supplementary Affidavit filed by the Respondents under cover of its Index dated 13.4.2010.

16. We clarify that the Petitioners cannot claim benefit of promotion from a retrospective date or salary to the higher post from the retrospective date for the reason they must earn a promotion and upon promotion would be entitled to the salary of the promotion post only upon discharging the duties of the higher post.

17. But, on the issue of increments to be paid to the Petitioners, we are of the opinion that notwithstanding FR-26, which contemplates, normal situation, the instant case has a peculiar factual setting and thus the Government must reconsider the matter from at least one point of view.

18. The 2 decisions of the Supreme Court which we have noted, show that nearly 2000 jawans of BSF sought voluntary retirement or resigned on the express assurance that having putting 10 years service, but less than 20 years service, pension would be paid. These jawans were paid pension when in the year 1998 it was detected by somebody that the assurance was contrary to the CCS (Pension) Rules 1972 resulting in the pension being stopped. Had these jawans been given no assurance, they would not have acted to their detriment. These poor fellows lost the battle in law inasmuch as law does not recognize any estoppels against a Statute.

Limited relief was given to these jawans by the Supreme Court when they were permitted to rejoin, but upon term of returning the pension which they have earned. Partial redressed has been accorded administratively to these persons in terms of the instructions dated 17.10.2008 requiring seniority to be protected but the consequences of promotion being prospective. In other words, an attempt has been made to harmonize the right of promotion with seniority retained with the liability of the Government to pay salary.

19. We can appreciate non-payment of salary on the promotional post till promotion is earned, but commensurate with the issue of seniority, would be the removal of the anomaly of a senior person not receiving a salary lower than what is received by the junior person. This anomaly is capable of being removed if an administrative decision is taken to waive FR-26 keeping in view the peculiar

circumstances of the instant case and by giving notional increments for the years the Petitioners remained out of service i.e. not depriving the Petitioners the benefit of annual increments, with actual amount being paid when they rejoin and when they earn a promotion. This would mean that on the promotional posts, if promotion is earned, last pay drawn, on a notional basis, would be protected.

20. Thus, we dispose of the writ petitions directing the concerned officer of BSF i.e. DIG Establishment to make a reference to the Ministry of Home Affairs seeking an opinion and preferably a concurrence to waive application of FR-26 qua the Petitioners and other similarly situated jawans of BSF and while so doing would draw up a note highlighting the origin of the problem in the context of the 2 decisions of the Supreme Court and would make a reference to our present decision; the opinion/concurrence to be sought would be to grant notional increments to all these persons so that the anomaly of their seniority being retained but they drawing less wages than their juniors would be removed. It would be highlighted that as per FR-26 a person granted Extra Ordinary Leave, other than on the grounds contemplated by FR-26, would result in the date of increment being shifted to the year succeeding when the person joins. A mandamus is issued to the Ministry of Home Affairs i.e. the Controlling Ministry, to process the reference made and take a reasoned decision.

21. No costs.