

PETITIONER:
DIRECTOR GENERAL OF POSTS & ORS.

Vs.

RESPONDENT:
B. RAVINDRAN & ANR.

DATE OF JUDGMENT: 08/11/1996

BENCH:
S.C. AGRAWAL, G.T. NANAVATI

ACT:

HEADNOTE:

JUDGMENT:
(With CA Nos. 4079, 4080, 4042/92, SLP(C) Nos. 10,747/92, 2422/93, 12271/93, 14027/93, 16075/93, 17609/93, 21462/93, 7717/94, C.A. Nos. 4710/94, 3136/95, 7832/95, 2872/93, SLP(C) 17023/92, C.A. Nos. 3864/93, 3865/93, 6226/90, 9384/95, 9416/95, 65/92, 2429/94, 15/91, 7367/93, 4369/90, 75/95, SLPC(C) 16076/93, C.A. No. 4458/96, SLP(C) Nos. 10472/95, 1170/96, 11949/96, 3706/92, 7187/95, 14102/95, 5344/94, 11469/94, 12383/94, 12971/94, CA. Nos. 11376/96, 10486/95, 10487/95 & 10488/95)(Civil Appeal Nos. 14493-14512/96 against SLPs 10747/92, 2422/93 etc. etc. respectively mentioned above)

J U D G M E N T

NANAVATI. J.

Leave granted.

The point which arises for consideration, in this batch of appeals, is whether an ex-serviceman, who after his retirement before attaining the age of 55 is re-employed in civil service, while getting his pay fixed, is entitled to an advance increment only if his pay plus pension plus pension equivalent of gratuity is less than The last pay drawn at the time of retirement.

This question arises in the context of the following facts and circumstances. It is unnecessary to refer to the facts of all these appeals and therefore, we refer to the facts of Civil Appeal No. 4077 of 1992 only. Ravindran, Applicant in O.A. No.3 of 1989, out of which this appeal arises, after his retirement from Air Force, was re-employed as a Postal Assistant on 29.11.83. He had served in the Air Force from 4.11.65 to 30.11.80. His last pay in the Air Force was Rs. 400/ per month and his pension on the basis of the said service was fixed at Rs. 187/- per month. The pension equivalent of gratuity was Rs. 20.17. On his re-employment as a Postal Assistant In the scale of Rs. 260-8-340-10-360-12-480 his pay was fixed at Rs. 260/- being the minimum of the pay scale. According to him while fixing his pay and determining hardship the whole of military pension which he was getting was required to be ignored and he ought to have been granted one advance increment for each completed year of military service in view of the Government of India, Ministry of Finance O.M. dated 25.11.58 read with

Government of India Ministry of Defence O.M. dated 8.2.83, as he was getting Rs. 140/- less than what he was getting at the time of retirement from military service. As he had put in 11 years' service in equivalent or higher grade in the Air Force his pay at the time of re-employment on 29.11.83 should have been fixed at Rs. 350/- per month. He was denied this benefit and his initial pay was pegged down to the minimum of the pay scale at Rs. 260/- on the ground that his case cannot be regarded as a case of hardship in view of the clarification made by the Department of Personnel and Training after consulting the Ministry of Finance and which is contained in the circular letter dated 30.12.85 issued by The Director General, P & T. The applicant, therefore, approached the Central 6 Administrative Tribunal and challenged the said clarification and the letter dated 30.12.85 as arbitrary and against the provisions of pay taxation of re-employed pensioners. The respondents in other appeals were also denied the benefit of advance increments for the same reason and, therefore, they had also challenged before the Tribunal the said clarification and the letter dated 30.12.85.

The contention of the applicants before the Tribunal was that it an ex-serviceman on being re employed in civil service does not get by way of pay plus pension plus pension equivalent of gratuity less than the last pay drawn by him at the time of retirement then it cannot be said that fixation of his initial pay at the minimum of the prescribed pay scale has caused undue hardship to him and, therefore, his pay was not required to be fixed at a higher stage by allowing one increment for each year of service which the officer had rendered before retirement in a post not lower than that in which he is re-employed. This was the policy of the Government right from 1958 and what was implied was made clear by department of Personnel and Training after consulting the Ministry of Finance. Therefore, the said clarification cannot be regarded as arbitrary or contrary to any statutory provision or a provision having force of law.

When O.A. No.3 of 1989 along with O.A. No.15 of 1989 came up for hearing before the Division Bench of the Tribunal Ernakulam it noticed that a Single Member Bench of the Tribunal had upheld this contention in an earlier matter. As it was inclined to take a different view it raised the following two issues and referred them to a larger Bench:

(a) Whether for the purpose Of granting advance increments over and above the minimum of the pay scale or re-employment post in accordance with the O.M . of 25.11.1958, the whole or part of the military pension of the ex-servicemen which is to be ignored for the purpose of pay fixation, can be taken into account to reckon that the minimum of the pay scale of the re-employment post plus pension, is more or less than the last military pay drawn by the re-employed ex-serviceman for the grant of advance increments on re-employment; and

(b) If Yes , i.e., if it is decided that the ignorance pension also has to be reckoned for the purpose of admissibility or advance

increments, whether the order issued to this effect in 1985 or 1987 can be given retrospective effect so as to adversely affect the initial pay of ex-servicemen who were re-employed prior to the issue of these instructions."

A Full Bench of the Tribunal answered those questions as follows:

"(a) We hold that for the purpose of granting advance increments over and above the minimum of the pay scale of the re-employed post in accordance with the 1958 instructions (Annexures IV in O.A. No.3 of 1989), the whole or part of the military pension of ex-servicemen which are to be ignored for the purpose of pay fixation in accordance with the instructions issued in 1964, 1978 and 1983 (Annexures V, V-a, and VI, respectively), cannot be taken into account to reckon whether the minimum of the pay-scale of the re-employed post plus pension is more or less than the last military pay drawn by the re employed ex-servicemen.

(b) The orders issued by the respondents in 1985 or 1987 contrary to the administrative instructions of 1964, 1978 and 1983 cannot be given retrospective effect to adversely affect the initial pay of ex-servicemen who were re-employed prior to the issue of these instructions."

Following the decision of the Full Bench, O.A.No.3 of 1978 and O.A. No.15 of 1989 were disposed of by the Division Bench by declaring that the applicants were entitled to be granted one advance increment for each completed year of their military service in equivalent grade in fixing their pay in the post of Post Assistant with effect from the date from which they were appointed if the minimum of Rs. 250/- in the pay scale of Postal Assistant together with unignorable part of their pension did not exceed last pay drawn by them in the Armed Force. The Tribunal also directed the respondents in those applications to exclude the ignorable part of their pension while deciding whether any undue hardship was caused to the applicants by fixing their reemployment pay at the minimum of the pay scale of Postal Assistant. The Tribunal set aside the impugned orders and also the clarification to the extent they were contrary to the said declaration. Aggrieved by the orders passed by the Tribunal in those two applications and similar orders passed in other applications the appellants have filed these appeals after obtaining special leave of this Court.

The learned counsel for the appellants submitted that the concept of hardship was introduced by the Government in O.M. dated 25.11.1958 to ensure that there was no drop in the total package of pay and pension on re-employment. It was never the intention of the Government to allow advance increments after comparing the minimum pay to The pre-

retirement pay as that would have entitled the ex-serviceman to double and unintended benefit. Thus the G.M. dated 30.12.1985 was clarificatory in nature as it made explicit what was implicit in O.M. dated 25.11.1958. The learned counsel further submitted that the tribunal having rightly found that the instructions issued in 1964, 1978 and 1983 did not deal with the concept of hardship committed an error in holding that the O.M. dated 30.12.1985 was not clarificatory in nature and was inconsistent with the statutory provision contained in the Civil Service Regulations and the instructions issued thereunder which also have equally binding force. As the O.M. dated 30.12.1985 was clarificatory in nature the question of giving it retrospective effect did not arise at all. It was submitted that the view taken by the Tribunal is therefore wholly misconceived. As against these submissions made on behalf of the appellant the learned counsel appearing for the respondents have submitted that the tribunal has correctly interpreted the O.Ms. of 1958, 1964, 1978, 1983 and 1985 and the effect of making a corresponding amendment in the Civil Service Regulations which are admittedly statutory in nature.

On 25.11.58 the Government of India took a policy decision in the matter of the procedure to be adopted in fixing the pay of pensioners re-employed in Central Civil Departments. It is applicable to all such pensioners. The relevant part of the said policy decision is as follows:

"(a) Re-employed pensioners should be allowed only the prescribed scales of pay, that is, no protected time scales such as those available to pre-1931 entrants should be extended to them.

(b) The initial pay, on re-employment should be fixed at the minimum stage of the scale of pay prescribed for the post in which an individual is re-employed.

In cases where it is felt that the fixation of initial pay of the re-employed officers at the minimum of the prescribed pay scale will cause undue hardship, the pay may be fixed at a higher stage by allowing one increment for each year of service which the officer has rendered before retirement in a post not lower than that in which he is re-employed.

(c) In addition to (b) above the Government servant may be permitted to draw separately any pension sanctioned to him and to retain any other form of retirement benefit for which he is eligible e.g., Government's contribution to a Contributory Provident Fund, gratuity, commuted value of pension, etc. provided that the total amount of initial pay as at (b) above, plus the gross amount of pension and/or the pension equivalent of other forms of retirement benefit does not exceed :-

- i) the pay he drew before his retirement (pre-retirement pay); or
- ii) Rs. 3,000/-, whichever is less.

Note 1 :

In all cases where either of these limits is exceeded, the pension and other retirement benefits may be paid in full and the necessary adjustments made in the pay so as to ensure that the total of pay and pensionary benefits is within the prescribed limits.

Where, after the pay is fixed at the minimum or any higher stage, it is reduced below the minimum as a result of the said adjustments, increase in pay may be allowed after each year of service at the rates of increments admissible, as if the pay had been fixed at the minimum or the higher stage as the case may be."

The Government of India felt that the capacity and usefulness of a person could not be greater than what it was at the time of retirement but this consideration became irrelevant when applied to persons who retired much earlier than the normal age of retirement of 58 years. Moreover, some of the lower rank in the Defence Services, e.g., sepoys who retired at a very early age qualified themselves for various trades and professions after undergoing some training. It therefore thought that a distinction between officers who retired at the normal age of 58 and those who retired at an early age was desirable. Taking into account the difficulties of low paid pensioners who retire at an early age. It decided that in case of persons retiring before attaining the age of 55 years, a part of the pension may be ignored in computing pay on re-employment. Accordingly an O.M. was issued directing Civil pensions upto Rs. 10 p.m. and Military pension upto Rs. 15 p.m. should be ignored in fixing pay on re-employment. An amendment to that effect was also made in Articles 521 and 526 of the Civil Service Regulations. As declared by the dated 19.1.1964 the Government again raised the limit in the following terms :-

- (i) in the case of pensions not exceeding Rs. 50/- per mensem the actual pension,
- (ii) in other cases, the first Rs. 50/- of the pension.

A corresponding amendment in the Civil Service Regulation was also made. This limit was further raised from Rs. 50/- to Rs. 125/- by Ministry of Finance O.M. dated 19.7.1978. By its O.M. dated 8.2.1983 Ministry of Defence issued an order by raising the limit of pension to be ignored in fixing of pay from Rs. 125/ to Rs. 250/ in the case of Service Officers and declaring that the entire pension should be ignored in the case of personnel below Commissioned Officer's rank. All these orders were made effective from the dates on which they were issued. We have referred to only those orders which are relevant for the purpose of these appeals.

It appears that the effect of making the entire pension ignorable in certain cases was examined by the Department of Personnel and Training in consultation with the Ministry of Finance. It was decided to issue the following clarification

with respect to the mode of pay fixation of re-employed pensioner :-

" When a re-employed pensioner asks for refixation of pay under the 1983 orders, his pay has to be fixed at the minimum of the scale. The question of granting him advance increments arises only if there is any hardship. Hardship is seen from the point (whether pay plus pension plus pension equivalent of gratuity whether ignorable or not) is less than the last pay drawn at the time of retirement. If there is no hardship no advance increments can be granted."

The said clarification was brought to the notice of all the concerned authorities of the postal department by the Assistant Director General of Posts by circular dated 30.12.1985 and they were directed to review all such previous cases in which the pay of the re-employed pensioners/ex-serviceman were otherwise fixed under the Ministry of Defence order dated 8.2.1983. As stated earlier this circular and the consequent action were the subject matter of the applications filed by the respondents before the tribunal.

The effect of the order dated 8.2.1983 and the circular dated 30.12.1985 was that in case of a pensioner who was re-employed on or after 8.2.1983 his pay was to be refixed in terms of the said order and the clarification. In respect of those ex-servicemen who opted to come under those orders their pay was also to be fixed in the same manner.

It is not in dispute that the original order for fixation of pay of re-employed pensioners was contained in O.M. dated 25.11.1958. In the matter of fixation of pay of such re-employed pensioners the first step required to be taken was to fix his initial pay at the minimum stage of scale of pay prescribed for the post on which he was re-employed. The next step to be taken was to find out whether his pay thus fixed plus pension (including other pensionary benefits) exceeded the pay which he drew before his retirement or Rs. 3000/-. If it exceeded either of those limits then necessary adjustment was to be made in the pay by reducing it below the minimum stage so as to ensure that the total pay including pension was within the prescribed limits. If the initial pay plus the pension was found to be less then it was to be regarded as a case of undue hardship and his pay was required to be fixed at higher stage by allowing one increment for each year of service which the officer had rendered before retirement in a post not lower than in which he was re-employed. However, when it was noticed that this formula was not fair and just in cases of pensioners who retired at an early age that is before 55 years, the Government in relaxation of the policy contained in the 1958 order decided to grant some benefits to such re-employed pensioners and issued an order directing that civil pension upto Rs. 10 per month and military pension upto Rs. 15 per month should be ignored in fixing pay on reemployment. Thus while totalling up the initial pay and the pension for the purpose of finding out whether the pensioner on re-employment was likely to get more or less than what he was getting earlier Rs. 10/- in case of civil Pensioners and Rs. 15/- in case of military pensioners were to be ignored. In other words the amount of pension to be

added to the initial Pay was to be reduced to that extent. Thereafter his pay was to be adjusted depending upon whether the pensioner would thus get more or less on his re-employment. This relaxation was obviously in the nature of a modification of the earlier policy. As narrated above the said limits to be ignored were increased from time to time and by the O.M. dated 8.2.1983 in case of ex-serviceman the limit was raised to Rs. 250/- in case of service officers and in case of personnel belonging to Commissioned Officer ranks the entire pensionary benefits were to be ignored. Though in the beginning, according to the original policy contained in the 1958 order the entire pension was to be added to the initial pay to find out whether it gave unintended advantage or caused undue hardship to the re-employed pensioner the position did not remain the same after the passing of the orders in 1963 and 1964 and thereafter. The modifications thus made by the 1963 and 1954 orders were given legal status by amending Articles 521 and 526 of the Civil Service Regulations accordingly.

However it was submitted by the learned counsel for the appellants that the orders which were issued in 1963, 1964, 1978 and 1983 did not deal with the aspect of hardship and were not intended to replace or change the basic policy contained in the 1958 instructions. They were intended as relaxations and, therefore, they cannot be said to have the effect of altering or modifying the 1958 policy. When the entire pension was made ignorable in the case of personnel below Commissioned Officers rank the position substantially changed and therefore the Government was obliged to clarify that as contemplated by the 1958 instructions hardship is to be seen from the point whether pay plus pension plus pension equivalent of gratuity (whether ignorable or not) was less than the amount of retirement. What the Government thereby did was to reiterate that if there was no hardship no advance increment should be granted. What is overlooked by the learned counsel is that the intention behind the orders issued in 1963, 1964, 1978 and 1983 was to give some more benefit to the re-employed pensioner/ex-servicemen. The effect of the benefit was to be given at a stage prior to the consideration of hardship. The ignorable part of the pension was to be ignored while totalling up the initial pay plus the pension in order to find out whether the retired pensioner thereby was likely to get more or less than what he was getting at the time of the retirement. To that the 1958 policy stood altered or modified. Though the said four orders did not directly deal with the aspect of hardship they did by widening the gap between the initial pay plus the non-ignorable part of the pension and the pay he drew before his retirement and thereby further necessitated giving of advance increments to alleviate hardship. It is, therefore, not correct to say that those orders had no concern with the aspect of hardship. What the contention raised on behalf of the appellants further overlooks is that pursuant to the orders issued in 1963 and 1964 corresponding amendments were made in Articles 521 and 526 of Civil Service Regulations. The said Regulations were some time prior to 1914 and had acquired statutory authority under Section 96-B(4) of the Government of India Act, 1919 and have been continued in force by virtue of Article 313 of the Constitution. They are, therefore, statutory in nature. After its amendment in 1964 it read as under:-

"526(a)

(b)

(c) In case of service personnel
who retire from the Forces before

attaining the age of 55 and are re-employed in civil posts on or after 16th January 1964 the pension shown below shall be ignored in fixing their pay on re-employment-

(i) in the case of pensions not exceeding Rs. 50 Per mensem, the actual pension;

(ii) In other case the first Rs. 50 of the pension.

The subsequent orders issued in 1978 and 1983 were supplementary in nature and did have a binding force. Under these circumstances, the Government could not have, under the guise of a clarificatory order, taken away the right which had accrued to such re-employed pensioners with retrospective effect by declaring that while considering hardship the last pay drawn at the time of retirement was to be compared with the initial pay plus pension whether ignorable or not. The 1985 clarificatory instructions were not only inconsistent with the relevant provisions of the Civil Service Regulations and the 1978 and 1983 orders but its effect was to supersede the said provision and the orders. The Tribunal was, therefore, right in holding the said instructions in so far as it directed to take into consideration the ignorable part of the pension also while considering hardship invalid and without any authority of law. These appeals are, therefore, dismissed with no order as to costs.