

PETITIONER:
THE GOVT. OF A.P. & ORS.

Vs.

RESPONDENT:
SYED YOUSUDDIN AHMED

DATE OF JUDGMENT: 13/08/1997

BENCH:
SUJATA V. MANOHAR, G.B. PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

PATTANAIK, J.

This appeal is directed against the judgment of the Full Bench of Andhra Pradesh Administrative Tribunal in O.A. No. 10380 of 1990. The Tribunal by the impugned order directed that 'inventive increments' which had been given to the respondent for his meritorious work must be held to be a personal pay and the said personal pay has to be taken into account for determining the 'emoluments' which the respondent was drawing on the date of his superannuation for the purpose of calculating his pension. The respondent, admittedly, was an employee of the erstwhile Hyderabad State and after the merger of the said State and on re-organisation he became an employee of the State of Andhra Pradesh. On the date of his superannuation on 31.12.1989 he was working as a Deputy Executive Engineer in the Irrigation Department and he had been granted four advance increments as 'incentive award' pursuant to GOMs No. 562 GAD dated 17.11.1982 and GOMs No. 127 I&CAD dated 8.4.1988. In calculating his pension since this amount drawn by the respondent as incentive increment was not taken into account he approached the Administrative Tribunal. The Tribunal by the impugned order having directed that the incentive increments drawn by the respondent on the date of his superannuation should be taken as a part of his emoluments and, therefore, should be taken into account for determination of his pension, the State, has come up in appeal.

The learned counsel for the appellant contended that the pension of the State Government employee has to be determined in accordance with the Andhra Pradesh Revised Pension Rules of 1980, which has been framed under proviso to Article 309 of the Constitution, hereinafter referred to as 'the Rules'. Under the Rules the expression 'emoluments' means 'Pay' as defined in Rule 9(21) (a) (i) of the Fundamental Rules which a Government servant was receiving immediately before his retirement or on his death. In Rule 9(21) (a) (i) of the Fundamental Rules the expression 'Pay' means : the pay, other than special pay or granted in view of his personal qualifications, which has been sanctioned

for a post held by him substantively or in an officiating capacity, or to which he is entitled by reasons of his position in a cadre. Therefore, the 'incentive award' which the respondent was drawing while working as a Deputy Executive Engineer cannot form a part of 'Pay' as defined in Rule 9(21) (a) (i) of the Fundamental Rules and consequently would not form a part of 'emoluments' within the ambit of Rule 31 of the Rules for the purpose of calculation of pension of the Government servant. The Tribunal, therefore, committed gross error in directing the said 'incentive award' should be taken into account for determining the pension of the respondent. The learned counsel for the respondent on the other hand contended, Rule 31 which was amended in 1988 will not govern the case determining pension of the employees who were already in service and it would apply to those who joined the service after the amendment came into force. The learned counsel further submitted that in view of the proviso to Rule 2 of the Fundamental Rule the Pension Rules could not have been amended to the disadvantage of a person already in service and consequently the amended provisions of Rule 31 of the Revised Pension Rules must be declared to be invalid. Though the Tribunal did not go into the said question even though raised, the respondent is entitled to raise the question in support of the order passed in favour of the respondent by the Tribunal.

In view of the rival submissions at the Bar the questions that arise for our consideration are:

- (i) Is the amended Rule 31 of the Pension Rules has any application to the existing employees like the respondent or it applies to those employees who would join the service after the amendment has come into force?
- (ii) Whether in calculating the pension of the respondent, the amount which he was receiving as 'incentive award' on the date of his superannuation can be taken as a part of emoluments within the meaning of Rule 31 of the Revised Pension Rules?
- (iii) Is the proviso to Rule 2 of the Fundamental Rules any way affects the amendment of the Pension Rules as contended by learned counsel for the respondent?

So far as the contention raised by the counsel appearing for the respondent that the amended Rule 31 of the Pension Rules will have no application to the existing employees of the Government is concerned, we do not find any substance in the same. The Pension Rules is a Rule framed by the Governor in exercise of the power under proviso to Article 309 of the Constitution. The relationship between the Government and its servant is not like and ordinary contract of service between a master and servant but a legal relationship something in the nature of status. Origin of Government service is contractual. But once appointed to his post or office, the government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. The Legislature under Article 309 of the Constitution and the Governor under proviso to Article 309 of the Constitution can make law determining the service conditions of the Government employees and such law can also be retrospectively made. But in the case in hand question of retrospective application of the amended provisions of Rule 31 of the Revised Pension Rules really does not arise. It becomes applicable to all the employees who were in service on the date the amended rules came into force for the purpose of finding out the meaning of the expression

'emoluments' on the basis of which the pension of the employee has to be calculated on superannuation. In this view of the matter the contention of the learned counsel for the respondent that Rule 31 would apply only to those employees who joined service after the amended rules came into force is wholly without substance and the same is accordingly rejected.

Coming now to the second question the answer would depend upon an interpretation of Rule 31 of the Revised Pension Rules and Rule 9(21) (a) (i) of the Fundamental Rules. Under Rule 31 of the Pension Rules the expression 'emoluments' would mean 'Pay' as defined in Rule 9(21) (a) (i) of the Fundamental Rules which a Government servant was receiving immediately before his retirement. Rule 9(21) (a) (i) of the Fundamental Rules defines 'Pay' to mean ; 'Pay' means the amount drawn monthly by a Government servant as -
(i) the pay, other than special pay or granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reasons of his position in a cadre;

The expression 'Special Pay' has been defined in Fundamental Rules 9(25) to mean an addition, of the nature of pay, to the emoluments of a post or of a Government servant granted in consideration of-

- (a) the specially arduous nature of the duties; or
- (b) a specific addition to the work or responsibility

The expression 'personal pay' has been defined in Rule 9 (23) of the Fundamental Rules to mean, additional pay granted to the Government servant,

- (a)
- (b) in exceptional circumstances, on other personal considerations.

The learned counsel appearing for the respondent had submitted that in view of the clarificatory circular issued by the General Administration (AR&T I) Department dated 25.5.84 to the effect that the increments with cumulative effect granted to a government servant the terms and conditions governing the grant of Family Planning Incentive increment would apply and since under the terms and conditions governing the grant of Family Planning incentive issued by the Government of Andhra Pradesh under Memorandum No. 402/D2/78-M&H dated 5.5.1978 such advance increments have been held to be 'personal pay' to be reckoned as basic pay for the purpose of pension the respondent is entitled to get the same the so far as the incentive increments awarded in his favour which he was drawing on the date of his superannuation. We are, however, not in a position to accept this submission of the learned counsel for the respondent. It is no doubt true, that under the Family Welfare Programme an incentive granted to the government servant therein the Government of Andhra Pradesh had issued an Administrative Order stating therein that the advance increments sanctioned for undergone sterilization operation in the lower post or higher post shall continue to be available as 'personal pay' to be reckoned as basic pay for the purpose of pension etc. The incentive increment which is granted to a government servant for arduous nature of duty discharged by a government servant though would not directly come under the purview of the Medical and Health Department Memorandum dated 5.5.7 relating to grant of increments for undergoing sterilization operation, yet in view of the Government letter dated 25.5.84 issued by the General Administration Department making terms and conditions of governing the grant of Family Planning

increment incentive applicable, the said incentive increment can be held to be a 'personal pay' of the respondent. But neither the aforesaid Health Department Memorandum dated 5.5.1978, nor the Government letter dated 25.5.84, issued by the General Administration Department could make aforesaid incentive increment to be part of the emoluments under the Provisions of Rule 31 of the Pension Rules so that the respondent can claim inclusion of the said amount for determining his pension. It may be stated here that for the purpose of Rule 31 of the Pension Rules 'emoluments' of government servant would mean the parry which he is drawing as defined in Rule 9(21)(a)(i) of the Fundamental Rules. Said Rule 9(21)(a)(i) clearly excludes the 'especial pay' or 'personal pay' granted to a government servant in view of his personal qualifications or otherwise from the purview of the expression 'pay' and, therefore, whether the 'incentive award' is held either a 'special pay' or 'personal pay' the same would not form part of 'pay' under Rule 9(21)(a)(i) of the Fundamental Rules and consequently would not form part of emoluments under Rule 31 of the Rules for being taken into account for computation of pension of the respondent. The Tribunal, therefore, is wholly in error in directing that the 'incentive award' granted to the respondent may be taken into account for determining his pension. The contention of the learned counsel appearing for the respondent, on this score is devoid of any force.

So far as the third question is concerned, undoubtedly the Tribunal has not gone into the issue and as the question had been raised before the Tribunal, we permitted the respondent to raise the question also in this proceeding. The counsel for the respondent urged that in view of the proviso to Rule 2 of the Fundamental Rules which was inserted by Section 7 of Act 23 of 1984, no rule can be modified or replaced by the Governor under Article 309 of the Constitution of India to the disadvantage of any person already in service except in respect of matters relating to the age of superannuation and as such the Pension Rules could not have been amended to the disadvantage of the respondent who was already in service. We do not find any force in the aforesaid contention since the proviso in question prohibits modification or replacement of provisions of Fundamental Rules itself in exercise of power under Article 309 of the Constitution to the disadvantage of a person already in service. It has no reference to any other Rule which a Governor could frame under proviso to Article 309 of the Constitution. In that view of the matter the proviso to Rule 2 of the Fundamental Rules cannot effect the power of the Governor to amend the Pension Rules in exercise of his power under the proviso to Article 309 of the Constitution. The said contention is devoid of any force.

In view of our conclusion on question no. 2 the impugned order of the Tribunal cannot be sustained and we accordingly set aside the same. It may be stated that the 'incentive award' which the respondent was drawing while continuing as Deputy Executive Engineer cannot be held to be a part of 'emoluments' for the purpose of determining the pension of the respondent under the Pension Rules. The OA No. 10380 of 1990 filed before the Andhra Pradesh Administrative Tribunal stands dismissed and this appeal is allowed but in the circumstances there will be no order as to costs.