

PETITIONER:
UNION OF INDIA

Vs.

RESPONDENT:
K. P. JOSEPH AND ORS.

DATE OF JUDGMENT 27/10/1972

BENCH:
MATHEW, KUTTYIL KURIEN
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MATHEW, KUTTYIL KURIEN
GROVER, A.N.
MUKHERJEA, B.K.

CITATION:
1973 AIR 303 1973 SCR (2) 752
1973 SCC (1) 194
CITATOR INFO :
R 1974 SC 252 (16)
R 1975 SC 434 (3)
F 1975 SC1487 (22)
RF 1976 SC1913 (11)
RF 1977 SC2411 (26)

ACT:
Military Service--General Order of Government of India
Ministry of Defence dated 15th July 1960 conferring certain
benefits on retired military personnel--Exception in
paragraph (3) cl. (3) of Order, applicability of--Claim
under Order whether justiciable--Offer not
retrospective--Pay whether could be re-fixed for period
before date of Order.

HEADNOTE:

The appellant was discharged from the post of combatant Clerk in the Indian Army on 9th June, 1953 and was re-employed shortly thereafter. His pay was re-fixed in the scale applicable. On 15th July 1960 the Government of India issued a general Order relating to re-employed ex-military personnel. Under the Order those entitled to its benefits would get fixed in the scale applicable to them by adding to the bottom of their scales increments equal to the total number of completed years of military service. The first respondent having exercised the option provided for in the Order, claimed that he was entitled to the benefit of the Order. The claim was rejected by the Government. The first respondent filed a writ petition in the High Court. The writ petition was allowed and the High Court directed that the pay of the respondent be re-fixed from 2-3-1953. In appeals to this Court it was contended by Union of India : (i) that the order was not applicable to the first respondent as he was re-employed before 25-11-1958; (ii) that the order being an administrative direction was not justiciable and no writ lay; (iii) that the order not being retrospective in character, the respondent's pay should not have been fixed with retrospective effect from 2-7-53. HELD :-(i) The general rule under the Order was that past cases of persons re-employed prior to 25-11-1958 would not be reopened. But the effect of clause (3) of paragraph (3)

is to create an exception to the general rule in the case of persons re-employed before 25-11-1958 for an unspecified period or for a period which extends to the date of order and who have exercised their option in writing to be brought under the Order. The respondent having exercised his option was therefore entitled to the benefit of the order.

(ii) Generally speaking an administrative order confers no justiciable right but this rule like all other general rules is subject to exceptions. To say that an administrative order can never confer any right would be too wide a proposition. There are administrative rights which confer rights and impose duties. It is because an administrative order can abridge or takeaway rights that this Court imported the principle of natural justice of audi alteram partem into this area. The order in question conferred upon the first respondent the right to have his pay fixed in the manner specified in the Order and that was part of the conditions of his service. There was no reason why this Court should not enforce that right. [755D]

Sant Ram Sharma v. State of Rajasthan and another, [1968] 1 S.C.R. 111; and Union of India and Others v. M/s. Indo Afghan Agencies Ltd., [1968] 2 S.C.R. 366, 377, applied to.

(3) The order was not retrospective in character. The High Court was therefore wrong in fixing the pay with retrospective effect from 2-7-1953.

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The direction could only be to fix the pay with effect from the date of the Order.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1204 of 1967.

Appeal by special leave from the judgment and order dated September 9, 1966 of the Mysore High Court in Writ Petition No. 885 of 1964.

P.P. Rao and S. N. Prasad and B. D. Sharma, for the appellant.

B. P. Maheshwari and C. L. Joseph, for the respondent.

The Judgment of the Court was delivered by

MATHEW, J.-This is an appeal by Special Leave from the order dated the 9th of September, 1966 passed by the High Court of Mysore in a Writ Petition filed by the first respondent.

The first respondent was a combatant Clerk in the Indian Army for a period of more than 14 years. He was discharged from that post on 9th June, 1953. On 2nd July 1953, he was re-employed as an ordinary clerk on the pay scale of Rs. 55-85EB-4-125-5-130. His pay was re-fixed in the above scale at Rs. 70/- plus a personal pay of Rs. 2.50 by an Order dated 28th October, 1958, with effect from the date of re-employment, i.e., 2-7-1953.

On 15th July, 1960, the Government of India, Ministry of Defence, issued a general Order called "Office Memorandum" No. 2(54)58/5801/D(Civil) providing for certain benefits to ex-military personnel on re-employment on the basis of their length of actual military service. The general effect of that Order was that those who are entitled to its benefits, would get fixed in the scale applicable to them by adding to the bottom of their scales increments equal to the total number of completed years of military service. The Order so far as it is relevant for the purpose of this appeal is contained in paragraphs 3 and 4 thereof and they read as follows :-

"3. These orders will apply to all cases of

reemployment occurring on or after 25-11-58 and past cases will not be reopened. In the cases of pensioners who are in service on the date of issue of these orders and have been re-employed from a date prior to 25-11-1958 for an unspecified period or for a period which extends beyond the date of issue of the present orders may, subject to their option, be brought under the provisions of these orders with immediate effect.

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(4). The option should be exercised in writing within a period of three months from the date of issue of these orders. The option once exercised shall be final."

The first respondent claimed that he was entitled to the benefit of the Order but the claim was rejected by the Government and so he filed the Writ Petition contending that as he answered the description of one to whom the benefit of the Order could properly be extended he should be given its benefit.

The High Court allowed the writ petition and issued an order directing respondent No. 2 to refix the pay of respondent No. 1 in the scale of pay of Rs. 55-3-85-EB-4-125-130 at 89/- as from 2-7-1953 and to make consequential adjustments and payments.

The appellant contended before us that the Order was not applicable to the first respondent, as he was re-employed before 25-11-1958 and his pay had already been fixed after re-employment and therefore according to the terms of the Order the case of the 1st respondent, being a past one, could not have been reopened. To resolve this question, it is necessary to understand the provisions of the Order. The first sentence in para 3 of the Order makes it clear that it is applicable only to persons reemployed on or after 25-11-1958. Respondent No. 1 clearly does not come within this category. The Order then goes on to say that past cases will not be re-opened. That means that cases of persons re-employed prior to that date will not be re-opened. But the contention of the first respondent is that although he was re-employed prior to 25-11-1958, he is governed by clause (3) of paragraph 3, and as he has exercised the option pursuant to clause (4) of the Order he is entitled to the benefit of the Order. In other words, the contention was that an exception to the general rule that past cases will not be re-opened has been created by clause (3) of paragraph 3 of the Order in favour of persons who were re-employed from a date prior to 25-11-1958 for an unspecified period or for a period which extended beyond the date of the issue of the Order and who exercised the option to be brought under the provisions of the Order with immediate effect and as his case fell within the exception, he was entitled to the benefit of the Order. We think that the contention of the first respondent is well founded. It is no doubt true that past cases, namely, cases of persons re-employed prior to 25-11-1958 will not be reopened. That is the general rule. But the effect of clause (3) of paragraph (3) is to create an exception to the general rule in the case of persons re-employed before 25-11-1958 for an unspecified period or for a period which extends beyond the date of the Order and who have exercised their option in writing to be brought under the Order.

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There is no dispute that the first respondent has exercised the option to be brought under the provisions of the Order.

We, therefore, think that the High Court was right in its view that the first respondent was entitled to the benefit of the Order.

The appellant, however, contended that the Order being an administrative direction conferred no justiciable right upon the first respondent which could be enforced in a Court by a writ or order in the nature of mandamus. The appellant submitted that the very foundation for the issue of a writ or an order in the nature of mandamus is the existence of a legal right and as an administrative order could confer no justiciable right, the High Court was wrong in issuing the order directing the second respondent to fix the pay of the first respondent in accordance with the Order.

Generally speaking, an administrative Order confers no justiciable right, but this rule, like all other general rules, is subject to exceptions. This Court has held in *Sant Ram Sharma v. State of Rajasthan and Another*(1) that although Government cannot supersede statutory rules by administrative instructions, yet, if the rules framed under Art. 309 of the Constitution are silent on any particular point, the Government can fill up gaps; and supplement the rules and issue instructions not inconsistent with the rules already framed and these instructions will govern the conditions of service.

In *Union of India and Others v. M/s. Indo Afghan Agencies Ltd.*(2), this Court, in considering the nature of the Import Trade Policy said:

"Granting that it is executive in character, this Court has held that Courts have the power in appropriate cases to compel performance of the obligations imposed by the Schemes upon the departmental authorities. "

To say that an administrative order can never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties. It is because an administrative order can abridge or take away rights that we have imported the principle of natural justice of audi alteram partem into this area. A very perceptive writer has written:

"Let us take one of Mr. Harrison's instances, - a regulation from the British War Office that no recruit shall be enlisted who is not five feet six inches high. Suppose a recruiting officer musters in a man who is five feet five inches only in height, and pays him the King's shilling; afterwards the officer is sued by the

(1) [1968] 1 S.C.R. 111.

(2)

[1968] 2 S.C.R. 366, 377.

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Government for being short in his accounts among other items he claims to be allowed the shilling paid to the undersized recruit. The Court has to consider and apply this regulation and, whatever its effect may be, that effect will be given to it by the Court exactly as effect will be given to a statute providing that murderers shall 'be hanged, or that last wills must have two witnesses." (John Chipman Gray on "The Nature and Sources of the Law").

We should not be understood as laying down any general proposition on this question. But we think that the Order in question conferred upon the first respondent the right to have his pay fixed in the manner specified in the Order and

that was part of the conditions of his service. We see no reason why the Court should not enforce that right. It was contended on behalf of the appellant that the Order not being retrospective in character, the respondent's pay should not have been fixed with retrospective effect from 2-7-1953. The Order is not retrospective in character. The High Court was therefore wrong in fixing the pay with retrospective effect from 2-7-1953. The direction could only be to fix the pay with effect from the date of the Order and the first respondent did not contend otherwise in this Court. The second respondent will, therefore, fix the pay of the 1st respondent in accordance with the provisions of the Order with effect from the date of the Order. The appeal is dismissed with this modification, but, in the circumstances, we make no order as to costs.

G.C.

Appeal dismissed.

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