Union of India

Vs

K. P. Joseph and Others

Civil Appeal No. 1204 (N) of 1967

(A. N. Grover, K. K. Mathew, A. K. Mukherjea JJ)

27.10.1972

JUDGMENT

MATHEW, J. –

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

2. 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 June 9, 1953. On July 2, 1953, he was re-employed as an ordinary clerk on the pay-scale of Rs. 55-85-EB-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 October 28, 1958, with effect from the date of re-employment, i.e., July 2, 1953.

3. On July 15, 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 re-employment occurring on or after November 25, 1958, 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 November 25, 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."

4. 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.

5. 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 Rs. 89/- as from July 2, 1953, and to make consequential adjustments and payments.

6. The appellant contended before us that the Order was not applicable to the first respondent, as he was re-employed before November 25, 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 re-opened. 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 re-employed on or after November 25, 1958. The 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 November 25, 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 November 25, 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 November 25, 1958, will not be re-opened. 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 November 25, 1958, for an unspecified period or for a period which extends beyond the date of the Order and who have exercised their option in writ to be brought under the Order.

7. 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.

8. 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.

9. 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, ((1968) 1 SCR 111 : AIR 1967 SC 1910 : (1968) 1 SCJ 672) that although Government cannot supersede statutory rules by administrative instructions, yet, if the rules framed under Article 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 the instructions will governed the conditions of service.

10. In Union of India and Others v. M/s. Indo-Afghan Agencies Ltd., ((1968) 2 SCR 366, 377 : AIR 1968 SC 718 : (1968) 1 SCJ 129) 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 inches only in height, and pays him the King's shilling; afterwards the officer is sued by the 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 statue 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").

11. 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.

12. 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 July 2, 1953. The Order is not retrospective in character. The High Court was, therefore, wrong in fixing the pay with retrospective effect from July 2, 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 first respondent in accordance with the provisions of the Order with effect from the date of the Order.

13. The appeal is dismissed with this modification, but, in the circumstances, we make no order as to costs.

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