

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WP (C) No.16697-16734 of 2004

% Reserved on: 10.07.2008
Date of decision: 08.08.2008

A.K. KARMAKAR & ORS. ...PETITIONERS
Through: Ms. Tamali Wad &
Mr. O.P. Agarwal, Advocates.

Versus

UNION OF INDIA & ORS. ...RESPONDENTS
Through: Mr. A.K. Bhardwaj, Advocate for
Respondents 1, 4 & 5.

Mr. S.K. Taneja, Sr. Advocate
with Mr. Rajesh Gupta &
Mr. T.K. Tiwari, Advocates for
Respondent No.3.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be
reported in the Digest? | No |

SANJAY KISHAN KAUL, J.

1. The petitioners were working in various units of the
Central Industrial Security Force (CISF) as
Constables/Security Assistants, Head Constables and
Assistant Sub-Inspector in different pay-scales when they

joined respondent No.3, National Thermal Power Corporation Ltd. (NTPC), on deputation basis in 1996. The initial period of deputation was fixed as one year and was to be governed by the standard terms and conditions of deputation applicable to Central Government employees as per OM dated 5.1.1994. The para 2 of the appointment letter dated 22.7.1996 and 20.8.1996 whereby the petitioners were so appointed on deputation reads as under:

“2. They will be on deputation for a period of one year and will be governed by the standard terms and conditions of deputation applicable to Central Govt. Employees circulated vide OM No.2/29/91-Estt. (Pay-II) dated 05.1.1994.”

2. Insofar as pay and allowances are concerned, Clause 4 of the Office Memorandum dated 5.1.1994 reads as under:

“4. Exercise of option

4.1 An employee appointed on deputation/foreign service may elect to draw either the pay in the scale of pay of deputation/foreign service post or his basis pay in the parent cadre plus deputation (duty) allowance thereon plus personal pay, if any.

4.2 The borrowing authority should obtain the option of the employee within one month from the date of joining the ex-cadre post unless the employee has himself furnished the option.

4.3 The option once exercised shall be final. However, the employees may revise the option under the following circumstances which will be affective from the date of occurrence of the same.

- (a) when he received proforma promotion or is appointed to non-functional selection grade in his parent cadre.

(b) when he is reverted to a lower grade in his parent cadre;

(c) when the scale of pay of the parent post on the basis of which his emoluments are regulated during deputation/foreign service or of the ex-cadre post held by the employee on deputation/foreign service is revised either prospectively or from a retrospective date.

(d) Based on the revised/same option of the employees, in the event of proforma promotion, appointment to non-functional Selection Grade revision of scales of pay in the parent cadre, the pay of deputationists will be refixed with reference to the revised entitlement of pay in the parent cadre. However, if the initial option was for the pay scale of the deputation post and no change in option already exercise is envisaged the pay already drawn in deputation post will be protected if the pay refixed is less.

Note: Revision in the rates of DA, HRA or other allowances either in the parent or borrowing organization shall not be an occasion for revision of the earlier option.

4.4. If the pay of an employee in his cadre post undergoes downward revision, the pay in the ex-cadre post is also liable to be refixed on the basis of the revised pay and in accordance with the revised option or existing option if the employee does not revise his option.”

3. The object of the Office Memorandum is apparent from the “Subject” as also Clause 2 which reads as under:

“OFFICE MEMORANDUM

05.01.1994

Subject:- Transfer on deputation/foreign service of Central Govt. employees to ex-cadre posts under the Central Govt./State Govts. Public Sector Undertakings/Autonomous Bodies/Universities/ Administration, Local Bodies etc. and Vice-versa –

Regulation of pay, deputation (duty) allowance, tenure of deputation/foreign service and other terms and conditions – regarding.

A need has been felt for some time past to consolidate at one place the various instructions/orders that have been issued from time to time and are still in force on the above mentioned subject. It was also felt necessary to review the entire matter and bring about rationalization and uniformity in the instructions/orders. Accordingly it has been decided to bring out a self-contained O.M. on the subject incorporating the provisions of various orders quoted in the margin, with suitable modification, where necessary. The Ministry of Finance, etc. are requested to bring to the notice of all administrative Ministries concerned the contents of this O.M. for information, guidance and compliance.

2. APPLICATION

2.1 These orders will apply to all Central Govt. employees who are regularly appointed on deputation/foreign service in accordance with Recruitment Rules of the ex-cadre posts under the same or some other Departments of Central Govt. or under the State Governments/Union Territories Administration/Local Bodies or Under Central/State PSUs/Autonomous Bodies or Under Central/State PSUs/Autonomous Bodies etc. (where such foreign service has been permitted in relaxation of appointment on immediate absorption conditions.) These orders will also cover the cases of regular appointment as per Recruitment Rules in the Central Government on deputation/foreign service of employees of State Governments/Central/State PSUs/Autonomous bodies, Local Bodies, etc. However, the following cases shall not be covered under these orders for whom separate orders exist:-“

4. The petitioners on being sent on deputation were posted to the security wing of the Administrative Department of NTPC and are stated to have exercised their option and

elected to draw their basic pay and emoluments in their parent cadre, i.e. CISF, as the scales of pay in the parent cadre were on the higher side in comparison with the borrowing department of NTPC.

5. A perusal of Clause 4.3 of the OM dated 5.1.1994 shows that though ordinarily the option once so exercised was final, the employees had an opportunity to seek revision of the same under certain exceptions. One such exception was in the event the pay-scales of the ex-cadre post held by the employee on deputation/foreign service being revised either prospectively or from a retrospective date.
6. The petitioners worked on deputation with the NTPC for eight (8) years and claimed that they were assigned W-3 grade which is a grade for a workman as per the policy, rules and regulations of the NTPC. This assignment of W-3 grade is sought to be supported by reference to the pay slips issued to the petitioners where it is so mentioned.
7. It is the case of the petitioners that there were no posts available in the NTPC for the deputation of the petitioners working as Constables, Head Constables, Assistant Sub-Inspectors, etc. and thus the posts on which the petitioners worked during the period of deputation were ex-cadre posts. This is stated to be the reason why the

appointment letter itself specified the applicability of the Memorandum dated 5.1.1994.

8. In the year 2001, the pay-scales in NTPC underwent an upward revision retrospectively w.e.f. 1.1.1997 and the said pay-scales became more lucrative than the pay and allowance which the petitioners were entitled to in their parent cadre posts. The petitioners, thus, sought to exercise their option by making a representation through proper channel whereby they wanted to be governed by the pay and allowance of NTPC. Such change of option was sought to be exercised in terms of Clause 4.3(c) of the OM dated 5.1.1994. This request of the petitioners was not acceded to which has resulted in filing of the writ petition.
9. The petitioners, in fact, state that the last pay certificate issued to the petitioners before their repatriation to their parent cadre in August/September 2004 specifically stated the pay-scales admissible to the own employees of the NTPC being the W-3 grade. The reason for denial of this change of option by the respondents is stated to be the fact that there was no cadre of force having the rank and structure of Inspector, Sub-Inspector, Assistant Sub-Inspector, Head Constable and Constable in the NTPC and thus the petitioners were held not to be holding any ex-cadre posts. It is, thus, the stand of the

respondents that the OM would only apply if the petitioners were holding an ex-cadre post.

10. A further grievance raised by the petitioners is that in the year 2003-2004 special incentives and cash awards were released to all employees of respondent No.3 Corporation other than the persons like the petitioners. It is, in fact, stated that other CISF personnel were released the said amount. The petitioners, thus, allege to have been discriminated against without any rational criteria.
11. The plea of the learned counsel for the petitioners was that not only the appointment letter made it clear that the deputation of the petitioners was in terms of OM dated 5.1.1994, but the petitioners were asked to exercise their option which they did exercise to be governed by the pay and allowances of the parent cadre. Thus, if the petitioners were to continue to be on the strength of their own cadre in their parent organization and the OM was not to be applied there was no question of exercise of any such option for drawing of pay and allowances. The added plea is that in pursuance to the Government of India, Ministry of Home Affairs dated 10.10.1997, the pre-revised pay-scales of the petitioners were rationalized and they were given revised pay-scales due to rationalization of rank structure and pay-scales of non-gazetted cadres of Central Police Organisations

including CISF. No option of revision was entailed since the petitioners had already opted for the basic pay and allowances of the parent department and the petitioners automatically became entitled to the revised scales granted by the CISF. It is only when the petitioners sought to exercise their option under Clause 4.3(c) that the petitioners were to be entitled to the higher pay-scales of the NTPC.

12. Learned counsel for respondent No.3, on the other hand, sought to rely upon an agreement dated 23.8.1991. The said agreement provides in sub-clauses (iii) and (iv) of Clause 2.0 as under:

“iii) The following allowances shall be regulated under the rules of the borrowing organization

On NTPC rules:

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|----|------------------------------|--|------------------------------|
| a) | HRA | | On Basic Pay plus Deputation |
| b) | CCA | | Pay actually being drawn. |
| c) | Washing Allowance | | |
| d) | Children Education Allowance | | |
| e) | Transport Subsidy | | |
| f) | Medical Facilities. | | |

iv) The following will be regulated as per the rules of the lending organization

On CISF rules:

- a) Leave and Leave Travel Concession.
- b) Group Insurance Coverage.
- c) Joining Time and Joining Time Pay.”

13. It may be noted at this stage that the applicability of the aforesaid agreement is seriously disputed by the petitioners on the ground that the same pertained to a

period prior to the issuance of the appointment letters to the petitioners in 1996 and if these terms and conditions had to apply, there would have been no occasion to refer to the OM dated 5.1.1994 in the appointment letter itself. No reference of this agreement dated 23.8.1991 had been made either in the appointment letter or otherwise.

14. The respondents seek to explain away the last pay certificates issued to the petitioners as having inadvertently mentioned the pay-scales on account of a pure and simple computer generated error. It was further pleaded that the said certificate mentioned the pay-scale as 5000-9590 which was not the pay-scale of the petitioners nor was the said pay-scale ever applied to the petitioners.
15. Learned counsel for the respondents pleaded that a distinction must be carved out between mere deputationist and deputationist holding ex-cadre posts with the borrowing department. It was, thus, submitted that it is not necessary that the deputationist would automatically hold an ex-cadre post. The petitioners are alleged to have held no ex-cadre posts and did not have any post or rank with the NTPC.
16. The respondents also submitted that there was, in fact, no revision in the scale of pay of ex-cadre posts and thus, there was no occasion to exercise the option.

17. On the second plea raised on behalf of the petitioners about there being distribution of special incentives and cash awards it is submitted that the same arose on account of the Silver Jubilee celebrations of the NTPC when gold coins were given to its employees. The decision in this behalf is stated to have been taken by the Inter office memorandum dated 6.10.2000, the relevant portion of which is as under:

“It has also been decided that a packet of sweets not exceeding Rs.100/- per packet should also be distributed to all employees along with Gold Coins. Apart from this sweet packets of same value need to be distributed to the following:

a) CISF and other associates through their respective Heads like Unit Commandant.”

18. Thus, a conscious decision was taken that gold coins were to be distributed to regular employees of the NTPC alone and not to CISF persons. The same was an act of benevolence only for its regular employees and was governed by the inter office memorandum. It has been explained that regular employees of NTPC are defined in Clause 3.0 of NTPC Rules and such regular employees form a separate class which does not include the petitioners.

19. We have examined the submissions of the learned counsels for the parties.

20. The second claim of the petitioners can be dealt with first as it is dependent purely on an administrative decision/guidelines in the form of an inter officer memorandum dated 6.10.2000. A reading of the office memorandum clearly shows that the CISF personnel were to receive only sweet packets on the occasion of the Silver Jubilee celebrations of the NTPC. The gold coins were to be distributed to the regular employees of the NTPC. It is not in dispute that the petitioners were not regular employees and had gone on deputation and cannot claim as a matter of right such benevolence on the part of the NTPC. The claim of the petitioners being contrary to the inter office memorandum dated 6.10.2000 is not sustainable and is, thus, rejected.
21. The main dispute really pertains to the petitioners not being granted the benefit of the change of their option whereby they sought to be governed by the terms and conditions of pay and allowances of the NTPC on account of the revisions of such pay and allowances which made it more lucrative for the petitioners. The answer to the claim of the petitioners depends upon the terms of deputation of the petitioners as there can be no right accrued upon the petitioners to claim the said amount, they being not regular employees of the NTPC. In this behalf as to what should form the terms of such

deputation, one has to necessarily peruse the appointment letters. The appointment letters are clear in their terms and Clause 2 specifically stipulates that it is the OM dated 5.1.1994 which would apply to the case of the petitioners.

22. The OM in its "Subject" itself stipulates that it applies to the transfer on deputation/foreign service of Central Government employees to ex-cadre posts. If the deputation of the petitioners was not on an ex-cadre posts there would have been no rationale for inclusion of the Office Memorandum as a term and condition of the deputation.
23. In our considered view the respondents cannot rely upon an earlier agreement of 23.8.1991 for such terms and conditions of deputation as the same did not form a part of the appointment letter issued to the petitioners. The petitioners were made aware of their terms of deputation as per the appointment letter. It is nobody's case that the appointment letter has been issued under a mistake and such a plea, if raised, in any case would not have been sustainable.
24. The petitioner initially exercised their option to be governed by the pay and allowances of their parent cadre in terms of Clause 4. The revision of the pay and allowances in the parent cadre, thus, automatically

applied in the case of the petitioners. The change of option was sought when the pay and allowances of NTPC became more lucrative. The option for such change is permissible as per sub-clause (c) of Clause 4.3.

25. The petitioners having exercised their option in terms of the aforesaid Office Memorandum dated 5.1.1994 which had been made applicable in the case of the petitioners as per their appointment letter, the respondents cannot be permitted to plead that the Office Memorandum does not apply. We are, thus, unable to accept the contention of the learned counsel for respondent No.3 that there is no ex-cadre post on which the petitioners were appointed as there were no equivalent posts available when the petitioners were sent on deputation. The appointment of the petitioners on deputation has to be treated as one on an ex-cadre post in view of there being no direct post available for the appointment of the petitioners on deputation.
26. We are of the view that nothing much turns on the respondents specifying the pay-scales as W-3 in the last pay certificate. The respondents seek to explain away the same as a computer generated error and as a method of identification by the Finance Department especially as the petitioners were alleged to be not in W-3 grade. In our view what is relevant is the applicability

of the OM dated 5.1.1994 in an unequivocal manner as per Clause 2 of the appointment letter. The petitioners were within their rights to have exercised the right of change of option.

27. A writ of mandamus is issued directing respondent No.3 to give the benefits to the petitioners of such change of option from the date they sought such change till they were repatriated to their parent cadre and the difference in the emoluments be remitted to the petitioners within a period of three (3) months from today.
28. The petition is allowed in the aforesaid terms leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

AUGUST 08, 2008
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MOOL CHAND GARG, J.