

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) Nos. 1751/06, 3141/01, 20237/05, 21489/05, & 8716/06.

DATE OF HEARING: 10.04.2008

DATE OF DECISION : 02.05.2008

IN THE MATTERS OF :

Wg. Cdr. I.M.Simoes (Retd.)	Petitioner in W.P.(C)No.1751/06.
Wg. Cdr. Vinod Kumar (Retd.)	Petitioner in W.P.(C)No.3141/01.
Wg. Cdr. V.S.Rathore (Retd.)	Petitioner in W.P.(C)No.20237/05.
Gp. Capt. P.Vijay @ Vijay Prakash (Retd.)	Petitioner in W.P.(C)No.21489/05.
Gp. Capt. P.S.Sood, VM (Retd.)	Petitioner in W.P.(C)No.8716/06.

Thru. Mr.K.K.Rohtagi, Advocate.

- Versus -

Union of India & Anr.		Respondents.
-----------------------	-------	--------------

Thru. Mr.Ashwani Bhardwaj, counsel for the
Respondent in WP(C)Nos.1751/06 & 3141/01.

Mr.Dalip Mehra and Mr.Rajiv Ranjan Mishra,
Counsel for the Respondent in WP(C)No.20237/05.

Mr.J.P.Sharma, counsel for the
Respondent in WP(C)No.21489/05.

Ms.Barkha Babbar, counsel for the
Respondent in WP(C)No.8716/06.

CORAM :-

THE HON'BLE MR.JUSTICE A.K.SIKRI

THE HON'BLE MR.JUSTICE J.M.MALIK

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

All these petitioners who have filed separate writ petitions are claiming identical relief in a similar factual background. They are all retired Air Force Officers who sought pre-mature retirement after getting offers from Public Sector Undertakings (PSUs); and were subsequently absorbed in the said PSUs. At the time of retirement, they opted to get their 100% pension commuted. On giving this option, they were paid lump sum commuted pension. Obviously, since 100% pension was commuted, these petitioners are not getting any monthly pension. After 15 years they requested for restoration of their pension. The respondents have passed orders restoring 43% of the commuted pension. The petitioners' grievance is that instead of 43%, full 100% pension should have been restored. In addition, they have also pleaded that commutation of 100% pension at the time of their retirement was not as per the Rules, as per which only 1/3rd of the pension could have been commuted. Since legal issue is same in all these petitions and flow from similar circumstances, our purpose would be served by taking note of the facts of one case. We accordingly proceed to state the factual merits of W.P.(C) No.1751 of 2006.

The petitioner in this case joined Indian Air Force on 31.12.1967 and was commissioned as Pilot Officer in the Flying Branch. In

the due course he was selected and promoted to the ranks of Flying Officer, Flight Lieutenant, Squadron Leader and then to the select rank of Wing Commander. In the year 1988, the Indian Air Force sought volunteers from specified category of officers i.e. Flying Helicopter Pilots to join M/s.Pawan Hans Ltd., a Public Sector Undertaking which was facing Pilots crunch and this was affecting its operations. The petitioner who fulfilled the terms on the basis of which volunteers were sought, applied for permanent absorption in Pawan Hans Ltd. through Air Head Quarters and was duly selected by the Combined Selection Committee of M/s.Pawan Hans Ltd and Air Head Quarters. He was thus granted pre-mature retirement by the Air Force on his permanent absorption in the said Pawan Hans Ltd. w.e.f. 6.10.1988. At the time of pre-mature retirement he had a total service of 20 years 10 months and 6 days in the Indian Air Force. He was also entitled to weightage element of 7 years for calculation of qualifying service for pension and on reckoning this his pension was to be commuted on the basis of 28 years of service. At the time of pre-mature retirement, he was drawing the pay of Rs.5250/-per month. His retiring pension was fixed at Rs.1621/-per month. According to the petitioner, it was less by Rs.609/-per month as weightage element of 5 years has not been added to the qualifying service of the petitioner for the calculation of gratuity.

The respondents had issued O.M. No.4/42/91-P & PW(d) dated 31.3.1995. As per para-3 thereof, if a retiring Air Force Officer wanted pension to be commuted, he was to get 100% pension commuted. Thus the petitioner filled up his form seeking 100% commutation of pension. His request was accepted and lump sum amount was paid to the petitioner. After 15 years thereafter the respondents issued PPO No.08/14/A/0184 of 2004 which was received by the petitioner in August,2004. As per this PPO, the respondents restored 43% out of the 100% commuted pension. Weightage element of 5 years was also not given while commuting the pension. The petitioner made representation to the respondents and according to the petitioner he was informed that the matter regarding weightage element of pension and gratuity was pending in the Supreme Court in Appeal No.2737 of 2002 and after the said case is decided the respondents shall implement the judgment. However, since only 43% of commuted pension was restored the petitioner filed the present writ petition with following prayers:

- A. “ Issue a writ of Certiorari or any other writ or directions quashing the Note-1 to para 5 of the respondents impugned executive order GOI, MOD No.1(5)/87/D (Pensions/Service) dated 30.10.1987 and declaring it illegal and in operative.
- B. Issue a writ of Certiorari or any other writ or directions quashing the PPO No.08/14/A/0215 of 1990 dated

16.3.1990 & Corr. PPO No.08/14/A/0184 of 2004 and declaring them ultravirus.

- C. Issue a writ of Certiorari or any other writ or directions quashing para 6(b) of the letter No.8(3)/86/A/D Pensions/Service) dated 19-2-1987 and declaring it ultravirus.
- D. Issue a writ of Mandamus or any other writ or directions to the respondents to recalculate and release the pension and gratuity of the petitioner as the petitioner is entitled to the residuary pension (i.e. of weightage element) along with DA on the total pension month to month + weightage element of gratuity BOTH along with 12%p.a. interest and revisions if any.
- E. Issue a writ of Mandamus or any other writ or directions to the respondents to restore 100% of the commuted pension along with revision and DA.
- F. AND pass such other further orders in the interest of justice and circumstances of the case.”

Insofar as prayer for giving weightage in the service for the purpose of calculation of pension is concerned, the same has to be rejected in view of authoritative pronouncement of the Supreme Court in the case of Union of India Vs. A.S.Gangoli & others (2007) 6 SCC 196. In that judgment the Supreme Court has categorically decided that such weightage is not admissible after the implementation of recommendation of 5th Pay Commission w.e.f. 1.1.1996. The learned counsel for the petitioner conceded this legal position and, therefore, did not press this relief.

It is clear from the above that we are concerned with the following two issues in these writ petitions:

1. Legality and/or validity of the action of the respondents in commuting 100% of the pension.
2. Restoration of 43% pension in stead of entire 100% which was commuted earlier.

We now proceed to deal with the aforesaid two issues:

ISSUE NO.1

The case of the petitioner is that as per the Pension Rules governing these petitioners, not more than 43% of the pension should have been commuted. This Pension Rule is in AFI 4/S which is to the following effect:

“COMMUTATION OF PENSION

13. Officers may commute a portion not exceeding 43% and airmen, a portion not exceeding 45% of the revised rates of pension introduced by this Instruction, subject to the conditions and limitations prescribed in Pension Regulations, Part I, (1961).”

It is the submission of the petitioner that contrary to the aforesaid Rule, O.M. dated 19.2.1987 was issued dealing with the case of officers on their permanent absorption in Central Public Enterprises and para-6 thereof provided as under:

“6. Every absorptee will be required to exercise an option within six months of his absorption for either of the alternatives indicated below:

- (a) Receiving pro-rate monthly pension and Death-cum-Retirement gratuity as admissible under the rules.
- (b) Receiving Death Cum Retirement gratuity and a lump sum amount in lieu of monthly pro-rate pension, worked out with reference to the Commutation tables as obtaining on the date on which commuted value becomes payable.

Where no option is exercised within the prescribed period the officer is automatically governed by alternative (b) above.”

As per para-6 an absorptee was required to exercise his option (a) or (b) within six months of his absorption in Public Sector Undertaking, failing which his case was to be dealt with as per option (b).

It was submitted that though Regulation provided commutation of 43% of pension, but in view of OM dated 19.2.1987, the petitioner was given no choice in the matter of commutation but to accept 100% commutation of pension. Therefore, the contention of the petitioner was that this provision was contrary to the Pension Regulation.

In the counter-affidavit filed by the respondents, the respondents have, inter alia, taken the plea that the petitioners had exercised their option in terms of Clause-(b) of para-6 of the aforesaid OM and had

received the benefit of commutation for 16 years. It is highlighted that the petitioner was given a lump sum of Rs.2,89,835/- as commuted value of 100% pension on 16.3.1990 and, therefore, he cannot now turn around and state that only 43% of the pension should have been commuted. We find force in this contention of the respondents. The petitioner has filed the present petition 16 years after he exercised his option on his own volition and without any reservation and accepted the lump sum amount of pension. In fact, as shall be noted hereafter while dealing with second issue, it is only when part of pension is restored after the judgment of the Supreme Court the petitioner has become wiser and is challenging the aforesaid action. The OM dated 19.2.1987 dealt with specific aspect, namely, pro-rata pension admissible to such officers who got themselves absorbed in Central Public Undertaking. This specific provision contained in the said OM was never challenged by the petitioners at the time of their pre-mature retirement on their absorption in Pawan Hans Ltd. Not only they took the lump sum amount, they enjoyed the said amount for all these years. It is clear from the option exercised by them that they did not want to receive pro-rata pension every month and instead wanted commutation. If the case of the petitioners was that 100% pension should not be commuted and they should be allowed to part of the pension in terms of Pension Regulation, they could have

challenged para-6 contained in OM dated 19.2.1987 at that stage. Having not done so at that time and voluntarily making an application for commuting 100% pension, receiving the lump sum amount and keeping the said amount for all these years with them, the petitioners would be estopped from challenging the said action of the respondents at this distant of time. That apart the writ petitions suffer from unexplained laches and delays in coming to the Court after a gap of more than 15 years, challenging this action. It is not possible to turn the clock back as it would create so many administrative and other problems as well. We, therefore, do not find any merit in this issue.

ISSUE No.2

To appreciate as to why 43% of the commuted pension is restored, we will have to take into consideration some of the judgments of the Supreme Court wherein such kind of direction is given. In respect of civil servants the Government passed the Central Service Commutation of Pension Rules 1981. Under those Rules civil employees under Government of India can commute up to $\frac{1}{3}^{\text{rd}}$ of their pension. After 15 years of service this $\frac{1}{3}^{\text{rd}}$ of pension is allowed to be restored. As the similar provision for restoration of commuted portion of pension was not available in the Pension Regulation for Defence Personnel, a Public Interest Litigation (PIL) in the

form of petition under Article 32 was filed, namely, Common Cause Vs. Union of India and the judgment given in that case is reported as [1987] 1 SCR 497. The said petition was allowed and it was directed that after 15 years the commuted portion of pension in case of Armed Forces Personnel be also restored. In case of Defence Personnel commutation is admissible up to 43% (in case of officers) and up to 45% in case of other ranks and, therefore, direction was given for restoration of 43% pension in case of Defence personnel as well. Thereafter, issue came up before the Supreme Court in the case of Welfare Association of Absorbed Central Government Employees in Public Enterprises and others Vs. Union of India and another AIR 1996 SC 1201. Following earlier judgment in Common Cause case (supra) the Supreme Court, inter alia, held that civilian/defence personnel would be entitled to restoration of 1/3rd/43% of the pension as the case may be. In this case the Court was primarily concerned with those Government servants who after putting some years of Government service were allowed to be absorbed in Public Sector Undertakings/Public Sector Enterprises. The Court specifically took note of the fact that though as per the Pension Rules, 1/3rd of the pension could be commuted, such officers on their absorption were also allowed to commute the balance 2/3rd of the pension, i.e., they were allowed to commute full pension. This facility, therefore, created was

in case of persons, namely, (1) the persons who had not commuted their pension and therefore, were drawing full monthly pension from the Government (2) the persons who had commuted 1/3rd of the pension and, therefore, were drawing sliced monthly pension, reduced to the extent of commuted amount and (3) the persons who had commuted the full pension and were not getting any monthly pension by deeming monthly pension to have been reduced to nil. The Court noted that while the persons falling in the first category continue to derive all the benefits of being Government pensioners and were getting all the Interim Reliefs, liberalization and /or whatever reliefs were given by the Government, the persons in the second category were denied these benefits to the extent of 1/3rd commutation whereas third category was the worst hit as they were totally denied these benefits. In normal course when full pension is commuted, there was no question of restoration of the commuted pension which was applicable only in those cases where up to 1/3rd of the pension was commuted. The Court, however, following its earlier judgment in Common Cause case (supra) directed that 1/3rd of pension for civilian and defence personnel respectively be restored after the expiry of 15 years even when such a person had got 100% pension commuted.

On the basis of this judgment, Ministry of Personnel and Public Grievances and Pensions, [Department of Pension and Pensioners' Welfare] in the Government of India issued OM dated 30/9/1986. While allowing 1/3rd of commuted pension in case of civilian, similar benefit was extended to defence personnel as well. Para-4 of the said OM thus contained a provision for restoration of 43% of their pension in the following manner:

“4.The Armed Forces Personnel including officers under their Service Regulations are entitled to commutation of 43% of their pension on their retirement in normal cases instead of 1/3rd commutation of pension that is admissible in the case of civilian Govt. servants. Accordingly, the Armed Forces Personnel who had commuted full pension shall be entitled to the restoration of 45% of their pension and the officers in the Armed Forces shall be entitled to the restoration of 43% of their pension in accordance with the above procedure.”

Pursuant to this OM dated 19.2.1987 the petitioners before us have been able to get their pension to the extent of 43% restored. This action of the respondents thus clearly is in accordance with the aforesaid judgment of the Supreme Court. But for the said judgment, these petitioners, who got 100% of their pension commuted and received lump sum amount, could not have got the benefit of restoration at all even after the expiry of 15 years. We, therefore, are of the opinion that the petitioners are

not entitled to restoration of 100% of the commuted value. As a result, we dismiss these petitions with no orders as to costs.

(A.K. SIKRI)
JUDGE

May 02, 2008.
skk

(J.M.MALIK)
JUDGE