

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

% Date of Decision : 07.02.2008

+ **WP(C) No.2411/2006**

Ex-Sub (Clk (GD))
Gurlaljit Singh Sandhu
S/o Late Milkha Singh Sandhu,
R/o 44, Guru Ram Das Avenue,
Anjala Road (Near U.K.International Place),
Amritsar – 143001 (PUNJAB) Petitioner

Versus

1. Union of India
Through Secretary,
Ministry of Defence,
South Block, New Delhi
2. Chief of Army Staff
South Block, New Delhi
3. Director Personnel
Coordination and Personnel Directorate/E1A,
Engineer-in-chief's Branch,
Army Headquarters,
Kashmir House, Rajaji Marg,
DHQPO, New Delhi – 110 011
4. Officer-in-Charge Records
Bengal Engineer Group Records,
Roorkee – 247667
5. Chief Engineer,
Jalandhar Zone,
Jalandhar Cantt., Jalandhar ... Respondents

Advocates who appeared in this case :

For the petitioner : Ms.Jyoti Singh, Advocate

For the respondents : Mr.Manoj Ohri with Mr.S.B.Sharma,
Advocate

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE J.M. MALIK

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

A.K.Sikri, J. (Oral)

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1. We had heard this matter at length on 5th February, 2008. After hearing both the parties we proceeded to dictate the judgment, however, after the order was substantially dictated, the learned counsel for the respondent sought a short adjournment as he wanted to look into the matter further. We granted that opportunity to learned counsel for the respondent and adjourned the matter for today.

2. We have heard the learned counsel for the respondent further on the issue. Since on 5th February, 2008 we had recorded the order substantially, it would be appropriate to recapitulate the

factual matrix stated therein.

3. The petitioner was enrolled in the Indian Army as Clerk(GD) on 13th December, 1977. He was promoted from time to time and rose to the rank of Subedar and on attaining the age of superannuation, after serving for 38 years, he retired from service on 31st December, 2005.

4. Much before his retirement i.e. in August, 2004, Ministry of Defence, Government of India, with a view to rehabilitate to ex-servicemen and as a welfare measure decided to allot 10% quota for ex-servicemen Clerks(GD) for the post of Lower Division Clerks in the Military Engineering Service(MES) as a deputation cum employment measure. SRO no.129 dated 18th August, 2004 was issued to this effect. Thereafter this provision was given statutory recognition as the aforesaid notification dated 18th August, 2004 was published in the Gazette of India dated 4th September, 2004 titled as "Military Engineering Services Group-C (Assistant, UDC and LDC) Recruitment Rules, 2004. These are framed by the President of India in exercise of powers conferred by proviso to Article 309 of the Constitution. The Notification further stipulates that they shall come into the force on the date of their publication in the official gazette. As they were published in the Gazette dated 4th

September, 2004, the said Rules thus came into effect from 4th September, 2004.

5. Few months after his retirement i.e. on 7th July, 2005, the petitioner made application for appointment to the post of Lower Division Clerk in Military Engineering Services through proper channel under the aforesaid rules. This application has however been not considered and the petitioner is denied the benefit. Challenging the decision, the present writ petition is filed.

6. In the counter affidavit filed by the respondent it is stated that after the aforesaid Notification was issued, the matter was processed and it took considerable time in formulation of the policy. Ultimately signal dated 11th July, 2005 was issued whereby it was decided that personnel due to retire between 1st January, 2006 to 30th June, 2006 would be considered for 'deputation cum re-employment' as Lower Division Clerks as per the said policy. According to the respondents as the petitioner retired before 1st January, 2006 i.e. on 31st December, 2005 he is not entitled to the benefit of the said policy.

7. Learned counsel for the petitioner has submitted that the aforesaid policy decision fixing date of 1st January, 2006 is clearly ultra vires Notification dated 18th August, 2005 published in

the Gazette on 4th September, 2004 as per which the Military Engineering Services Group-C (Assistant, UDC and LDC) Recruitment Rules, 2004 came into force from its publication i.e. 4th September, 2004.

8. It is the submission that these rules are statutory in nature having been framed under proviso to Article 309 of the Constitution and, therefore, by administrative order, date of enforcement cannot be changed by fixing the same as 1st January, 2006. Learned counsel for the petitioner has also referred to the judgment of a Single Judge of this Court in the case of **Lt. General R.C.Kochar vs. Union of India and others** 2000 (2) SLJ 388 to contend that merely because there was administrative delay in implementing the policy a person to whom the right has already accrued cannot be denied the same.

9. Learned counsel for the respondent has submitted that after the said notification was passed, it took some time to the respondent to implement the said order as the matter was to be looked into administratively at various angles. Even if such a submission of the learned counsel for the respondent is accepted at its face value, merely because some administrative delay took place in implementing the aforesaid notification, that would

not mean that it was open to the respondent to change the date fixed in the notification by administrative order. As already noted above, the Military Engineering Services Group-C (Assistant, UDC and LDC) Recruitment Rules, 2004, came into force on 4th September, 2004. This date is provided in the notification itself as it clearly states that same shall come into force from the date of its publication and aforesaid rules were gazetted on 4th September, 2004. Thus all the persons covered by those rules would get benefit of these rules w.e.f. 4th September, 2004. These rules are statutory in nature having been framed under proviso Article 309 of the Constitution . These rules itself stipulates that these statutory rules cannot be changed or supplant as referred in **Union of India Vs. Charanjit Singh Gill & Others** 2000 (V) SCC page 42. This aspect is even covered by the judgment of this court in **Lt. General R.C. Kochar Vs. Union of India & Others** (Supra). This is Single Bench judgment given by one of us (A. K. Sikri, J.). However, the same was affirmed by the Division Bench of this Court and even Special Writ Petition against this judgment was also dismissed by the Supreme Court. Relevant portion from this judgment is reproduced as under:

I am conscious of the principle that employer has right to fix the cut of date i.e. from which a particular decision would come into effect and there are number judgments to this effect. But circular letter dated 29th July, 198 issued in this respect cannot be read in isolation and all the facts are to be taken into consideration cumulatively, including the circumstances and the background in which the said circular letter came to be issued. It is clear from the aforesaid discussion that initial exclusion of the category of lieutenant general AFMS by the respondents was on the assumption that extention beyond 60 years was not only for certain special categories of personnel (including medical specialists) to be dealt on cases to case basis (i.e. in terms of took into consideration only para 2(b) of the Memorandum dated 13th May, 1998). However, later on, it was realised that in terms of para6 of Office Memorandum dated 13th may, 1998 there could be general extention of retirement age of all armed forces personnel by two years. once this is realised and corrected steps taken consequent upon which circular dated 29th July, 1998 is issued, persons like the petitioner should not have been left out and it should have been made effective from 31st May, 1998 instead of 31st July, 1998. Position would have been different if for the first time decision was taken for enhancement of the age of retirement of armed forces personnel on 29th July, 1998 and made effective from 31st July, 1998.

However, decision taken on 29th July, 1998 is equal to the decision which was taken vide Office Memorandum dated 13th May, 1998. Therefore, this would be a case where ratio of the judgment of D.S. Nakara Vs. Union of India, AIR 1983 SC 130, can be applied. Once corrective steps are taken but made effective from prospective date i.e. 31st July, 1998 instead of 31st May, 1998 it creates discrimination. Fixing the date of 31st July, 1998 would therefore be arbitrary and violative of Article 14 of the Constitution of India. At the cost of repetition it is stressed that substantive decision is taken vide Office Memorandum dated 13th May, 1998 and in particular para 6 thereof which gives the benefit to the petitioner. If the Government realised the correct position on a later date and remedied the defect it should not affect the petitioner prejudicially as respondents cannot take advantage of their own wrong. Moreover, fixing of date of 31st July, 1998 has no nexus with the objective sought to be achieved and classifying persons in two categories i.e. one to retire before 31st July, 1998 and others to retire on 31st July, 1998 and thereafter, when they form same class in view of the facts noted above, would be discriminatory. More so, when the genesis of both the orders dated 30th May, 1998 is same i.e. both derive their sustenance from Office Memorandum dated 13th May, 1998. Therefore the benefit of letter dated 29th July, 1998 should have been

extended to the petitioner also and not doing is unfair and violative of what is popularly known as Wendsbury's principle of fairness.

The matter can be seen from another angle also. Decision is taken on 13th May, 1998 itself as is clear from para 6 of Office Memorandum dated 13th May, 1998 which enhanced age of retirement of personnel of armed forces by two years. Once that decision is taken which was taken before the retirement of the petitioner the only formality was to pass necessary orders and amend respective rules. If the respondents deferred the parsing of necessary orders, those who retired in the meantime should not be made to suffer. More so, when petitioner is only person who has become a victim of delayed corrective decision which comes ultimately in the form of circular dated 29th July, 1998.

10. Therefore fixing the date 1st January, 2006 as the date in the signal dated 11th July, 2005 is clearly in violation of the aforesaid recruitment rules and the fixing of the said date is, therefore, hereby set aside. It is thus mandatory that the aforesaid rules would be given effect to from 4th September, 2004.

11. Accordingly we allow this petition and make the rule absolute.

12. The case of the petitioner for employment as ex-serviceman

under 10% quota fixed in the aforesaid rules shall now be considered and decision thereon be taken within three months from today.

A.K. SIKRI, J.

February 07, 2008
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J.M. MALIK, J.