

**\*THE HON'BLE SRI JUSTICE SANJAY KUMAR**

**+WRIT PETITION NO.23832 OF 2009**

**% DATED 24<sup>th</sup> JUNE, 2015**

Between:

# K. Subrahmanyam .. Petitioner

and

\$ The Border Roads Development Board,  
rep. by its Secretary, Government of India,  
New Delhi and others .. Respondents

<Gist:

>Head Note:

! Counsel for petitioner : Sri Siva  
Smt. K. Rajya Lakshmi

^ Counsel for respondents : Sri T. Balaji  
Sri B. Narayana Reddy

? CASES REFERRED:

1. (1979) 2 SCC 150 = AIR 1979 SC 1060.
2. (2000) 8 SCC 395 = AIR 2000 SC 3243.
3. AIR 1982 MADRAS 386 (DB)
4. 2006 Writ LR 705 (DB).
5. 2013(5) ABR 458 = 2013 (6) ALLMR 724 (DB).
6. AIR 1999 AP 335 = 1999 (3) ALD 632.

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**ORDER**

The petitioner, an octogenarian, is aggrieved by the rejection of his claim for certain pensionary benefits by the Director General, Border Roads, New Delhi, the second respondent, under letter dated 22.05.2009 (wrongly mentioned as 22.05.2008).

There is no dispute as to the petitioner's entitlement to pensionary benefits from 04.04.1979. He has been agitating his grievance in connection therewith since 1985 and this is the third round of litigation before this Court. *Ergo*, a lengthy and tortuous history precedes the case. Shorn of needless detail, the facts to the extent relevant may be summed up thus:

The petitioner entered the service of the Central Water and Power Commission, Government of India, in December, 1956. He was thereafter appointed to the General Reserve Engineer Force, Border Roads Development Board, in May 1963. In March, 1974, he was promoted as a Superintendent Engineer (Mechanical). He was deputed to work in M/s. Singareni Collieries Company Limited, a public sector undertaking, in April, 1975 and continued as such till April, 1979. He was permanently absorbed in M/s. Singareni Collieries Company Limited with effect from 04.04.1979. The permanent absorption order was issued by the Government of India, Ministry of Shipping and Transport, Boarder Roads Development Board, New Delhi, under proceedings dated 28.02.1985. These proceedings record that the petitioner's permanent absorption would have effect from 04.04.1979 but no arrears on account of pension and death-cum-retirement gratuity would be paid to him from

04.04.1979 till 28.02.1985. It was further stated therein that the petitioner would be eligible for pro-rata pension and gratuity based on the length of his qualifying service under the Government of India till the date of his permanent absorption, as admissible under the rules. Admittedly, his qualifying service was from his initial appointment in December, 1956, till his absorption in M/s. Singareni Collieries Company Limited in April, 1979. Clauses (v) and (vi) of the proceedings dated 28.02.1985 are germane and read thus:

‘(v) Option:

The officer will exercise an option, within six months of the date of issue of this letter, for either of the alternatives indicated below:-

- a) Receiving the pro-rata monthly pension and death-cum-retirement gratuity as admissible under clauses (ii), (iii) and (iv) above under the Government of India Rules.

OR

- b) Receiving the pro-rata gratuity and a lump sum amount in lieu of pension worked out with reference to the Commutation Tables obtaining on the date from which the commuted value becomes payable.

(vi) Commutation:

In case Shri K. Subrahmanyam opts to receive pension as in para (v) (a) above but wishes to commute a portion of his pension, such commutation will be regulated in accordance with the Government of India Rules in force at the time of his permanent absorption in Singareni Collieries Limited.’

According to the respondents, the petitioner furnished Option Certificate dated 24.03.1985 opting to receive pro-rata gratuity and a lump sum amount in lieu of pension. The petitioner would however contest this claim. According to him, the sequence of events demonstrates that he had not opted for 100% commutation and, in fact, he could not have done so under the prevailing legal regime.

In the first instance, the petitioner approached this Court by way of W.P.No.16779 of 1997 aggrieved by the denial of pensionary benefits from 04.04.1979 to 28.02.1985. Therein, he sought a direction to the respondents to restore his pension from the date of his retirement from Government service and to regulate the same in accordance with the orders extant. It appears that prior to filing this case, the petitioner approached the Central Administrative Tribunal. The Tribunal however

refused to entertain his case on the ground of delay. He thereupon filed the writ petition. Initially, a learned Judge of this Court dismissed the writ petition by order dated 08.07.1998. Aggrieved thereby, the petitioner filed W.A.No.1407 of 1998. The said appeal was allowed by order dated 19.12.2000 and the writ petition was remitted for consideration afresh. It was then disposed of by a Division Bench of this Court on 26.02.2004. Observing that the petitioner was 75 years of age at that time and requiring him to approach the Tribunal again would be a long drawn exercise, the Division Bench considered the matter on merits.

Similar considerations would therefore weigh with this Court now, as the petitioner has advanced in age by another decade.

The Division Bench took note of the fact that the petitioner had received lump sum pensionary benefits in 1986 and that the commuted portion of his pension was restored after 15 years, i.e., in 2001, and observed that till the commutation of the pension was effected the petitioner was eligible for pension. He was accordingly held entitled to the arrears of pension for the said period. The operative portion of the order dated 26.02.2004 reads thus:

‘(1) The petitioner is entitled for pension in accordance with the Rules either pro rata or otherwise from 04.04.1979 till the date of 100% commutation of pension.

(2) .....

(3) The arrears and also the amount which became payable to the petitioner shall be paid within a period of three (03) months from the date of receipt of a copy of this order.’

It appears that the respondents, in purported compliance with the above order, granted pension to the petitioner from 04.04.1979 till the date of commutation in 1986. Earlier, the letter dated 29.10.1986 issued to the petitioner had stated that his pro-rata pension was calculated as Rs.614/- per month and the commuted value of 1/3<sup>rd</sup> of the pension, i.e. @ Rs.204/-, was arrived at Rs.27,172.80 ps. The terminal benefit, being twice the commuted value, was calculated at Rs.54,345.60 ps. and the total amount of Rs.81,518.40 ps. was remitted. This letter clearly demonstrated that only 1/3<sup>rd</sup> of the petitioner's pension was commuted.

The revision of his pension with effect from 01.01.1986 was extended to him pursuant to the order dated 26.02.2004 and he was granted certain arrears along with interest. However, dissatisfied with the manner in which the issue was dealt with, the petitioner again approached this Court by way of W.P.No.6975 of 2005. His prayer therein was as under:

‘.....a) to declare the action of the respondents in not granting the arrears of pension payable to the petitioner from 17-10-1986 as per the revised pension of Rs.1277/- p.m. after deducting the commutation portion of Rs.614/- and the pension revisions that took place from time to time; b) to declare the action of the respondents in not granting the benefits of Central Government Health Scheme to the petitioner and his family from the date of retirement is arbitrary, discriminatory and unconstitutional; c) and the respondents be directed to release all the arrears of amounts due to the petitioner on account of monthly pension of Rs.663/- p.m. payable to him since 17-10-1986 and the arrears of amounts of expenditure incurred by the petitioner towards himself and to his wife for medical treatment and operations undergone by them from 1-11-1987 with interest on arrears compounding at 18% p.a. by allowing the writ petition with exemplary costs and compensation for the loss suffering and hardship caused to the petitioner and his family and pass such other order or orders as this Hon’ble Court may deem fit and proper in the circumstances of the case.’

This writ petition was disposed of by order dated 05.11.2008 directing the respondents to consider the representations of the petitioner canvassing his grievance in accordance with law and to pass appropriate orders thereon within a time frame. It was pursuant to this order that the present impugned letter dated 22.05.2009 has been issued.

At the core of the controversy lies the question as to whether the petitioner commuted 100% of the pension payable to him as per rules and whether the respondents acted upon the same?

It is no doubt true that Section 10 of the Pension Act, 1871, provides that the appropriate Government may, with the consent of the holder, order the whole or any part of his pension to be commuted for a lump sum on such terms as it may deem fit. However, the question, as stated earlier, is whether the petitioner consented to 100% commutation of his pension.

The record reflects that there was no clarity on this issue on the part

of the petitioner and more so, unfortunately, on the part of the respondents. In the proceedings dated 28.02.1985, there was no reference to any rule in connection with the choice offered to the petitioner to opt for a lump sum amount in lieu of pension. However, the respondents stated in their counter-affidavit that the grant of pro-rata retirement benefits under the proceedings dated 28.02.1985 was relatable to Rule 37-A of the Central Civil Services (Pension) Rules, 1972 (for brevity, 'the Rules of 1972').

Significantly, Rule 37-A of the Rules of 1972 pertains to payment of pension on absorption consequent upon conversion of a Government department into a central autonomous body or a public sector undertaking. In the present case, the petitioner alone was absorbed in M/s. Singareni Collieries Company Limited and there was no conversion of his parent department into a public sector undertaking. This rule therefore had no application to the petitioner. On the other hand, Rule 37 of the Rules of 1972 deals with pension payable on absorption in or under a corporation, company or body. This rule reads to the effect that a Government servant, who has been permitted to be absorbed in a corporation, wholly or substantially owned or controlled by the Government, shall be deemed to have retired from service from the date of such absorption and shall be eligible to receive retirement benefits. The Explanation thereto makes it clear that the date of absorption shall, in case the Government employee joins a corporation on absorption basis, be the date on which he actually joins that corporation. It is clear that Rule 37 of the Rules of 1972 alone governs the petitioner.

Further, it may be noticed that the impugned letter dated 22.05.2009 relies heavily upon the Office Memorandum dated 08.04.1976 of the Department of Expenditure, Government of India. A copy of the said Office Memorandum was produced by the learned Assistant Solicitor General. Though a reference was made to this Office Memorandum in the proceedings dated 28.02.1985, the clause as to the exercise of option was materially different therein. In the Office Memorandum dated 08.04.1976, the clause reads as under:

‘(iii) Every Government servant is to exercise an option, within six months of his absorption, for either of the alternatives indicated below:

- (a) Receiving the monthly pension and DCR Gratuity already worked out, under the usual Government arrangements.
- (b) Receiving the gratuity and a lump sum amount in lieu of pension worked out with reference to commutation tables obtaining on the date from which the pro-rata pension, gratuity etc. would be disbursable.

Where no option is exercised within the prescribed period, the officer will automatically be governed by alternative (b) above. Option once exercised shall be final. The option shall be exercised in writing and communicated by the Government servant concerned to the undertaking/autonomous body.’

*(emphasis added)*

Significantly, the proceedings dated 28.02.1985 did not disclose that the option once exercised would be final and that it had to be exercised in writing and communicated by the petitioner to M/s. Singareni Collieries Company Limited. There is no proof of due compliance in this regard by the petitioner even at this late stage.

To complicate matters further, the learned Assistant Solicitor General produced a form dated sometime in August, 1985, duly signed by the petitioner, relating to commutation of his pension without medical examination. This form tallies with Form 1 of the Central Civil Services (Commutation of Pension) Rules, 1981 (for brevity, ‘the Rules of 1981’), which relates to an application for commutation of a fraction of pension without medical examination. In this form, there is no indication that the petitioner commuted 100% of the pension payable to him and going by the format of the application, he could not have done so. On the other hand, he stated therein that the amount of pension had not yet been settled and the pension proposed to be commuted was as per the Rules of 1972. This form was obtained by the respondents in August, 1985, and it contradicted the earlier certificate obtained from the petitioner in March, 1985. To add to the confusion, the letter dated 29.10.1986 issued by the respondents, referred to *supra*, indicated that the petitioner underwent a medical examination on 30.06.1986!

There is no explanation forthcoming even now as to these

discrepancies and contradictions.

Further, the letter dated 29.10.1986 demonstrated that only 1/3<sup>rd</sup> of the petitioner's pension was commuted. This was in keeping with Rule 5 of the Rules of 1981, which decrees that a Government servant can commute for a lump sum payment only a fraction, not exceeding 1/3<sup>rd</sup>, of his pension. The Rules of 1981 would have application as they apply to classes of pension referred to in Chapter V of the Rules of 1972, which includes Rule 37. It is relevant to note that Rule 9 of the Rules of 1981 provides that a Government servant to whom, pending assessment of final pension, provisional pension has been sanctioned, would be eligible to commute only a fraction of such provisional pension subject to the limit specified in Rule 5.

At the point of time when the option certificate was obtained from the petitioner in March, 1985, the petitioner's final pension had not even been calculated, much less sanctioned. He could not therefore have acted in violation of the rules and sought 100% commutation. It is not the contention of the learned Assistant Solicitor General that the Rules of 1981 do not apply to the petitioner. The Office Memorandum dated 08.04.1976 cannot therefore override the statutory rule, viz., Rule 5 of the Rules of 1981. Further, as indicated *supra*, the intimation given to the petitioner under the proceedings dated 28.02.1985 was not even in consonance with the Office Memorandum dated 08.04.1976 and the petitioner was never put on notice that the option exercised by him would be final. The respondents themselves did not treat the option exercised by him in March, 1985 as final, as is clear from the subsequent option form obtained from him in August, 1985, which was quite contrary to the earlier option. At the time the petitioner purportedly opted for 100% commutation in March, 1985, his provisional pension had not even been calculated or sanctioned.

It is therefore not open to the respondents to claim that the petitioner opted for 100% commutation and that it is final and binding on him. Their own conduct speaks against such a conclusion. Except for

banking upon the clause extracted from the Office Memorandum dated 08.04.1976, the impugned letter dated 22.05.2009 does not demonstrate as to why the petitioner's main grievance has not been considered. It was his case that he had only asked for commutation of a fraction of his pension. It appears that the fraction initially permitted to be commuted was 1/3<sup>rd</sup> of his pro-rata pension in accordance with the rules but thereafter, confusion abounded and amounts in excess of the permissible limit were paid to the petitioner. However, it was for the respondents to be more mindful of the legal regime while dealing with the petitioner's pension payments and they ought to have acted in accordance with law. Ignorance or carelessness on the part of the petitioner cannot be taken advantage of by the respondents in this regard.

It may also be noticed that pursuant to the order passed by the Division Bench of this Court in W.P.No.16779 of 1997, the petitioner was paid arrears of pension from 04.04.1979 till the date of the so called commutation. If it was the stand of the respondents that the petitioner's option to receive 100% commutation is final and binding, there was no question of his being allowed pension payment on regular basis from 04.04.1979 till the date of the so called commutation in 1986. The respondents therefore cannot approbate and reprobate. If it was their contention that he was entitled to only a lump sum payment in lieu of pension, he should have been paid, at best, an additional lump sum for the period in question and not the arrears of regular pension, as has been done. It is also significant to note that the Division Bench had left it open to the respondents to pay pension to the petitioner in accordance with law 'either pro-rata or otherwise'. The respondents opted to pay him arrears of pension for that period. Once they chose to do so, it is not open to them at this late stage to say that the petitioner opted for a one-time lump sum commutation whereby he stood disentitled to receive regular pension.

Significantly, it was only in September, 2004, that the respondents applied this so called 100% commutation to the revised pension of Rs.1,277/- and paid him a further lump sum amount. This unilateral

action on their part, after a lapse of nearly 18 to 19 years, is in clear violation of the rules and cannot be countenanced. This also speaks volumes about the utter lassitude and negligence of the respondents in dealing with a pensioner who rendered loyal service to the organization.

Reference in the counter affidavit to Rule 10 of the Rules of 1981, as to an applicant who commutes a fraction of his final pension not being required to apply afresh for commutation after revision of such pension, indicates clear lack of application of mind. The rule applies, as is self-evident, in the case of an application for commutation of part of the final pension. It has no application to a case of 100% commutation. Despite the same, the respondents now seek to justify their action in the year 2004 by relying on this rule. This lack of clarity and understanding on the part of the respondents in discharging their statutory obligation towards the petitioner has resulted in this long drawn battle stretching over several decades causing great injustice to the petitioner in his twilight years.

To sum up, it is manifest that both parties were completely at sea as to the implementation of the rules and the benefit of this lack of clarity on the part of the implementing authority must necessarily go to the petitioner. Needless to state, there can be no estoppel against the statute. Further, there is no possibility of applying the principle of constructive *res judicata* to the petitioner on the ground that this is the third case filed by him. The issue was kept alive since the very first round of litigation and never attained a quietus. The petitioner is therefore not estopped from raising this grievance even at this stage.

Finally, the relief to be granted. The confidence reposed by this Court in the respondents while disposing of W.P. No. 6975 of 2005 has not been honoured by them as is apparent from the cursory handling of the petitioner's representations under the impugned letter dated 22.05.2009. A direction to again consider the issue would therefore not suffice; all the more so, keeping in mind the advanced age of the petitioner. Having fought this battle relentlessly, he is justly entitled to

enjoy the benefits thereof during his lifetime.

The respondents have made enough of a muddle and a parody while dealing with the petitioner's case and cannot be trusted to set right their mistakes by applying the rules correctly at this stage, even if this Court directs them to do so. It is a settled proposition of law that in a fit and deserving case, this Court would have the power to issue positive directions. (*DISTRICT REGISTRAR V/s. M.B.KOYAKUTTY*<sup>[1]</sup>, *BADRINATH V/s. GOVERNMENT OF TAMILNADU*<sup>[2]</sup>, *STATE OF TAMILNADU V/s. C.VADIAPPAN*<sup>[3]</sup>, *GOVERNMENT OF TAMILNADU V/s. G.B.TRUST*<sup>[4]</sup>, *NARENDRA BARDE V/s. MUNICIPAL CORPORATION OF BRIHAN MUMBAI*<sup>[5]</sup> and *LAVU EDUCATIONAL SOCIETY V/s. GOVERNMENT OF ANDHRA PRADESH*<sup>[6]</sup>). This Court has no hesitation in holding that the case on hand falls within the exceptional category warranting exercise of such power.

Viewed thus, this Court holds that the petitioner is deemed to have opted for commutation of only 1/3<sup>rd</sup> of his pro rata pension as per the rules. Consequently, the respondents would have to redo the exercise of working out his pensionary benefits right from the start. In accordance with such option, the respondents shall work out the commuted pension payable initially and upon revision, the regular pension payable after such commutation initially and upon revision, the amount payable after restoration of the commuted pension and all the arrears. As the petitioner received certain amounts in excess of the amounts due and payable to him, he would necessarily have to refund the same. Such amounts would therefore have to be adjusted against the final amount calculated to be due and payable to the petitioner pursuant to this order. The amounts found due and payable by both sides shall carry simple interest @ 6% per annum. The entire exercise shall be completed and the final amount shall be remitted to the petitioner within two months from the date of receipt of a copy of this order. Considering the refractory attitude of the

respondents in driving the petitioner from pillar to post for his rightful dues, this Court is constrained to impose exemplary costs of Rs. 10,000/- upon the respondents.

The writ petition shall stand disposed of accordingly. Pending miscellaneous petitions, if any, shall stand closed in the light of this final order.

**24<sup>th</sup> JUNE, 2015**

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**SANJAY KUMAR,J**

**Note:** L.R.Copy to be marked (B/o) Svv

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- [\[1\]](#) (1979) 2 SCC 150 = AIR 1979 SC 1060.
  - [\[2\]](#) (2000) 8 SCC 395 = AIR 2000 SC 3243.
  - [\[3\]](#) AIR 1982 MADRAS 386 (DB)
  - [\[4\]](#) 2006 Writ LR 705 (DB).
  - [\[5\]](#) 2013(5) ABR 458 = 2013 (6) ALLMR 724 (DB).
  - [\[6\]](#) AIR 1999 AP 335 = 1999 (3) ALD 632.