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

% ***Judgment Dated: 22nd July, 2016***

+ **W.P.(C) 3204/2016**

NEHRU YUVA KENDRA SANGATHAN & ANR. Petitioners

Through : **Mr.R. Ramachandran and Lakshmi
Gurung, Advs.**

versus

SHRI S.S.R. SHARMA Respondents

Through : **Mr.L.R. Khatana Adv.**

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE I.S. MEHTA

G.S.SISTANI, J (ORAL)

1. Present writ petition has been filed by the petitioner under Article 226 of the Constitution of India seeking to challenge the order dated 19.2.2016 passed by Central Administrative Tribunal (hereinafter referred to as '*the Tribunal*') in RA No.325/2015 in the O.A No. 1644/2012 whereby the R.A. filed by the petitioner was dismissed by the learned Tribunal.
2. The necessary facts to be noticed for disposal of the present petition are that the respondent was employed with the petitioner No.1 and was working in substantive post of Youth Coordinator. The petitioner No.1 has the hierarchy of promotional post starting from the post of Youth Coordinator as under:-

Name of Post	Pay scale as per V CPC
Youth Coordinator	8000-275-13500

Regional Coordinator	10000-325-15200
Zonal Director	12000-375-16500
Director	14300-400-8300

3. On 04/09/1996, the respondent was promoted to the highest post as a director on ad-hoc basis vide order No. NYKS/Admn/96/322. The said post was not the immediate higher post, but to the third higher post, in the promotional order it was indicated that the pay of the respondent would be regulated in terms of FR-35 and FR-49 till the time the regular pay scale to the post of director is granted. Fundamental Rule 35 reads as under:

“F.R. 35 The Central Government may fix the pay of an officiating government servant at an amount less than that admissible under these rules”

FR 49 deals with “combination of Appointments” and its relevant part read as under:

“F.R. 49 The Central Government may appoint a Government servant already holding a post in a substantive or officiating capacity to officiate, as a temporary measure, in one or more of other independent posts at one time under that Government. In such cases, his pay is regulated as follows:-

(i) Where a Government servant is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/line of promotion, in addition to his ordinarily duties, he shall be allowed the pay admissible to him, if he is appointed to officiate in the higher post, unless the competent authority reduces his officiating pay under Rule 35; but no additional pay shall, however, be allowed for performing the duties of lower post”

4. The petitioner vide office order No. NYKS/PERS:Pay/2143/99 dated

28/04/1999 fixed the pay of the respondent at Rs.14300/- as on 14/10/1996 in the pay scale of 14300-275-18300. The respondent had drawn the said pay scale without break till the date of his retirement i.e. 30/04/2001 and at the time of retirement, the respondent's basic pay was Rs.15,900/-. The petitioner instead of releasing respondent's pension as per the average emoluments drawn by him during the last ten months of service, the petitioner released the pension on the basis of Rs.13,950/-. Being aggrieved by the action of the petitioner herein, the respondent approached the Tribunal by filing O.A., which was allowed by the learned Tribunal. Being aggrieved by the order passed by the Tribunal, the petitioner filed a writ petition being W.P(C) No. 9562/2015 before this court, vide order dated 29/11/2015 this Court permitted the petitioner to file a Review Application before the Tribunal. The petitioner filed a review application before the learned Tribunal, which stands dismissed.

5. Mr. Ramachandran, learned counsel for the petitioner, submits that the learned Tribunal has erred in holding that the review applicant has not pointed out any error apparent on the face of the record but questioned the view held by the Tribunal. If the review applicant was aggrieved by the same, then he should have approached higher judicial forum through appropriate judicial proceedings. This is not an error, which can be corrected in a review.
6. Mr. Ramachandran, learned counsel for the petitioner, submits that the learned Tribunal has failed to take a note that pension cannot be granted on the basis of "Average emoluments" drawn from erroneous pay fixation. It is further submitted that the learned Tribunal has committed grave error in concluding that "re-fixation of their pay under FR-35 cannot be accepted as such re-fixation of pay cannot be done after the

retirement of the employee service”. Calculations of pension based on correct entitlement of the retired employee cannot be equated as re-fixation of pay after retirement.

7. The learned counsel for the petitioner, submits that the learned Tribunal has proceeded on the premise that pension has to be fixed on the “average pay” drawn by the employee during last 10 months before retirement, even if the pay fixation was wrongly done in violation of Fundamental Rule 35. It is further submitted by the learned counsel for the petitioner that the pension has to be calculated as per the correct entitlement of the respondent, not as per average emoluments drawn even if based on wrong fixation.
8. The learned counsel for the petitioner submits that the impugned order has the effect of directing the petitioner to grant pension, which is of perennial nature on the higher side based on erroneous pay fixation leading to erroneous “average emoluments” to which the respondent is not at all entitled to as per extant rules. The counsel contends that the effect of the learned Tribunal’s impugned order is such that the petitioner would be liable to pay higher family pension also, as the Family Pension is based on the pension sanctioned to the retired employee.
9. The learned counsel for the respondent submits that there is no infirmity in the impugned order passed by the learned Tribunal and further submitted that the pension is to be determined on the basis of the average emoluments drawn by the respondent during the last 10 months before his retirement. Further, learned counsel for the respondent submits that respondent pay was fixed in accordance with the rules and there was no question of re-fixation of the same. As the respondent had already been placed in the scale of pay of Rs.14,300-400-18,300 in 1998 itself with

retrospective effect from 01.01.1996. The respondent continuously drew the pay fixed and pay scale with annual increments till the date of his retirement. Therefore, the question of refixation of pay did not arise.

10. We have heard learned counsel for the petitioner and respondent and also perused the impugned order dated 19/02/2016 and the order dated 28/11/2014 in O.A No.1644/2012.
11. The respondent was promoted as Director on ad-hoc basis w.e.f 04/09/1996 in the pay scale of Rs.14300-400-18300 and the average pay drawn by him during the last 10 months prior to retirement was Rs.15100/-. The counsel for the petitioner submitted that the pay fixation of the respondent was erroneous inasmuch as it is violative of FR-35. However, FR 35 is a rule of fixation of pay of a serving employees and the said rule is not applicable for fixation of pension.
12. In view of the aforesaid it cannot be disputed that fixation of salary of the respondent as aforesaid was an act of the petitioner themselves and the respondent had not misrepresented before the authorities concerned
13. As per CCS (Pension) Rules, 1972, the pension is to be calculated on the basis of the average emoluments drawn by the respondent during the last ten months before his retirement. As far as Respondent is concerned, the respondent was promoted as Director on ad hoc basis with effect from 04/09/1996 in the pay scale of Rs.14300-400-18300 and the average pay drawn by the respondent during last 10 months prior to retirement was Rs.15100/-. It was correctly held by the learned Tribunal that refixation of his pay under FR 35 cannot be accepted as such refixation of pay cannot be done after the retirement of the employee from service.
14. The impugned judgment rendered by the learned Tribunal is a well-reasoned judgment. The Tribunal has taken into consideration and dealt with all the grounds, which have been urged. Resultantly, we find no

ground to entertain the present writ petition. Thus, there is no infirmity in the impugned judgment, which would require interference by this Court in proceedings under Article 226 of the Constitution of India.

15. Accordingly, writ petition stands dismissed.

CM.APPL 13703/2016(stay)

16. Application stands dismissed in view of the order passed in the writ petition.

G.S.SISTANI, J

I.S. MEHTA, J

JULY 22, 2016
//msr

