212 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.1955 of 2017 (O&M)
Date of decision : February 11, 2020

Ganda Singh .... Petitioner

Versus

Punjab State Power Corporation Ltd. and others .... Respondents

CORAM : HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present:- Mr. Narinder Sharma, Advocate for the petitioner.

Ms. Bhavna Gupta, Advocate for the respondents.

HARSIMRAN SINGH SETHI J. (ORAL)

In the present writ petition, the grievance of the petitioner is that the petitioner is being granted the pension @ ₹2,832/- w.e.f. 01.01.2006 whereas, as per the Policy of the Government of Punjab dated 17.08.2009, the petitioner is entitled for the benefit of minimum pension of ₹3,500/- w.e.f. 01.01.2006.

As per the facts mentioned in the writ petition, the petitioner initially joined the Army on 21.11.1962 and he remained with the Indian Army up to 11.05.1978, when he was discharged from Indian Army. It is an admitted fact that the petitioner is getting pension after retiring from the Indian Army. After discharge from the Army, the petitioner was appointed as Sewadar with the respondent-Corporation (erstwhile 'the Punjab State Electricity Board') on 31.10.1986. The petitioner retired from the said service on attaining the age of superannuation on 30.04.2004. While implementing the recommendations of 5th Pay Commission by the Government of Punjab, the pay and pension of the employees/retirees was to be re-fixed as per recommendations. The said recommendations were accepted by the Government of Punjab, vide letter dated 17.08.2009. On 17.08.2009, two separate instructions were issued for the implementation of the 5th Pay Commission, one for the retirees, who had retired before 01.01.2006 and the second set of instructions was issued with regard to the employees/retirees, who retired after 01.01.2006. The petitioner is governed by the Policy/instructions which relates to the retirees, who retired prior to 01.01.2006. Annexure P-2 annexed with the present writ petition is not the said Policy, as the said instructions/Policy is in respect to the retirees, who retired on or after 01.01.2006.

The petitioner has placed reliance upon Annexure P-2 to claim the minimum pension @ ₹3,500/- per month w.e.f. 01.01.2006, as the respondents, vide PPO dated 22.02.2012 have fixed his pension at ₹2,832/- per month w.e.f. 01.01.2006.

In the present case, the claim of the petitioner is for issuance of a direction to the respondents to grant the minimum pension to him @ ₹3,500/- per month w.e.f. 01.01.2006 along with arrears.

Upon notice of motion, the respondents have filed the reply. In the reply, the respondents have stated that Annexure P-2 i.e. Policy dated 17.08.2009 is not applicable upon the petitioner as the same covers the employees, who retired on or after 01.01.2006. As per the respondents, the petitioner is covered under the Policy dated 17.08.2009 issued in respect of the employees, who retired prior to 01.01.2006. According to said Policy, the petitioner is not entitled for the benefits of fixation of minimum pension of ₹3,500/- per month as being claimed by the petitioner.

Learned counsel for the petitioner argues that even as per the Policy/instructions dated 17.08.2009, which are applicable upon the employee who retired prior to 01.01.2006, claim of the petitioner is covered under clause 7 of the said Policy/instructions for grant of minimum pension @ ₹3,500/- per month w.e.f. 01.01.2006.

I have heard the learned counsel for the parties and have also carefully gone through the record with their valuable assistance.

The claim of the petitioner is that he should be granted minimum pension of ₹3,500/- per month w.e.f. 01.01.2006 as per Clause 7 of the Policy dated 17.08.2009 which is applicable upon the employees, who retired prior to 01.01.2006. No doubt, Clause 7 of the Policy dated 17.08.2009 allows the benefit of minimum pension @ ₹3,500/- per month w.e.f. 01.01.2006, but the same is subject to certain conditions, which have been given in Clause 11 of the said Policy. The Clause 11 of the Policy dated 17.08.2009 is as under:

> *"All Pension Disbursing Authorities handling disbursement of pension to the Punjab Government pensioners/family pensioners are hereby authorised to pay pension/family pension to the existing pensioners/family pensioners are hereby authorised to pay pension/family pension to the existing pensioners/family pensioners at the consolidated rate in terms of para 4.1, 5 & 7 above without any further authorisation from the Accountant General (A&E) Punjab/Head of Office etc. However, before disbursement of the pension, the Pension Disbursing*

Authority shall authenticate that the fixation made is strictly in accordance with the provision of these orders. For this purpose a table indicating the existing basic pension/family pension without dearness pension and the revised consolidated pension/family pension is available at Annexure I. This table may be used where the pensioner is in receipt of the single pension only. Where a pensioner is in receipt of more than one pension, consolidation may be done separately in terms of para 4.1 & 7 and floor ceiling of Rs.3500/- may be applied to total pension from all sources taken together except the cases falling in para 9.2. A suitable entry regarding the revised consolidated pension shall be recorded by the Pension Disbursing Authorities in both halves of the pension payment order. An intimation regarding disbursement of revised pension may be sent by the Pension Disbursing Authority to the Accountant General (A&E) Punjab and concerned Treasury Officer/Assistant Treasury Officer in Annexure II."

A bare perusal of the above Clause would show that where an employee is getting more than one pension, the consolidation may be done separately but the floor ceiling of ₹3,500/- is to be applied on the total pension from all sources taken together except the cases falling under Para 9.2.

In the present case, the claim of the petitioner is not covered under para 9.2. The petitioner is getting pension @ ₹4,500/- per month from Indian Army and ₹2,835/- per month from the respondent-Corporation and therefore, both combined together crosses the ceiling of ₹3,500/- and hence petitioner will not be entitled for the benefits of minimum pension as mentioned in clause 7 of the Policy dated 17.08.2009.

No fault can be found with the denial of the said benefit to the petitioner. The fact that the petitioner is already getting pension @ ₹4,500/- per month from Indian Army and ₹2,832/- from the respondent-Corporation and the total pension i.e. ₹4,500/-(from Indian Army)+₹2,832/-(from Corporation) exceeds minimum ceiling of ₹3,500/- cannot be ignored. Therefore, the petitioner will not be eligible to claim the benefit of Clause 7 for fixing the minimum pension by the Corporation at ₹3,500/- per month.

Learned counsel for the petitioner argues that the claim of the petitioner is covered by the judgment of this Court passed in CWP No.21553 of 2014, titled as ***"Kashmir Chand v Punjab State Power Corporation Ltd. and others",*** decided on 15.07.2016. In the said judgment, the relevant Policy, which grant the minimum pension @ ₹3,500/- per month, has not been noticed or discussed. The provisions of the Policy dated 17.08.2009 i.e. clause II, which have been noticed above were not brought to the notice of the Hon'ble Court and hence has not been discussed while passing the said order. Once, the relevant provisions have not been noticed as the same were not brought to the notice of this Court, no benefit of the said judgment can be extended to the petitioner and the said judgment cannot be pressed into operation seeking the benefit.

Hon'ble the Supreme Court of India while deciding Civil Appeal No.5092 of 2009, titled as ***"Subhash Chandra and another v Delhi Subordinate Services Selection Board and others. 2009 (3) S.C.T., 827,*** decided on 04.08.2009 held that where the Rules or Policies governing the service were not brought to the notice of the Hon'ble Court and were not discussed and the judgment was given without considering the same, the said judgment cannot be relied upon for seeking relief. The relevant paragraph of the said judgment is as under:

> *44. The only question which survives is as to whether S. Pushpa (supra) constitutes a binding precedent. A decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom.*
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> *In S. Pushpa (supra), decisions of the Constitution Benches of this Court in Milind (supra) had not been taken into consideration. Although the case of Chinnaiah (supra) was decided later on, we are bound by the same. It is now a well settled principle of law that a division bench, in case of conflict between a decision of a Division Bench of two Judges and a decision of a larger Bench and in particular Constitution Bench, would be bound by the latter. [See M/s Sardar Associates v. Punjab & Sind Bank, CAs @ SLP (C) Nos. 5249-5250 of 2008 decided on 31st July, 2009]*
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> *This Court in Marri Chandra Shekhar Rao (supra) categorically held that when a person is held to be a member of scheduled caste for one State, he cannot be treated as such in another. In Milind (supra), it was categorically held that the High Court, in exercise of its supervisory jurisdiction, under Article 227 of the Constitution of India, cannot make any roving inquiry for the purpose of finding out as to whether a person belonging to one caste would, for one reason or the other, can be held to be belonging to another caste or tribe which had been notified as scheduled caste or scheduled tribe. It is also well known that a decision rendered in ignorance of a binding precedent and/or in ignorance of a constitutional provision, would be held to have been rendered per incuriam.*

In Harminder Kaur & Ors. v. Union of India & Ors. [2009 (7) SCALE 204], this Court held:

"16. A judgment of a Constitution Bench of this Court laying down the law within the meaning of Article 141 of the Constitution of India must be read in its entirely for the purpose of finding out the ratio laid down therein. The Constitution Bench, in no uncertain terms, based its decision on the touchstone of the `equality clause' contained in Articles 14 and 16 of the Constitution of India. Emphasis has been laid at more than one place for making appointments only upon giving an opportunity to all concerned. Appointment through side-door has been held to be constitutionally impermissible."

[See also Oriental Insurance Company Limited v. Mohd. Nasir and Another (2009) 6 SCC 280]

In Black's Law Dictionary, 8th edition, 2004, it is stated:

"There is at least one exception to the rule of stare decisis. I refer to judgments rendered per incuriam. A judgment per incuriam is one which has been rendered inadvertently. Two examples come to mind: first, where the judge has forgotten to take account of a previous decision to which the doctrine of stare decisis applies. For all the care with which attorneys and judges may comb the case law, errare humanum est, and sometimes a judgment which clarifies a point to be settled is somehow not indexed, and is forgotten. It is in cases such as these that a judgment rendered in contradiction to a previous judgment that should have been considered binding, and in ignorance of that judgment, with no mention of it, must be deemed rendered per incuriam; thus, it has no authority.... The same applies to judgments rendered in ignorance of legislation of

which they should have taken account. For a judgment to be deemed per incuriam, that judgment must show that the legislation was not invoked."

Louis-

Philippe Pigeon, Drafting and Interpreting Legislation 60 (1988) "As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence." Rupert Cross & J.W. Harris, Precedent in English Law 149 (4th ed. 1991)"

In an article "Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search For Principle" by B.V. Harris published in (2002) 112 LQR 408-427, it is stated:

"A decision may be held to be per incuriam where relevant statutory provisions, or binding case law authority, have been overlooked or misinterpreted in arriving at the holding in the precedent....

Considerations Relevant To Deciding whether to Defer to or Overrule Precedent:

The first consideration for a final appellate court called upon, in the exercise of its discretion, to overrule an allegedly wrong precedent of its own, will be whether the precedent can be distinguished on the facts, *including changing social and other contexts, or distinguished on the law. If the precedent can be distinguished, overruling will not be necessary. The subsequent appellate court will rather be free to choose not to follow the precedent which can be distinguished.*

Second, the precedent should be considered closely to determine whether the decision was reached per incuriam. A per incuriam precedent may be overruled.

Third, the workability of the precedent should be assessed. Evidence of lack of workability may justify overruling.

The fourth consideration will be whether any reasons have been advanced in the appeal which were not considered in deciding the precedent.

This category could arguably be included in many circumstances, either in the first category as a form of distinguishing, or in the second category if the omission is sufficiently serious to cause the precedent to be per incuriam.

All of the first four considerations have traditionally been accepted as exempting subsequent appellate courts from the obligation to follow precedent."

In the context of overruling the two leading precedents {de Freitas v.Benny [1976] AC 239 and Reckley v. Minister of Public Safety and Immigration (No. 2) [1996] A.C.527} which had held the exercise of the prerogative of mercy to be nonjusticiable, Lord Slynn of Hadley in Lewis v. Att. Gen. Of Jamaica [2001] 2 AC 50 at p. 75, stated:

"The need for legal certainty demands that they should be very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so. But no less should they be prepared to do so when a man's life is at stake, where the death penalty is

involved, if they are satisfied that the earlier cases adopted a wrong approach. In such a case rigid adherence to a rule of stare decisis is not justified."

The case of Attorney General v. Blake [(1997) Ch D; (1998) Ch 439 CA; and (2001) 1 A.C.268 HL] has been referred by SIR Richard Buxob in his article How the Common Law Gets Made: Hedley Byrne and Other Cautionary Tales" [(2009) 125 L.Q.R. 60], as decision given per incuriam. Prof.A.W.Brain has prepared a memorandum on the said note. In the particular case in 1961 Blake pleaded guilty to five offences against Official Secrets Act 1911. He had communicated information which he has come to pssess as a member of the Secret Intelligence Service (SIS). He was sentenced o term of 42 years imprisonment. The House of Lords decision stated that Blake wasa member of the security and intelligence. However it is stated by the author that there is no practice of describing the SIS as a security service; it is not concerned with security but with foreign intelliegence, including the sponsorship of espionage and was "an offshoot of some sort of the Foreign Office, possibly also being associated with the Cabinet Office or the Prime Minister's Personal Office." Thus there was no details explained as regards to the employment of Blake and it was not clear. The author states that it was a well settled in 1940s that the relationship between a member of the armed services and the crown was non-contractual. However it is stressed that if the nature of employment of Blake was in civil capacity then the application of above observation needs to be considered. But more importantly, what needs to be addressed is that "to treat incidental undertakings by members of the armed services as actionable contracts would lead to *absurdity". It is also pointed out that "the relationship between the Crown and members of the armed services is and long has been regulated by disciplinary proceedings, by failure to promote, or by retirement, not by the private law of contract or tort. If this position is to be changed by a judicial decision then the court surely needs to attend to the radical nature of such a change." Also it is noted that the "signing the Official Secrets Acts" created a binding contract relating just to one aspect of Blake's duties, is something which is problematic. Thus author states that "the supposed contract case was decided without any careful investigation of the very existence of a binding contract, or of its scope and character, assuming there to have been one. It does not seem to be a good idea to proceed in this way, and at end of day there is therefore a strong case for regarding the decision as having been given per incuriam in their Lordships' attention had never been adequately directed to either the relevant facts or the relevant law." [See A Decision Per Incuriam? -Prof. A.W.Brian Simpson, The Law Quarterly Review, volume 125, July 2009, p.433]*

We have noticed hereinbefore that the premise on which S. Pushpa (supra) was rendered, namely, Marri Chandra Shekhar Rao (supra), had no application to union territories was not correct."

In the present case, in ***Kashmir Chand's*** case (*supra*), the relevant Clause 11 of Policy issued by the Government of Punjab on 17.08.2009 applicable upon the employees, who retired prior to 01.01.2006 has not been noticed or considered and therefore, the said judgment cannot be pressed into operation for seeking relief keeping in view the settled principle of law noticed above.

In view of the above, the present writ petition is dismissed.

(HARSIMRAN SINGH SETHI)
JUDGE

February 11, 2020
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Whether speaking / reasoned Yes
Whether Reportable: Yes