

ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI

T A No.4 of 2012

(OA No.340 of 2012 of the Armed Forces Tribunal, Prl.Bench, New Delhi)

FRIDAY, THE 27TH DAY OF SEPTEMBER, 2013/5TH ASWINA, 1935

CORAM:

HON'BLE MR. JUSTICE SHRIKANT TRIPATHI, MEMBER (J)
HON'BLE LT.GEN.THOMAS MATHEW, PVSM, AVSM, MEMBER (A)

APPLICANT:

WING COMMANDER (RETD). KAMBHALUR SREENIVASA RAO,
(SERVICE NO.15448-S),
ADDRESS: 301-B, SANTOSH APARTMENTS,
2ND MAIN ROAD, AMARA JYOTHI LAYOUT,
SANJAY NAGAR, BANGALORE -094.

BY ADV. SRI. V.K. SATHYANATHAN.

versus

RESPONDENT:

UNION OF INDIA, THROUGH SECRETARY,
MINISTRY OF DEFENCE, GOVT. OF INDIA,
SOUTH BLOCK, NEW DELHI.

BY ADV. SRI. P.J. PHILIP, CENTRAL GOVT. COUNSEL.

ORDER

Shrikant Tripathi, Member (J):

1. Heard Mr. V.K.Sathyanathan for the applicant and Mr.P.J.Philip for the respondents and perused the record.
2. The applicant Wing Commander K.Sreenivasa Rao, has filed the instant petition for a direction to the respondent to fix

his pension with effect from 1.1.2006 according to Para 5 of the Letter No.17(4)/2008(1)/D(Pen/Policy) dated 11.11.2008 (Annexure A2) with all consequential benefits. He filed the instant matter before the Principal Bench, which was transferred to this Bench and is registered here as T.A.No.4 of 2012.

3. The relevant facts are that the applicant was Commissioned in the Indian Air Force on 25.6.1976 and in due course of time he rose to the rank of Wing Commander (Selection Grade) and was ultimately allowed premature retirement in the afternoon of 31.3.2002. He had therefore, rendered 23 years, 9 months and 5 days service. The respondents fixed his pension, according to the recommendations of the Sixth Central Pay Commission with effect from 1.1.2006, at Rs.24143/- and that fixation remained in operation upto 23.9.2012. The respondent reconsidered the matter and fixed the applicant's pension at Rs.24,643/- pm with effect from 24.09.2012.

4. It appears that the respondent issued the Special Air Force Instruction No.2/S/2008 dated 21st April, 2009 (Annexure A3) granting certain benefits to post 1.1.2006 retirees, due to the reason that the Wing Commander who

had been earlier in Pay Band 3 was shifted to Pay Band 4 with Grade Pay of Rs.8000/- and Military Service Pay of Rs.6000/-. Accordingly, the respondent revised the pension of the rank of Wing Commander with effect from 1.1.2006 at the rate of Rs.38,530/- for those who retired on or after 1.1.2006. As the applicant had retired prior to 1.1.2006, he was not made entitled to the benefit so conferred by the aforesaid Special Air Force Instruction.

5. It is also significant to state that for pre 1.1.2006 retired Wing Commanders and Others, separate provision was made by the respondent vide Letter No.17(4)/2008(1)/D(Pen/Policy) dated 11.11.2008 (Annexure A2). Para 4.1, 4.2 and 5 of the said letter being relevant on the point are reproduced as follows:

“4.1. The Pension/Family Pension of existing Pre-1.1.2006 pensioners/ family pensioners will be consolidated with effect from 1.1.2006 by adding together:

- (i) The Existing Pension (including commuted portion of pension, if any)/Existing Family Pension.
- (ii) Dearness Pension, if any, as applicable from 1.4.2004 to those retired/died prior to 1.4.2004,
- (iii) Dearness Relief upto AI CPI (IW) 536 i.e. 24% of basic pension/ family pension plus dearness pension.

- (iv) Fitment weightage @ 40% of the Existing Pension/Family Pension. Where the amount of fitment weightage works out in fraction of a rupee, it will be rounded off to the next higher rupee.

Note: Where the Existing Pension/Existing Family Pension includes the effect of merger of 50% of Dearness Pay in respect of those retired/died on or after 1.4.2004, the existing pension/family pension for the purpose of fitment weightage will be recalculated after excluding the merged Dearness Pay of 50% from emoluments for computation of existing pension/existing family pension. This will be in line with the definition of "Existing Pension" and "Existing Family Pension" given in para 3 of these orders.

4.2 The amount so arrived at in terms of Para 4.1 above will be regarded as consolidated pension/family pension with effect from 1.1.2006. Since the consolidated pension will be inclusive of commuted portion of pension, if any, the amount of pension commuted will be deducted from the said amount while making monthly disbursements.

5. The consolidation of pension will further be subject to the provision that the consolidated pension, in no case, shall be lower than fifty percent of the minimum of the pay in the pay band plus the grade pay corresponding to the pre revised scale from which the pensioner had retired/ discharged including Military Service Pay and 'X' Group where applicable. For example, if a pensioner had retired in the pre revised scale of pay of 6600 - 170 - 9320, the corresponding pay band being 9300 - 34800 and the corresponding grade pay and Military Service Pay being Rs.4600/- and Rs.2000/0 respectively, his minimum guaranteed pension would be 50% of Rs.9300 + Rs.4600 + Rs.2000 i.e. Rs.7950 for 33 years of qualifying service. The pension so calculated will be reduced pro rata, where the pensioner had less than the maximum required service of 33 years for full pension and in no case it will be less than Rs.3500/-. In case the pension consolidated as per Para 4.1 above is higher than the pension calculated in the manner indicated above, the same (higher consolidated pension) will be

treated as Basic Pension with effect from 1.1.2006.

The consolidation of family pension will be subject to the provision that the consolidated family pension, in no case, shall be lower than thirty percent of the sum of the minimum of the pay in the pay band and the grade pay thereon corresponding to the pre-revised pay scale in which the pensioner/deceased Armed Forces Personnel had retired/died including Military Service Pay and 'X' Group pay where applicable. In case the family pension consolidated as per Para 4.1 above is higher than the family pension calculated in the manner indicated above, the same (higher consolidated family pension) will be treated as Basic family pension with effect from 1.1.2006."

6. The aforesaid Government Letter defines "Existing Pension" according to which, basic pension exclusive of Dearness Pension but inclusive of commuted portion of pension due on 31.12.2005 was the existing pension as on 1.1.2006. According to Para 4.1, for fixation of pension of pre-1.1.2006 retired persons, the existing pension, the dearness pension if any applicable from 1.4.2004 to those who retired or died prior to 1.4.2004 and dearness relief upto AI CPI (IW) 536, ie. 24% of basic pension/family pension plus dearness pension and fitment weightage @ 40% of the existing pension/family pension were liable to be computed together, with the condition that in the event of fraction of a rupee, the same was to be rounded off to the next higher rupee. The provisions of the Note appended to

Para 4.1 to the Government Letter are not attracted to the applicant as he had retired prior to 1.4.2004. Para 4.2 provides that the amount arrived in terms of Para 4.1 above will be treated as the consolidated pension/family pension with effect from 1.1.2006 inclusive of commuted portion of pension. So, while fixing the actual amount of pension to be paid to the pensioner, the amount of the commuted pension was liable to be deducted from the amount so arrived. Para 5 of the Government Letter further provides that the consolidated pension arrived at aforesaid shall in no case be less than 50% of the minimum of the pay in the pay band plus the grade pay corresponding to the pre revised scale from which the pensioner had retired/discharged including Military Service Pay and 'X' Group Pay where applicable for 33 years of Qualifying Service. In case the service is less than 33 years, the pension was to be reduced pro rata. But, while so reducing the pension the amount will not be less than Rs.3500/- per month. Para 5 further provides that if the amount of pension consolidated as per para 4.1 is higher than the pension calculated in the manner indicated in para 5, the higher amount will be treated as the Basic Pension as on 1.1.2006.

This is all what the Government Letter dated 11th November, 2008 (Annexure A2) provided.

7. It appears that the respondent proceeded to fix the applicant's Basic Pension as on 1.1.2006 on the basis of the aforesaid provisions of the Government Letter dated 11.11.2008 (Annexure A2), but the applicant claims the benefit of Special Air Force Instruction No.2/S/2008 dated 21st April, 2009 issued in respect of post 1.1.2006 retirees.

8. It is also significant to state that the aforesaid Government Letter dated 11.11.2008 (Annexure A2) was amended from time to time and was lastly amended vide Ministry of Defence letter dated 15.11.2010 and 18.01.2011 and ultimately in order to sort out the disputes and redress the grievances of the applicant and similarly placed persons, the Office of the Principal Controller of Defence Accounts (Pensions), Allahabad issued Circular No.500 dated 17th January, 2013 annexing therewith a copy of the Letter No.1(11)/ 2012-D(Pen/Policy) dated 17th January, 2013 issued by the Government of India, Ministry of Defence,

Department of Ex-Serviceman Welfare and made the following clarification in Para 3 of the said letter, which may be reproduced as follows:

"3. The above recommendation of the Committee has been accepted by the Government and the President is pleased to decide that with effect from 24th September, 2012 the minimum guaranteed pension and ordinary family pension in respect of pre-2006 Commissioned Officers Pensioners/Family Pensioners shall be determined as fifty and thirty percent respectively, of the minimum of the fitment table for the rank in the revised pay band as indicated under fitment table annexed with SAI 2/S/2008 as amended and equivalent instructions for Navy & Air Force and SAI 4/S/2008, plus the Grade Pay corresponding to the pre-revised scale from which the pensioner had retired/discharged/ invalided out/died including Military Service Pay, wherever applicable. It has also been decided that with effect from 24th September, 2012, the minimum guaranteed pension and ordinary family pension in respect of pre-1996 EC/SSC pensioners/ family pensioners shall be determined as fifty and thirty percent respectively, of the pay in the pay band corresponding to the pre-revised pay of Rs.10,500/- (in terms of Para 9(a)(i) of SI 1/S/2008 as amended and equivalent instructions for Navy & Air Force) plus the Grade Pay of Rs.5400 and Military Service Pay of Rs.6000/-."

According to the learned counsel for the respondent, by the

aforesaid letter dated 17th January, 2013 of the Government of India, Ministry of Defence, Department of Exservicemen Welfare and the Circular No.500 of the Office of the Principal Controller of Defence Accounts, Allahabad, the pre 1.1.2006 retired Wing Commanders were also given the benefit of Pay Band 4 with effect from 24th September, 2012, at par with post 1.1.2006 retirees.

9. Mr.V.K.Sathyanathan, appearing for the applicant, submitted that the respondents have adopted dual standard in the matter of fixation of pension between pre and post 1.1.2006 retirees. They adopted different yardstick for post 1.1.2006 retirees, according to which, they have been conferred the benefit of Special Air Force Instructions 2/S/2008 dated 21.4.2009 with effect from 1.1.2006. Consequently, such persons of the rank of Wing Commander was made entitled to minimum basic pension of Rs.25,700 (subject to correction) with effect from 1.1.2006.

10. Mr.Sathyanathan then submitted that whereas in the matter of pre 1.1.2006 retired Wing Commanders, the respondent adopted different yardstick, according to which, they were made entitled to pension as per Annexure A2

letter dated 11.11.2008 with effect from 1.1.2006 upto 23.9.2012. But, any how, the respondent made available the same benefit to pre 1.1.2006 retired Wing Commanders only with effect from 24.9.2012 in terms of the Government Letter dated 17th January, 2013.

11. Mr.Sathyanathan further submitted that the retired Wing Commanders, whether they retired prior to 1.1.2006 or thereafter, belong to a single group and constitute a homogenous class of pensioners. The respondent was not justified in making a micro classification of this group into two, that is, pre 2006 and post 1.1.2006 retirees. This stand of the respondent was violative of Article 14 of the Constitution of India.

12. In support of the aforesaid submissions, Mr.Sathyanathan placed reliance upon the decision of the Principal Bench rendered in O.A.No.106 of 2009 and other connected OA.s decided on 7th December 2011 (in the matter of **Wing Commander V.S.Tomar vs. Union of India and Others**). In that case, the Principal Bench extended the benefit of Special Air Force Instruction No.2/S/2008 dated 21.4.2009 to pre 1.1.2006 retired Wing Commanders. The

Principal Bench directed the respondents to treat the minimum pay for pension purposes as Rs.37,400/- but the order was modified by the Principal Bench vide order dated 25th April, 2013 rendered in R.A.No.7 of 2013, whereby the Principal Bench held that the minimum pay of pre 1.1.2006 retired Wing Commanders should be fixed at Rs.38,530/- per month with effect from 1.1.2006 in place of Rs.37,400/- as ordered earlier.

13. Mr.Sathyanathan lastly submitted that the aforesaid decision of the Principal Bench is squarely applicable in the case of the applicant.

14. Mr.P.J.Philip, on the other hand, submitted that the if the applicant was given the benefit of the aforesaid Special Air Force Instruction No.2/S/2008, he was not entitled to have any weightage for the qualifying service, so his pension was liable to be fixed according to his actual length of service of 23 years, 9 months and 5 days.

15. We have considered the rival submissions and perused the record. We find no reason to take a different view from the view expressed by the Principal Bench. So we

agree with the view of the Principal Bench and proceed to decide the matter accordingly.

16. There are a few decisions of the Apex Court on the point. In the case of **State of Punjab vs. Justice S.S. Dewan**, (1997) 4 SCC 569, the Apex Court very specifically held that in the matter of liberalisation of an existing scheme, all pensioners are entitled to be treated equally but in the matter of introduction of a new retiral benefit, the benefit will not be available to those who retired prior to the introduction of the scheme. The view expressed in **Justice S.S.Dewan's case (supra)** has been reiterated by the Apex Court in the case of **K.J.S. Buttar vs. Union of India**, 2012 (1) AFTLJ 38.

17. Apart from the aforesaid decisions, it is also necessary to refer to a Constitution Bench judgment of the Apex Court in **D.S.Nakara and Others vs. Union of India**, (1983) 1 SCC 305. In that case, the Constitution Bench held that all pensioners must have equal right to receive the benefit of liberalised pension scheme. The petitioners form a class as a whole and could not be micro

classified by an arbitrary, unprincipled and unreasonable eligibility criterion for the purpose of revised pension. The Apex Court further held that criterion of date of enforcement of the revised pension scheme entitling benefits of revision to those retiring after that date while depriving the benefits to those retired prior to that date was violative of Article 14 of the Constitution of India. The Apex Court further laid down the principle that the specified date is to be retained only for the purpose of re-computation of pension of those who retired earlier to it and no arrears can be claimed by such pensioners prior to that date.

18. As the pre 1.1.2006 and post 1.1.2006 retired Wing Commanders belong to the same class, with no reasonable distinction, therefore, the respondent could not be said to be justified in providing beneficial provision for post 1.1.2006 retired persons, denying the benefit to pre 1.1.2006 retired persons. This action of the respondent seems to be violative of the equality clause enshrined in Article 14 of the Constitution of India. We, therefore, hold that the applicant was entitled to the benefit of Special Air Force Instruction No.2/S/2008 dated 21.4.2009 with effect

from 1.1.2006 and his pension was liable to be fixed accordingly.

19. The Transferred Application is allowed. The respondent is directed to refix the pension of the applicant in the light of the observations made hereinbefore after extending him the benefit of Special Air Force Instruction No.2/S/2008 dated 21.4.2009 with effect from 1.1.2006 and pay him the entire arrears within four months from the date of receipt of a copy of this order, failing which the respondent will be liable to pay to the applicant simple interest at 8% per annum on the unpaid amount.

20. Immediately after pronouncing the order, Mr.P.J.Philip, appearing for the respondent submitted that since a point of law of general public importance with regard to cut off date is involved, therefore, the respondent may be allowed leave to appeal to the Supreme Court. In our view, the matter of cut off date for grant of pensionary benefit in respect of pensioners holding them as a homogenous class without any micro classification has already been settled by the Apex Court in **D.S.Nakara's** case (supra), therefore,

the leave prayed for is refused.

21. There will be no order as to costs.

22. Issue free copy of this order to both side.

Sd/-

LT. GEN. THOMAS MATHEW,
MEMBER (A)

Sd/-

JUSTICE SHRIKANT TRIPATHI,
MEMBER (J)

DK.

(True copy)

Prl. Private Secretary