IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. 2503 of 2016 a/w
CWPOA No. 663 of 2020

Reserved on: 02.11.2020.

Decided on: 06 .11.2020.

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1. CWP No 2503 of 2016

Hari Prakash ……Petitioner.

Versus

State of Himachal Pradesh & ors. .....Respondents.

2. CWPOA No. 663 of 2020

Krishan Pal ……Petitioner.

Versus

State of H.P. & anr. .....Respondents.

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, *Judge.*

The Hon'ble Ms. Justice Jyotsna Rewal Dua, *Judge.*

Whether approved for reporting?[1]

For the petitioner : **Mr. B. Nandan Vashishta, Advocate for the petitioner in CWP No. 2503 of 2016.**

Mr. Rajesh Kumar, Advocate, for the petitioner in CWPOA No. 663 of 2020.

For the respondents : **Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Addl. AGs, Ms. Bhupinder Thakur, Ms. Seema Sharma and Mr. Yudhbir Singh Thakur, Dy. AGs for respondents No. 1,2,4 and 5 in CWP No. 2503 of 2016 & for respondents No. 1 and 2 in CWPOA No 663 of 2020.**

Mr. Shashi Shirshoo, CGC, for respondents No. 3 and 6 in CWP No. 2503 of 2016.

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment?***

Jyotsna Rewal Dua, *Judge*

Whether an employee who retired on 31st of a month is entitled to the increment which would have fallen due on 1st of the next month is the question involved in the Civil Writ Petition No. 2503 of 2016.

2. Petitioner was appointed as Technical Assistant in the Department of Industries (Geological wing) on 1.3.1968 in the pay scale of Rs. 250-550. He retired as Senior Hydrogeologist on 31.3.2003 in the pay scale of Rs. 10025-15100(pre-revised). His grievance is that even after rendering twelve months of continuous service from 1.4.2002 to 31.3.2003, he has been retired without giving him the benefit of one increment which was due to him on 1.4.2003. A petition preferred in this regard by the petitioner (T.A No. 530/2015) has been dismissed by the erstwhile H.P. Administrative Tribunal on 8.8.2016. Aggrieved, instant writ petition has been preferred by the petitioner seeking following reliefs:

> *"I. To quash Annexure P-10, the order passed by Hon'ble H.P. Administrative Tribunal dated 8.8.2016 whereby the TA of the petitioner has been dismissed without giving due considerations to the grounds raised by the petitioner in TA.*
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> *II. To strike down the offending part of impugned provision of R 56(a) of Fundamental Rules being unconstitutional to the extent it causes undue hardship and is discriminatory to the petitioner as it deprives him from getting the benefit of due and legitimate one increment even after rendering 12 months continuous and uninterrupted service for the reason that his date of birth falls on 1st April which also happens to be his date of next increment.*
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> *III. Or in the alternative, the Respondents No.1 and 2 may kindly be directed to grant necessary relaxations in favour of the petitioner by invoking the provision of FR-5-A as undue recurring financial hardship has been caused to the petitioner in his pension and pensionary benefits and thereby enabling the petitioner to get the benefits of one increment since the petitioner has already rendered 12 months continuous and uninterrupted service in the time scale of his post but on superannuation, has been illegally deprived of the benefits of one increment due to the wrong interpretation of FR 56(a) by the Respondents, with further prayer to grant consequential necessary benefits flowing therefrom alongwith admissible interest on the arrears accruing thereto".*

3. We have heard learned Counsel for the parties and gone through the record.

3(i). In support of his claim of the increment immediately falling due post retirement, learned Counsel for the petitioner relied upon a judgment passed by the High Court of Judicature at Madras in WP No. 15732 of 2017, titled *P.*

Ayyamperumal vs. *Registrar, CAT* decided on 15.9.2017, wherein it was observed that on completing one year of service from 1.7.2012 to 30.6.2013, the petitioner therein became entitled for the benefit of increment, which accrued to him 'during that period' though the increment fell due on 1.7.2013 when he was not in service. The relevant extract from the judgment is reproduced hereinafter:

> *"6. In the case on hand, the petitioner got retired on 30.06.2013. As per the Central Civil Services (Revised Pay) Rules, 2008, the increment has to be given only on 01.07.2013, but he had been superannuated on 30.06.2013 itself. The judgment referred to by the petitioner in State of Tamil Nadu, rep.by its Secretary to Government, Finance Department and others v. M.Balasubramaniam, reported in CDJ 2012 MHC 6525, was passed under similar circumstances on 20.09.2012, wherein this Court confirmed the order passed in W.P.No.8440 of 2011 allowing the writ petition filed by the employee, by observing that the employee had completed one full year of service from 01.04.2002 to 31.03.2003, which entitled him to the benefit of increment which accrued to him during that period.*
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> *7. The petitioner herein had completed one full year service as on 30.06.2013, but the increment fell due on 01.07.2013, on which date he was not in service. In view of the above judgment of this Court, naturally he has to be treated as having completed one full year of service, though the date of increment falls on the next day of his retirement. Applying the said judgment to the present case, the writ petition is allowed and the impugned order passed by the first respondent-Tribunal dated 21.03.2017 is quashed. The petitioner shall be given one notional increment for the period from 01.07.2012 to 30.06.2013, as he has completed one full year of service, though his increment fell on 01.07.2013, for the purpose of pensionary benefits and not for any other purpose. No costs."*

The SLP (Civil) preferred against this judgment was dismissed in limine by the Hon'ble Apex Court on 23.7.2018 with following order:

> *"Delay condoned.*
>
> *On the facts, we are not inclined to interfere with the impugned judgment and order passed by the High Court of Judicature at Madras.*
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> *The special leave petition is dismissed."*

The review petition against the order dated 23.7.2018 was dismissed on 8.8.2019. Learned Counsel for the petitioner also pressed in service

the judgment passed in WP(C) 10509/2019, titled *Gopal Singh* Vs. *Union of India and others,* decided by a Division Bench of High Court of Delhi on 23.1.2020 whereunder relying upon the judgment in P. Ayyamperumal's case *supra* the writ petition was allowed and respondents therein were directed to grant notional increment to the petitioner w.e.f. 1.7.2019 for the service rendered by him from 1.7.2018 to 30.6.2019. The respondents were further directed to re-fix the pensionary benefits of the petitioner.

Relying upon the above judgments, learned Counsel for the petitioner submitted that in the instant case petitioner had rendered continuous service of twelve months on the date of his retirement but he was not granted the benefit of one increment which was due and admissible to him on 1.4.2003.

3(ii) Opposing the petition, on behalf of the State, learned Additional Advocate General placed reliance upon a decision rendered on 29.7.2020 by the Madhya Pradesh High Court in *Madhav Singh Tomar & ors.* vs. *M.P. Power Management Co. Ltd. & ors., (WP No. 9940 of 2020*) wherein relying upon an earlier order passed by a Division Bench of the High Court on 10.7.2017 in writ appeal No. 717 of 2016, the writ petition claiming next annual increment due immediately after retirement was dismissed keeping in view the Fundamental Rules governing service conditions of the petitioner. Reliance was also placed by learned Additional Advocate General upon a Full Bench decision of Andhra Pradesh High Court delivered on 27.1.2005 in ***Principal Accountant General*** vs. ***C. Subba Rao 2005 Lab I.C. 1224*** where the impugned order of the Tribunal holding the employee entitled to an annual increment that fell due on 1.1.2002 after his retirement on 31.12.2001 was quashed and set aside. Relevant extract from the judgment is as under :-

"16. As per F.R. 17, extracted hereinabove, a Government servant shall begin to draw the pay and allowances attached to his post with effect from the date when he assumes the duties of that post until he ceases to discharge those duties. "Pay" as defined in F.R.9(21)(a) means, the amount drawn monthly by a Government servant which also includes the increment given at an anterior date. Therefore, after retirement, a person will not be entitled to any pay including the increment that may be due from the posterior date. F.R.22 regulates the initial pay of a Government servant who is appointed to a post in time-scale and F.R.24 and F.R.26 regulate the sanction of increment to a Government servant, who is on duty. A reading of various Fundamental Rules extracted hereinabove would show that a person appointed as a Government servant is entitled to pay in time- scale of pay. He is also entitled to draw the increment as per time-scale of pay as a matter of course as long as such Government servant discharges duties of the post and such Government servant shall not be entitled to draw the pay and allowances attached to the post as soon as he ceases to discharge those duties. In other words, as per F.R. 17 read with F.Rs.24 and 26 annual increment is given to a Government servant to enable him to discharge duty and draw pay and allowances attached to the post. If such Government servant ceases to discharge duties by any reason say, by reason of attainment of age of superannuation, such Government servant will not be entitled to draw pay and allowances. As a necessary corollary, such employee would not be entitled to any increment if it falls due after the date of retirement, be it on the next day of retirement or sometime thereafter.

17. F.R.56(a) creates a legal fiction. Even if a person attains the age of 60 years on any day of the month, he shall be retired on the afternoon of the last day of the month. A Government servant, who attains the age of 60 years on any day in a month, is deemed to have not attained the superannuation till the last day of the month. In the case of a Government servant, whose date of birth is first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of 60 years. In this case, actually and factually, a Government servant would have completed the age of 60 years a day before the date on which his date of birth falls. Therefore, there are two situations. In the first situation, a Government servant though he attains the age of 60 years on any day of the month, he is deemed to have not attained such age till the afternoon of the last day of that month. Assuming that such a situation is not contemplated - as in the case of persons holding constitutional offices like, Judges of Supreme Court, High Court, Members of Election Commission, Comptroller and Auditor General etc; if a Government servant is retired on a day before the actual date of birth on any day of the month and the increment of such Government servant falls on the first of the succeeding month, can he claim annual grade increment? The answer must be an emphatic "no". Because, by the date on which the increment falls due, such Government servant ceased to be a Government servant. It is therefore logical and reasonable to conclude that merely because for the purpose of F.R.56(a), a person is continued till the last date of the month in which he attains the age of superannuation, such an employee cannot claim increment which falls due on the first day of the succeeding month after retirement."

4(i). Fundamental Rules ('FR' in short) govern all general conditions of service of employees. FR 56 relates retirement of an employee. The relevant part of the Rule 56(a) reads as under:-

F.R. 56(a) *Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:*

Provided that a Government servant whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years.

Provided further that a Government servant who has attained the age of fifty-eight years on or before the first day of May, 1998 and is on extension in service, shall retire from the service on expiry of his extended period of service.

Or on the expiry of any further extension in service granted by the Central Government in public interest, provided that no such extension in service shall be granted beyond the age of 60 years."

In terms of FR 56(a), a Government servant retires on the last day of the month in which he attains age of superannuation. In case his date of birth is the first of a month, then he shall retire on the afternoon of the last day of the preceding month on attaining age of superannuation. Petitioner with date of birth as 01.04.1945 had retired from sevice on 31.03.2003 on attaining 58 years of age of superannuation.

4(ii) The day when the government employee retires has to be treated as his last working day. FR 17(1) provides that an officer shall begin to draw pay and allowances attached to the post w.e.f. the date when he assumes duties of that post and shall cease to draw them as soon as he ceases to discharge those duties. The rule reads as under:

*"**F.R. 17(1)** Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties."*

Rule 5 of CCS Pension Rules says that date of retirement of the person shall be treated as his last working day and his claim to pension shall be regulated by provisions of rules in force at the time of his retirement. The Rule reads as under :-

"5.***Regulation of claims to pension or family pension***

(1) Any claim to pension or family pension shall be regulated by the provisions of these rules in force at the time when a Government servant retires or is retired or is discharged or is allowed to resign from service or dies, as the case may be.

> *(2) The day on which a Government servant retires or is retired or is discharged or is allowed to resign from service, as the case may be, shall be treated as his last working day. The date of death shall also be treated as a working day"*

Under Rule 83(1) of CCS Pension Rules, pension becomes payable from the date a Government servant ceases to be borne on the establishment. The Rule is extracted hereinafter :-

> **"83 Date from which pension becomes payable**
>
> *(1) Except in the case of a Government servant to whom the provisions of Rule 37 apply and subject to the provisions of Rules 9 and 69, a pension other than family pension shall become payable from the date on which a Government servant ceases to be borne on the establishment."*

Rule 34 of CCS Pension Rules provides for determination of average emoluments with reference to emoluments drawn by a Government servant during last ten months of the service. Under Rule 33 'emoluments' means basic pay as defined in Rule 9(21) (a) (i) of Fundamental Rules which a Government servant was receiving immediately before his retirement. Rule 33 is as under :-

> **"33. Emoluments**
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> *"The expression `emoluments' means basic pay as defined in Rule 9 (21) (a) (i) of the Fundamental Rules which a Government servant was receiving immediately before his retirement or on the date of his death ; and will also include non-practising allowance granted to medical officer in lieu of private practice.*
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> *EXPLANATION. - Stagnation increment shall be treated as emoluments for calculation of retirement benefits."*

The petitioner was not on duty on 1.4.2003. Increment can be drawn only when an employee is on duty. The increment in terms of FR 24 & 26 did not become due during the period of service of the petitioner. Therefore, increment on 1.4.2003 cannot be sanctioned in favour of petitioner on the ground that he had completed twelve months of continuous service. The date of increment falls due on the first day of the succeeding month after the retirement. Petitioner retired on the basic pay drawn by him on 31.3.2003 i.e. his date of retirement. His pension has to be determined accordingly. Petitioner had become a pensioner on 1.04.2003. He cannot be held entitled to any increment which may

fall due post his retirement. He is entitled only to those increments which fall due to him during the period of his service.

4(iii) Learned counsel for the petitioner contended that in P. Ayyamperumal's case (supra) a direction was issued to the respondents to grant the employee one notional increment for the purpose of pensionary benefits for the period 01.07.2012 to 30.06.2013 as he had completed one full year of service on his retirement on 30.06.2013 even though next increment fell due on 01.07.2013. He further submitted that since the SLP against this judgment was dismissed by the apex Court on 23.07.2018 and review petition was also dismissed on 08.08.2019, therefore, the legal position has now been settled by the apex Court that the increment which falls due on the day immediately following the day of retirement, has to be granted to the employee on the ground that he had completed 12 months of service on the date of his retirement.

The aforesaid contention of learned counsel is untenable. It is settled law that an order refusing Special Leave to Appeal may either be a speaking order or the non speaking one. In either case, it will not attract doctrine of merger. In the instant case, the order refusing Special Leave to Appeal is non speaking, therefore, it does not stand substituted in place of the order under challenge. In this regard, it would be appropriate to refer to paragraph 44 of the judgment passed by apex Court in **(2000) 6 SCC 359** titled **Kunhayammed and others** Vs. **State of Kerala and another,** relied upon in (**2019) 4 SCC 376**, titled **Khoday Distilleries Limited and others** Vs. **Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal.**

> *"44. To sum up our conclusions are :-*
> *(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.*
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> *(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an*

appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimite application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non- speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C."

In **(2019) 6 SCC 270,** titled **State of Orissa and another** Vs. **Dhirendra Sunder Das and others**, principle of law was reiterated that dismissal of an SLP in limine without giving any detailed reason does not constitute any declaration of law or a binding precedent under Article 141. The relevant paragraph is reproduced hereinbelow :-

> *"9.27 It is a well settled principle of law emerging from a catena of decisions of this Court, including Supreme Court Employees' Welfare Association v. Union of India & Anr. (1989) 4 SCC 187 and State of Punjab v. Davinder Pal Singh Bhullar (2011) 14 SCC 770, that the dismissal of a S.L.P. in limine simply implies that the case before this Court was not considered worthy of examination for a reason, which may be other than the merits of the case. Such in limine dismissal at the threshold without giving any detailed reasons, does not constitute any declaration of law or a binding precedent under Article 141 of the Constitution".*

In **(2020) 5 SCC 421,** titled **Union of India and others** Vs. **M.V. Mohanan Nair**, it was held that the law declared by the Supreme Court has to be essentially understood as a principle laid by the Court and it is this principle which has the effect of a precedent. A principle can be delivered only after examination of the matter on merits and not on the basis of a decision delivered on technical grounds without entering into the merits at all. A decision unaccompanied by reasons cannot be said to be a law declared by the Supreme Court though it will bind the parties inter se in the litigation. The relevant paragraph of the judgment (supra) is reproduced hereinbelow :-

> *"48. Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India, i.e. the pronouncement of the law on the point shall operate as a binding precedent on all courts within India. Law declared by the Supreme Court has to be essentially understood as a principle laid down by the court and it is this principle which has the effect of a precedent. A principle as understood from the word itself is a proposition which can only be delivered after examination of the matter on merits. It can never be in a summary manner, much less be rendered in a decision delivered on technical grounds, without entering into the merits at all. A decision, unaccompanied by reasons can never be said to be a law declared by the Supreme Court though it will bind the parties inter-se in drawing the curtain on the litigation. In Union of India v. All India Service Pensioners' Association and another (1988) 2 SCC 580, the Supreme Court held that "when reasons were made by the Supreme Court for dismissing the SLP, the decision becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India."*

Therefore, it cannot be said that by dismissal of SLP against the judgment rendered in P. Ayyamperumal's case (supra), the apex Court had laid down the binding principle of law that increment which falls due on first day post the retirement of an employee is to be granted to him only for the reason that he had rendered 12 months of service on the day of his retirement.

Learned Tribunal rightly held that power to relax requirement of a rule, provided under F.R.5-A can be exercised only in consonance with the rule and not in a routine manner. Petitioner had retired on 31.03.2003. It was in 2014 that he moved representations seeking claim on the increment which would have fallen due on 01.04.2003. We have already held that petitioner had retired on 31.03.2003 on the basis of pay drawn by him on that date. His status as on 01.04.2003 was that of a pensioner. Therefore, increment which fell on 01.04.2003 cannot be granted in his favour.

No other point was urged by the learned counsel.

For the foregoing reasons, we find no merit in the present writ petition and the same is accordingly dismissed. Pending applications, if any, also stand disposed of.

CWPOA No. 63 of 2020

The petitioner, a Junior Basic Teacher, with 01.03.1958 as his date of birth was due for superannuation on 29.02.2016. The date of his annual increment was 1st March of every year. He being a State awardee was granted an extension of one year in service in light of State Government instruction, dated 30.11.2015. After availing the extended service, petitioner superannuated on 28.02.2017. His representation requesting one day extension in service has been rejected. Hence he has preferred instant writ petition to claim increment which fell on 01.03.2017. Point involved is covered by the discussions made above. This writ petition is, therefore, also dismissed. Pending applications, if any, also stand disposed of.

(Tarlok Singh Chauhan),
Judge

November 11, 2020
vandana

(Jyotsna Rewal Dua),
Judge