

MAHARASHTRA ADMINISTRATIVE TRIBUNAL
NAGPUR BENCH NAGPUR
ORIGINAL APPLICATION NO. 667/2020

Shilpa Maroti Kharapkar,
Aged about 39 years,
R/o O/o District Sainik Welfare Officer,
Nagpur.

Applicant.

Versus

- 1) The State of Maharashtra,
Through its Secretary,
General Administration Department,
Mantralaya, Mumbai-400 032.
- 2) The Director of Sainik Welfare,
(M.S.), Pune.
- 3) Pay Verification Unit,
Joint Director of Accounts and Treasuries,
Nagpur.
- 4) Pay Verification Unit through
Accounts Officer, Treasury, Wardha.

Respondents

Shri Tushar D. Mandekar, Ld. counsel for the applicant.
Shri S.A. Sainis, Ld. P.O. for the respondents.

Coram:- Hon'ble Shri M.A. Lovekar, Member (J).

Dated: - 3rd February, 2022.

Heard Shri Tushar D. Mandekar, learned counsel for the applicant and Shri S.A. Sainis, Ld. P.O. for the respondents.

2. Facts leading to this application are as follows:-

On completion of tenure of five years of short service commission in Army, the applicant was released on 25.4.2013 (Annexure A-1). She was holding a rank of Major at the time of release. In response to the advertisement (Annexure A-2), issued by M.P.S.C., she applied for the

post of District Sainik Welfare Officer reserved for ex-service personnel. She was selected against the vacancy reserved for OBC (Female) and posted at Wardha (Annexures A-3 and A-5). District Collector, Wardha being the Administrative Head fixed pay of the applicant vide order dated 8.1.2019 (Annexure A-6) on the basis of option given by her (Annexure A-16), her last pay certificate (Annexure A-7), G.R. dated 11.7.2012 (Annexure A-8) and Rule 162 (a) of M.C.S. (Pension) Rules, 1982. Vide order dated 13.9.2019 (Annexure A-9), respondent No.2 re-fixed pay of the applicant *inter alia* on the basis of G.Rs dated 2.6.1992 (Annexure A-12) and 30.8.2019 (Annexure A-17) as well as Rule 8 of M.C.S. (Revised Pay) Rules, 2019. Against this re-fixation, the applicant made a representation (Annexure A-10) dated 23.12.2019 to respondent No.1 and submitted as to why her pay ought not to have been fixed on the basis of G.R. dated 2.6.1992. Vide communication dated 16.9.2020 (Annexure A-11), the applicant was informed that her pay was rightly fixed as per G.R. dated 2.6.1992. In case of one Smt. Kori whose case was identical and with whom, according to the applicant, she could claim parity, respondent No.4 had opined vide Annexure A-13 dated 12.3.2013 that Smt. Kori's pay scale was to be fixed as per G.R. dated 11.7.2012. Communication dated 12.11.2018 (Annexure A-14) issued by Kendriya Sainik Board, New Delhi shows that last pay drawn by officers of Short Service Commission should be protected on their re-employment in State service. The applicant is getting salary (Annexure A-15) as per re-fixation made by respondent No.2 which is arbitrary.

Thus, grievance of the applicant in nutshell is that her pay fixation made by District Collector, Wardha should be restored and re-fixation made by respondent No.2 be set aside.

3. By their reply at pages 44 to 50, respondent Nos. 1 and 2 resisted the application on the following grounds:-

Grounds

- (a) Pay fixation made by District Collector, Wardha by relying upon G.R. dated 11.7.2012 was erroneous.
- (b) Respondent No.2, the Competent Authority rightly re-fixed pay of the applicant as per G.R. dated 2.6.1992.
- (c) Finance Department, Government of Maharashtra turned down request of the applicant to fix her pay as per G.R. dated 11.7.2012 on the ground that the said G.R. was applicable only to Regular Commissioned Officers and not to Short Service Commissioned Officers.
- (d) G.R. dated 2.6.1992 is applicable to both—emergency period Commissioned Officers as well as Short Service Commissioned Officers who are re-employed in State Civil Service.
- (e) Regular Commissioned Officers and Short Service Commissioned Officers cannot be treated to be on par. The former put in qualifying service for getting pensionary benefits while the latter do not.

(f) While re-fixing pay of the applicant as per G.R. dated 2.6.1992, benefit of increment was given to her as per number of years of her commission in defence service.

4. By filing reply at pages 52 to 54, respondent No.3 prayed for his deletion on the ground that he is not a necessary party.

5. By filing return / additional reply at pages 59 to 62, respondent Nos. 1 and 2 contended that for all Zilla Sainik Welfare Officers, respondent No.2 is Head of the Department as specified in Government Corrigendum dated 6.8.2018 (Annexure R-3), there was no delegation of powers in favour of District Collector, Wardha to fix pay of the applicant, this power vested in respondent No.2 and he exercised it properly by re-fixing pay of the applicant.

6. Affidavit-in-reply filed on behalf of respondent No.3 is at pages 74 to 78. According to the deponent, only respondent No.2 had power to fix pay of the applicant which he did as per relevant Rules and G.R. dated 2.6.1992. To this reply, *inter alia*, communication dated 16.9.2020 received from Under Secretary, Government of Maharashtra is attached at page No.85. Relevant portion of this communication reads—

“अ. वित्त विभाग, शासन निर्णय दिनांक ११.७.२०१२ व सुधारित दिनांक ३०.८.२०१९ हे शासन निर्णय राजादिष्ट अधिकारी पदावरून सेवानिवृत्त अधिकाऱ्यांसाठी लागू असून दिनांक ३०.८.२०१९ च्या शासन निर्णयातील परिच्छेद क्र.११ मध्ये स्पष्ट करण्यात आले आहे की, लघुसेवा राजादिष्टित अधिकारी संवर्गाची वेतननिश्चिती ही सामान्य प्रशासन विभागाच्या दिनांक २.६.१९९२ प्रमाणेच होईल, त्यामुळे लघुसेवा राजादिष्टित अधिकारी यांची वेतननिश्चिती साप्रवी, शा. नि. दिनांक २.६.१९९२ नुसार करणे अपेक्षित आहे”.

7. Rejoinder of the applicant at pages 103 to 139 contains following grounds:-

(a) The applicant was re-employed on the post reserved for OBC (Female).

(b) Condition No.12 in her letter of appointment (Annexure A-4) specified that she would be governed by relevant Maharashtra Civil Services Rules. This condition reads as under:-

“वर नमूद केलेल्या विनिर्दिष्ट अटी व शर्ती व्यतिरिक्त महाराष्ट्र शासनाच्या गट-अ अधिकाऱ्यांना लागू असलेले सर्व नागरी सेवाविषयक नियम या अधिकाऱ्यांना लागू राहतील.”

(c) The applicant joined at Wardha. The District Collector, Wardha signed her joining report (Annexure A-15).

(d) At the time of her joining, G.R. dated 11.7.2012 was in place. She gave option (Annexure A-16) to fix her pay as per Rule 162 of M.C.S. (Pension) Rules, 1982 which was applicable to her case.

(e) Respondent No.2 ought not to have re-fixed pay of the applicant on the basis of G.R. dated 30.8.2019 (Annexure A-17).

(f) Pay of the applicant could not have been re-fixed as per G.R. dated 2.6.1992 as it applies only to Emergency Military Officers and officers appointed on unreserved posts. The applicant did not fall in either of these categories.

(g) Director, Kendriya Sainik Board, Ministry of Defence, Government of India has communicated vide letter dated 12.11.2018 as follows:-

4. The Central Civil Services (Revised Pay) Rules, 2016 promulgated vide GOI, DOPT letter No. 3/3//2016-Estt. (Pay II) dated 1st May 2017 Para 8 (iv), applicable for fixation / drawal of pay in all other cases (deemed appropriate for your case) reads:-

“Pay fixation in cases not covered in order 4 (D) will be as per the general principle “pay minus pension” while the last pay drawn shall be reckoned for pay fixation, the entire pension shall be deducted from the pay so fixed.”

5. From the above, it can be construed that **in the case of Short Service Officers (SSC) or non-pensioners the last pay drawn may be reckoned for pay fixation as their pension element is zero.** Therefore, it is suggested that you may like to request your State Government to consider the same for employment of SSC / non-pensioner officer for appointments.

In continuation of this communication, e-mail dated 13.7.2020 (Annexure A-18) reiterates that for pay fixation on re-employment, last pay drawn by Short Service Commissioned Officers shall be reckoned. This guideline was then modified by subsequent mail in which the word, “shall” was substituted by the word, “should”.

(h) G.Rs or Government Circulars cannot supersede statutory Rules. Hence, Rule 162 of M.C.S. (Pension) Rules, 1982 which is squarely applicable to the case of the applicant will prevail while fixing her pay.

(i) G.R. dated 2.6.1992 applies to specified categories of officers. It is silent about how to deal with cases like those of the applicant

who neither served during emergency nor was appointed to unreserved post. In this scenario, Rules 41 and 162 of M.C.S. (Pension) Rules, 1982 which are clear and unambiguous should be pressed into service. This conclusion would receive further support from G.R. dated 4.10.1976 (Annexure A-21), heading of which reads—

“Emergency Commissioned Officers and Short Service Commissioned Officers-Fixation of pay in the Civil posts on appointment to unreserved vacancies.”

(j) By writing letter dated 4.1.2021 (Annexure A-22), respondent No.2 tried to influence Pay Verification Unit with regard to pay fixation of the applicant as per G.R. dated 2.6.1992. This was done with ulterior motive.

(k) Initially, pay of the applicant was rightly fixed by the competent authority i.e. District Collector, Wardha. This exercise ought not to have been undone by re-fixing her pay.

(l) Conjoint consideration of Rules 41 and 162 of M.C.S. (Pension) Rules, 1982 would unmistakably lead to the conclusion that last pay drawn by officers like the applicant is required to be protected when they are re-employed in State Civil Service.

(m) As per Rule 9 (37) of the M.C.S. (Pension) Rules, 1982, “Pension” includes a gratuity. This definition, read with Rules 41 and 162 of the M.C.S. (Pension) Rules, 1982 would further strengthen case of the applicant about protection of last pay drawn by her before re-employment in State Civil Service.

(n) Definition of "Pension" as per Article 366 (17) of the Constitution of India also suggests that pay fixation of the applicant made on the basis of Rule 162 of M.C.S. (Pension) Rules, 1982 and G.R. dated 11.7.2012 is proper.

(o) Reliance ought not to have been placed on G.R. dated 30.8.2019 by respondent No.2 to re-fix pay of the applicant which was already fixed on 8.1.2019 by District Collector, Wardha after the applicant had exercised option to fix her pay as per Rule 162 of M.C.S. (Pension) Rules, 1982, This option was exercised as provided under M.C.S. (Revised Pay) Rules, 2009 and Circular dated 29.4.2009 (Annexure A-23) issued in that behalf.

(p) G.R. dated 6.8.2001 (Annexure A-25) is about re-employed pensioners / Regulation of pay in the revised pay-scales. Its contents also support case of the applicant.

8. In her additional affidavit dated 13.1.2022, the applicant has additionally contended as follows:-

(a) Rule 2 (B) of the Maharashtra Released Defence Service Personnel defines Released Defence Service Personnel as under:-

"Rule 2 (B) Released Defence Service Personnel means Emergency Commissioned Officers / Short Service Regular Commissioned Officers and other ranks who have been released by the Defence services after completion of a fix tenure."

(b) Rule 162 of M.C.S. (Pension) Rules, 1982 which applies to the applicant reads as under :-

"162. Fixation of pay of Military pensioner on re-employment in Civil Department.

Where a pensioner formerly in Military service, obtains employment in Civil Department after having been granted a Military pension and continues to draw his Military pension, the authority competent to fix the pay and allowances of the post in which he is re-employed shall, in fixing his pay and allowances in the post reduce his initial pay in the post by the amount of pension, including such portion of it as may have been commuted and fix the pay as under:-

- (a) In the case of Commissioned Officers pay on re-employment plus full Military pension (including pension equivalent of death-cum-retirement gratuity or gratuity in lieu of pension, if any) should not exceed the pay drawn before retirement (i.e. basic pay other than allowances of any kind.)

Provided that, where the pay so fixed is not a stage in the time scale, it should be fixed at the stage next below that pay plus personal pay equal to the difference, and, in either case he will continue to draw that pay until such time as he would have earned an increment in the time scale of the new post:

Provided further that, where the pay so fixed is less than the minimum of the scale, it may be fixed at the minimum.

- (ii) In the case of persons retiring before attaining the age of 55 years, the amount of pension as shown below shall be ignored in fixing their pay on re-employment.

Note:- The pension for the purpose of (a) (ii) above shall include pension equivalent of death-cum-retirement gratuity or gratuity in lieu of pension, if any.

- (b) In the case of Junior Commissioned Officers and below, pay on re-employment shall be fixed at a stage in the time scale which is equal to the last pay drawn (i.e. basic pay other than allowances of any kind) ignoring the pensionary benefits.

(c) Once the pay is fixed, he shall be allowed to draw normal increments in the time scale of the new post.

Note:- For the purpose of this rule.

- (a) Commissioned Officers shall include
- (1) Field Marshal,
 - (2) General,
 - (3) Lt. General,
 - (4) Major General,
 - (5) Brigadier,
 - (6) Colonel,
 - (7) Lt. Colonel,
 - (8) Major,
 - (9) Captain,
 - (10) Lieutenant.”

(c) Definition of “Pension” in Rule 9 (37) reads as under:-

“**Rule 9 (37)**- Unless the context otherwise requires, the terms defined in this Chapter are used in the various sets of the M.C.S.R, in the sense here explained:-

Pension includes a gratuity.”

The applicant received gratuity as can be seen from letter dated 19.3.2021 (Annexure A-26).

(d) Clause-11 of the G.R. dated 30.8.2019 is totally against M.C.S.(Pension) Rules, 1982. This Clause reads as under:-

“**Clause-11**-सादर शासन निर्णय लघुसेवा राजादीष्टीत अधिकारी संवर्गास लागू नसून लघुसेवा राजादीष्टीत अधिकारी संवर्गाची वेतननिश्चीती ही सामान्य प्रशासन विभागाच्या शासन निर्णय क्रं. आरटीए-1086/3179/प्र.क्र. 219/91/28 दिनांक 2 जून 1992 प्रमाणेच होईल.”

(e) In the judgment (Annexure A-27), the Delhi High Court held that retired Army Officer upon re-appointment in Government service is entitled to his basic pay being fixed on par with his last drawn salary. This ruling was not interfered with by the Hon'ble Supreme Court as can be gathered from order passed on 23.11.2015 (Annexure A-28).

9. The applicant has relied on her pay fixation made by District Collector, Wardha on 8.1.2019 (Annexure A-6). This fixation was made on the basis of para 3 (2) of G.R. dated 11.7.2012 (Annexure A-8) and option (Annexure A-16) exercised by the applicant. Para 3 (2) of Annexure A-8 is as under:-

“3 (2)- दिनांक १.१.२००६ रोजी किवा त्यानंतर सैनिकी सेवेतून राजादिष्ट पदावरून सेवानिवृत्त होऊन दिनांक १.१.२००६ रोजी किवा त्यानंतर राज्याच्या नागरी सेवेत पुनर्नियुक्त झालेल्या माजी सैनिकांची वेतननिश्चिती खालीलप्रमाणे करावी: संबंधित राजादिष्ट अधिकाऱ्यास सैनिकी सेवेतून सेवानिवृत्त होताना त्याचे सहाय्या वेतन आयोगानुसार निश्चित झालेले अंतिम मूळ वेतन (मूळ वेतन + गुड सर्विस पे + क्लास पे + एक्स ग्रुप पे, रँक पे) वजा सैनिकी सेवेतील सुधारित निवृत्तिवेतन (सैनिकी सेवेतील सुधारित निवृत्तिवेतन वजा दुर्लक्षित रक्कम) + नागरी सेवेत तो ज्या पदावर तो नियुक्त झाला आहे, त्या पदाचे ग्रेड वेतन एवढे वेतन अनुज्ञेय करावे. मात्र असे वेतन अनुज्ञेय करत असताना म.ना.से. (निवृत्तिवेतन) नियम १९८२ मधील नियम १६२ (ए) नुसार पुनर्नियुक्तीचे वेतन + निवृत्तिवेतन यांची बेरीज सैनिकी सेवेतील अंतिम वेतनापेक्षा अधिक असता कामा नये. त्यामुळे सैन्यातील अंतिम वेतन वजा सैनिकी सेवेतील सुधारित निवृत्तिवेतनातून दुर्लक्षित निवृत्तिवेतन वजा करून येणारी रक्कम वजा नागरी सेवेतील पदाचे ग्रेड वेतन) एवढे वेतन व नागरी सेवेतील पदाचे ग्रेड वेतन अनुज्ञेय करावे. उपरोक्त २ व ३ या दोनही संवर्गामध्ये दि. २ जुलै ते

१ जानेवारी या कालावधित नियुक्त झालेल्या कर्मचाऱ्यास पुढील १ जुलै रोजी वेतनवाढ अनुज्ञेय राहिल तर २ जानेवारी ते दि. ३० जून या कालावधित नियुक्त झालेल्या कर्मचाऱ्यास पुढील वर्षाच्या १ जुलै रोजी वेतनवाढ अनुज्ञेय राहिल.”

10. According to the respondents, G.R. dated 11.7.2012 was applicable to those defence personnel who had retired and were then re-employed. It was submitted that after her Short Service Commission, the applicant was “released” and not “retired”. Shri S.A. Sainis, the learned P.O. relied on the heading of G.R. dated 11.7.2012. Said heading is as follows:-

“सैनिकी सेवेतून सेवानिवृत्त होऊन नागरी सेवेत पुनर्नियुक्त होणाऱ्या कर्मचाऱ्याची सुधारित वेतनश्रेणीत वेतननिश्चिती करण्याबाबत.”

He further relied on repeated use of the word “सेवानिवृत्त” in G.R. dated 11.7.2012 to contend that this G.R. was clearly not applicable to the applicant who was “released” after tenure of five years of her Short Service Commission came to an end.

Advocate Shri Tushar Mandlekar, conceded that the applicant was “released”, but he submitted that even then pay fixation made on 8.1.2019 by District Collector, Wardha will have to be restored. According to him, mere nomenclature “released” or “retired” will not be decisive.

11. It was further submitted by Advocate Shri Tushar Mandlekar, that on the date of giving appointment to the applicant i.e. 10.9.2018, G.R. dated 11.7.2012 was in place and, therefore, pay fixation was rightly made by relying on the same. This submission cannot be accepted. On 10.9.2018, G.R. dated

2.6.1992 was also in place. It was not superseded by G.R. dated 11.7.2012. Both these G.Rs were operative. They were issued to take care of distinct contingencies. Therefore, by considering the facts in totality, it will have to be determined whether G.R. dated 11.7.2012 was applicable to the case of the applicant.

12. It was further argued by Advocate Shri Tushar Mandlekar that the applicant had exercised option for fixing her pay as per Rule 162 (a) of M.C.S. (Pension) Rules, 1982 in preference to the other option of fixing her pay under Rule 8 of the M.C.S. (Revised Pay) Rules and hence, pay fixation made by District Collector, Wardha under Rule 162 (a) of M.C.S. (Pension) Rules, 1982 ought not to have been revised. The mere fact of giving option would not be decisive. It cannot act as estoppel. It will have to be determined whether pay of the applicant could be fixed under Rule 162 (a) of M.C.S. (Pension) Rules, 1982.

13. It was further submitted by Advocate Shri Tushar Mandlekar that the applicant was appointed to Grade-A post in State of Maharashtra and hence she could exercise option for fixing her pay under Rule 162 (a) of M.C.S. (Pension) Rules, 1982. I have already quoted Rule 162 above. Attention of this Tribunal was invited to Note-8 in which rank of "Major" is mentioned. Admittedly, at the time of completion of her tenure in Short Service Commission, the applicant held the rank of "Major".

14. On behalf of the applicant, further reliance was placed on definition of "Pension" under Rule 9 (37) of M.C.S. (Pension) Rules, 1982 and also under Article 366 (17) of the Constitution of India. These definitions have been quoted above.

15. According to the applicant, since she was paid gratuity as reflected in Annexure A-26, it can be concluded that she had received pension and hence her pay was rightly fixed under Rule 162 (a) of M.C.S. (Pension) Rules, 1982 and G.R. dated 11.7.2012.

16. It was further argued by Advocate Shri Tushar Mandlekar that pay fixation of the applicant as made by District Collector, Wardha was based not only on Rule 162 (a) of M.C.S. (Pension) Rules, 1982, but also on Rule 41 of M.C.S. (Pension) Rules, 1982 and conjoint consideration of these two Rules would show that pay fixation made by District Collector, Wardha was proper. Rule 41 of M.C.S. (Pension) Rules, 1982 reads as under:-

Rule 41. Other cases in which Military service counts as service for pension.

(a) In any case not covered by rule 40, a competent authority may be general or special order direct that the Military service performed by any Govt. servant, after attaining age of 18 years, who before entering civil employ was in Military employ but did not earn a pension in Military employ, shall be treated as service qualifying for pension. In issuing such an order the competent authority shall specify the method by which the amount of service shall be calculated and may impose any condition which it may think fit,

Provided—

- (1) that the Military service must have been pensionable under military rules;
- (2) that the Military service must have been paid from Consolidated Fund of India or of State or pensionary contribution for that service must have been received by Consolidated Fund of India or of State; and
- (3) that, if the service is treated as service qualifying for civil pension any bonus or gratuity received in lieu of

pension on or since discharge from Military service must be refunded in not more than 36 monthly instalments from such date as the competent authority may direct.”

17. It was further argued by Advocate Shri Tushar Mandlekar that pay fixation of the applicant made on the basis of Rule 162 (a) of M.C.S. (Pension) Rules, 1982 having statutory force, could not have been effaced by G.Rs dated 2.6.1992 and 30.8.2019. It was submitted that legitimate claim of the applicant based on proper reading of Rule 162 (a) and Rule 41 of M.C.S. (Pension) Rules, 1982, cannot be allowed to be defeated by afore-quoted Clause-11 in G.R. dated 30.8.2019.

Apart from Clause-11 of G.R. dated 30.8.2019, Clause-14 would also be relevant. It reads—

“Clause-14—वेतननिश्चिती संदर्भातील महाराष्ट्र नागरी सेवा (निवृत्तीवेतन) नियम, 1982 मधील नियम १६२ (ए) व १६२ (बी) मधील तरतुदी या शासन निर्णयातील तरतुदींच्या मर्यादेत सुधारण्यात आल्या आहेत, असे समजण्यात यावे.”

18. It was further submitted by Advocate Shri Tushar Mandlekar that G.R. dated 2.6.1992 applies to only those personnel mentioned therein, the applicant admittedly did not fall in either of these categories and hence it ought not to have been relied upon. Reply of the respondents on this point is to be found in paras 9,10 and 11 (Page 47) of say filed by respondent Nos. 1 and 2. It is as follows:-

“9. It is submitted that provisions of General Administration Department, G.R. dated 2.6.1992 are applicable to Emergency Period Commissioned Officers and Short Service Commissioned Officers or the officers who have joined services after 10.1.1968

and appointed in State Civil Services on unreserved posts. The applicant being Short Service Commissioned Officer is entitled for the fixation of pay as per the provisions of G.A.D. G.R. dated 2.6.1992.

10. It is submitted that, the expression, "Emergency Commissioned Officers" as reflected in G.R. dated 2.6.1992 is defined to mean, "a person commissioned, gazetted or in pay as an officer in the defence forces during the proclamation of the national emergency for the period commencing on 26th October 1962 and ending on 10th January 1968", the provisions of the said G.R. are also applicable to all short service officers re-employed in State Civil Service.

11. It is submitted that Short Service Commissioned Officers have not completed the minimum qualifying defence service eligible for the pension benefits, they are not considered at par with regular Commissioned Officers for the fixation of pay at the time of re-employment. Hence, the claim of the applicant for the fixation of pay as per the Finance Department G.R. dated 11.7.2012 needs no consideration. The duties, responsibilities and the nature of work of the defence service is entirely different than the State Civil Service.

The respondents also relied on letter dated 16.9.2020 (Annexure A-11) whereunder the applicant was informed that her contention regarding fixing her pay on the basis of G.R. dated 11.7.2012, could not be accepted. Relevant part of Annexure A-11 is as under:-

ब. डॉ. शिल्पा खरपकर यांनी त्यांची नियुक्ती महाराष्ट्र लोकसेवा आयोगामार्फत राखीव पदावर झाली असल्याने, त्यांची वेतननिश्चिती दिनांक ११.७.२०१२ च्या शासन निर्णयाप्रमाणे

करण्याची विनंती केली आहे, याबाबत सैनिकी सेवेतील अधिकारी यांची नागरी सेवेतील पुनर्नियुक्तिनंतरची वेतननिश्चिती ही संबंधितांनी सैन्य सेवेमध्ये लघुसेवाराजादिष्ट अथवा राजादिष्ट पदावर सेवा केली आहे, या निकषावर भिन्न प्रकारे करण्यात येते, त्यामुळे साप्रवी, दिनांक २.६.१९९२ च्या शासन निर्णयातील "बिनराखीव" "पदावरील नियुक्ती व नागरी सेवेतील "राखीव" पदावरील नियुक्ती या भिन्न संज्ञा असून त्यांचा एकमेकाशी अन्वयार्थ लावता येणार नाही".

19. The applicant also wanted to rely on Annexure A-14. By this communication, Director (Policy), Kendriya Sainik Board suggested as under:-

"5. From the above, it can be construed that in case of Short Service Officers (SSC) or non-pensioners the last pay drawn may be reckoned for pay fixation as their pension element is zero. Therefore, it is suggested that you may like to request your State Government to consider the same for employment of SSC/ non-pensioner officer for appointments."

20. The aforequoted para would show that by this communication, only a suggestion was made that for pay fixation of Short Service Commissioned Officers on their re-employment, last pay drawn may be reckoned, as their pension element is zero. By this communication, an endeavour was made to bring about parity between those who are governed by Central Services (Revised Pay) Rules, 2016 and others who are governed by State Civil Services Rules. Since this communication is only in the form of a suggestion, the case in hand will have to be decided on the basis of applicable Rules having statutory force.

21. While re-fixing pay of the applicant by the impugned order, respondent No.2, *inter alia* relied on G.R. dated 2.6.1992. To assail this re-fixation of pay, the applicant has contended that for following reasons, the said G.R. ought not to have been relied upon.

“(i) G.R. dated 2.6.1992 was issued only for the officers who had worked as “Emergency Military Officers” during emergency period. The G.R. dated 2.6.1992 is not applicable to the applicant as the same is applicable only to “Emergency Short Commissioned Officers” who are:-

- a) appointed in military before undergoing special training as Commissioned Officers,
- b) appointed in civil services on unreserved post or open post.

(ii) The post of the applicant is reserved from the inception for OBC (Female) category. The appointment of the applicant was also made by the State Government of Maharashtra on 10.9.2018 in OBC (Female) category.

(iii) The G.R. or the Government Circulars cannot supersede the statute or statutory provisions of the Rules and the case of the applicant is squarely covered U/s 162 of the M.C.S. (Pension) Rules, 1982.

(iv) The respondents have not denied that the post of the applicant is reserved for OBC (Female) category.

(v) As per the G.R. dated 2.6.1992, pay of only the Commissioned Officers and Short Service Commissioned Officers who were appointed and who had worked during “emergency period” or who had been appointed after 10.1.1968 and were appointed on “unreserved post” was to be fixed thereunder.

(vi) Because the State Government Resolution dated 2.6.1992 was for fixation of pay of emergency service Commissioned Officers who served on “emergency” before 1992, and regarding those officers, the M.C.S. (Pension) Rules, 1982 are silent, therefore, it was supplementary to the Rules and it cannot

override the basic provisions of Rules unless Rule itself is amended or found to be arbitrary in nature.”

22. In support of aforesaid grounds, reliance is placed on Dr. Rajinder Singh V/s State of Punjab and others, (2001) 5 SCC 482. In this case, it is held—

“7. The settled position of law is that no Government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the Rules, Class II of the service can be treated Class I only by way of notification. Following such a course in effect amounts to amending The rules by a government order and ignoring the mandate of Article 309 of the Constitution.”

23. According to the applicant, heading of G.R. dated 4.10.1976 (A-21) will also support her contention that there was no question of fixing her pay as per G.R. dated 2.6.1992. Heading of this G.R. dated 4.10.1976 reads--

“Emergency Commissioned Officers and Short Service Commissioned Officers-Fixation of Pay in the Civil posts on appointment to unreserved vacancies.”

24. It was further submitted by Advocate Shri Tushar Mandlekar that G.R. dated 30.8.2019 which was primarily issued for fixing pay in accordance with 7th Pay Commission could not have been made applicable retrospectively in case of the applicant and since her pay was already fixed by the competent

authority, there was no reason to re-fix it. It was submitted that it is settled position of law that if law prescribes a particular act to be done in a particular manner, that act should be done in that manner alone or not at all. Fundamental question to be determined in the matter is which pay fixation was proper i.e. whether the one made by District Collector, Wardha or the one made by respondent No.2.

25. It was further submitted by Advocate Shri Tushar Mandlekar that as per Rule 41 of M.C.S. (Pension) Rules, 1982, the competent authority has to treat the service rendered in military service as a qualifying service for pension when the person in military employment has not earned pension. According to him, if Rules 41 and 162 of M.C.S. (Pension) Rules, 1982 are considered together, it would emerge that last pay of the applicant drawn by her as Short Service Commissioned Officer, deserves to be protected and that was precisely what was done by District Collector, Wardha. I have quoted Rule 41 of M.C.S. (Pension) Rules, 1982. Rule 41 deals with other cases in which military service counts as service for pension. Proviso to this Rule stipulates certain conditions. One of these conditions is that the military service must have been pensionable under Military Rules. Sub-rule (3) of Rule 41 of M.C.S. (Pension) Rules, 1982 stipulates that if the service is treated as service qualifying for civil pension any bonus or gratuity received in lieu of pension on or since discharge from military service must be refunded. Most importantly, Rule 41 of the M.C.S. (Pension) Rules, 1982 contemplates passing of general or special order in case of a particular Government servant that military service performed by him / her shall be treated as service qualifying for pension. None

of these conditions stipulated in Rule 41 of M.C.S. (Pension) Rules, 1982 has been satisfied in this case.

26. It was further argued by Advocate Shri Tushar Mandlekar that Clause-11 of G.R. dated 30.8.2019 cannot be allowed to override the Rules having statutory force. On the one hand, there is Clause-11 of G.R. dated 30.8.2019 and on the other, there are Rules 162 and 41 of the M.C.S. (Pension) Rules, 1982. It will have to be primarily seen whether Rules 162 and 41 of M.C.S. (Pension) Rules, 1982 apply to the case of the applicant. I have also held that none of the conditions stipulated in Rule 41 of the M.C.S. (Pension) Rules, 1982 is satisfied in the case of the applicant. Now it remains to be seen whether Rule 162 of the M.C.S. (Pension) Rules, 1982 will apply.

27. The applicant has also relied on judgment dated 18.3.2013 passed by Delhi High Court in W.P. Nos. 2331/2012 and 6701/2012. In this case, para 8 of the C.C.S. (Fixation of Pay of re-employed Pensioners) Order, 1986 was considered. After considering this para, it was held in para 10—

10. Meaningfully read, paragraph 8 of the C.C.S. (Fixation of Pay of re-employed Pensioners) Order, 1986 would simply mean that a retired Armed Force Personnel, upon re-appointed in Government service, would be entitled to his basic pay fixed at par with his last drawn pay.”

These observations will not apply since the matter in hand would be governed by relevant Rules of M.C.S.R. It may also be observed that his was a case of “retired” Armed Force Personnel.

28. It was further argued by Advocate Shri Tushar Mandlekar that in M.C.S. (Revised Pay) Rules, 2009, instructions regarding pay fixation have been laid down (A-23) pursuant to which G.R. dated 16.8.2011 (A-24) has

been issued which lays down the procedure for revising pay scale of re-employed military persons in State Government whose pay fixation is to be made under Rule 162 (b) of M.C.S. (Pension) Rules, 1982. Heading of G.R. dated 16.8.2011 is—

“सैनिकी सेवेतून सेवानिवृत्त होऊन नागरी सेवेत पुनर्नियुक्त होणाऱ्या कर्मचाऱ्यांची सुधारित वेतनश्रेणीत वेतननिश्चिती करण्याबाबत.”

Opening sentence of this G.R. reads—

“सैनिकी सेवेतून सेवानिवृत्त होऊन नागरी सेवेत पुनर्नियुक्त होणाऱ्या कर्मचाऱ्यांचे वेतन महाराष्ट्र नागरी सेवा (निवृत्तीवेतन) नियम १९८२ मधील नियम १६२ नुसार निश्चित करण्यात येते. या नियमातील नियम १६२ (बी) नुसार संबंधितांचे पुनर्नियुक्ती नंतरचे वेतन, निवृत्तीवेतनविषयक लाभ विचारात न घेता अखेरच्या मिळालेल्या वेतनाइतक्या समय श्रेणीतील टप्प्यावर निश्चित करावयाचे आहे”.

This G.R. explicitly refers to re-employment of military personnel after their retirement. It will obviously not apply to the case of the applicant who was “released” on completion of tenure of five years of her Short Service Commission. So far as this aspect of the matter is concerned, it may be mentioned that pay fixation made by respondent No.2 was based on Rule 8 of M.C.S. (Revised Pay) Rules, as introduced on 30.1.2019. The impugned order refers to Rule 8 of the said Rules (Appendix-2).

29. It was further argued by Shri Tushar Mandlekar, learned counsel for the applicant that G.R. dated 6.8.2001 (A-25), and Rule 162 (a) of the M.C.S. (Pension) Rules, 1982 and Clauses 3.2, 5, 10 and 11 of G.R. dated 11.7.2012 taken together would show that the order of pay fixation of the applicant passed by District Collector, Wardha on 8.1.2019 was proper.

30. Basic question involved in the matter is whether pay of the applicant could have been fixed as per G.R. dated 11.7.2012 and as provided under Rule 162 (a) of M.C.S. (Pension) Rules, 1982. G.R. dated 11.7.2012 (Annexure A-8) applies to persons who are re-employed after their retirement from military service. It refers to retired defence personnel / regular Commissioned Officers. It does not cover cases of Short Service Commissioned Officers who are “released” on completion of tenure of the Commission. All the Clauses of said G.R. on which the applicant wants to rely refer to “Retired Defence Personnel”.

31. Heading of Rule 162 of M.C.S. (Pension) Rules, 1982 expressly refers to fixation of pay of “Military Pensioners” on re-employment in Civil Department. I have quoted Rule 162 of M.C.S. (Pension) Rules, 1982. Even if it is assumed for the sake of argument that the applicant would answer to the description of “Pensioner” by virtue of having received gratuity and also by virtue of definition in Article 366 (17) of the Constitution of India, her case would not be covered by Rule 162. This Rule not only refers to grant of one time military pension, but also refers to the pensioner continuing to draw military pension. This is obviously not the case of the applicant. Further, Rule 162 of M.C.S. (Pension) Rules, 1982 is silent about its application to Short Service Commissioned Officers. Reason for the same is obvious. Tenure of Short Service Commissioned Officers as the very nomenclature suggests, falls short of qualifying service which is required for grant of pension.

32. I have also recorded reasons as to why case of the applicant would not be covered by Rule 41 of the M.C.S. (Pension) Rules, 1982 either.

33. Discussion made so far would show that neither G.R. dated 11.7.2012 nor Rules 162 (a) / 41 of M.C.S. (Pension) Rules, 1982 were applicable to the case of the applicant.

34. I have referred to the fact that the impugned order dated 13.9.2019 (Annexure A-9) of re-fixation of pay of the applicant is based on M.C.S. (Revised Pay) Rules, 2019 introduced on 30.1.2019. It specifically refers to Rule 8 of the said Rules. The order dated 13.9.2019 also refers to G.R. dated 2.6.1992. It is apparent that calculation in Clause-2 of order dated 13.9.2019 is based on Para 1 of G.R. dated 2.6.1992 (A-12). Para 1 of the G.R. dated 2.6.1992 reads as under:-

“अशा व्यक्तींना सैन्यातील सेवेचा प्रत्येक पूर्ण वर्षाच्या सेवेसाठी एक वेतनवाढ मंजूर करण्यात यावी व त्याआधारे त्याचे वेतन त्यांच्या नागरी सेवेतील प्रवेशाच्या दिनांकांना पुंनर्निश्चित करण्यात यावे.”

35. G.R. dated 2.6.1992 speaks about two categories to whom it primarily applies. The applicant admittedly does not fall in either of these categories. This, however, does not mean that its application is excluded to take care of other cases like that of the applicant. Respondent No.2 re-fixed pay of the applicant as per Rule 8 of M.C.S. (Revised Pay) Rules, 2019. While undertaking this exercise, procedure laid down in para 1 of G.R. dated 2.6.1992 was followed which is not inconsistent with Rule 8 of M.C.S. (Revised Pay) Rules, 2019. Therefore, pay fixation made by respondent No.2 deserves to be sustained. Sustainability of pay fixation by respondent No.2 as per Rule 8 of the M.C.S. (Revised Pay) Rules, 2019 would also answer objection of the applicant raised on the basis of Clause-12 in her letter of appointment dated

10.9.2018 (A-4) that she was to be governed by M.C.S. Rules on her re-employment.

36. On behalf of the applicant, reliance is placed on **Commissioner of Central Excise, Bolpur V/s M/s Ratan Melting and Wire Industries (judgment delivered by the Hon'ble Supreme Court on 14.10.2008)**. In this case, it is held—

“It must be remembered that law laid down by this Court is law of the land. The law so laid down is binding on all Courts/Tribunals and bodies. It is clear that Circulars of the Board cannot prevail over the law laid down by this Court.”

37. The applicant has further relied on **“Chief Settlement Commissioner, Punjab and others V/s Omprakash and others**. In this case, it is held—

“Under our Constitutional system, the authority to make the law is vested in the Parliament and the State Legislatures and other law making bodies and whatever legislative power the executive administration possesses must be derived directly from the delegation of the legislature and exercised validly only within the limits prescribed.”

38. On behalf of the applicant, reliance was also placed on **“Sansar Chand Atri V/s State of Punjab and others (judgment dated 2.4.2002 delivered by the Hon'ble Supreme Court in Civil Appeal No. 2403 of 2002)** wherein it is observed that, equal treatment is to be meted out to all persons irrespective of whether the nomenclature used is “relieved” or “discharged” or “retired”.

This observation was made when the question that fell for determination was whether the appellants were ex-servicemen for the purpose of appointment under the Punjab recruitment of Ex-servicemen Rules.

39. Further reliance is placed by the applicant on **Waman Madhao Sakharkar V/s State of Maharashtra and another 2004 (6) Bombay C.L. 907.**

In this case, it is held—

“5. The expression “released defence services personnel in Rule 2 (b) is comprised of two categories. Firstly, it comprises of emergency commissioned officers / short service regular commissioned officers. Secondly, it comprises of other ranks who have been released by the defence services after completing of a fixed tenure”.

The applicant has further relied on **Madhaorao B. Tamboli V/s State of Maharashtra (judgment dated 27.6.2003 delivered by Bombay High Court)**. In this case, it is held—

“The expression “released” for the purpose of Rule 2 (b) ought not to be regarded as not including a member of the defence service who has been discharged, so long as the discharge was after completing a fixed tenure.”

None of the above rulings would assist the applicant in contending that her pay fixation as made by District Collector, Wardha did not call for interference by respondent No.2 who then re-fixed her pay.

40. On behalf of the applicant, an attempt was made to rely on cases of certain other defence personnel in support of her contention that her pay was rightly fixed by District Collector, Wardha on the basis of G.R. dated 11.7.2012.

Cases of these defence personnel who have been re-appointed in State Civil Service do not fall for determination in this matter.

41. Discussion made so far would show that the application is liable to be dismissed. Hence, the order.

ORDER

- 1) Original Application is dismissed.
- 2) No order as to costs.

(M.A.Lovekar)
Member (J)

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It is submitted by Advocate Shri Tushar Mandlekar that effect and implementation of this order be kept in abeyance for a period of two weeks from today so that there will be no immediate initiation of proceeding to recover part of the salary from the applicant. Prayer is granted.

(M.A.Lovekar)
Member (J)

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