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OM PRAKASH SOOD

v.

UNION OF INDIA AND ANR.

AUGUST 26, 2003

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[M.B. SHAH AND DR. AR. LAKSHMANAN, JJ.]

Service Law:

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Superannuation—Age—Determination of—Employee holding a post in which superannuation age was 60 years—Offered higher post in which superannuation age was 58 years—Acceptance with condition that he should be allowed to revert to his earlier post and retire at the age of 60 years—Not replied by the Department—Order of superannuation on attaining age of 58 years—Held not justified—Since the Department neither accepted nor rejected the condition and the employee was allowed to work in the earlier post in which the age of superannuation was 60 years.

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Constitution of India, 1950—Article 136—Special Leave Petition—Power under—Held, such power is unfettered and to be invoked when it is concluded by the Court that a person has been dealt with arbitrarily.

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Appellant was working on the post of Technical Assistant, the age of superannuation whereof was 60 years. Subsequently post of Key Board Operator was created by the Department, the age of superannuation whereof was also 60 years, which was later reduced to 58 years. Appellant was promoted to the post of Key Board Operator on ad hoc basis but was reverted as he did not qualify the trade test. Again when he qualified the trade test he was offered the post. Appellant made representation putting the condition that he would accept the offer only if he were allowed to revert to his original post and retire at the age of 60 and not at 58. Respondent department did not reply. Appellant had been drawing salary of Technical Assistant; he used to sign the attendance register as Technical Assistant which was being authenticated by two gazetted officers. On appellant's attaining the age of 58 years, he was superannuated. Appellant's request to consider his previous representation was not replied by the respondent. Therefore, appellant moved the Assistant Labour Commissioner, and the respondent submitted that appellant had not

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unequivocally refused to take up the post of Key Board Operator. Hence appellant gave his unequivocal refusal to hold the post and respondent was directed to reply to appellant's representation. On not getting any reply from the respondent, appellant moved Central Administrative Tribunal which dismissed the application and held that just because the appellant had been signing the attendance register as Technical Assistant, it does not mean that he had worked in that capacity and that there is no question of conditional acceptance and hence his plea to revert back cannot be acceded to as the stand of the department was that the post of Technical Assistant got abolished when the appellant got promoted; and that the two other posts of Technical Assistant were provisional as the two incumbents holding the post could not qualify the trade test for promotion. Appellant's review application was also dismissed by the Tribunal.

In appeal to this Court respondent contended that since the appointment to the post of Key Board Operator was conditional, he would not be allowed to revert back; that the post of Technical Assistant stood abolished since 1988; that mere signing as Technical Assistant did not give the appellant right to serve in that post; and that no case is made out for interference under Article 136 of the Constitution.

Allowing the appeal, the Court

HELD:1.1. Since the appellant continued to work as Technical Assistant and has refused to accept the post of Key Board Operator and continued to serve till the last day of reaching his superannuation i.e. 58 years as available to the posts of Technical Assistant and no effort to cut-short his career and make him retire even by a day earlier than 60 years would amount to negation of legally protected rights. Therefore, the notice of retirement is liable to be quashed and set aside. There was no acceptance, implicit or otherwise that he accepted the post of Key Board Operator on the terms and conditions offered by the respondents. On the contrary, the appellant, had clearly kept the counter condition that he will accept the offer of appointment to the post of Key Board Operator only if he was allowed to revert to his original post of Technical Assistant and retire after reaching the age of 60 years and not at the age of 58 years. However, the respondents are taking advantage of their own wrong because on the one hand they have neither replied to this condition put forward by the appellant, on the other hand, they have neither fixed his pay as Key Board Operator nor took work from him as Key Board

A Operator. On the contrary, the appellant was allowed to sign the attendance register as Technical Assistant drawing salary and allowances as Technical Assistant and was even allowed an increment of Rs.40 on 1.3.1994 raising his pay from Rs. 1920 to Rs. 1960 in the pay-scale of Rs. 1320-2040. [1028-A, B; 1027-E-H]

B 1.2. It is correct that the offer of appointment contained inter alia a condition that he shall not be allowed to revert back. However, the appellant gave a conditional acceptance in view of practice prevailing reserving his right to be reverted to the post of Technical Assistant. When the offer of appointment was stated to be very clear and does not leave
C any room for accepting the appointment conditionally, the condition reserving the right for reversion would mean a conditional acceptance which was either to be outrightly rejected by the Department by a specific order or was to be accepted with the said condition in view of prevailing practice. In either way, it is beneficial to the appellant. The records will show that whereas the appellant was allowed to continue as Technical
D Assistant during the entire period and was paid his pay and allowances as was paid to Technical Assistant. He was however, retired on completing the age of 58, treating him as Key Board Operator which is totally illegal. [1029-C-F]

E 1.3. It cannot be said that reversion was not admissible in the case of the appellant. Neither the appointment letter indicates anywhere that the promotion offered was temporary or on ad hoc or on regular basis nor have the posts of Technical Assistant abolished. The appellant has been singled out as could be evident from the fact that some Compositors Grade-I who were promoted as Section Holder were permitted to be
F reverted to the post of Compositors Grade I. [1030-B, C]

1.4. It is denied by the appellant that the post of Technical Assistant stand abolished since 1988. The appellant pointed out that two Technical Assistants who could not qualify the test were not promoted as Key Board Operator and were still holding on the post of Technical Assistant and
G that they were functioning as Technical Assistants despite crossing 58 years of age. [1030-E, F]

1.5. It cannot be said that a mere signing as Technical Assistant does not give the appellant the right to serve in that post in view of the fact
H that if the appellant was working as Key Board Operator, the higher

authorities cannot permit him to sign the attendance register as Technical Assistant throughout the disputed period. Permitting signing of the attendance register as Technical Assistant, paying the salary as Technical Assistant, declaring the designation as Technical Assistant even after 12 months of the so-called offer of appointment as Key Board Operator and indicating in the PPO the salary and designation of the appellant as Technical Assistant - all this cannot be an inadvertent mistake by the respondents. In reality, the appellant was never treated as Key Board Operator at all and all along had been treated only as Technical Assistant. [1030-F-H]

1.6. The letter of department indicating superannuation of appellant at the age of 58 years would mean that on the basis of the acceptance given by the appellant, the appellant was promoted as the Key Board Operator in which event his right to revert back as Technical Assistant is fully secured. [1031-A, B]

2. Powers of this Court under Article 136 of the Constitution are unfettered and are invoked invariably when this Court reaches the conclusion that a person has been dealt with arbitrarily. The case on hand is one such wherein the Department treated the appellant as a Technical Assistant all through but superannuated him at 58 while the age of superannuation for Technical Assistant is 60. [1029-G, H; 1030-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9169 of 1996.

From the Judgment and Order dated 12.5.95 of the Central Administrative Tribunal, New Delhi in O.A.No. 2571 of 1994.

K.B. Sounder Rajan for the Appellant.

P.P. Malhotra, Ashok K. Srivastava, D.S. Mahra and Ms. Sushma Suri for the Respondents.

The Judgment of the Court was delivered by

Dr. AR. LAKSHMANAN, J. The short but core point for consideration by this Court in this appeal is-

- (a) when admittedly the appellant had been paid the salary of Technical Assistant till the last day;

- A (b) when he had been signing the attendance register only as Technical Assistant which was authenticated by two gazetted officers including the Deputy Manager of the respondent organization;
- B (c) When the appellant had never worked as Key Board Operator on regular basis;
- (d) When at the time of exercising his option to function as Key Board Operator, the appellant clearly spelt out that he reserves his right to revert back as Technical Assistant in accordance with the practice in vogue in respect of other supervisory posts;
- C How far is the Central Administrative Tribunal right in holding that the respondents are right in their contention that the appellant was promoted as Key Board Operator and his pay as Key Board Operator would be drawn and paid to him in due course and he should superannuate on attaining his age of 58 years instead of 60 which is for Technical Assistant.

D In other words, when an individual has not served in a particular post but had been serving in a lower post can the respondent superannuate the appellant on the basis of the post not held.

The short facts of the case are as follows:-

- E The appellant had been working as Technical Assistant since 1971 and the age of superannuation of Technical Assistant is 60 years. In late eighties, Department introduced Phototype setting Key Board Operator posts. The age of superannuation of Key Board Operator is 60 years, later on reduced to 58 years. In 1989 the appellant was promoted on ad hoc basis as Key Board
- F Operator but was reverted as he did not qualify in the trade test in Hindi. Again, in 1993 after he qualified in the trade test, he was offered the post of Key Board Operator and the appellant had stated that he reserved his right to revert as Technical Assistant as such a reversion from supervisory grade to workmen grade was permissible in other trades.
- G All along the appellant had been working as Technical Assistant and had been drawing the salary as Technical Assistant only, and his signing the attendance register as Technical Assistant was authenticated by the Technical Officer and the Deputy Manager till December, 1994. As in August, 1994, the respondents issued an order indicating the superannuation of the appellant
- H as 31.12.1994, on his attaining the age of 58 years, and the appellant vide his

letter dated 08.09.1994 invited their attention to his representation dated 28.12.1993 whereby he had stated that he would be accepting the post of Key Board Operator subject to the condition that he is permitted to revert back to the post of Technical Assistant on his attaining the age of 58 years. The respondents, were, therefore, requested to reconsider their decision. However, since there was no reply, the appellant again on 07.11.1994 and 15.11.1994 requested them to consider his request. But there was once again no information, which compelled the appellant to move the matter before the Assistant Labour Commissioner praying for a direction to the respondent to give a reply to the appellant to his request. Before the Assistant Labour Commissioner, the respondents submitted that the appellant had not given any unequivocal refusal to take up the post of Key Board Operator. Hence, the appellant gave his unequivocal refusal to hold the post of Key Board Operator vide his letter dated 16.12.1994 and the Assistant Labour Commissioner too gave a direction to the respondents to give a reply to the appellant's representation.

As even till 28.12.1994, there was no reply which prompted the appellant to move the matter to the Central Administrative Tribunal contending that he never accepted the post of Key Board Operator and his original representation contained only conditional acceptance on knowing the mind of the respondents which they spelt out before the Assistant Labour Commissioner, the appellant had clearly given his refusal to accept the post of Key Board Operator.

The Tribunal, however, rejected all the contentions of the appellant and accepted those of the respondents that just because the appellant had been signing the attendance register it does not mean that he had worked as Technical Assistant; that if his pay as Key Board Operator has not been claimed, the same would be claimed and given to him; that there is no question of conditional acceptance and hence his request for reverting back cannot be acceded to.

Thus, the order of the Central Administrative Tribunal has been challenged as erroneous.

The respondents filed counter affidavit through its Manager, Government of India, Press denying the allegations contained in the special leave petition/appeal. According to the respondent, the appellant along with others as per his request was trade tested on 10.08.1993 which he duly qualified and appointed to the post of P.T.S. Key Board Operator w.e.f. 27.12.1993, wherein it was specified in clear-cut terms that he shall not be allowed to revert back

A to his erstwhile post, once he is appointed as P.T.S. Key Board Operator. It is further submitted that the appointment of the appellant as P.T.S. Key Board Operator is very clear and does not leave any room for accepting his appointment conditionally. However, the appellant accepted the post vide his application dated 28.12.1993 instead of submitting an out-right refusal to accept the same, due to unfavourable conditions as stated by him, attached to the post and he also exercised his option for fixation of his pay in the new scale, vide application dated 25.01.1994 which is available to the persons who are appointed on regular basis. Thus, it is submitted that the contention of the appellant that he accepted to the post of P.T.S. Key Board Operator conditionally is, therefore, nullified. It is further submitted by the respondents that with the abolition of the IBM Section where the appellant along with his colleagues was working as Technical Assistant and that of the post of Technical Assistant itself the position held by the appellant also stands abolished as soon as he vacated the post. However, at the fag end of his career, the appellant submitted his intention to revert back to his erstwhile post of Technical Assistant, vide his application dated 15.11.1994 which was duly considered but his request could not be acceded to and that the appellant was accordingly communicated of the decision vide office memorandum dated 02.01.1995.

E The appellant filed a detailed rejoinder to the counter affidavit filed by the respondents. We heard Mr. K.B. Sounder Rajan, learned counsel for the appellant and Mr. P.P. Malhotra, learned senior counsel for the respondents. Our attention was drawn to the averments contained in the special leave petition, counter affidavit and rejoinder affidavit and also the various Annexures filed by the appellant herein. We have also perused the order passed by the Central Administrative Tribunal. The Tribunal in its order dated 12.05.1995 held as under:-

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- (a) The memorandum of promotion clearly stipulated that applicant would not be allowed to seek reversion.
 - (b) The stand of the respondents is that the post of Technical Assistant stands abolished as and when the incumbent gets promoted as KBO.
 - (c) The two posts of Technical Assistants maintained were of provisional basis occupied by two incumbents who could not qualify in the Trade Test, whereas the petitioner qualified in the Trade Test and, therefore, there was no post of Technical Assistant available to him.

- (d) The signing in the Attendance Register as Technical Assistant does not mean that the petitioner was holding the post of Technical Assistant. A
- (e) As regards pay granted as of Technical Assistant only, the respondents were preparing bills to pay the arrears of pay and allowances being the difference but in the pay as Key Board Operator and that as Technical Assistant." B

On the above, the Tribunal dismissed the appeal. The appellant also filed a review application before the same Bench which was also dismissed by order dated nil, copy of which is annexed and marked as Annexure XIV to this appeal. Both the learned counsel reiterated their respective contentions which had been taken by them in their special leave petition and the counter affidavit. C

The appellant was appointed and subsequently confirmed as Technical Assistant on which post he was working since 09.08.1971. He is entitled to retire with the rights and liabilities governing that post which at the moment permits an incumbent to the post of Technical Assistant to superannuate on reaching the age of 60 years and not on reaching the age of 58 years. The appellant had taken to the trade test of Key Board Operator in Hindi and English only to prove his proficiency that even though without practice he is an efficient operator on the Key Board Off-set Photo Type Setting Training and there was no acceptance, implicit or otherwise that he accepted the post of Key Board Operator on the terms and conditions offered by the respondents. On the contrary, the appellant had clearly kept the counter condition that he will accept the offer of appointment to the post of Key Board Operator only if he was allowed to revert to his original post of Technical Assistant and retire after reaching the age of 60 years and not at the age of 58 years. However, the respondents are taking advantage of their own wrong because on the one hand they have neither replied to this condition put forward by the appellant, on the other hand, they have neither fixed his pay as Key Board Operator nor took work from him as Key Board Operator. On the contrary, the appellant was allowed to sign the attendance register as Technical Assistant drawing salary and allowances as Technical Assistant and was even allowed an increment of Rs.40/- on 01.03.1994 raising his pay from Rs. 1920/- to Rs. 1960/- in the pay-scale of Rs. 1320-2040. Since the appellant continued to work as Technical Assistant and has refused to accept the post of Key Board Operator and continued to serve till the last day of reaching his superannuation i.e. 58 years as available to the post of Technical Assistant D
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- A and no effort to cut-short his career and make him retire even by a day earlier than 60 years would amount to negation of legally protected rights. The notice dated 26.08.1994 which falls in this category also and, therefore, we are of the opinion that the notice of retirement dated 26.08.1994 is liable to be quashed and set aside. In the instant case, the respondent had retired the appellant treating him as Key Board Operator whereas the documentary
- B evidence annexed to the special leave petition would all prove that he was holding the post of Technical Assistant and as such the date of retirement only on his attaining the age of 60 years and not the age of 58 years.

- C We have perused the Annexures filed by the appellant along with the special leave petition. A perusal of the Annexures show that the appellant was originally treated ad hoc Key Board Operator (in short "KBO") on 26.09.1989 when the age of superannuation of KBO was 60 years. As there was a move to revert the appellant on account of not qualifying in the Hindi test, he did agitate before the Tribunal in O.A. No. 1239 of 1990 which was decided on 24.07.1992 with a direction to the respondent to afford two
- D opportunities to the appellant to qualify in the relevant test. When the appellant gave the test and qualified in the same, by the time the age of superannuation of KBO was brought down to 58 years. Obviously, the appellant who has been holding a substantive post of Technical Assistant the age of superannuation of which is 60, would not want to opt for KBO for a marginal
- E short time increase in his pay and allowances which ultimately would result in his superannuation at 58 years. Instead, if he continued as Technical Assistant as the same would enable him to serve up to 60 years, when his pay was to touch the same level, if not more. It is on account of this reason that when an offer of appointment as KBO was issued vide Annexure-II, the appellant had clearly indicated that he never applied for appointment as KBO
- F and he gave the test only to prove his efficiency in the Hindi test. Again, citing the Rule position as to the date of superannuation of 60 years in the post of Technical Assistant, the appellant accepted the offer of appointment as KBO clearly stating that he shall be reserving his right to revert back to the substantive post of Technical Assistant on his completing 58 years of age rather than retire at 58 as KBO. It is also seen from the Annexures that till
- G December, 1994, the appellant had been signing the Attendance Register only as Technical Assistant duly authenticated by the higher authorities including the Deputy Manager (Annexure-IV).

- H When a Certificate of pay was requested for, the same was given by the respondents for the month of October, 1994 on 08.11.1994 clearly spelling

out the designation of the appellant as Technical Assistant (vide Annexure-V) Thus, though the respondents claimed that on account of new technology posts of KBO were created, the appellant was retained only as Technical Assistant and it is pertinent to notice here that in addition to the appellant herein two more persons were functioning as Technical Assistant as could be found from a reply in the Industrial Disputes Application No. nil of 1994, wherein the respondents have clearly stated, that there are two Technical Assistants still holding the post of Technical Assistant because they are not interested to be absorbed as PTS KBOs.

Mr. P.P. Malhotra, learned senior counsel, submitted that since the condition was put when the appellant was appointed to the post of KBO, he shall not be allowed to revert back. True, the offer of appointment contained, inter alia, a condition to the said effect. However, the appellant gave a conditional acceptance in view of practice prevailing reserving his right to be reverted to the post of Technical Assistant. The documents filed in this case show that the appellant was signing the attendance register as Technical Assistant and he was paid his allowance till the date of his retirement, only the pay as was admissible for a Technical Assistant. This, in our opinion, would show that the Department had not accepted the conditional acceptance given by the appellant and kept him as a Technical Assistant. When the offer of appointment was stated to be very clear and does not leave any room for accepting the appointment conditionally, the condition reserving the right for reversion would mean a conditional acceptance which was either to be outrightly rejected by the Department by a specific order or was to be accepted with the said condition in view of prevailing practice. In either way, it is beneficial to the appellant. The records will show that whereas the appellant was allowed to continue as Technical Assistant during the entire period and was paid his pay and allowances as was paid to Technical Assistant. He was, however, retired on completing the age of 58, treating him as KBO which is totally illegal.

The learned senior counsel for the respondent submitted that the appellant had not made any case for interference by this Court in the exercise of its extraordinary jurisdiction under Article 136. This Court has held in a number of cases that the powers of this Court under Article 136 are unfettered and are invoked invariably when this Court reaches the conclusion that a person has been dealt with arbitrarily. The case on hand is one such wherein the Department treated the appellant as a Technical Assistant all through but superannuated him at 58 while the age of superannuation for Technical

A Assistant is 60.

It is further submitted by the learned senior counsel for the respondent that the reversion was not admissible in the case of the appellant. This submission has no force. Neither the appointment letter indicates anywhere that the promotion offered was temporary or on ad hoc or on regular basis nor have the posts of Technical Assistant being abolished. Hence it is futile to contend that reversion was not admissible in the case of the appellant. The appellant has been singled out as could be evident from the fact that some Compositors Grade-I who were promoted as Section Holder in November, 1993 were permitted to be reverted to the post of Compositors Grade I w.e.f. October, 1994. Along with the rejoinder, the appellant has annexed the office orders dated 22.11.1993, 24.06.1994 and 21.10.1994 as Annexure-II.

When the appellant had made his intention clearly to accept the promotion as KBO only on a specific condition of his exercising his right to revert, only two options are left to the respondent, namely, either to accept the conditional acceptance or to permit the appellant to continue as Technical Assistant. In the case of the appellant, the latter only prevailed throughout as could be seen from Annexures IV and V. The appellant was treated only as a Technical Assistant by the respondents.

It was argued by the learned counsel for the respondent that the entire post of Technical Assistant stand abolished since 1988. This was denied by the appellant. The appellant pointed out that two Technical Assistants who could not qualify test were not promoted as KBO and were still holding on the post of Technical Assistant and that they are functioning as Technical Assistants despite crossing 58 years of age.

As regards the contention of the respondent that a mere signing as Technical Assistant does not given the appellant the right to serve in that post, we are of the opinion that the same cannot be accepted in view of the fact that if the appellant was working as KBO, the Higher Authorities cannot permit the attendance register being signed as Technical Assistant through out the disputed period. Permitting signing of the attendance register as Technical Assistant paying the salary as Technical Assistant, declaring the designation as Technical Assistant even after 12 months of the so-called offer of appointment as KBO and indicating in the PPO the salary and designation of the appellant as Technical Assistant - all this cannot be an inadvertent mistake by the respondents. In reality, the appellant was never treated as KBO at all and all along he had been treated only as Technical Assistant.

As noticed earlier, the appellant after submitting the conditional acceptance continued to work only as a Technical Assistant. He was taken by surprise when in August, 1994 the appellant was issued with a letter wherein his date of superannuation was indicated as 31.12.1994. This letter would mean that on the basis of the acceptance given by the appellant, the appellant was promoted as the KBO in which event his right to revert back as Technical Assistant is fully secured.

For the foregoing reasons, we are of the opinion that the impugned action of the respondent should be declared as devoid of merit and the appeal is liable to be allowed. The appellant shall be deemed to have continued in service and his pension and retiral benefits should be fixed accordingly. However, he shall not be entitled to get any salary after his retirement on 31.12.1994. The difference of retiral benefits should be given within eight weeks from today with 6 per cent interest.

In the result, the judgment and order dated 12.05.1995 in O.A. No. 2571 of 1994 passed by the Central Administrative Tribunal, Principal Bench, New Delhi is set aside and this appeal stands allowed as indicated above with cost of Rs.5,000 to be paid to the appellant by the respondents.

K.K.T.

Appeal allowed.