

(2008) 02 DEL CK 0151

In the Delhi High Court

Case No : WP (C) No. 5897-5900 of 2006

Ex. Ptr. Baldev Singh and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-02-2008

Acts Referred:

Citation : (2008) 02 DEL CK 0151

Hon'ble Judges : J.M. Malik, J;A.K. Sikri, J

Bench : Division Bench

Advocate : S.M. Dalal, in WPC Nos.5897-5900/2006 and 7159-623/2004 and A.K. Trivedi, in WPC Nos. 1839/2006 and 1431/200, for the Appellant; S.S. Pandey in WP(C) Nos. 5897-5900/2006, 7159-623/2004 and 1839/2006 and Mohan Kumar in WP(C) No. 1431/2007 and Abhimanyu Mahajan in WP(C) Nos. 7159-623/2004, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—Common question of law based on same set of facts is involved in these cases. It was precisely for this reason that all these petitions were heard together, though different counsel appeared on behalf of the petitioners and the respondents were also represented by many counsel.

2. All the petitioners were in the service of the Indian Army and retired before 1.1.1996. All these petitioners are getting disability pension as they were invalidated out of service due to some injury or disease which was treated as attributable to and/or aggravated by military service. At the relevant time when these petitioners retired, there was a formula prescribed by the Government for fixation of disability pension which, inter alia, provided fixation of such a pension on the basis of actual percentage of disability suffered by the official.

3. It is a matter of common knowledge that the Government of India constitutes Pay Commission generally after a gap of every 10 years to go into the exercise of revision of pay scales admissible to Central Government staff. The exercise

undertaken by such Central Pay Commissions include the defense Forces as well. Fifth Central Pay Commission thus constituted, gave its report which was implemented with certain modifications by the Government of India, with effect from 1.1.1996. In respect of armed forces, Ministry of defense took the decision on the recommendation of the said Pay Commission regarding disability pension/war injury pension/special family pension/liberalised family pension/dependent pension/liberalised dependent pension vide orders dated 31.1.2001. Apart from providing revision in the various kinds of pensions mentioned above, one significant recommendation which was given nod by the Central Government in the aforesaid communication was prescribing modified formula for computing disability element of pension. The new formula which is contained in Para 7.2 of the aforesaid communication dated 31.1.2001 reads as under:

7.2. Where an Armed Forces personnel is invalided out under circumstances mentioned in Para 4.1 above, the extent of disability or functional incapacity shall be determined in the following manner for the purposes of computing the disability element:

Percentage of disability as Percentage to be reckoned assessed by invaliding for computing of disability medical board element

less than 50 50 between 50 to 75 75 between 76 to 100 100

4. As per the revised formula, if the percentage of disability is assessed at less than 50%, for the purpose of computing the pension, the disability element is to be taken at 50%. Thereafter, even if the disability is assessed at 20%, disability element would be reckoned for the purpose of computing at 50%. Likewise, if the disability is assessed at, say, 60%, it is reckoned at 75%. Disability above 75% is to be taken as 100%. This is a benevolent provision introduced to benefit such of the armed forces personnel who invalidate out of service as a result of disability suffered due to circumstances attributable/aggravated by military service. Same yardstick is fixed also for giving benefit to the dependents of those who die under the circumstances attributable/aggravated by military service. As per the earlier formula noted above, if an official suffered disability, say, of 20%, his disability element of pension was computed after taking into consideration 20% of the disability whereas, under the revised formula it is to be taken as 50%. Thus, all such military personnel invalidated out of service are going to be benefited by this revised formula.

5. The problem is, however, created by Para 2.1 of the said communication which has fixed the cut off date of 1.1.1996, i.e. that the beneficial formula of fixation of disability element of pension would be applicable only to those who were in service on 1.1.1996 or joined thereafter as is clear from the reading of this para:

2.1. The provisions of this letter shall apply to the Armed Forces personnel who were in service on 1.1.1996 or joined/join service thereafter unless otherwise specified in this letter.

6. All these petitioners, as mentioned above, retired before 1.1.1996 and, Therefore, they were not in service as on that date. In their case, Therefore, the disability element of pension, which was fixed as per the erstwhile formula, would continue. The petitioners contend that this amounts to hostile discrimination, as two classes are sought to be created, namely, those who retired before 1.1.1996 and those who retired after 1.1.1996. According to the petitioners, this is not reasonable classification as both the categories are identically constituted and no avowed objective is sought to be served thereby. Therefore, they have prayed for quashing of the fixation of cut off date of 1.1.1996 as unreasonable and have asked for revision of their disability element of pension on the same formula as provided in Para 7.2 extracted above.

7. Before we come to the legal submissions on the basis of which plea is advanced, the factual basis on which this plea is founded may first be noted. It is pointed out that the purpose for which the Central Government had constituted Fifth Pay Commission vide its resolution dated 9.4.1994 and is incorporated in the report of the Fifth CPC as well was the following:

No. 5(12) E-III/93. The government of India have been considering for some time past changes that have taken place in the structure of emoluments of Government employees over the years. Conditions have also changed in several respects since the last pay commission made its report in 1986. Accordingly, it has been decided to appoint the Fifth Central Pay Commission..."

8. It is stated that keeping the above resolution in view, the Central Government gave Terms of Reference to the Pay Commission. One of the terms given to the 5th Central Pay Commission by Central Government and which is contained in para 1.13(c), page 4 in Vol. I is "To examine with a view to having a proper pension structure for pensioners, the existing pension structure including death cum retirement benefits and make recommendations relating thereto which may be desirable and feasible."

9. The 5th Central Pay Commission in its recommendations on rationalizing Disability Pension has stated in para 164.7, page 2017, Vol. III that there is a need to fix a suitable minimum disability element for service personnel as distinct from the minimum for civilians. Therefore, in order to ensure uniformity and to provide a higher benefit, disability element for service personnel may also be calculated as a percentage of pay for 100% disability. It is stated in para 164.8 of the same report "We also feel that some rationalisation with regard to the degree of disablement is also required as the existing system is prone to delays. We suggest that for personnel boarded out of service due to disability, attributable to service, the minimum disability element should be reckoned as 50% irrespective of what it actually is". The Commission further recommended, "....Where it is not feasible to retain such personnel, a minimum disability element calculated at 50% may be paid. For individuals who are boarded out and degree of disability is assessed between 50% and 75% disability element may be authorized at 75% and for more than 75% disability,

the element should be calculated at 100%. Thus, there will be broad-banding of the extent of disability and the likelihood of mistakes on disagreements would be minimum.

10. Submission is that it is quite clear from the above mentioned Resolution, Terms of Reference and Recommendations of 5th Central Pay Commission that the Central Government had felt the necessity to change the pension structure as it existed on 9.4.1994 because it suffered from drawbacks and wanted to have a proper pension structure and asked the Pay Commission to make recommendations which were desirable and feasible. At this point in time it was not the desire of Central Government to create two pension structures, instead the Government wanted to rationalize the existing structure so that its benefits could accrue to all pensioners. Accordingly, the 5th Pay Commission gave its recommendations which it considered desirable and feasible. In case of disabled pensioners the Commission felt the need to fix a suitable minimum disability element for service personnel as distinct from the minimum for civilians and recommended that a minimum disability element be calculated at 50%, and for persons having disability more than 50% and up to 100% it recommended two more slabs. While making these recommendations, the Pay Commission arrived at a considered view that implementation of these recommendations will result in broad-banding of the extent of disability and would minimise the likelihood of mistakes on disagreements. It was not the recommendation of the Pay Commission that the old structure which was suffering from some infirmities be continued in respect of pensioners who were invalided out before a certain date and the new and beneficial structure be made applicable to those who were in service and invalided out after that date. The Commission had recommended only one pension structure, to be made applicable uniformly to all the pensioners irrespective of their dates of invalidment. Though the Central Government has laid down the same amount of disability element of 100% disability in respect of all the pensioners, it has laid down different formula for computation of less than 100% disability in respect of those Armed Forces persons who were invalided out before 1.1.1996 and a different and more beneficial criteria for those who were in service on or after 1.1.1996. It is argued that this decision of the Central Government is irrational and arbitrary.

11. It is on the basis of the aforesaid factual matrix that the petitioners contend that the respondents have divided a homogeneous class of pensioners, who are entitled to disability pension, into two different sub classes which is vocative of the letter and spirit of Article 14 of the Constitution, as it is not based on any rational principles and is wholly unrelated to the objectives sought to be achieved by revising old pension structure. It is the submission that the eligibility criteria as contained in Para 2.1 of the Government of India letter dated 31.1.2001 and 16.5.2001 fixing the cut off date of 1.1.1996 is, Therefore, arbitrary and discriminatory in view of ration of law laid down by the Constitutional Bench of the Supreme Court in the case of D.S. Nakara and Others Vs. Union of India (UOI), . Learned Counsel for the respondent also rested their case on the

judgment of the Apex Court in *Subrata Sen and Ors. v. Union of India and Ors.* 2001 SCC (L&S) 1237 wherein the principles contained in *D.S. Nakara (supra)* was reiterated and such a cut off date for applicability of revised pension scheme therein was struck down.

12. The respondents, on the other hand, have sought to justify the fixation of cut off date primarily on the ground that with the change of formula there is going to be a huge financial implication and this is an important reason and rational behind fixing the cut off date. It is, thus, submitted that once a different yardstick is laid down fixation of disability element of pension. It is open to the Government to fix a particular date from which such a benefit would accrue to the persons and, Therefore classification is reasonable. Those officials who retired prior to 1.1.1996 formed a different group than those who retired or are going to retire after 1.1.1996. It is the submission of the respondents that in *Union of India Vs. P.N. Menon and others*, , the Supreme Court held that:

It is not always possible to extend the same benefits to one and all, irrespective of the dates of superannuation. As such any revised scheme in respect of post retirement benefits, if implemented with a cut off date which can be held to be reasonable and rational in the light of Article 14 of the Constitution, need not be held to be invalid. It shall not amount to "picking out a date from the hat". Whenever a revision takes place, a cut off date becomes imperative because the benefit has to be allowed within the financial resources available with the Government.

13. It is further submitted that the entire case of the petitioner is based on a fallacy that the Government cannot fix a cut off date for extending the post retirement benefits as doing the same would amount to cause a vertical division among a homogeneous class of persons. However, they have failed to appreciate that extension of such benefits has its own pecuniary implications and while taking a decision about the implementation of such a scheme these implications have to be borne in mind. It is submitted that the impugned letters were issued in pursuance of the recommendations of the 5th Pay Commission and these recommendations were brought into effect from 1.1.1996. As such, no vertical division has been caused among the class of disability pensioners. The Supreme Court once again upheld the fixing of cut off date for extending the post retirement benefits in *P.K. Kapur Vs. Union of India (UOI) and Others*, .

14. We have given our due considerations to the aforesaid submissions made by counsel on either side.

15. It would be advisable to start the discussion keeping in view the judgment of the Supreme Court in *P.K. Kapur v. Union of India and Ors. (supra)*. Not only it is the most recent judgment on the subject rendered on 1.2.2007, what is important is that in this judgment same very circular letter dated 31.1.2001 came up for consideration by the Apex Court. The issue of fixation of cut off date of 1.1.1996 was also considered.

16. In that case, the appellant stood superannuated from the Indian Army on 30.11.1989. He was entitled to war disability pension which he started getting from the said date of retirement. Before his retirement his war injury disability was assessed at 30% (permanent and for life). It may, however, be noted that he was not prematurely invalidated out of service because of the said war injury which he suffered in 1965 while fighting in Jammu and Kashmir Sector against Pakistani troops. He was retained in service, granted permanent commission and was allowed to work till 30.11.1989 when he was released on superannuation on completion of 51 years of age after putting in qualifying service of 26 years. The disability pension which was granted to him was calculated on the basis of disability assessed at 30%. In the writ petition filed by him in this Court, one of the reliefs sought by him, with which we are concerned, was that in view of the recommendation of the 5th Pay Commission, the disability should be treated as 50% as per notification dated 31.1.2001. He made this complaint on the same basis which is made by the petitioners herein, namely, cut off date of 1.1.1996 could not have been fixed by the respondents, which was violative of Article 14 of the Constitution having regard to the law laid down by the Supreme Court in the case of D.S. Nakara (supra). The precise argument, which was raised by him in this behalf, is noted by the Supreme Court in para 6 of the judgment, which is reproduced below:

6. Now, coming to the second challenge concerning "enhancement of percentage of disability", appellant has submitted that Government of India had vide O.M. dated 3.2.2000 enhanced the percentage of disability for Armed Forces officers including junior officers in service on or after 1.1.96. Since, the appellant retired on 30.11.89 this enhancement of percentage of disability was not admissible in the case of the appellant. Appellant submitted that there was no reason for denying enhancement of percentage of disability to junior officers in the Indian Army who retired prior to 1.1.96. Fixation of this cut-off date of 1.1.96, according to the appellant, is arbitrary, irrational and violative of Article 14 of the Constitution. Appellant submitted that one of the facets of Article 14 is that it eschews arbitrariness in any form. Appellant submitted that this Court in the case of Nakara (supra) has observed that Article 14 condemns discrimination in any form. He submitted that there is no rational for excluding officers from the benefit of enhancement merely because they stood retired prior to 1.1.96. Appellant, Therefore, submitted that O.M. dated 3.2.2000 should be made applicable to officers who have retired even prior to 1.1.96.

17. The aforesaid contention of the appellant in the said case did not jell with the Court. The Court drew the distinction between those who were invalidated from service prematurely and others, like the appellant therein who were allowed to complete normal tenure of service and held that these two were distinct and separate categories. Therefore, there was no violation of Article 14 of the Constitution. Exact discussion in this behalf may be reproduced at this stage:

7. We do not find any merit in the above arguments. As stated above, appellant

stood superannuated from the Indian Army on 30.11.89. He was entitled to war disability pension. He has been paid arrears on that basis on and from 30.11.89. Under Government of India letter No. PC1(2)/97/D(Pen-C) dated 16.5.2001 the rate of war injury element for hundred per cent disability in battle casualty cases has been prescribed. It is in accordance with the rates mentioned in para 11.2 of the letter of Government of India No. 1(2)/97/D (Pen-C) dated 31.1.2001. Under O.M. dated 3.2.2000 the benefit of enhancement of percentage of disability, and not the rates, is given to officers who were in service on or after 1.1.96. This enhancement is from 30% to 50%. Appellant claims this enhancement from 30% to 50% in his case also. However, O.M. Dated 3.2.2000 states that the said enhancement shall be applicable only to those officers who stood invalidated out of service. This provision is not applicable to the appellant who retired on superannuation prior to 1.1.96. Appellant was not invalidated out of service. He completed his normal tenure of service. The benefit of enhancement is given to those officers who stood invalidated out of service because their tenure of service got cut due to invalidment on account of disability or war injury. Therefore, the appellant does not fall in the category of invalidment. The Government is always entitled to classify officers who stood retired vis-a-vis the officers whose tenure of service got reduced due to invalidment. These are two distinct and separate categories. Hence, there is no violation of Article 14 of the Constitution.

18. It would also be of interest to note that when the appellant's disability pension was fixed on his superannuation, while calculating the qualifying service, he was given weightage of five years as per the relevant rules and to protect his pension he was given additional weightage of three years. This three years weightage was withdrawn after the revision of pension took place on the basis of recommendation of the 5th Pay Commission. The appellant had challenged the withdrawal of the additional weightage as well. The Supreme Court repelled that challenge as well on the ground that this protected weightage of three points (in years) was removed after the 5th Pay Commission, as he started earning pension more than that of a Major, which was not so during the period 1989-99. For our purposes, second reason advanced by the Supreme Court rejecting the contention of the appellant on this score is relevant as the same deals with fixation of cut off date. We, Therefore, reproduce that portion:

Secondly, it is well settled in law that Article 14 permits class legislation and not classification based on intelligible differentia which distinguishes those that are grouped together from others and that differentia must have a rational relation to the objects sought to be achieved by the Act. In the case of *Union of India v. P.N. Menon and Ors.* this Court has held that pay revision can invite a cut-off date. In matters of pay fixation it is the pay commission which is entitled to take into account various parameters depending upon the nature of posts, the duties attached to those posts, the qualifications attached thereto, the manner of calculating the retirement benefits etc.

19. This leads us to the judgment of the Supreme Court in *P.N. Menon (supra)*.

That was a case where the Third Pay Commission had recommended that on price level rising above the 12 monthly average of 272 (1960 = 100) Government should review the position and decide whether the dearness allowance scheme should be extended further or the pay scales themselves should be revised. On 30.9.1977 the price level reached that point. Therefore, the Government issued O.M. No. F-19(4)-E.V./79 dated 25.5.1977, which introduced a scheme to treat a portion of the dearness allowance as pay in respect of government servants, who retired on or after 30.9.1977. With reference to different pay ranges, it fixed the amount of dearness pay which was to be counted as emoluments for pension and gratuity in terms of Rule 33 of the Central Civil Services (Pension) Rules, 1972. However, in the case of officers drawing pay above Rs. 2180 and retiring on or after 1.12.1978, the amount of dearness pay to be treated for the purpose of retirement benefits, was specified in the O.M. The O.M. enabled the persons who retired on or after 30.9.1977 but not later than 30.4.1979, to exercise an option out of the two alternatives of getting pension and death-cum-retirement gratuity, calculated either by excluding the element of dearness pay or by including the element of dearness pay. The question before the Supreme Court was whether the said O.M. was discriminatory and arbitrary so as to be violative of Article 14 of the Constitution of India inasmuch as it was not applicable to all the retirees irrespective of the dates of their retirement. Answering the question in the negative and reversing the decision of the High Court, the Supreme Court held:

20. Whenever the Government or an authority, which can be held to be a State within the meaning of Article 12 of the Constitution, frames a scheme for persons who have superannuated from service, due to many constraints, it is not always possible to extend the same benefits to one and all, irrespective of the dates of superannuation. As such any revised scheme in respect of post-retirement benefits if implemented with a cut-off date, which can be held to be reasonable and rational in the light of Article 14 of the Constitution, need not be held to be invalid. Whenever a revision takes place, a cut-off date becomes imperative because the benefit has to be allowed within the financial resources available with the Government.

21. The Supreme Court specifically considered the impact of the judgment in *D.S. Nakara* (ibid), but held that dicta laid down in that judgment would not be applicable in the said case. The distinguishing feature, as pointed out by the Supreme Court, can be traced in para 20 of the judgment and it would be wise on our part to reproduce the same:

20. The scheme to merge a part of the dearness allowance for purpose of fixing the dearness pay, was evolved, and was linked with the average cost of living index fixed at 272, which fell on 30-4-1977. In this background, it cannot be said that the date, 30-9-1977, was picked out in an arbitrary or irrational manner, without proper application of mind. The option given to employees, who retired on or after 30-9-1977 but not later than 30-4-1979, to exercise an option to get

their pension and death-cum-retirement gratuity calculated by excluding the element of dearness pay as indicated in the aforesaid office memorandum or to get it included in their pension and death-cum-retirement gratuity, was not an exercise to create a class within class. The decision having a nexus with the price index level at 272, which it reached on 30-9-1977, was just and valid. It has been rightly pointed out that respondents had never been in receipt of dearness pay and as such the office memorandum in question could not have been applied to them. Similarly, the encashment of leave was a new scheme introduced which could not have been extended retrospectively to respondents, who had retired before the introduction of the said scheme. Same can be said even in respect of family pension scheme which was earlier contributory, but with effect from 22-9-1977 the scheme was made non-contributory. The respondent not being in service on the said date, were not eligible for the said benefit and no question of refunding the amount, which had already been contributed by them did arise. According to us, the High Court was in error in applying the principles of D.S. Nakara¹ in the facts and circumstances of the present case.

22. The subtle distinction which is, thus, made is that a new benefit is introduced or a particular benefit already in existence is revised in a manner that it is based on the application of a new principle, there can be a cut off date fixed for giving the said benefit prospectively from the said date. The Court was of the opinion that any revised scheme in respect of post retirement benefits, if implemented with a cut off date, which can be held to be reasonable and rational in the light of Article 14 of the Constitution, need not be held to be invalid.

23. At this stage, it would be of use to take note of another judgment of the Apex Court. The title of the case is State of Punjab and Others Vs. Amar Nath Goyal and Others, . That was a case where O.M. dated 14.7.1995 issued by the Central Government whereby dearness allowance linked to the All India Consumer Price Index 1201.66 (as on 1-7-1993) came up for consideration. The said benefit was made available to the employees who retired or died on or after 1.4.1995, which was the cut off date suggested by the 5th Pay Commission in its Interim Report. The respondents had challenged fixation of cut off date as they had retired before the said cut off date and were, Therefore, denied the benefit of the formula provided in the O.M. dated 14.7.1995. The High Court Punjab and Haryana had allowed the writ petitions and State of Punjab and others had come in appeal. The Supreme Court set aside the judgment of the High Court and held that the cut off date of 1.4.1995 was rightly fixed. What is important for our purpose is to take note of the rationale given by the Apex Court in the said judgment while upholding the said cut off date. The judgment premised on the ground that financial and economic implications are very relevant and germane for any policy decision touching the administration of the Government, at the centre or at the State level and the cut off date of 1.4.1995 was fixed on a valid ground, i.e. financial constraints.

24. When we apply the ratio of all the aforesaid judgments to the facts of the

present case, we are unable to accede to the prayer of the petitioners in these writ petitions and there are various reasons for that:

25. Firstly, this cut off date of 1.1.1996 fixed by the Government for granting the benefit in its orders dated 31.1.2001 has been upheld by the Supreme Court in the case of P.K. Kapur (supra) albeit while discussing another aspect. The reasons because of which the cut off date in the same orders is upheld persuade us to take the same view in the present case as well.

26. Secondly, as a consequence of the recommendation of the 5th Pay Commission, a new formula is prescribed in fixation of disability pension. It is not merely a revision of the pay/pension. By introduction of such a formula for the first time, the Government is entitled to fix a date from which it would be enforced.

27. Thirdly, as pointed out in P.N. Menon (supra) and Amar Nath Goyal (supra), such pay revisions can invite cut off date and such a date can be fixed having regard to various parameters, one of which is financial constraints. These aspects are explained by the respondents in the counter affidavit filed in the present case from which it is clear that action cannot be treated as arbitrary.

28. We are, Therefore, of the opinion that in this case also the law laid down by the Supreme Court in the case of D.S. Nakara (ibid) may not have any application and fixation of cut off date of 1.1.1996 for the application of new formula, given on the basis of the recommendations of the 5th Pay Commission, cannot be treated as arbitrary or violative of Article 14 of the Constitution. We, Therefore, dismiss these writ petitions. However, there shall be no orders as to costs.