
(2003) 10 KL CK 0044
In the High Court Of Kerala
Case No : O.P. No. 1649 of 1996

Kochaniyan

APPELLANT

Vs

Cochin Port Trust

RESPONDENT

Date of Decision : 22-10-2003

Acts Referred:

Citation : (2004) 1 KLT 166

Hon'ble Judges : Kurian Joseph, J

Bench : Single Bench

Advocate : T.L. Ananthasivan, for the Appellant; Antony Dominic and Priya Manjooram, for the Respondent

Judgement

Kurian Joseph, J.—Whether the petitioner who retired from the service of the first respondent in June, 1994 is entitled to the benefit of amendment to the Cochin Port Employees (Recruitment, Seniority and Promotions) Regulations, 1964 (hereinafter referred to as "the Regulations") as amended in 1995 as per notification dated 15.3.1995 is the short question that arises for consideration in this Original Petition. Ext.P2 is the amendment notified on 15.3.1995. The amendment provides that benefit of Rule 30(1) of the C.C.S. (Pension) Rules, 1972 will be applicable to the scheduled employees. There is no dispute that the petitioner was a scheduled employee as per the Regulations. Rule 30 of the C.C.S. (Pension) Rules reads as follows:

"30. Addition to qualifying service in special circumstances

(1) (A Government servant who retires from a service or post after the 31st March, 1960, shall be eligible to add to his service qualifying for superannuation pension (but not for any other class of pension) the actual period not exceeding one-fourth of the length of his service or the actual period by which his age at the time of recruitment exceeded twenty-five years or a period of five years, whichever is less, if the service or post to which the Government servant is appointed is one -

(a) for which post-graduate research, or specialist qualification or experience, in scientific, technological or professional fields is essential; and

(b) to which candidates of more than twenty-five years of age are normally recruited.

Provided that this concession shall not be admissible to a Government servant unless his actual qualifying service at the time he quit Government service is not less than ten years.

Provided further that this concession shall be admissible only if the recruitment rules in respect of the said service or post contain a specific provision that the service or post is one which carries the benefits of this rule.

Provided also that this concession shall not be admissible to those who are eligible for counting their past service for superannuation pension unless they opt before the date of their retirement, which option once exercised shall be final, for the weightage of service under this sub-rule forgoing the counting of the past service.

(2) A Government servant who is recruited at the age of thirty-five years or more, may within a period of three months from the date of his appointment, elect to forgo his right to pension whereupon he shall be eligible to subscribe to a Contributory Provident Fund.

(3) The option referred to in Sub-rule (2) once exercised, shall be final."

2. It may be seen from the first proviso that the concession is admissible only if the recruitment rules in respect of the said service or post contains provision in that regard. As far as the first respondent Port Trust is concerned, a resolution was taken on 29.9.1993. To the extent relevant, the resolution reads as follows:

"After detailed discussions. Board resolved to approve the proposal to grant the benefit of added years of service not exceeding one fourth of the length of service or the actual period by which the age at the time of recruitment exceeded 25 years or a period of 5 years, whichever is less for the purpose of superannuation pension in terms of Rule 30(1) of C.C.S. (Pension) Rules, 1972 as amended from time to time to the incumbent of the following posts and to incorporate a note as under to this effect in the relevant Recruitment Rules appended as SCHEDULE "A" to the Cochin Port Employees (Recruitment, Seniority and Promotion) Regulations, 1964.

1. Pilot

2. Dredger Commander

3. Engineer-in-Charge, Hopper Barges/Dredgers/Tugs.

NOTE: Those Officers appointed to the post and continue to hold the same, and those officers appointed initially to the post and subsequently promoted to higher posts, will be eligible for added years of service qualifying for superannuation

pension in terms of Rule 30(1) of the C.C.S. (Pension) Rules, 1972, as amended from time to time."

3. S. 124 of the Major Port Trusts Act, 1963 provides that the Regulations will come into effect only if it is approved by the Central Government and the approval has been published in the Official Gazette. There is no dispute as to the competency of the first respondent u/s 28(b) to provide for a regulation as proposed in the resolution. It is seen from Ext.P2 that the first respondent Central Government notified the Regulations only on 15.3.1995. However, it is significant to note the introductory paragraph of the notification which reads as follows:

"G.S.R.135(E) - In exercise of the powers conferred by Sub-section (1) of Section 124 read with Sub-section (1) of Section 132 of the Major Port Trusts Act, 1963 (38 of 1963), the Central Government hereby approves the Cochin Port Trust Employees (Recruitment, Seniority and Promotion") Amendment Regulations, 1995 made by the Board of Trustees for the Port of Cochin and set out in the Schedule annexed to this Notification."

Therefore, it has to be seen that the Central Government has taken a decision to approve the resolution as such. But, it is provided further that the "said regulations shall come into force on the date of publication of this notification in the Official Gazette." The date of notification in the Gazette is 15.3.1995. It is the stand of the second respondent that the Regulations specifically provide for date of coming into force, namely, the date of publication 15.3.1995 and hence, the petitioner is not entitled to the benefit of the amended regulation since admittedly, he retired in June, 1994. However, it is the submission of Sri. Ananthasivan, learned counsel appearing for the petitioner that there cannot be two classes of pensioners in the Cochin Port Trust since the note to the amended regulations provided that "those officers appointed to the post and continue to hold the same and those Officers appointed initially to the post and subsequently promoted to higher posts, will be eligible for the added years of service qualifying for superannuation pension in terms of Rule 30(1) of the C.C.S. (Pension) Rules, 1972.

4. On the date of superannuation, petitioner had 27.5 years of service in the Cochin Port Trust. It is his claim that he is entitled to get the benefit of five years of service as per the amended Regulations. The Regulations as introduced by Ext.P2 is captioned as "Cochin Port Employees (Recruitment, Seniority and Promotion) Amendment Regulations, 1995". Though the petitioner made a request to both the respondents, the Port Trust took a stand that the amended Regulations came into effect only from 15.3.1995, when notified in the Gazette after approval by the Government of India and hence, he is not entitled to get the benefit. The petitioner relies on the decision of the Constitution Bench of the Supreme Court in D.S. Nakara and Others Vs. Union of India (UOI), . That was a case where central liberalised pension scheme was introduced with effect from 31.3.1979 and the Apex Court held that in the case of those who retired prior to

that date also will be entitled to the benefit of the liberalised pension scheme, but without arrears. Referring to the cut off date, it has been held as follows:

"The words "who were in service on March 31,1979 and retiring from service on or after that date" are words of limitation introducing the mischief and are vulnerable as denying equality."

The court also observed that "In the present case Article 14 is wholly violated inasmuch as the pension rules being statutory in character, the amended rules, since the specified date, accord differential and discriminatory treatment to equals in the matter of commutation of pension. It would have a traumatic effect on those who retired just before that date. This division which classified pensioners into two classes is artificial and arbitrary, is not based on any rational principle and whatever principle, if there be any has not only no nexus to the objects sought to be achieved by liberalising the pension rules, but is counter-productive and runs counter to the whole gamut of the pension scheme".

5. Learned Standing Counsel appearing for the first respondent however submits that unlike in Nakara's case (supra) where the Supreme Court considered the question of classification when a liberalised pension scheme was introduced, the instant case is one of introduction of a new pension scheme as such. It is submitted that when the petitioner joined service in 1967, the service regulations of the Cochin Port Trust did not provide for a provision for added years as provided in Rule 30(1) of the C.C.S. (Pension) Rules. For the first time, that scheme was introduced only as per Ext.P2 dated 15.3.1995. Therefore, it cannot be said that any injustice is done to the petitioner. There was no pension scheme for adding the years when he joined service and there is no provision either for that when he left the service. The provision was introduced as per a new scheme with effect from 15.3.1995 and therefore, there is no question of any discrimination. The Standing Counsel also refers to various decisions of the Supreme Court wherein Nakara 's case (supra) has been explained. First is in All India Reserve Bank Retired Officers Association and others Vs. Union of India and others, Paragraph 10 of the judgment, to the extent relevant is extracted below:

"10. D.S. Nakara and Others Vs. Union of India (UOI), has itself drawn a distinction between an existing scheme and a new scheme. Where an existing scheme is revised or liberalised all those who are governed by the said scheme must ordinarily receive the benefit of such revision or liberalisation and if the State desires to deny it to a group thereof, it must justify its action on the touchstone of Article 14 and must show that a certain group is denied the benefit of revision/liberalisation on sound reason and not entirely on the whim and caprice of the State. The underlying principle is that when the State decides to revise and liberalise an existing pension scheme with a view to augmenting the social security cover granted to pensioners, it cannot ordinarily grant the benefit to a section of the pensioners and deny the same to others by drawing an artificial cut-off line which cannot be justified on rational grounds and is wholly unconnected with the object intended to be achieved. But when an employer

introduces an entirely new scheme which has no connection with the existing scheme different considerations enter the decision making process. One such consideration may be the financial implications of the scheme and the extent of capacity of the employer to bear the burden. Keeping in view its capacity to absorb the financial burden that the scheme would throw, the employer would have to decide upon the extent of applicability of the scheme. That is why in Nakara 's case this Court drew a distinction between continuance of an existing scheme in its liberalised form and introduction of a wholly new scheme: in the case of the former all the pensioners had a right to pension on uniform basis and any division which classified them into two groups by introducing a cut-off date would ordinarily violate the principle of equality in treatment unless there is a strong rationale discernible for so doing and the same can be supported on the ground that it will subserve the object sought to be achieved. But in the case of a new scheme, in respect whereof the retired employees have no vested right, the employer can restrict the same to certain class of retirees, having regard to the fact-situation in which it came to be introduced, the extent of additional financial burden that it will throw, the capacity of the employer to bear the same, the feasibility of extending the scheme to all retirees regardless of the dates of their retirement, the availability of records of every retiree, etc. etc. It must be realised that in the case of an employee governed by the CPF Scheme his relations with the employer came to an end on his retirement and receipt of the CPF amount but in the case of an employee governed under the pension scheme his relations with the employer merely undergo a change but do not snap altogether. That is the reason why this Court in D.S. Nakara and Others Vs. Union of India (UOI), drew a distinction between liberalisation of an existing benefit and introduction of a totally new scheme. In the case of pensioners it is necessary to revise the pension periodically as the continuous fall in the rupee value and the rise in prices of essential commodities necessitates an adjustment of the pension amount but that is not the case of employees governed under the C.P.F. Scheme, since they had received the lump sum payment which they were at liberty to invest in a manner that would yield optimum return which would take care of the inflationary trends. This distinction between those belonging to the pension scheme and those belonging to the C.P.F. Scheme has been rightly emphasised by this Court in Krishena Kumar and Others Vs. Union of India and others, .

6. Another decision is in Union of India and Others Vs. K.G. Radhakrishana Panickar and Others, . At paragraph 12 of the judgment, the Supreme Court held as follows:

"In this regard, it may be stated that the Tribunal was in error in invoking the principle laid down in D.S. Nakara in the present case. The decision in D.S. Nakara has been considered by this Court in subsequent decisions and it has been laid down that the principle laid down in D.S. Nakara can have application only in those cases where there is discrimination in the matter of existing benefit between similar set of employees and the said principle has no application where a new benefit is being conferred with effect from a particular date. In such a case

the conferment of the benefit with effect from a particular date cannot be held to be violative of Article 14 of the Constitution on the basis that such a benefit has been conferred on certain categories of employees on the basis of a particular date."

7. Yet another decision is in *State of West Bengal and Another Vs. West Bengal Government Pensioners Associations and Others*, . In that case also, the Supreme Court has held that *Nakara's* case will not apply in a case where a new retiral benefit is introduced unlike a revision in pension or liberalising the existing pension scheme.

8. It has to be noticed from all the above decisions referred to by Ms. Priya Manjooran, learned counsel appearing for the first respondent that the Apex Court clarified and distinguished the Constitution Bench decision in *Nakara's* case (supra) between liberalised pension scheme and a new pension scheme on the main ground of financial impact. In *All India Reserve Bank Retired Officers'* case (supra), the Supreme Court clearly noted that when an employer introduces an entirely new scheme which has no connection with the existing scheme, different considerations enter the decision making process. It was again observed in the very same decision that having regard to the fact situation in a case the employer can restrict the scheme to certain class of retirees, in view of the extent of additional burden, the capacity of the employer etc. The court held that these are some of the factors which should weigh with the employer when the scheme is introduced. In the instant case, the employer is the Cochin Port Trust. It resolved to introduce the scheme by its resolution dated 29.9.1993. Admittedly, the petitioner was in service as on that date. Once the employer resolves to introduce a new scheme, rest is a matter of procedure since the Port Trust can implement the scheme thus introduced only if it is approved by the Government of India and when the scheme is notified in the Official Gazette. Therefore, when the scheme was introduced by the employer, the entire relevant considerations have been gone into and a resolution was taken to introduce the new scheme. It is significant in this context to note that the agenda originally proposed for the resolution dated 29.9.1993, as can be seen from Ext.PI was that the scheme should be made applicable with effect from 8.5.1962, when the Cochin Port Trust became a pensionable establishment. However, when the Board of Trustees of the Cochin Port Trust considered the issue, it was decided not to give effect to the scheme from 8.5.1962. It has to be taken that the Cochin Port Trust desired and decided to introduce the scheme only with effect from the date of resolution namely, 29.9.1993.

9. As already noted above, a Regulation framed by the Cochin Port Trust u/s 28 of the Major Port Trusts Act, 1963 requires approval by the Government of India, under S. 124 of the Major Port Trusts Act. The Government of India while granting approval to the newly introduced scheme noted that it was approving "the Cochin Port Trust Employees (Recruitment, Seniority and Promotion) Amendment Regulations, 1995 made by the Board of Trustees for the Port of

Cochin" Therefore, what is approved is the resolution - the new scheme - with regard to added years. Once the employer having regard to relevant factors takes a resolution to introduce a scheme and once the Central Government decides to approve the scheme, the Central Government cannot fix a cut off date by restricting the date of coming into force of the scheme from the date of notification in the Official Gazette, without any valid, justifiable and discernible reason. It is seen from Ext.P2 that the resolution taken by the Cochin Port Trust on 29.9.1993 was approved by the Government of India in 1994, but notified only on 15.3.1995. The crucial and relevant factor being the resolution by the employer regarding the introduction of the new scheme having regard to the relevant factors like the financial burden, capacity of the employer, feasibility of the scheme etc. and when the employer consciously decided not to give effect to the scheme from 8.5.1962 when the employer became a pensionable establishment, it has to be taken that the employer wanted the scheme to be introduced from the date of the resolution, namely, 19.9.1993. The Government of India has apparently not considered any of these aspects while approving the Regulations. Once the employer decides to introduce a scheme and once it is decided to approve the scheme, in the absence of any special reason there is no justification in not giving effect to the scheme from the date of the resolution by the employer.

10. Ordinarily, the court should have left the matter at that since the petitioner has filed a representation before the Government of India, the second respondent as per Ext.P7. However, it is seen from Ext.P8 communication that the said representation was considered by the Government of India and the request was turned down. There is no counter affidavit in the case by the Government. In the Constitution Bench decision, the Supreme Court took the view that the impugned order can be read down severing the objectionable portion which introduces an arbitrary fortuitous circumstance. "A reading down would not render the liberalised pension scheme vague, unenforceable or unworkable; nor that would amount to legislation by the court. By reading down the memoranda, the court merely sets at naught the unconstitutional portion, retaining the constitutional portion".

11. Therefore, it is declared that the petitioner who retired in June, 1994 will be entitled to the benefit of the Cochin Port Employees (Recruitment, Seniority and Promotion) Amendment Regulations, 1995, since he was an employee of the Cochin Port Trust on the date when the resolution for introduction of the amended regulations was taken by the Cochin Port Trust, namely, 29.9.1993. The benefit shall be worked out and disbursed to the petitioner within a period of three months from the date of production of a copy of the judgment.

The Original Petition is disposed of as above.