(2010) 02 DEL CK 0008

In the Delhi High Court

Case No : Writ Petition (C.) No. 8440 of 2009

K.S. Dhall and Another — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 15-02-2010

Acts Referred:

Citation : (2010) 02 DEL CK 0008

Hon'ble Judges : Mool Chand Garg, J;Anil Kumar, J

Bench : Division Bench

Advocate : S. Ravi Shankar, for the Appellant; Rajesh Katyal, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J.—Petitioner No. 1 is an employee while Petitioner No. 2 is an association of employees of National Airports Authority of India (NAAI), a Public Sector Undertaking (PSU), who earlier had been working with the Central Government and were absorbed permanently in the said PSU on the basis of a decision taken by the Government of India, i.e., respondent No. 1 w.e.f. 01.06.1986 with the conditions that they would hold the office in NAAI on deputation by the same tenure and upon the same terms and conditions in respect of remuneration, leave, provident fund, retirement or other terminal benefits as they should have held such office if NAAI has not been constituted and shall continue to do so until duly absorbed by NAAI in its regular service. In fact additional benefits were also provided to those persons for getting 100% commutation of the retiral benefits including gratuity as provided under Rule 37A of the Central Civil Services (Pension) Rules, 1972 (hereinafter referred to as the "Pension Rules") as it existed on that day and provided as follows:

Rule 37A : Payment of lump sum amount to person on absorption in or under a Corporation, company or body.

(1) Where a Government servant referred to in Rule 37 elects the alternative of receiving the (retirement gratuity) and a lump sum amount in lieu of pension he

shall in addition to the (retirement gratuity) be granted:

(a) on an application made in this behalf, a lump sum amount not exceeding the commuted value of one-third of his pension as may be admissible to him in accordance with the provisions of the Civil Pensions (Commutation) Rules, and

(b) terminal benefits equal to the commuted value of the balance amount of pension left after commuting one-third of pension to be worked out with reference to the commutation tables obtaining on the date from which the commuted value becomes payable subject to the condition that the Government servant surrenders his right of drawing two-thirds of his pension.

2. In the case of all the petitioners, it was implemented by providing commutation of 100% pension in the following manner:

a) 1/3rd of the amount to be commuted immediately at the time of absorption.

b) 2/3rd of the amount of pension to be commuted and given to those persons after 7 years of the date of absorption.

3. Thereafter, a judgment was delivered by the Supreme Court in the Common Cause, A Registered Society and Others Vs. Union of India (UOI), . Pursuant to the aforesaid judgment, a new Rule was brought in vide notification dated 30.09.2000 published as Central Service (Pension Amendment) Rules, 2000 by which all the Central Government employees were held entitled to draw pension against commutation of 1/3rd of the retiral benefits. Even though this judgment was not given in the case of employees of a PSU such as the petitioners, this benefit was also extended to them.

4. The lis subject matter of present writ petition is the desire of the petitioners seeking restoration of the commuted portion of the pension in respect of the terminal benefits of 2/3rd of the pension after 15 years of their absorption on the plea that the said 2/3rd amount was given to them after 7 years of their absorption on the principles laid down in the "Common Cause" judgment (supra).

5. After ''Common Cause'' judgment the petitioners also gave a representation in this regard to the respondents on 21.08.2003 i.e. after 16 years of Common Cause judgment. Since the said representation was not responded to, they filed an application before the Central Administrative Tribunal (CAT) on 23.12.2004 seeking a direction to restore 100% of the commuted pension by submitting that they were eligible for restoration of 100% pension from the date of commutation on the principal laid down in ''Common Cause'' case judgment as they had not surrendered their right to claim 2/3rd of the pension as described under Rule 37A of the Pension Rules. It was submitted that the petitioners formed a separate group of employees, who were not covered under Rule 37A of the erstwhile pension service rules. The said O.A. was, however, dismissed of by the CAT on 23.03.2007 but a liberty was granted to the petitioners to file a representation before the respondents.

6. A fresh representation was given by the petitioners on 09.04.2007 seeking restoration of the balance 2/3rd of 100% commuted pension, as by virtue of the amendment brought in the pension service pursuant to the judgment delivered by the Supreme Court in "Common Cause'' case they had already started getting pension in respect of 1/3rd of the commuted amount. However, the said representation of the petitioner was again rejected by the respondents on 11.07.2007 and against the said order, they filed the second O.A. bearing No. 1569/2007 on 20.08.2007 which has also been dismissed by the Tribunal vide order dated 23.12.2008 and it is against the aforesaid order that they filed the present petition.

7. It is the case of the petitioners that Rule 37A of the Pension Rules has no application in their case, as they were not asked to surrender 2/3rd portion of their retiral benefits/pension which was commuted in their case. Even though there is no dispute that in this regard they had received 2/3rd of the retiral benefits after 7 years of their absorption and in this manner had received 100% of the retiral benefits after their absorption in NAAI.

8. It is submitted by them that in view of the judgment in the case of ''Common Cause'' petitioners are entitled to restoration of pension even in respect of 2/3rd pension of the retiral benefits because of following reasons:

i. The Supreme court of India in the ''Common Cause'' case directed the Central Government to consider the possibility of restoring the original pension amount after 15 years of period from the date of commutation since it was convinced of the calculation that the commuted lump sum amount is recovered back by the Government within 12 to 13 years of time. The Government of India also accepted the proposal and restored the pension as it is present today. At that point of time, Supreme Court was not informed that in some cases even 100% commutation is permitted. Hence, in its order dated 09.12.1986 in the matter of Common Cause, A Registered Society and Others Vs. Union of India (UOI), . It has been mentioned that the commuted portion of Pension for civilians/Defence Personnel shall be restored on completion of 15 years. (it may be observed here that petitioners were not party to that case)

ii. The impugned order contains a finding that the petitioners and all the Central Government employees who were absorbed in any PSU are covered by Rule 37A of CCS (Pension) Rules, 1972. But even though 37A applies generally to the Central Government employees who opted to join a PSU after a few years of service in the Central Government, it was not applicable to the petitioners and a separate office memorandum dated 5.7.1989 was made applicable to the petitioners which took away many favourable provisions which were available in Rule 37A.

iii. Because the impugned order was passed without an understanding that the Central Government pensioners are never ceased to be pensioners even if they have joined the PSU later. They are entitled to all the pensionary benefits, allowances, concessions and pre-requisites granted to all the Central Government pensioners from time to time as per the various rules, orders, circulars and notifications.

iv. Because for the general category who were covered by Rule 37A had options to commute either one-third of their pension only or to commute also the balance two-third of the pension. But the petitioners were allowed only one option of commutation i.e. 100%. Hence, the petitioners form a different class of Central Government petitioners and they are not covered by Rule 37A.

v. Because the applicants who were employees in the Civil Aviation Department were put on deputation with the National Airports Authority of India without any other option with effect from 1.6.1986 (without even deputation allowance). The above mentioned office memorandum was finally settled between the Government and the then Civil Aviation Department Employees after many representations and negotiations. Hence, OM dated 5.7.1989 clearly excluded the petitioners from the general applicability of Rule 37A.

vi. Because the judgment in P.V. Sundararajan v. Union of India WP (c) 11855 of 1985 with WP (C) No. 567 of 1995 is not applicable in the present case, because the Supreme Court held that the applicants in that case form a different class from the ''Common Cause'' petitioners for the reason that they commuted two-third of their pension surrendering their right to claim that portion of the pension. But in the present case, the petitioners did not surrender their right and hence they cannot be equated with the petitioners in the above mentioned P.V. Sundararajan case.

vii. Because the CAT failed to appreciate the fact that the Office Memorandum dated 05.07.1989 and various other OMs regulating the restoration of Pension are exceptions to Rule 37A of CCS (Pension) Rules, 1972.

9. We have given our thoughtful consideration to the submissions made on behalf of the petitioners.

10. The arguments addressed on behalf of the petitioners that there was no clause regarding surrender of terminal benefits qua 2/3rd of the commuted portion of pension, has been very specifically discussed by the Supreme Court in the judgment delivered in the case of Welfare Association of Absorbed Central Government Employees in Public Enterprises and others Vs. Union of India and another, . In that case, it is held;

7. To appreciate the claim of the petitioners, it is necessary to set out two relevant rules in the CCS. Pension Rules 1972. Rule 37 and 37A read as follows : Rule 37A : Payment of lump sum amount to person on absorption in or under a Corporation, company or body.

(1) Where a Government servant referred to in Rule 37 elects the alternative of receiving the (retirement gratuity) and a lump sum amount in lieu of pension he shall in addition to the (retirement gratuity) be granted:

(a) on an application made in this behalf, a lump sum amount not exceeding the commuted value of one-third of his pension as may be admissible to him in accordance with the provisions of the Civil Pensions (Commutation) Rules, and

(b) terminal benefits equal to the commuted value of the balance amount of pension left after commuting one-third of pension to be worked out with reference to the commutation tables obtaining on the date from which the commuted value becomes payable subject to the condition that the Government servant surrenders his right of drawing two-thirds of his pension.

8. From the above extracts, it will be seen that a clear-cut distinction is made in Rule 37A itself between one-third portion of pension to be commuted without any condition attached and two-third portion of pension to be received as terminal benefits with condition attached with it. It follows that so far as commutation of one-third of the pension is concerned, the petitioners herein as well as petitioners in ''Common Cause'' case stand on similar footing with no difference. So far as the balance of two-third pension is concerned, the petitioners herein have received the commuted value (terminal benefits) on condition of their surrendering of their right of drawing two-thirds of their pension. This was not the case with the petitioners in Common Cause'' case. That being the position the denial of benefit given to Common Cause'' petitioners to the present petitioners violates Articles 14 & 16 of the Constitution. The reasoning for restoring one-third commuted pension in the case of Common Cause'' petitioners equally applies to the restoration of one-third commuted pension in the case of these petitioners as well.

(emphasis supplied)

11. The aforesaid observations clarify that once the petitioners had received the commuted value (Terminal Benefits) with respect to 2/3rd portion of such benefits, it was of no consequence as to whether they were required to surrender their rights of drawing 1/3rd of their pension or not and their case was distinguished with the petitioners in the case of ''Common Cause'' (supra).

12. The Tribunal relied upon the aforesaid judgment and has dealt with similar arguments addressed before us by making the following observations:

5. In 1983, Common Cause, a registered society and three retired Government servants approached the Honourable Supreme Court in Writ petitions No. 3958-61 of 1983 praying for striking down of certain provisions of the Commutation of Pension Rules, applicable to civilian and defence pensioners as they permit the Union of India to recover more than what is paid to the pensioners upon commutation. The Commutation Rules referred to the CCS (Commutation of Pension) Rules, 1981. The Honourable Supreme Court directed that the commuted portion of pension should be restored after 15 years from the date of such commutation and this would be applicable from 1.4.1985. The Honourable Supreme Court also made the following observations regarding the benefits of commutation:

Commutation brings about certain advantages. The commuting pensioner gets a lump sum amount which ordinarily he would have received in course of a spread over period subject to his continuing to live. Thus two advantages are certainly forthcoming out of commutation: (1) availability of a lump sum amount, and (2) the risk factor.

6. Pursuant to the direction of the Honourable Supreme court, the Government of India issued an OM No. 34/2/86-P & PW dated 5.3.1987 restoring commuted portion of pension after 15 years of service. In respect of the employees of PSUs/ Autonomous Bodies, this facility was not allowed, as per paragraph 4 of the above mentioned OM Paragraph 4 is reproduced below:

Central Government employees who got themselves absorbed under Central Public Sector Undertakings/autonomous bodies and have received/or opted to receive commuted value for 1/3rd of pension as well as terminal benefits equal to the commuted value of the balance amount of pension left after commuting 1/3rd of pension are not entitled to any benefit under these orders as they have ceased to be Central Government pensioners.

7. The Government of India issued OM No. 4/18/87-P & PW(D) dated 5.7.1989 about en masse transfer of employees from Central Government to P.S.Us. The OM, inter alia, provided that

i) Employees will have an option either to draw pro rata pension monthly or to draw a lump sum amount in lieu of 100% pro rata pension.

ii) where the employees opt in favour of monthly payment of pro-rata pension, the same shall be allowed to be drawn with effect from the date of permanent absorption in a PSU/Autonomous Body. No part of the pro rata pension will be allowed to be commuted or any time thereafter.

iii) In the case of employees who opt in favour of a lump sum amount in lieu of 100% pro rata pension, the lump sum shall be worked out on the basis of table prescribed under the CCS (Commutation of Pension) Rules 1981.

iv) In the case of employees covered by Clause (II), the retirement gratuity and for those covered by Clause (iii) above, both retirement gratuity as well as lump sum commuted value shall be paid on the expiry of a period of 7 years from the date of permanent absorption. The amounts, however, can be paid earlier in the event of death/retirement/resignation/discharge from service.

8. On 15.09.1989, the NAAI issued a notice dated 15.09.1989 on the subject of the absorption in the regular service of the NAAI, u/s 13(3) of the NAA Act, 1985. The Applicants were absorbed with effect from 2.10.1989. They were asked to exercise option in the enclosed proforma. The terms and conditions of absorption were given in Annex-1 to the Notice. The relevant portions are extracted below:

a) The permanent Government servants shall have an option to retain the pensionary benefits available to them under the Government Rules or be governed by the rules of the NAAI. This option shall also be available to quasi-permanent and temporary employees after they have been confirmed in the NAAI.

b) The Government servant, who opts to be governed by the pensionary benefits available under the Government shall at the time of their retirement be entitled to pension etc. in accordance with the Central Government Rules in force at that time.

c) The permanent Government servants with less than 10 years service, quasi-permanent employees and temporary employees who opt for the rules of NAA shall be entitled to an amount equal to provident fund contribution for the period of their service under the Central Government up to the date of permanent absorption in NAA with simple interest at 6% per annum as opening balance in their Contributory Provident Fund account with the NAA.

d) The permanent Central Government servants who have completed 10 years or more of service and who opt for retirement benefits of the NAA will receive pro-rata retirement benefits for the service rendered under the Government. These will be regulated as follows:

(i) Employees will have an option either to draw prorata pension monthly or to draw a lump sum amount in lieu of 100% pro rata pension.

(ii) When the employees opt in favour of monthly

payment of pro rata pension, the same shall be allowed to be drawn with effect from the date of permanent absorption in the NAA. No part of pro rata pension will be allowed to be commuted either at the time of permanent absorption or at any time thereafter.

(iii) In the case of employees who opt in favour of a lump sum amount in lieu of 100% pro rata pension, the lump sum value shall be worked out on (the basis of) table prescribed under the Central Civil Services (Commutation of Pension) Rules, 1981.

(iv) In the case of employees covered by Clause (ii) the retirement gratuity and for those covered by Clause (iii) above both retirement gratuity as well as lump sum commuted value shall be paid on the expiry of period of 7 years from the date of permanent absorption. The amounts, however, can be paid earlier in the event of death/retirement/resignation/discharge from service.

In is in terms of the O.M. dated 5.07.1989 referred to in paragraph 7 above. The form of option appended with the Notice, inter alia, mentioned that:

As my absorption will be subject to my resigning from Government service, accordingly this letter my please be treated as my technical resignation from the service of Central Government with effect from 02 October, 1989 with the terminal benefits and conditions laid down by the Government under relevant rules.

9. The Department of Civil Aviation also issued a letter No. A-11013/3/87-NAA dated 22.09.1989 to the Chairman of the NAA, drawing his attention to the O.M. dated 05.07.1989 of the Government of India and elaborating terms and conditions for the employees absorbed in the NAA. These are the same as already mentioned in the Notice dated 15.09.1989, adverted above.

13. The O.M. dated 05.03.1987, which did not extend the facility of extension of restoration of one-third portion of commuted pension, after 15 years of such commutation, as given to Government employees, was challenged in two writ petitions before the Hon''ble Supreme Court under Article 32 of the Constitution of India (Welfare Association of Absorbed Central Government Employees in Public Enterprises and Ors. v. Union of India and Anr. W.P.(C) No. 11855/1985 and P.V. Sundarajan v. Union of India W.P.(C) No. 567/1995). The issue before the Hon''ble Supreme Court was summed up thus in the judgment of the Tribunal as under:

At the time of argument learned Counsel appearing in these writ petitions confined their relief to the restoration of the one-third portion of the fully commuted pension as per the decision of this Court in Common Cause, A Registered Society and Others Vs. Union of India (UOI), and consequently to quash para 4 of O.M. 3412/86. P & PW issued by Government of India, Department of Pension and Pensioners Welfare dated 05.03.1987.

The Hon''ble Supreme Court, after adverting to Rule 37 and Rule 37A of CCS (Pension) Rules, 1972 observed that the reasoning for restoring one-third commuted pension in the case of "Common Cause" petitioners equally applies to the restoration of one-third commuted pension in the case of these pensioners as well. The Government had opposed the plea on the ground that:

It would be seen from (b) above that the two-third terminal benefits received by the absorbees is nothing but pension. Thus, the absorbees who have opted for lump sum payment have not only commuted one-third of their pension which is treated as "terminal benefits". The absorbees have in fact commuted the entire pension and not one-third of pension.

11. Following the above directions of the Hon''ble Supreme Court, the Government of India issued an Office Memorandum No. 4/3/85 P & PW (D) dated 30.09.1996 for restoring one-third commuted portion of pension after 15 years from the date of commutation in respect of Government servants who had drawn lump sum amount on their absorption in a PSU. Further clarifications were issued on 13.01.1998 and 14.07.1998, the latter on further direction in Contempt Petition No. 530/97 in P.V. Sundarrarajan Case (supra), and 12.07.2000. A fresh Rule 37A was introduced by O.M. No. 4/61/99-P & PW (D) dated 30.09.2000 by CCS (Pension) Amendment Rules 2000.

14. As stated above, the petitioners then approached the CAT expecting that

their full pensions would be restored after 15 years of commutation of full pension because in the terms and conditions issued to them there had been no mention of the condition of surrendering their right of drawing two-thirds of pension, as was the condition prescribed in Rule 37A, as it existed prior to 31.03.1995. However, only one-third of their pension had been restored. The Original Application earlier filed by the petitioners was registered as O.A. No. 3095/2004. The Tribunal in its order dated 23.03.2007 had observed thus:

12. It would be seen from the above that there are substantial differences between the conditions for restoration of commuted pension in Rule 37A, O.M. of 05.07.1989 and the conditions of absorption in NAAI. Most important point is about surrendering the right to two-thirds pension, which is a part of Rule 37A, but such a condition has not been a condition of absorption of the Applicants in NAAI. In P.V. Sundararajan (supra) the Hon''ble Supreme Court has observed as follows:

From the above extracts, it will be seen that a clear-cut distinction is made in Rule 37A itself between one-third portion of pension to be commuted without any condition attached and two-third portion of pension to be received as terminal benefits with condition attached with it. It follows that so far as commutation of one-third of the pension is concerned, the petitioners herein as well as petitioners in Common Cause case stands on similar footing with no difference. So far as balance of two-third pension is concerned, the petitioners herein have received the commuted value (terminal benefits) on condition of their surrendering of their right of drawing two-thirds of their pension.

13. It is clear that the pensioners have surrendered their right as regards two-thirds pension in P.V. Sundararajan (supra), whereas in the instant there is no such commitment. As we have discussed earlier the Applicants had no option for commuting one-third pension.

14. Considering the rival contentions we direct the Applicants to submit a fresh representations to the Ministry of Civil Aviation, which would consider the representation/s along with the averments made in this O.A. in consultation with the concerned Department of Pension and Pensioners Welfare and any other Ministry/Department of Union Government in the light of our observations in this order within three months of receiving a fresh representation with liberty to the Applicants to take appropriate legal remedy if their grievance survives. No costs.

(emphasis supplied)

15. After the decision was given by CAT while dismissing O.A. No. 3095/2004, a representation was made by petitioners on which the respondents passed the order dated 11.07.2007, rejecting the representation of the petitioners. While rejecting the application, respondents had observed:

i) The following options were given to the absorbed employees:

a) Draw pro-rata pension monthly;

b) to draw lump sum amount in lieu of 100 per cent pro rata pension; or

c) to be governed by the pensionary benefit available under the Government of India at the time of the employee''s retirement in accordance with the Central Rules in for at that time.

The Applicants opted for option (b) - The Central Government employees who were absorbed in or under any PSU were entitled to get lump sum amount as laid down in erstwhile Rule 37A of CCS (Pension) Rules, 1972. Thus, the Applicants were sanctioned lump sum amount under this Rule. The Applicants had opted for (b) consciously, with all consequences known to them. The benefit of restoration of only one-third pension was given to all. The employees absorbed in the NAAI do not form a separate class and have to be treated like the rest of the employees, so absorbed in the NAAI.

...

16. The aforesaid order rejecting the representation was in consonance with the views expressed by the Supreme Court in the case of Welfare Association of Absorbed Central Government Employees in Public Enterprises and Ors (Supra)

17. The Tribunal while disposing of the said O.A. has, thus, rightly observed:

19. All the employees, who were transferred en masse from the Government to the PSU would be governed by the erstwhile Rule 37A, as long as it lasted. The Applicants have not shown any exception to this Rule. They (the Applicants) cannot also be exceptions to this Rule. The scheme by which they were absorbed does not give them any right for restoration of hundred per cent pension because such right has not even been envisaged in that scheme. Merely on the basis of scheme of 15.09.1989, which is not concerned with the restoration of commuted pension, they cannot claim better terms of restoration of commuted pension then given to similarly situated employees of other PSUs/Autonomous Bodies. The OA is misconceived. We would also like to add that this Tribunal has not held any view definitely favouring the stand of the Applicants in OA No. 3095/2004. It is due to this reason that the Respondents were directed only to consider fresh representation to be given by the Applicants.

20. On the above reasoning, we find no merit in OA, which is accordingly dismissed. No Costs.

18. We find that the judgment delivered by the Tribunal is well reasoned, based upon the law laid down by the Hon''ble Supreme Court and does not suffer from any infirmity, which calls for our interference under Article 226 of the Constitution of India. Accordingly, the writ petition is dismissed with no orders as to costs.