
(2008) 03 DEL CK 0103

In the Delhi High Court

Case No : Writ Petition (C) No. 11120 of 2004

Sh. Chaman Lal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-03-2008

Acts Referred:

Citation : (2008) 03 DEL CK 0103

Hon'ble Judges : Vipin Sanghi, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Party-in-Person, for the Appellant; Avnish Ahlawat and Simran, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—There is no dispute about the following facts relating to the service profile of the petitioner herein and fixation of his pension on his retirement. The petitioner was working as Office Superintendent in the Directorate of Education, Delhi Administration in the pay scale of Rs.550-900, which was revised by the Third Pay Commission to Rs.1640-2900 w.e.f. 1.1.1986. The petitioner superannuated on 28.2.1986. His pension was fixed at Rs.1156/- on the basis of last pay drawn at Rs.2540/- per month and on the basis of calculation of 10 months average emoluments. Later on his pension was consolidated at Rs.3496/- in terms of the OM dated 27.10.1997 w.e.f. 1.1.1996. Thereafter, the Government issued OM dated 10.2.1998, which provides for notional fixation of pension of Pre-1986 retirees at 50% of the notional pay as determined in the 1986 scale of pay, appropriate to each case. However, those persons who had retired between 1.1.1986 and 30.9.1986, the pension has been fixed at the rate of 50% of 10 months" average emoluments. Application of this formula has resulted in lower pension for those who retired between 1.1.1986 and 30.9.1986 in comparison to those who retired prior to 1986 from the same post. Since the petitioner had retired on 28.2.1986, he fell into this category where his pension calculated on the basis of the said average formula was lower than those who

retired prior to 1.1.1986. He accordingly filed OA before the Tribunal in the year 2002 challenging the OM dated 10.2.1998 on the ground that the same was discriminatory as there could not be any basis of fixing two different yardsticks for calculation of the pension-one for those who retired prior to 1.1.1986 and other for those who retired between 1.1.1986 and 30.9.1986. The petitioner, thus, wanted similar benefit as given to those who retired prior to 1.1.1986. He demonstrated the effect of differential treatment by giving the following example:

One Sohan Lal who had retired prior to 1.1.1986 while his pay was fixed at Rs.810/- per month and the petitioner was drawing Rs.870/- per month his pension had been fixed at Rs.3567/- per month whereas the pension of the petitioner had been fixed at Rs.3496/-.

2. He also pointed out that this anomaly was removed while implementing the recommendation of 5th Pay Commission with effect from 1.1.1996. There also those who retired between 1.1.1996 to 30.9.1996 were in the same position as the petitioner. However, subsequently vide order dated 18.10.1999 the Government had granted special benefit/concession to the retirees of 1.1.1996 to 30.9.1996, though it was not based on any recommendation of the 5th Pay Commission. It would be useful to reproduce the following extracts from the judgment of the Tribunal:

16. In this case it will also be pertinent to mention that the applicant who is comparing his pension with one Sohan Lal who had retired prior to 1986 and the applicant himself has retired on 28.2.1986 has been getting higher pension than Sohan Lal till 1995 and it is only after 5th Pay Commission when the emoluments of the retirees had been refixed by a particular order on the basis of which the pension has been determined the applicant happened to get a little lower pension than Sohan Lal. This also shows that the difference which has arisen is not on account of failure of the Government to apply the pension scheme but it is because of the fixation of notional emoluments by virtue of the 5th Pay Commission.

17. The Government had removed the anomaly in the case of post 1986 retirees of 1.1.1996 to 30.9.1996 and in the counter-affidavit the Government had given an Explanation as to why the retirees of the period 1.1.1996 to 30.9.1996 was given different dispensation which is result of a conscious decision because of the higher fitment of 40% allowed by the Government at the time of implementation of 5th Pay Commission which had resulted in second reduction in pension of those employees who had retired during the period 1.1.1996 to 30.9.1996 whereas there was no such case for those retirees who retired between 1.1.1986 to 30.9.1986. The retirees of period 1.1.1986 to 30.9.1986 formed a different category than that of the retirees of 1.1.1996 to 30.9.1996 and there is a reasonable classification for categorizing these two sets of retirees, so we do not find any ground to interfere.

3. The learned Tribunal did not accept the plea of the petitioner having regard to

the judgment of the Supreme Court in *State of West Bengal and Another Vs. West Bengal Government Pensioners Associations and Others*, .

4. The petitioner appeared in person and assailed the aforesaid reasoning adopted by the learned Tribunal. He again emphasized his plea of discrimination and submitted that reliance was wrongly placed on the judgment of the Supreme Court in the case of *West Bengal Govt. Pensioners' Association (surpa)*, as according to him, his case was directly covered by the judgment of the Supreme Court in *D.S. Nakara and Others Vs. Union of India (UOI)*, . He further submitted that Respondent No. 1 (D.O.P.-Nodal authority) had issued the following three sets of orders vide which retirees have been grossly discriminated/differentiated by classifying the retirees of 1.1.1986 to 30.9.1986 as a neglected category of pensioners being in a very small number as compared to Pre-1986 retirees and also retirees of 1.1.1996 to 30.9.1996:

(a) O.M. dated 27.10.1997: Revision of pension for those who had retired on or after 1.1.1973 but were surviving on 31.12.1985 but now the same is applicable to retirees of 1.1.1986 to 30.9.1986 only.

(b) Modified O.M. dated 10.2.1986: For Pre-1986 retirees (up to 31.12.1985) whose pension was updated by "Notional Fixation" of their pay as on 1.1.1986, by adopting of the same formula as for the serving employees and thereafter for the purpose of consolidation of their pension as on 1.1.1986. They were treated alike those who were retired on or after 1.1.1986 (as is the case of the petitioner as retiree of 28.2.1986. Notional pay of Pre-1986 retirees was treated as an average emoluments as on 1.1.1986. Formula of 10 months' average emoluments has been done away with. Provisions of para 4.1 of OM dated 27.10.1997 *ibid* was also extended for consolidation of their pension w.e.f. 1.1.1996. Upon issue of impugned order dated 10.2.1998, anomalies/disparities arose in revision of pension for the following two classes of pensioners:

a) Retirees of 1.1.1986 to 30.9.1986 (petitioner retired on 28.2.1986):- The matter still hangs in the balance because such pensioners are very few who are still left out from justice, i.e. Post 1986 (1.1.1986 to 30.9.1986). Thus, it is abundantly clear and very evident that this class/equals have been treated differently and discriminatory.

b) Retirees of 1.1.1996 to 30.9.1996:- For this class, anomaly was removed vide modified OM dated 18.10.1999 by grant of special concession to protect their interest on the grounds who were in a large number and were entitled to a pension lower than that admissible to those retired prior to 1.1.1996 from the same post and at the same stage of pay in the pre-revised pay scales.

5. Learned Counsel for the respondents, on the other hand, submitted that grant of pension and formulation of pension scheme is a policy matter involving financial implication which is entirely done on the basis of instructions/orders issued by Government of India, which has been upheld by the Supreme Court in *State of Punjab and Others Vs. Amar Nath Goyal and Others*, . Where a cut off

date has been fixed on a very valid ground, namely, that of financial constraints, fixing of the cut off date is not arbitrary, irrational and do not offend Article 14. It is pointed out that pension is decided on the basis of average emoluments drawn by the Government servant during the 10 months prior to his retirement. Fifth Pay Commission made certain recommendations with respect to parity of pension as per the scales and as such, Government of India vide its letter dated 10.2.1998 directed to update the pay of all Pre-1986 retirees by notional fixation of pay as on 1.1.1986 by adopting the same formula as for serving employees at that time and then calculate their pension/family pension. Fifth Pay Commission recommended that all past pensioners be brought to Fourth Pay Commission level by notionally fixing their pay and pension as on 1.1.1986 and the pay so arrived at was treated as average emoluments for purpose of calculation of pension and thereafter consolidated pension in accordance with the provisions of para 4.1. of OM dated 27.10.1997. It is further submitted that even though complete parity is advisable, but the same is not possible in view of huge financial implications, hence modified parity in respect of people who retired after 1.1.1986 was recommended by consolidation of their pension and wherever such consolidated pension fell short of 50% of the minimum of revised scale of pay held by the pensioner at the time of his retirement, it be stepped up to that level (50% of the revised scale of pay held by the pensioner).

6. Learned Counsel for the respondents further submitted that in view of the higher fitment of 40% given by the Fifth Pay Commission in fixing pension, there was an anomaly in the pension of those who retired after 1.1.1996 as the benefit was not available for the period falling in 1995, the Government upon examination of the anomaly took a conscious decision to remove the same vide OM dated 18.10.1999. It was also submitted that anomaly arose due to calculation of pension based on 10 months' emoluments, which is inherent in the system. The same cannot be reopened as the difference in the emoluments was nominal between the retirees of 1.1.1986 to 30.9.1986 and the retirees of 1.1.1996 to 30.9.1996 and the scheme being beneficial for retired persons, from which the petitioner also benefited, cannot be questioned only because at one point of calculation, the emoluments are slightly lower than what the others will get. In fact, the Ministry of Finance, while dealing with the proposal of Department of Pension & PW regarding removal of anomaly in calculation of pension of employees retiring between 1.1.1986 and 30.9.1986 also did not agree with the same.

7. We have considered the rival submissions. It is not in doubt that anomaly has arisen due to calculation of pension based on 10 months' emoluments. However, that is inherent in the system as pointed out by the respondents. It is also not in doubt that similar anomaly, which arose while implementing Fifth Pay Commission's recommendation in respect of retirees of 1.1.1996 to 30.9.1996, has been removed by the Government but similar exercise is not undertaken in respect of those who retired between 1.1.1986 to 30.9.1986. The matter regarding removal of this anomaly was subsequently taken by the Ministry of

Finance but rejected giving following reasons:

(i) the special dispensation in respect of retirees of the period 1.1.1996 to 30.9.1996 was taken because the higher fitment benefit of 40% allowed by the Government at the time of implementation of the recommendations of the 5th CPC had resulted in significant losses in the pension of these employees in relation to those who had retired prior to 1.1.1996. The decision could, by itself, not provide enough justification for re-opening the issue relating to a past period.

(ii) the perceived anomaly is attributable to the formula for calculation of pension based on ten months average emoluments and is inherent in the scheme.

(iii) any decision taken in this regard would also logically have to be extended to those who retired within a period of ten months from the date of implementation of the 4th CPC and earlier Central Pay Commission's recommendations.

(iv) the problem in this regard would not be acute as the decision had already been taken to equate the pension of all pre-1996 retirees, including the pre-1986 retirees, to at least 50% of the minimum of the applicable 5th CPC revised pay scales.

8. As pointed out above, the purported anomaly is inherent in the system as the pension is to be calculated taking into consideration average of 10 months' emoluments prior to retirement. This happened even when the recommendation of Third Pay Commission or even earlier Pay Commissions were implemented. Therefore, it is not that such a situation arose for the first time when Fourth Pay Commission was implemented with effect from 1.1.1986 by which the petitioner is allegedly affected. No doubt, in so far as the period of 1.1.1996 to 30.9.1996, on the implementation of 5th Pay Commission's recommendations, is concerned, the respondents have decided to remove the disparity. However, they have given valid reason for not reopening the past periods. Learned Counsel for the respondents is right in her submission that these are policy matters. In *Amar Nath Goyal's case* (supra) the Supreme Court held that financial and economic implications are very relevant and germane for any policy decision touching upon the administration of the Government. That case also related to fixation of cut off date for grant of benefit of increase of quantum of death-cum-retirement gratuity. Therefore, normally Courts cannot interfere with such policy decisions unless case is made out that they are discriminatory in nature.

9. Therefore, the question arises as to whether difference between Pre-1986 pensioners and Post-1986 pensioners is discriminatory. Answer to that is found in the judgment of the Supreme Court in *West Bengal Govt. Pensioners' Association* (surpa) wherein the Court was concerned precisely with the Pre-1986 pensioners and Post-1986 pensioners and upheld the same. That was a case where the Third State Pay Commission of West Bengal revised the pay scales and other benefits of certain categories of its employees in terms of the reference and also recommended that its recommendations should be made effective from 1.1.1986, the date from which the Central Government employees and the

employees of a large majority of other States had got the benefit of revised emoluments. Accepting the said recommendations, the State Government published the West Bengal (Revision of Pay and Allowances) Rules, 1990 on 12.1.1990. These Rules revised the pay scales of the State Government employees w.e.f. 1.1.1986 even though they might have retired before 12.1.1990. However, the pay of such retirees could be revised only notionally and a memorandum was issued on 25.4.1990 giving them pensionary benefits calculated on the basis of such notionally revised scales of pay. The claim of the respondent Association for calculation of pension payable to pre 1.1.1986 retirees, though rejected by the State Government, was allowed by the High Court. The appellant State Government challenging that decision stated that the formula for calculation for pre 1.1.1986 and for post 1.1.1986 retirees, namely, 50% of the last pay drawn was the same. Additionally, all retirees were getting dearness allowance commensurate with the consumer price index. Moreover, the relief sought by the respondents in the instant case had already been granted to them by the State Government, albeit w.e.f. 1.1.1996. Therefore, the dispute was confined to the period 1.1.1986 to 31.12.1995. The contention of the respondents was that there was no rationale for distinguishing between the pre 1.1.1986 and post 1.1.1986 retirees as far as quantum of pension was concerned for the period 1986 to 1995. Allowing the State's appeal, the Supreme Court made the following pertinent observations:

21. Because the scales of pay had been revised from 1.1.1986, the recomputation of pension for such employees as had been granted the revised scales of necessity was limited to the same cut-off date. All that the impugned Memorandum No. 4056-F dated 25.4.1990 did was to recompute the benefits in favor of post 1.1.1986 retirees according to the existing formula as provided by memorandum No. 7530-F and No. 7531-F, both dated 6.7.1988. The same formula continues to be applied to the pre-1986 retirees. The difference between pre-1986 pensioners and the post-1986 pensioners is only on account of the revision of pay scales and not on account of failure of the State Government to equitably apply the liberalized Pension Scheme formula. The quantum of the emoluments formed no part of the formula for grant of pension during 1986 to 1995.

10. The Supreme Court distinguished the judgment in D.S. Nakara (supra), as can be found from para 22 thereof, which read thus:

22. Nakara decision¹ did not direct the payment of an equal amount of pension to all pensioners. This is clear from the following passage where the Court discusses the financial impact of the formula on the resources of the Government: (SCC p. 334, para 49)

In our opinion, it would make a marginal difference in the case of past pensioners because the emoluments are not revised. The last revision of emoluments was as per the recommendation of the Third Pay Commission (Raghubar Dayal Commission). If the emoluments remain the same, the

computation of average emoluments under amended Rule 34 may raise the average emoluments, the period for averaging being reduced from last 36 months to last 10 months. The slab will provide slightly higher pension and if someone reaches the maximum the old lower ceiling will not deny him what is otherwise justly due on computation.

11. Keeping in view the above, we do find any infirmity in the judgment of the Tribunal and dismiss the writ petition as devoid of any merits.