

(2008) 04 SC CK 0142

In the Supreme Court Of India

Case No : Civil Appeal No. 2338 of 2008 (Arising out of S.L.P. (C) No. 1622 of 2005)

Videsh Sanchar Nigam Ltd. and Another

APPELLANT

Vs

Ajit Kumar Kar and Others

RESPONDENT

Date of Decision : 01-04-2008

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 3, 3(1), 33, 44, 49

Citation : AIR 2009 SC 34 : (2009) 3 ALT 20 : (2008) 4 CALLT 80 : (2008) 5 JT 286 : (2008) 6 SCALE 296 : (2008) 11 SCC 591 : (2008) 2 SCC(L&S) 1047 : (2008) 2 UPLBEC 1903

Hon'ble Judges : P. P. Naolekar, J; Lokeshwar Singh Pantia, J

Bench : Division Bench

Advocate : K.J. Presswala, Asha Gopalan Nair and Khooshnum R. Daviervalva, for the Appellant; K.V. Vishwanathan, Hiren Dasan, Anandajyoti Dasgupta, Dharendra Kumar Mishra and Sarla Chandra, for the Respondent

Final Decision : Dismissed

Judgement

Lokeshwar Singh Pantia, J.—Leave granted.

2. This appeal by special leave is directed against the judgment and order dated 25th November, 2004 passed by the High Court of Calcutta in MAT No. 171 of 2002 whereby and whereunder the order of the learned Single Judge of the High Court dated 15th October, 2001 recorded on Writ Petition No. 6935(W) of 1999 was affirmed and the appellants herein were directed to give retrial benefits to all the writ petitioners/respondents 1 to 8-retirees in accordance with the Central Government Pension Scheme as opted by them in the year 1989 within a period of four weeks from the date of communication of the order.

3. Briefly stated, the facts of the case are as follows:

The respondents 1 to 8-retirees herein were employees of the Overseas Communication Service (OCS), the Department of Telecommunications of the

Government of India. The OCS was converted into a Government Company, namely, 'Videsh Sanchar Nigam Limited' (VSNL) on 1st April, 1986.

4. By an Office Memorandum No. 4(8)/85-P & PW dated 13th January, 1986, the Government of India settled the pensionary terms of Government employees who were transferred to an Autonomous Body/Public Sector Undertaking (PSU) on conversion of a Central Government Department/Office into an Autonomous Body or PSU. The relevant terms of the said Circular reads as under:

(a) The permanent Government Servants shall have an option to retain pensionary benefits available to them under Government Rules or be governed by the Rules of the Public Sector Undertaking/Autonomous Body.

(b) The Government Servants who opt 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.

5. The Government of India, Ministry of Communication, Sanchar Bhawan, vide another O.M. bearing No. G 25015/ 1/86-00 dated 19.3.1986 decided to set up a wholly Government owned Public Sector Corporation known as VSNL which was made operational from 1st April, 1986. This Circular reiterated that the pension and other benefits to the employees on their absorption in the Corporation will be determined in accordance with the Department of Pension & Pension Welfare, O.M. No. 4(8)-85, P & PW dated 13.1.1986 and as amended from time to time. Later on, O.M. dated 13.1.1986 was amended by O.M. No. 4/18/87-P & PW (D), dated 5.7.1989, which provided inter alia that the employees will have an option to retain Government pay scale till their promotion or retirement (whichever is earlier) or to come over to the service conditions of PSUs. A Circular No. HQ/01-01/89-PEM/dated 11.12.1989 was issued by VSNL with a proposal to absorb individual employees in regular service with effect from 1.1.1990 and the employee concerned had to exercise his/her option of getting himself/herself absorbed in regular service of VSNL and if the concerned employee did not opt for absorption, his or her name will be transferred to the Surplus Staff Cell for deployment against possible vacancies in other Government offices. The terms and conditions of permanent absorption of the OCS staff contained in separate formats were supplied to the employees for their information and necessary action.

6. The Government of India, Ministry of Personnel, Public Grievances and Pension (Department of Pension and Pension Welfare) later on vide O.M. bearing No. 4/18/87-P & PW (D) dated 7.2.1990 issued clarification in the following terms:

(i) that where the employees had opted to retain pensionary benefits under the Central Government Rules, the emoluments drawn under the PSU shall be treated as emoluments for the purpose of Rule 33 of the Central Civil Services (Pension) Rules, 1972 and accordingly any emoluments drawn by the transferred employee will be taken into account for the purpose of calculation of average

emoluments as per clarification given in Note 10 below Rule 33 of the Central Civil Services (Pension) Rules, 1972.

(ii) That such employees, who have specifically opted for Central Government Pensionary benefits, will be entitled to the benefit of payment of pension on the emoluments drawn at the time of retirement from the PSU. It is not obligatory on the part of the transferred employees who opted for pensionary benefits as admissible under Central Government Rules to retain Government pay scales, since both issues are not related.

7. A fresh Staff Notice, bearing Ref. No. HQ-A/01-01/90 PE1 dated 21.2.1990, was issued by VSNL by which the employees were called upon to exercise their option as to whether they wanted to retain the pensionary benefits available to them under the Government Rules or be governed by the Rules of the PSU/Autonomous Body. The clarificatory information was annexed to the said Notice which inter alia provided that the option to retain pensionary benefits under the Central Government Rules will mean that the employees will receive pensionary benefits (Pension & Gratuity) on the basis of emoluments/average emoluments drawn by the employee at the time of retirement from VSNL and in accordance with the Rules of the Central Government.

8. The Government of India vide Office Memorandum dated 24.12.1992 conveyed to the VSNL the revision of the pay structure of Executives (below Board level) and Non- Executives/employees of VSNL recruited on or after 1989 to the Industrial Dearness Pattern (IDP). This O.M. also provided that D.A. admissible to Executives and Non-Executives would be at the rates specified in the DPEs O.M. dated 22.1.1991 as amended from time to time. The letter in the 'Fitment Method' would show that the basic pay plus Central D.A. was merged in the Basic Pay to be fixed in the appropriate stage of the IDA pattern scale of pay and it was also clarified that the total emoluments would be drawn by VSNL employees in the Government scale of pay and D.A. pattern as on 2.1.1990 and, accordingly, the pay scales of Non-Executive employees of VSNL were changed over to IDA pay scale in May, 1993 with retrospective effect from 2.1.1990. The VSNL vide Office Order No. HQ-A/01-04/91-PE1 dated 3.9.1993 in reply to the clarifications sought for by its Centres/Units as to whether the pay drawn on IDA scales could be treated as emoluments for the purpose of calculation of pension in respect of employees who opted to retain pensionary benefits available to them in terms of Government of India Rules but have changed over to the IDA pattern of pay scales. It was clarified in a letter dated 3.9.1993 with reference to O.M. dated 5.7.1989 that in respect of those employees who have changed over to IDA pattern of pay scales with effect from 2.1.1990, emoluments for the purpose of calculation of pension and other terminal benefits shall be the treated emoluments drawn by them in IDA Scale at the time of retirement/resignation/death from the Company. This Order stated that pension and other terminal benefits in the above case shall be calculated in accordance with the Rules of the Central Government in that behalf. The order further clarified: "Admissible

Dearness Relief shall also be allowed on the pension so arrived at as per the existing Central Government Rules."

9. On 18.10.1995 VSNL vide its Reference No. HQ-A/01- 04/91-PE1, issued Office Order in terms of O.M. No. 4/18/87- P & PW(D) dated 07.02.1990 of the Ministry of Personnel, Public Grievances and Pension (DP & PW) notifying mode of settlement of pensioners' benefits in case of the employees who opted for the Government pension on superannuation at the time of absorption in the Company and thereafter VSNL by Office Order dated 19th December, 1995 carried out modifications in Para 2(A) of the earlier office order dated 18th October, 1995. The modified para reads as under:

A. Employees who retired prior to 1.1.1992 shall have the following alternative for regulation of their pension;

(i) To draw pension on eligible CDA pay with admissible Dearness Relief as per the existing Central Government rules.

(ii) To draw pension last IDA pay (emoluments for purposes of calculation of pension shall comprise of Basic Pay, Personal Pay, if any) with admissible DA notified by the Government for employees of Public Sector Undertakings.

10. The modification so recorded was a one-time exercise for choosing the alternatives for settlement of pension and the pensioners shall be required to submit their consent to the Regional Heads by 15.1.1996 on a prescribed format giving choice of either of the alternatives. The Assistant General Manager (P) sent a letter dated 19.12.1995 to Shri Nikhileshwar Das, Secretary, VSNL Retired Employees Association, in regard to the alternatives being provided to employees who retired prior to 1.1.1992 so as to bring to their notice to choose either CDA pay with Central Dearness Relief or IDA pay with admissible DA notified by the Government of India for the employees of PSUs. The Ministry of Personnel, Public Grievances and Pension (Department of Pension and Pensioners' Welfare) vide its Office Memorandum No. 4/16/90-P & PW (D), clearly stated that all those transferred employees on the establishment of VSNL who received IDA pay scales prior to their retirement, their emoluments for the purpose of pension shall be calculated based on the emoluments drawn in the IDA pay scales, but, they will not be entitled to the payment of DR on pension at Central Government rates as the Department of Public Enterprises have prescribed a separate DR table in respect of such transferred employees and, therefore, DR on pension in respect of VSNL retirees shall be regulated as per the orders issued by the Department of Public Enterprises from time to time.

11. It appears that the Director, Ministry of Personnel, Public Grievances and Pension (Department of Pension and Pensioners' Welfare) vide its O.M. No. 4/3/07-P & PW (D) requested the Department of Communications to examine the grievances of the absorbees, in accordance with the Rules and Instructions so that the absorbees who had opted for retention of Central Government pensionary benefits on their absorption on the establishment of VSNL could get

their retrial benefits, gratuity and commutation of pension and secondly to examine the anomalies highlighted by the Association of Retired Employees of VSNL in consultation with the Department of Public Enterprises.

12. The Department of Telecommunications in reply to the representation dated 23.08.1998 of the Secretary of VSNL's Retired Employees Association, in their notification states:

(i) Pension in IDA pay scale with IDA relief:

Having changed over to IDA pattern of pay scales as per the Government instructions, it is obvious that employees who opted for the Government pension should be paid in the applicable IDA pattern of pay scales with IDA relief.

(ii) Revision of Pension - Rule 70

It is clarified that it is not a revision of pension but change of pension from CDA to IDA pattern of pay scales as per the government decision. The revision in IDA pattern of pay scales is due from 1.1.1997 and pension shall also be revised.

13. The respondents 1 to 8, who are the retired VSNL employees, filed W.P. No. 6935 (W) of 1999 before the High Court of Calcutta on 19th April, 1999 seeking inter alia the following reliefs:

(a) a writ in the nature of mandamus directing the VSNL and Union of India to rescind or revoke the impugned decisions and orders contained in the Office Orders/Memoranda dated October 18., 1995 (Annexure P-11); December 19, 1995 (Annexure P- 12); November 22, 1996 (Annexure P-14); May 5, 1998 (Annexure P-16); May 28, 1998 and November 12, 1998 (Annexure P-17);

(b) to pay to the petitioners their pensionary benefits on the basis of the appellants decisions contained in Memoranda and/or Office Orders dated January 13, 1986 (Annexure P-1); March 19, 1986 (Annexure P-2); October 30, 1986; July 5, 1989 (Annexure P-4); December 11, 1989 (Annexure P - 6); February 07, 1990 (Annexure - P8); February 21, 1990 (Annexure P-8); February 21, 1990 (Annexure P-9) and September 3, 1993 (Annexure P-10).

(c) to make payments of arrears of pensionary benefits after calculating average emoluments on the last pay drawn in the revised pay scale of 1992 and other subsequent revised pay scales with the dearness relief calculated at the rate or rates prescribed by Central Government for the Central Government emoluments

(d) to make payments of the withheld amount of gratuity and commuted value of pension; and to make all such payments with compound interest at the minimum rate of 18% per annum from the date or dates such amounts became due and payable till (which should be forth with) the date or dates such emoluments became due and payable till the date of the same are actually paid.

14. In the writ petition, VSNL and the Union of India were made parties-respondents. Affidavit in-opposition to the writ petition has been filed by a senior

officer of VSNL. The respondents 1 to 8-retirees filed rejoinder and VSNL filed supplementary affidavit-in-opposition to the rejoinder of the respondents 1 to 8-retirees. The learned Single Judge of the High Court allowed the Writ Petition and granted the above said reliefs.

15. The appellants then preferred an appeal before the Division Bench of the High Court which dismissed the same by judgment and order dated 24.11.2004 impugned by the appellants in this appeal by way of special leave before us.

16. We have heard learned Counsel for the parties and perused the material on record. The appellants have challenged the correctness and validity of the impugned judgment and order of the High Court inter alia on the following grounds:

(i) The Hon'ble High Court failed to appreciate that in service jurisprudence, Dearness Relief (DR) in a particular pay scale complements the basic pay of the pay scale and is designed to compensate the cost of living while the basic pay/pension remains steady so that an employee/retired employee is protected against fluctuation in the cost of Living Index;

(ii) The Hon'ble High Court failed to appreciate that the basic purpose of the DR is neutralization of the increase in cost of living and it cannot exceed 100% neutralization. The impugned order would result in a wrongful gain to the respondents 1 to 8- retirees far in excess of 100% neutralization;

(iii) The Hon'ble Court failed to appreciate that the original petitioners viz. respondent nos. 2, 3, 5, 6 and 7 herein were retired on CDA emoluments and they were drawing pension on CDA pay scale with DR as applicable to CDA pay scale and therefore, they have no vested right to receive pension as per IDA pay scale which would be much higher;

(iv) The Hon'ble Court failed to appreciate that IDA pay scales were introduced by VSNL pursuant to the Government letter No. G-12013/1/91-OC dated 24th December, 1992 with retrospective effect in respect of employees who were on the role of company as on 2nd January, 1990 and the same was implemented for Non- Executive Employees in May, 1993 with retrospective effect from 2nd January, 1990 and for Executive Employees in December, 1993 with retrospective effect from 2nd January, 1990. Respondent Nos. 1, 4, 8 and other employees who retired after May, 1993 and December, 1993 (when the change over to the IDA scale was implemented for Non-Executive Employees and Executive Employees respectively) had in fact started drawing pay on the IDA scales of pay and Dearness Allowance (DA) as notified by the Government for employees of Public Sector Undertakings. Therefore, there was no question to respondents Nos. 1 to 8- retirees having claimed vested right to draw DR as per existing Central Government Rules when they accepted their pension not as per Central Government Rules and CDA pay scales, but as per IDA pay scales which were much higher in view of the fact that IDA pay scales were arrived at by merger of CDA pay scales and DR;

(v) The Hon'ble Court failed to appreciate that if it could be stated that the respondent Nos. 1 to 8 retirees have vested right to receive DR as per Central Government Rules, then they did not have any vested right to receive pension as per IDA pay scale;

(vi) The Hon'ble Court failed to appreciate that the respondents No. 1 to 8 retirees were approbating and reprobating at the same time in as much as when it came to the payment of pension as per IDA pay scale, although the same was introduced retrospectively much after their retirement, the same was acceptable to them whereas DR as notified by the Government for employees of PSUs was not acceptable to them on the ground that it was taking away their vested right to receive DA/DR;

(vii) The Hon'ble Court failed to appreciate that the impugned order would result in adverse discrimination to other employees of VSNL who retired subsequently inasmuch as the subsequent retirees would get pension at the IDA pay scale and DR as notified by the Government for PSU employees whereas the respondents Nos. 1 to 8 - retirees would get that pension as per CDA scale and at the same time they would get DR as per Central Government Rules, which was also much larger than the DR as notified by the Government for employees of PSUs on IDA scale.

17. We may note at this stage that the respondents-retirees despite service of notice have chosen not to file any counter to the SLP or the appeal before this Court. Having heard Mr. K.J. Presswala learned Counsel for the appellants and Mr. K.V. Vishwanathan learned Counsel for the respondents-retirees this Court on 17.01.2008 recorded the following order:

The Parties are permitted to file affidavit explaining Clause 3 of the Circular dated 24.12.1992 of the Government of India, Department of Telecommunications, Sanchar Bhavan, 20 Ashok Road, New Delhi within the period of one week and the counter affidavit a week thereafter.

Mr. Vivek D. Dhule, Senior Manager (HR) of appellant-VSNL, pursuant to the above said order filed an affidavit inter alia states as under:

1. That in order to ascertain the meaning of Clause 3 of the Circular dated 24th December, 1992 I saw my own fixation of pay in the IDA Scale as on 2nd January, 1990.

2. In fixation of the said pay, my Basic Pay (CDA) on 2nd January, 1990 of Rs.1260/- was taken and clubbed with my CDA Dearness Allowance Relief of Rs.479/- making the total existing CDA emoluments of Rs.1739/- (Rupees one thousand seven hundred thirty nine only). From this amount, an amount of Industrial Dearness Allowance and fixed Dearness Allowance (FDA) of Rs.325.75 (Rupees three hundred twenty five and paise seventy five only) and Rs.101.60 (Rupees one hundred one and paise sixty only) respectively (i.e. Rs.427.35 (Rupees four hundred twenty seven and paise thirty five only) was deducted and

the amount for fixation was arrived at Rs.1,311.65 (Rupees one thousand three hundred eleven and paise sixty five only) and I was fitted in the pay scale at Rs.1,321/- (Rupees one thousand three hundred twenty one only) (Basic pay). On this salary Industrial Dearness Allowance of Rs.325.75 (Rupees three hundred twenty five and paise seventy five only) plus Fixed Dearness Allowance of Rs.101.60 (Rupees one hundred one and paise sixty only) was added and my total pay became Rs.1,748.35 (Rupees one thousand seven hundred forty eight and paise thirty five only)

3. This shows how the said circular was implemented.

4. In the subsequent revision, i.e. in 1992 the basic pay and dearness allowance was merged, resulting in larger basic pay and lower IDA Dearness Allowance while the CDA Dearness Allowance remained much larger as the CDA basic pay was much smaller.

18. Mr. Ajit Kumar Kar, respondent No.1 herein, in reply to the affidavit of the Senior Manager (HR) dated 22.02.2008 filed an affidavit inter alia states in para 5 "...I state that the calculations given as per the pay scale of the deponent clearly shows that there was no sharp rise and/or increase in the basic pay as a result of merger with Central D.A. The same calculation shows that not the entire D.A. but only a fraction of it (arrived at after deducting the IDA plus FDA from it) was merged with the basic pay. Before the merger, the basis pay was Rs.1260/-. The Central D.A. being 38% of the basic pay as on 01.01.1990, the amount comes to Rs.478.80 rounded to Rs.479/- in the said affidavit. From this, an amount of Industrial D.A. (Rs.325.75) plus Fixed D.A. (Rs.101.60) total being Rs.427.35 was deducted bringing down the Central D.A. to Rs.51.65. The mode of calculation was same for all the transferred erstwhile OCS employees and the resulting meagre increase in the basis pay after the above deductions as per Clause 3 does not speak of any double benefit. Thus it clearly shows that not the entire D.A. but only 10.78% of it was merged with the basic pay making it Rs.1311.65 and as per the Fitment Method, the said amount was fitted in the next higher scale resulting in Rs.1321/- being the PSU basic pay and CDA was abolished. No option was offered to the transferred erstwhile OCS employees to retain CDA pay and it was only after retirement of all the private respondents, the Appellate Authority came up with the theory that Central D.A. will be given only on CDA pay although there was no existence of CDA pay." It is further stated that in para 6 of the affidavit, the calculations given by the appellant-authority shows that by implementing the circular dated 24.12.1992 no "double benefit" was given to any of the transferred employees because the Central D.A. was drastically reduced by about 89% to 90% before it was merged with the Central basic pay. He denied and disputed the statement made in the affidavit of Shri Vivek D. Dhule that "in the subsequent revision i.e. in 1992 the basic pay and dearness allowance was merged resulting in larger basic pay and lower Industrial Dearness Allowance while the CDA Dearness Allowance remained much larger as the CDA basic pay was much smaller" as the same is not supported by

any Circular or Office Memo. Finally, he supported the judgment and order of the High Court and prayed for the grant of withheld pay, gratuity and arrears of pensionary benefits to respondents-retirees.

19. The learned Counsel for the respondents-retirees on the basis of the available record contended before us that the reasons given by the learned Single Judge as well as by the Division Bench of the High Court for granting relief to the respondents - retirees are based upon proper appreciation of the various Office Memoranda issued by VSNL and the Union of India from time to time relating to the subject-matter in issue. It has however, been contended that pension being a right (and not a bounty) available to retired employees and DR being a part of pension, right to receive the same could not have been denied merely because the incumbent opted for IDA pay scale. In support of the submission, reliance has been placed upon a decision of this Court in the case of *Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others*, . The learned Counsel also submitted that in the facts and circumstances of the case, this Court shall not be obliged to interfere in the well-merited judgment of the High Court which does not suffer from any infirmity or perversity.

20. We have given our anxious considerations to the pleadings, the reasonings recorded and the view taken by the High Court in the impugned order and the contentions put forth before us by the learned Counsel for the parties. We are afraid that we cannot subscribe to the view expressed by the High Court while construing the expression of DR as of right accrued to the respondents-retirees. It is not in dispute that the respondents- retirees along with other employees of OCS of the Department of Telecommunications of the Government of India were transferred to the service of VSNL on its formation with effect from 1st April, 1986. By an Office Memorandum No. 4(8)/85-P & PW dated 13th January, 1986, Government of India, Ministry of Personnel, Public Grievances and Pension (Department of Pension & Pensioner's Welfare), settled the pensionary benefits of the Government employees who were transferred to Autonomous Organizations/PSUs consequent on the conversion of Government Department/Office into an Autonomous Body or PSUs. The terms of the said Circular clearly stated that 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 PSUs/Autonomous Body and the Government servants who opted to be governed by the Rules of the Autonomous Body or PSUs shall become entitled to the pensionary benefits in accordance with the Rules of the Autonomous Body or PSUs from the day of their transfer from the service of the Government. Based on this Circular, another O.M. No.G-12015/1/86-00 dated 19th March, 1986 was issued by the Government of India, Ministry of Communications, in which it was reiterated in Clause 8 that the pensionary and other retiral benefits to the employees on their absorption in the Corporation i.e. VSNL will be determined in accordance with the Department of Pension and Pensioners' Welfare O.M. No. 4(8)/85-P&PW dated 13.01.1986 and as amended from time to time. In partial modification of O.M. No. 4(8)/85-P&PW

dated 13th January, 1986 and O.M. of even number dated 30th October, 1986 on the subject of settlement of pensionary terms etc. in respect of Government employees transferred en masse to Central Public Sector Undertakings/Central Autonomous Bodies. Government of India, Ministry of Personnel, Public Grievances and Pension (Department of Pension and Pensioners' Welfare) vide its O.M. No. 4/18/87-P&PW(D) dated 5th July, 1989 lays down certain terms and conditions which will be applicable to the transferees. The material and relevant terms are that 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 PSUs/Autonomous Body. The Government servants, who opted 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. On December 11, 1989, VSNL issued an Office Memorandum to its employees asking their choice of absorption in the regular service of VSNL. Along with the said Memorandum, a format was supplied which contained terms and conditions of permanent absorption of the erstwhile OCS staff in the service of VSNL. One of the terms relating to pensionary benefits was that the permanent government servants shall have an option to retain pensionary benefits available to them under the Government Rules or be governed by the Rules of VSNL. The option was also made available to quasi-permanent and temporary employees after they have been confirmed in VSNL. The Government of India, Ministry of Personnel, Public Grievances and Pension, (Department of Pension and Pensioners' Welfare) vide Office Memorandum dated 7.2.1990 in reply to the Department of Telecommunications O.M. No. A-13016/1/188- O.C. dated 22nd January, 1990 issued a clarification relating to the settlement of pensionary terms, etc. in respect of erstwhile OCS employees who were absorbed in VSNL. In terms of this O.M., it was clarified very specifically that where the employees had opted to retain the pensionary benefits under the Central Government Rules, the emoluments drawn under the PSUs shall be treated as emoluments for the purpose of Rule 33 of the Central Civil Services (Pension) Rules, 1972 and, accordingly, any emolument drawn by the transferred employee will be taken into account for the purposes of calculation of average emoluments as per the clarification given in Note 10 below Rule 33 of the CCS (Pension) Rules and it was stated that such employees who had specifically opted for Central Government Pensionary benefits will be entitled to the benefit of payment of pension based on the emoluments drawn at the time of retirement from the PSUs.

21. Before proceeding further to deal with the matter, we think it appropriate to refer to the relevant provision of the CCS (Pension) Rules, 1972. Rule 3 (c) of the CCS (Pension) Rules defines "emoluments" to mean emoluments as defined under Rule 33. Rule 33 of CCS (Pension) Rules deals with emoluments and reads as under:

The expression 'emoluments' means basic pay as defined in Rule 9(21)(a)(i) of the Fundamental Rules which a Government servant was receiving immediately

before his retirement or on the date of his death; and will also include non-practising allowance granted to medical officer in lieu of private practice.

Note 10 below Rule 33 provides:

When a Government servant has been transferred to an Autonomous Body consequent on the conversion of a Department of the Government into such a body and the government servant so transferred opts to retain the pensionary benefits under the rules of the Government, the emoluments drawn under the Autonomous Body shall be treated as emoluments for the purpose of this rule.

Dearness Relief is defined under Rule 3(1)(cc) of the CCS (Pension) Rules to mean relief as defined in Rule 55-A. Rule 55-A deals with Dearness Relief on Pension/Family Pension. It provides:

Relief against price rise may be granted to the pensioners in the form of dearness relief at such rates and subject to such conditions as the Central Government may specify from time to time.

Rule 9 (21) (a) of Fundamental Rules defines "pay" to mean the amount drawn monthly by a Government servants as -

(i) the pay, then special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and

(ii) overseas pay, special pay and personal pay; and

(iii) any other emoluments which may be specially classed as pay by the President.

22. Fresh Staff Notice bearing No. HQ-A/01-01/90-PE1 dated 21.2.1990 came to be issued by VSNL to all the permanent employees in Government Service whose services had been transferred to VSNL from the OCS and who had opted for absorption in VSNL calling upon them to exercise their option in terms of sub-para (a) of Department of Pension and Pensioners' Welfare O.M. No. 4/18/87-P & PW dated 05.07.1989 which was placed on record of the High Court as Annexure P4 along with a clarificatory information which inter alia provided that the option to retain pensionary benefits under the Central Government Rules will mean that the employees will receive pensionary benefits (pension and gratuity) on the basis of emoluments/average emoluments drawn by the employees at the time of retirement from VSNL and in accordance with the Rules of the Central Government. In short, it was clarified that when the employees of VSNL will retire from the Nigam, he shall retire with pensionary benefits as if he had retired from Central Government service. Along with the clarificatory information three formats in the form of model (1), model [2] and model [3] were annexed requesting VSNL employees either to retain pensionary benefits under the Government Rules or retiral benefits of the Company by exercising their options

as enumerated in either of the model form. It appears from the record that vide order dated 24.11.1996, the Government of India conveyed its approval to the revision of pay structure of Executives Employees and Non-Executives Employees of VSNL to the IDA pattern who were recruited on or after January 1, 1989. This order also provided that DA admissible to Executives and Non-Executives will be at the rates specified by the Department of Public Enterprises in their O.M. dated 22.1.1991 as amended from time to time. The letter in the 'Fitment Method' would show that the basic pay plus Central D.A. has been merged in the basic pay fixed in the appropriate stage of the IDA pattern scale of pay. It was specifically clarified in the said letter that the total emoluments drawn by VSNL employees in the Central Government scale of pay and DA pattern as on 2.1.1990 would stand protected and their pay would be fixed as clarified in the said order. Further, it was also specifically provided that after 2.1.1990 the employees of VSNL would draw increments and DA as per IDA pattern. Based on this direction from the Government of India, Department of Telecommunications, the pay scale of Non-Executives of VSNL was changed over to IDA pay scale in May, 1993 with retrospective effect from 2.1.1990 and for Executives in December, 1993 with retrospective effect from 2.1.1990. The respondents-retirees who were petitioners before the High Court have also relied upon the said letter dated 24.12.1992 in paragraph 28 of the writ petition. Again, VSNL issued office order bearing No. HA-A/01-04/91-PE1 dated 03.09.1993 in reply to clarification sought for by its Centres/Units as to whether pay drawn under IDA pattern could be treated as emoluments for the purpose of calculation of pension and other terminal benefits on or after 2.1.1990 in respect of employees who opted to retain pensionary benefits available to them in terms of Government of India Rules and also for change over to the IDA pattern of pay scale. In accordance with O.M. dated 5.7.1989 issued by Ministry of Personnel, Public Grievances and Pension, (Department of Pension and Pensioners' Welfare) being Annexure-P4, it was clarified that in respect of those employees who had changed over to IDA pattern of pay scale with effect from 2.1.1990 emoluments for purposes of calculation of pension and other terminal benefits shall be the emoluments drawn by them in the IDA scales at the time of their retirement/resignation/death, etc. from the Company. The said order also prescribed that the pension and other terminal benefits in the above case shall be calculated in accordance with the Rules of Central Government in that behalf. It further stated that "Admissible Dearness Relief" (ADR) shall also be allowed thereupon so arrived at as per the existing Central Government Rules. The respondents-retirees pleaded in the High Court the clarificatory order as existing facility and accrued right and the mode of computation of pensionary benefits to the OCS employees who were absorbed in VSNL. The letter dated 3.9.1993 (Annexure-P10) was a simple internal clarificatory circular exchanged between VSNL and its Centres/Units and in no circumstances the terms and conditions contained in the said letter could have been treated as a mode of computation of pensionary benefits of VSNL employees. When the clarificatory order stated: "Admissible Dearness Relief" shall also be allowed on the pension so arrived at as per

existing Central Government Rules", the words 'so arrived at' have to be read and construed to be on the basis of the emoluments drawn in the IDA pay scales and nothing more or nothing less. It appears that due to some uncertainty on the part of VSNL for some period pension was paid on emoluments arrived at as per the IDA pay scales and DR accrued on IDA pay scale was wrongly given as per the CDA scales. This method and calculation was totally contrary to and inconsistent with the Government Circular dated 24.12.1992 which was referred to and relied upon by the respondents-retirees themselves in paragraph 28 of the writ petition and, therefore, the payment of pension made under bona fide mistake would, under no circumstances, be viewed and treated as vested right of VSNL employees who were drawing pay in IDA scales.

23. On realising the mistake at the time when the revision of IDA pay scales was to be implemented in October, 1995 with effect from 1st January, 1992 by merger of IDA pay scales and IDA DR, VSNL issued its order bearing Reference No. HQ-A- 01-04/91-PE-1 dated 19.12.1995. The Government of India, Ministry of Personnel, Public Grievances and Pension (Department of Pension and Pensioners' Welfare), New Delhi vide O.M. No. 4/16/90-P&PW dated 22.11.1996 clearly clarified that the Central Government employees who opted for retention of Central Government pensionary benefits of absorption in PSUs/Autonomous Body as a result of efforts of Government departments as such, were entitled to the payment of pension based on the emoluments drawn by them in PSUs. In this connection reference to Note 10 below Rule 33, CCS (Pension) Rules, as extracted in the earlier part of this judgment was also made. As per this Office Memorandum, earlier clarification has been repeated and re-asserted that in the case of transferred employees of VSNL who were drawing IDA pay scales prior to their retirement, the emoluments for the purpose of pension shall be calculated on the basis of emoluments drawn in the IDA pay scales. It was also categorically stated that such employees shall not be entitled to the payment of DR on pension at Central Government rates. The Department of Public Enterprises have prescribed a separate DR table in respect of such transferred employees and therefore, DR on pension in respect of VSNL retirees shall be regulated by the orders issued by the Department of Public Enterprises from time to time. In these circumstances, it cannot be countenanced that the respondents - retirees have any vested right to receive DR at CDA scales on the pension which was calculated as per the IDA pay scales. The payment, as we have pointed out earlier, was made for sometime under a mistake and in contravention of the Government letter dated 24.12.1992 and, therefore, the office order of VSNL dated 3.9.1993 could never be considered as supporting the existing facilities or accrued right of the OCS employees absorbed in VSNL regarding the mode of computation of their pensionary benefits as held by the High court. The said clarificatory order nowhere has suggested that the DR of CDA scales would be given on pension which was based on emoluments in the IDA pay scales. Thus, the respondents-retirees would get pensionary benefits on the basis of the Government Circular dated 24.12.1992 and not on the basis of clarificatory office

order of VSNL. The respondents Nos. 1, 4 and 8 (except respondents 2, 3, 5, 6 and 7) prior to their retirement were drawing pay in the IDA scale of pay with the ADR of the IDA pay scales and therefore, pension could only be calculated on IDA pay scales with IDA pattern of DR and not on DR of CDA scales of pay. Moreover, the pensionary benefits, i.e. pension as well as gratuity of the respondents-retirees, were not finally settled till as late as 25.3.1997 as was evident from O.M. bearing Reference No. 4/3/07 P & PW (D) dated 25.3.1997 (Annexure P-15) issued by the Government of India, Ministry of Personnel, Public Grievances and Pension to the Department of Telecommunications with a copy to Shri A.K. Kar, Secretary, VSNL Retired Employees Association (respondent No. 1 herein) which would clearly show that there was delay in releasing the terminal benefits of the employees of VSNL because of some doubts and confusions raised by some Centres/Units of VSNL and such doubts were finally settled by the Government of India, Ministry of Personnel, Public Grievances and Pension vide their O.M. dated 22.11.1996 (Annexure P-14).

24. In the facts and circumstances of the case, we are of the opinion that the clarification given by the Government of India in its O.M. dated 22.11.1996 (Annexure P14) in clear and unambiguous terms stated that the employees of VSNL were drawing the IDA pay scales with the ADR under the IDA pay scales were entitled to pensionary benefits only on the basis of IDA pay scales as IDA pay scales with IDA pattern of DR was already taken into account for pension and other benefits at the time of retirement of such employees of VSNL. It appears from the various communications exchanged between the Government of India and VSNL referred to earlier that due to some error or bona fide mistake, VSNL made wrong payments of DA to the respondents-retirees calculated on the IDA pay scales and such employees were getting double benefits of DR. Employees who were getting IDA pay scales with IDA pattern of DR could not draw pension calculated on IDA emoluments with CDA pattern of DR. It is well-settled that a bona fide mistake does not confer any right to any party and it can be corrected. VSNL vide subsequent Office Order bearing Ref. No. HQ-A/01-04/91-PE1 dated 18.10.1995 had rectified its mistake appearing in earlier order dated 3.9.1993 and the said office order was again modified by another Office Order bearing No. HQ-8A/01-04/91-PE1 dated 19.12.1995 by which para 2(A) of the Office Order dated 18.10.1995 was modified to the extent as stated in the earlier part of this judgment. The modified order was one-time exercise for choosing the alternatives of settlement of pension and the pensioners were required to submit their consent to the Regional Heads in a prescribed format by 15th January, 1996. The Government of India, Ministry of Personnel, Public Grievances and Pension (DP & PW), New Delhi, issued O.M. dated 22.11.1996 (Annexure-P14) which is the nodal department of the Government of India for taking policy decisions on pensionary matters sent clarificatory order, a copy thereof was sent to the Ministry of Tele-Communications, Department of Communications, dealing with the subject of payment of pension to the employees of erstwhile OCS who were absorbed in

VSNL.

25. In view of the above, we are of the opinion that the benefit of DR of CDA scales, which has been given to the respondents-retirees by mistake at the time of their retirement, is not to be given again as clarified by the Government of India from time to time in their various Office Memoranda referred to above and the respondents -retirees are entitled to pension to be calculated on emoluments in the IDA pay scales. The ratio of the decision cited at Bar in the case of Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others, is of no assistance to the respondents-retirees in the facts and circumstances of the present case. In that case, the respondents were railway employees belonging to the category of running staff (retired from service after 1.9.1973 and before 5.12.1998) and their pensionary benefits were to be calculated on the basis of "average emoluments" as defined in Rule 2544 of the Indian Railway Establishment Code. The 'Running Allowance' up to maximum of 75% taken as part average emoluments for determination of their pension and gratuity. When the pay scales of railway employees were revised w.e.f.1.1.1973 under the Railway Services (Revised Pay) Rules, 1973, the Railway Board by its letter dated 21.1.1974 intimated that existing percentage of running allowance would continue for the time being, though it was under revision. In a subsequent letter dated 22.3.1976, the percentage was reduced to 45% retrospectively w.e.f. 1.4.1976 which order was quashed by the Central Administrative Tribunal in some other case. The Railway Board did not challenge the validity of the said order of the Tribunal, but it issued two statutory notifications dated 5.12.1988, in which the percentage was reduced to 45% retrospectively w.e.f. 1.1.1973 and to 55% retrospectively w.e.f. 1.4.1979. The argument on behalf of the Railway Board before this Court was that the total amount of pension already being paid to the respondents did not get reduced on account of the impugned notifications. The argument was based on the premise that the respondents had not yet been paid pension by taking into account maximum limit of 75% of 'Running Allowance' on revised pay scale applicable from 1.1.1973. Rejecting this argument, this Court held that pension was payable to the respondents after their retirement. They were no longer in service on the date when the impugned notifications were issued. The amendments in the Rules were not restricted in their application in futuro but apply to employees who had already retired and were no longer in service on the date the impugned notifications were issued. It was observed that pension was determined on the basis of emoluments payable at the time of retirement (Rule 2301). It was held that the impugned amendments took away the right of the employees to have their pension computed on the basis of their average emoluments in accordance with the provisions applicable at the time of their retirement. The amount of pension payable to the respondents in accordance with the rules which were in force at the time of their retirement had been reduced. In such circumstances, this Court held that retrospective amendment of statutory rule, adversely affecting pension of employees who already stood retired on the date of the notification was

invalid. A retrospective reduction of the pension was held not permissible under law.

26. In the present case, on the basis of the above-noted various Office Memoranda relating to the subject matter of pension, the Government of India or VSNL have not infringed or snatched away the right of pension of the respondent retirees which had accrued to them on the basis of IDA pay scale with IDA pattern of DR either retrospectively or prospectively. The respondents-retirees, therefore, cannot be held entitled to get DA twice, i.e. first on CDA pay scale and then on IDA pay scale. In terms of Rule (o) of CCS (Pension) Rules, 'Pension' does not include DR and amount of pension has to be calculated as prescribed under Rule 49 thereof. It is well known that DR is always related to industrialization of the increase in cost of living and it cannot exceed to 100% neutralisation. Therefore, the impugned order of the High Court would result in granting to the respondents-retirees benefits in excess of 100% neutralisation of the increase in cost of living.

27. Respondents Nos. 1, 4, and 8 and other employees who retired after May 1993 and December 1993 respectively when the change over to the IDA scale was implemented for Non- Executive Employees and Executive Employees retrospectively, had in fact started drawing pay in the IDA scales and DA in accordance with the orders of the Government of India issued from time to time to all PSUs/Autonomous Bodies. Therefore, no question arose for the respondents-retirees claiming a vested right to draw DR as per existing pay scales which was much higher in view of the fact that IDA pay scales were arrived at by merger of CDA pay scales and DR. It is well- settled that DR is a matter of grace to the Government Servants and not a vested right and hence a claim against the Government for the grant of such allowance at particular rate is not justiciable. The grant of DR at such rates and subject to such conditions is the prerogative of the Central Government in terms of Rule 55-A of the CCA (Pension) Rules, 1972. Rule 44 of FR to the grant of DA imposed no duty on the State to grant it and it merely confers a power on the State to grant compassionate allowance at its own discretion and no mandamus or any other writ or direction, therefore, should be issued to compel the exercise of such a power as there is no right in the employee which is capable of being protected or enforced. [see. The State of Madhya Pradesh Vs. G.C. Mandawar,].

28. In this view of the matter, our conclusion on the question of denial of Dearness Relief on pension in case of those retired employees of VSNL who have drawn pay on IDA pay scales with IDA Dearness Relief is legal and just. Therefore, the view taken by the High Court in this regard cannot be sustained. In the result, this appeal is allowed and the order of the Division Bench in MAT No. 171 of 2002 dated 25.11.2004 affirming the order recorded by the learned Single Judge in CWP No. 6935(W) of 1999 dated 15.10.2001 shall stand set aside. We direct dismissal of the writ petition. We make it clear that if any pensionary benefits have been given to respondents-retirees or to any similarly

situated persons of VSNL at the time of mistaken calculation of the pensionary benefits or in compliance to the order of the High Court, such benefits shall not be recovered from them.

29. However, in the fact and circumstances of the case, there shall be no order as to costs.