Action Committee South Eastern Railway Pensioners and Another

Vs

Union of India and Others

Writ Petition (Civil) No. 501 of 1988

(N. M. Kasliwal, K. Ramaswamy JJ)

05.09.1990

JUDGMENT

N. M. KASLIWAL, J. –

This petition under Article 32 of the Constitution of India has been filed by petitioner 1, an association of the retired employees of the South Eastern Railway and petitioner 2 being the convenor of the association. For convenience sake we would hereinafter refer to the above class of pensioners as petitioners. According to the Railway Board's letter No. PC III/79/DP/1 dated June 11, 1979 the Ministry of Railways extended the benefit of merger of Dearness Pay (DP) up to 272 points price index level with average emoluments for calculation of pensionary benefits to the railway servants retired on or after September 30, 1977. It further stipulated that the railway employees retired on or after September 30, 1977 but not later than April 30, 1979 will have an option to choose either of the two alternatives i.e. favour of the existing rule to have their pension calculated without merger of DP on 272 points price index level or with merger of the same. Such employees were given time up to December 31, 1979 to exercise their option. It was further stated therein that those who will retain their option in existing schemes will be allowed graded relief on pension to the fullest extent admissible from time to time inclusive of price index level i.e. 272 and those who will opt out of the existing scheme i.e. opt in favour of merger of DP shall be allowed to enjoy the instalment of graded relief sanctioned beyond average price index level 272. The pension and gratuity were, therefore, calculated in terms of options exercised by the ex-employees.

2. According to the petitioners at the time of their retirement they were given option as to whether the petitioners would opt for pension and service gratuity/death-cum-retirement gratuity computed after taking into account of a portion of dearness allowance as dearness pay or for pension and service gratuity/death-cum-retirement gratuity excluding dearness allowance as dearness pay. The petitioners opted for pension and service gratuity/death-cum-retirement gratuity to be computed after taking into account dearness allowance as dearness pay. According to the petitioners they have at all material times drawn pension and service gratuity and death-cum-retirement gratuity calculated and/or computed after taking into account dearness pay only. The case of the petitioners is that according to the above circular only 22 per cent of pay has been treated as dearness pay for computation of pension in the case of the employees including the petitioners who opted for pension and service gratuity/death-cum-retirement gratuity after including dearness pay. In June 1979, total dearness allowance payable to the railway servants were 45.5 per cent of pay whereas in computation of pension and service gratuity/death-cum-retirement gratuity only 27 per cent of pay was taken into consideration instead of 45.5 per cent of pay. By another order No. 103/82 dated May 11, 1982 further 15 per cent of basic pay was added as dearness pay in lieu of total dearness allowance in computation of pension for those who had opted for dearness pay in computation of

pension. At that time the railway servants in service were drawing 75.5 per cent of pay as dearness allowance.

3. By another order No. 108/83 dated May 25, 1983 a further 0.5 per cent of the basic pay was added to dearness pay thus in all 42.5 per cent in lieu of total dearness allowance was permitted in case of pensioners including the petitioners who opted for dearness pay for computation of pension payable to them. At that time such of the petitioners in service and other railway servants were drawing 99.5 per cent of basic pay as total dearness allowance. Various representations were made on behalf of the railway servants for taking into account entire dearness allowance for the purpose of computation and calculation of pension and service gratuity/death-cum-retirement gratuity in view of paragraphs 501 and 506 of Manual of Railway Pension Rules, 1969.

4. The Railway Board by its order No. PC/III/85/DP/I dated May 17, 1985 decided that the entire dearness allowance and ad hoc dearness allowance in addition to dearness pay be treated as part of pay for the purpose of calculating pension and other retirement benefits in respect of railway servants who retired on or after March 31, 1985. However the petitioners and other railway servants who happened to retire before March 31, 1985 were not given such benefits. The case of the petitioners is that no reasons have been given why the railway servants who retired before March 31, 1985 were not given such corresponding benefits as given to those who retired on or after March 31, 1985. In the said order dated May 17, 1985 it has been further provided that in case of railway servants who would retire between March 31, 1985 and September 30, 1985 one half of dearness pay including therein additional dearness allowance and ad hoc dearness allowance would be added to average emoluments and in case of railway servants who would retire after September 30, 1985 full dearness pay including therein additional dearness allowance would be added to average emoluments for computation of pension, gratuity and other retirement benefits.

5. The petitioners in these circumstances have urged that the order dated May 17, 1985 issued by the respondents is not only discriminatory, arbitrary and designed to deny the petitioners the equal treatment as guaranteed under the Constitution but also mala fide and illegal. It has thus been prayed that this Hon'ble Court be pleased to declare that the petitioners and those who have retired prior to March 31, 1985 are also entitled to be treated at par with those who have retired subsequently thereto in the matter of computation of their pension and other retirement benefits in terms of the order dated May 17, 1985 and give a direction to the respondents to extend the benefits of the circular dated May 17, 1985 to the petitioners with effect from the respective dates of their retirement. The petitioners have placed strong reliance in support of their case on D.S. Nakara v. Union of India [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165].

6. The respondents have filed a counter-affidavit in which it has been submitted that in the Board's letter dated June 11, 1979 an option was given to either claim benefit of merger of DP up to 272 points price index level with average emoluments for calculation of pensionary benefits or to have their pension calculated without merger of DP. It was further stated therein that those who will retain their option in existing schemes will be allowed graded relief in pension to the fullest extent admissible from time to time inclusive of price index level and those who will opt out of the existing scheme i.e. opt in favour of merger of DP shall be allowed to enjoy the instalment of graded relief sanctioned beyond average price index level 272. The pension and gratuity were therefore calculated in terms of options exercised by the ex-employees. Thus the Board's intention was very clear to mitigate the loss by granting graded relief to the pensioners having opted in favour of new scheme by merging of DP in average emoluments for calculation of pension. It has been submitted that the amount of DA merged as pay in different pay slabs are as follows :

Pay range Amount of DP(i) up to Rs 300 36 per cent of pay.(ii) Above Rs 300 and 27 per cent of pay subject up to Rs 2157 to minimum of Rs 208 and maximum of Rs 243.(iii) Above Rs 2157 and Amount by which pay falls short up Rs 2399 of Rs 2400.##

7. The respondents further submitted in the reply that the Ministry of Railways further reviewed the order in Estt. Sl. No. 192/79 and decided to merge DA as pay up to average price index level 320 vide Estt. Sl. No. 103/82 (Board's letter No. PC III/82/DP/3 dated April 30, 1982) giving effect to employees who retired on or after January 31, 1982. The issue was further got examined by the Board and modified vide Estt. Sl. No. 108/83 (Board's letter No. PC III/82/DP/3 dated May 11, 1983) allowing a further merger @ 5 per cent DA as pay for calculation of pension giving effect from the same day i.e. January 31, 1982. The amount of DA merged as pay in different pay slabs are as follows :

Pay range Amount of DP(i) Up to Rs 300 21 per cent of pay subject to a minimum of Rs 42 and maximum of Rs 60.(ii) Above Rs 300 and 15 per cent of pay subject up to Rs 2037 to a minimum of Rs 60 and maximum of Rs 120.##

8. The above amount of dearness pay was further modified under Board's letter dated May 11, 1983 as under :

Pay range Amount of DP(a) Up to Rs 300 21.5 per cent of pay subject to a minimum of Rs 42 and maximum of Rs 62 p.m.(b) Above Rs 300 and 15.5 per cent of pay subject up to Rs 800 to a minimum of Rs 62.(c) Above Rs 800 and Rs 100 plus 3 per cent of pay up to Rs 2037 subject to a maximum of Rs 127.##

9. Thus the date of option by the eligible ex-employees was extended up to September 3, 1983 vide Estt. Sl. No. 108/83. It has been further submitted that the option called for in terms of both the orders were in the line of Estt. Sl. No. 192/79 i.e. retain the merger of DP on average price index level 272 in calculating average emoluments or with merger of DP on 320 point price index level and graded relief in cases of employees who opted for merger of 272 price index level were allowed relief in pension beyond 272 price index level and those who opted in favour of merger of 320 price index level beyond 320 price index level.

10. The respondents further submitted in the counter-affidavit that the Railway Ministry under their letter No. PC III/85/DP/1 dated May 17, 1985 decided that entire ADA/DA and ad hoc DA sanctioned under their letter No. PC III/85/DA/1 dated January 19, 1985 (Estt. Sl. No. 17/85) linked to average index price level 568 be treated as dearness pay in addition to DP already treated as part of pay vide Ministry's letters dated June 11, 1979, April 30, 1982 and May 11, 1983 for the purpose of retirement benefit of railway servant retired on or before March 31, 1985 to the extent specified therein. The Railway Ministry vide their letter No. PC. III/85/DP/1 dated June 27, 1985 have further clarified that the dearness allowance, ADA and ad hoc DA up to average index level 568 shall be treated as DP with effect from the date from which these were sanctioned. Where the pension calculated results in loss as compared to the total amount of pension plus relief on pension, admissible at the average index level 320 (i.e. 80 per cent on pension) the loss will be made up by the grant of personal pension. Those pensioners (retired on or after March 31, 1985) were eligible for graded relief on pension sanctioned beyond average price index level 568. Board's letter dated June 27, 1985 also stipulates that benefits which are advantageous be applied setting aside the question of option as required under Board's letter dated May 17, 1985.

11. It has been further submitted in the reply that the case of D.S. Nakara [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165] is not applicable inasmuch as Nakara case [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165] applies to pensioners who were treated in one class. In the present case Railway Board's order dated May 17, 1985 and June 27, 1985 apply to the serving employees at the material time. The serving employees and the petitioners who are pensioners fall in two different classes. Thus the principle enunciated in Nakara case [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165] cannot apply in the case of the petitioners. In the present case the question is not about the applicability of liberalised pension formula but the issue is entirely different i.e. modality of treatment of 'pay' for determining retirement benefits.

12. We have heard learned counsel for both the parties and have perused the record. From a perusal of the abovementioned circulars of the Railway Board issued from time to time it is clear that the pension and gratuity were calculated in terms of options exercised by the petitioners and other employees having retired prior to March 31, 1985. The petitioners admittedly exercised their option for pension and other retirement benefits computed after taking into account dearness allowance as dearness pay. It is also admitted position that to mitigate the loss graded relief has been granted to the pensioners having opted in favour of new scheme. The petitioners are admittedly getting dearness allowance in addition to their pension on account of price index level going high. All pensioners falling in the category of the petitioners have been classified in one class and have been given equal treatment. So far as the circular/letter dated May 17, 1985 is concerned it granted the merger of entire dearness allowance as dearness pay in case of those employees who were continuing in service on March 31, 1985. The petitioners in this regard cannot claim any right that their entire dearness allowance should also be merged as dearness pay and to further calculate the other retiral benefits like gratuity, commuted value of pension etc. on that basis. During the course of arguments learned counsel for the petitioners was unable to show us any material difference in the actual pension drawn by the petitioners with those who retired after March 31, 1985. Learned counsel for the petitioners only submitted that if the formula adopted in the case of employees having retired after March 31, 1985 vide circular dated May 17, 1985 is applied in the case of the petitioners then it would make substantial difference in the calculation of the amount of gratuity and commuted value of pension. As already discussed above no such claim can be allowed nor the same can be permissible on any principle of equality enshrined under Article 14 of the Constitution inasmuch as the petitioners form a different class from those who were continuing in service on or after March 31, 1985. The petitioners of their own accord had opted for the choice given to them and the principle enunciated in D.S. Nakara case [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165] cannot be applied in the case of the petitioners. A Constitution Bench of this Court in Krishena Kumar v. Union of India [(1990) 4 SCC 207 : 1991 SCC (L&S) 112 : JT (1990) 3 SC 173 : (1990) 14 ATC 846] after dealing with Nakara case [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165] in detail observed as under : (SCC p. 231, paras 30 and 31)

> "Thus the court treated the pension retirees only as a homogeneous class. The P.F. retirees were not in mind. The court also clearly observed that while so reading down it was not dealing with any fund and there was no question of the same cake being divided amongst larger number of the pensioners than would have been under the notification with respect to the specified date. All the pensioners governed by the 1972 Rules were treated as a class because payment of pension was a continuing obligation on the part of the State till the death of each of the pensioners and, unlike the case of Contributory Provident Fund, there was no question of a fund in liberalising pension.

> The argument of Mr Shanti Bhushan is that the State's obligation toward pension retirees is the same as that towards PF retirees. That may be morally so. But that was not the ratio decidendi of Nakara [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) 2 SCR 165]. Legislation has not said so. To say so legally would amount to legislation by enlarging the circumference of the obligation and converting a moral obligation."

13. In the result we find no force in any of the contentions raised on behalf of the petitioners and the writ petition is dismissed with no order as to costs.

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