

Union of India

Vs

L. V. Vishwanathan

(Sujata V. Manohar, M. Jagannadha Rao JJ)

11.11.1997

JUDGMENT

MRS. SUJATA V.MANOHAR, J.

1.The respondents in both these appeals retired as Audit Officers from the Office of the Accountant General, Andhra Pradesh, after more than 30 years of service.The respondents, some time prior to their retirement, had been sent on deputation to the Andhra Pradesh Secretariat and they continued to be on deputation till the date of their retirement.Each person when he is sent on deputation has an option either to opt for the pay in the parent office plus a deputation allowance or to opt for the scale of pay in the deputation post. Both the respondents had opted for retaining their pay in the parent office plus a deputation allowance.The respondent in Civil Appeal No.3343 of 1990 (L.V.Vishwanathan) retired on 31.1.1987 while the respondent in Civil Appeal No.8851 of 1994 (M.S. Sabhesan) retired on 31.5.1986. At the time of their retirement, under Rule 33 of the Central Services Pension Rules which are applicable to the respondents, emoluments for the purpose of calculation of pension were defined to mean pay as defined in Fundamental Rule 9(21).Fundamental Rule 9(21) is as follows: -

"9(21): (a) Pay means the amount drawn monthly by a Government servant as -

(i) the pay, other than 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

(ii;) any other emoluments which may be specially classed as pay by the President.It is an admitted position that the Government of India treated deputation allowance as special pay.Emoluments, therefore, at the time of the retirement of the respondents included deputation allowance for the purpose of calculation of pension.

2.After the Fourth Central Pay Commission Report, Government orders were issued in June 1986 revising the pay scales with effect from 1st of January, 1986.Thereafter under an Office Memorandum dated 14th of April, 1987 issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions, there was a revision in the provisions regulating, inter alia, pension.In the opening part of the Office Memorandum it is stated that 'In pursuance of the Government decisions on the recommendations of the Fourth Central Pay Commission the President is pleased to introduce the following modifications in the rules regulating pension, death-cum-retirement gratuity and family pension under the CCS (Pension) Rules, 1972.'" The modifications

were applied retrospectively from 1st of January, 1986 so as to coincide with the revision in the pay scales. As per, the modifications, the term 'emoluments' for the purposes of calculating various retirement benefits including pension, was redefined to mean basic pay as defined in Fundamental Rule 9(21)(a)(i) which the Government servant was receiving immediately before his retirement. Similarly, the term 'average emoluments' was to be determined with reference to the emoluments drawn by a Government servant during the last ten months of his service.

3. As a result of this modification only sub-clause (i) of Fundamental Rule 9(21)(a) would constitute basic pay, excluding subclauses (ii) and (iii). Therefore, since special pay is excluded from subclause (i) the basic pay would have to be calculated by excluding deputation allowance. In consequence, Rule 33 of the C.C.S. Pension Rules was amended in 1988 with retrospective effect from 1.1.1986. Previously, Rule 33 of CCS Pension Rules defined "emoluments" as follows:

"The expression 'Emoluments' means pay as defined in Rule 9(21) of the Fundamental Rules (including Dearness Pay as determined by the order of the Government issued from time to time) which a Government servant was receiving immediately before his retirement or on the date of his death." The amended Rule 33 (With retrospective effect from 1.1.1986) is as follows:

"Emoluments: 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.

4. In the same Office Memorandum clause 10.1 makes a provision for those who retire between 1.1.1986 and 30.6.1987. These persons have an option to retain their pre-revised scales of pay and have their pension calculated under the rules in force prior to the Office Memorandum of 14.4.1987. In other words, they have the option to retain pre-revised scales of pay and the pre revised formula for calculation of pension. The other option is for them to accept the new scales of pay from 1.1.1986 but their pension will be under the amended Pension Rules i.e. without taking into account the deputation allowance. This was expressly provided in the Office Memorandum to prevent any actual prejudice in the form of lesser pension being given on account of retrospective operation of the new pension formula.

5. The Office Memorandum of 14.4.1987 was modified on 8th of December, 1987 on account of many representations which were received. As per the modification, in cases where ten months' average has to be calculated on either side of the date 1.1.1986, the emoluments as per Fundamental Rule 9(21)(a)(i) will be calculated only for the period falling after 1.1.1986. Once again, retrospectivity was curtailed to prevent any actual prejudice.

6. Since the Office Memorandum was given retrospective operation from 1.1.1986, the respondents who had retired after 1.1.1986 but before 14.4.1987, were affected by this Office Memorandum. They opted for revised pay scales. Hence, for the purpose of calculation of pension, only the basic pay as revised excluding deputation allowance was taken into account for determining pension.

7. The respondents contend that by a retrospective amendment in the pension rules, their right to include deputation allowance as a part of their emoluments has been taken away. They contend that such retrospective operation of the pension rules must be set aside as arbitrary and violative of

Articles 14 and 16. This contention has been upheld by the Central Administrative Tribunal, Hyderabad Bench. Hence the Union of India has filed the present appeals.

8. It is contended by the appellants that the changes consequent upon the Fourth Central Pay Commission Report have to be taken as a package. By accepting the revised pay scales with retrospective effect from 1.1.1986 the Central Government Employees got benefits in pay, pension and gratuity from 1.1.1986. When they take these benefits retrospectively from 1.1.1986, they cannot reject a part of that package which is "disadvantageous" to them. In fact, the actual pension which the respondents got is much more than what they would have got had they opted for the old rules prevailing when the old pay scales were in force. In the Office Memorandum of 14.4.1987 there is a specific provision for people like the respondents who have retired after 1.1.1986 but before 30th of June, 1987 (i.e. the period prior to the Office Memorandum) giving them an option either to retain their old pay scales and the old benefits which they were getting or to opt for their new pay scales and get benefits as per the new scheme. So that in those cases where the retrospective operation of the "package" causes any prejudice, the employee can reject it and retain his old benefits.

9. A Constitution Bench of this Court has recently, in the case of *Chairman Railway Board & Ors. Vs. C.R. Rangadhamaiah & Ors.* (JT 1997 [7] S.C.180), considered a situation where a retrospective effect was given to a reduced percentage of running allowance being taken into account for determining average emoluments for pension of railway employees. The Constitution Bench has held that pension would have to be calculated on the basis on which it was required to be calculated on the date when the person retired. A more restrictive formula for calculation of pension was held as arbitrary and violative of Articles 14 and 16 to the extent that it was made applicable with retrospective effect. In the present case, however, there is a clear nexus between the upward revision in the pay scales and the new formula for calculating pension. Both are given with retrospective effect from 1.1.1986. The Office Memorandum which changes the formula for pension also provides that those who retired after 1.1.1986 but before the issuance of the Office Memorandum would have the option to get their pension determined under the then existing rules on the basis of emoluments they were then getting. The effect is that (1) those who retired prior to 1.1.1986 got old emoluments and pension as per the old formula (2) those who retire after 30.6.1987 get new pay scales and pension as per new formula and (3) those who retire between 1.1.1986 and 30.6.1987 have the option to choose to be with either those in (1) or those in (2) whichever is more advantageous to them.

10. The respondents want to carve out a fourth category. Those who retire between 1.1.1986 and 30.6.1987 should have the new pay scales and also the more liberal old formula for calculating pension as applied to the new pay scales. If this is accepted, those who retire between 1.1.1988 and 30.6.1987 will get higher pension than all those who have retired before 1.1.1986 as also all those who retire after 30.6.1987. There is no justification for conferring such higher benefits only on a small group that retired between 1.1.1986 and 30.6.1987. The Office Memorandum, therefore, rightly gives them the choice, to obviate any prejudice to this small group. The retrospective operation of office Memorandum, therefore, cannot be considered as prejudicial to this small group as it has made an express provision to prevent any actual prejudice to this group. The ratio of the decision of this Court in *Chairman, Railway Board Vs. Rangadhamaiah* (supra) does not, therefore, apply in the facts and circumstances of the present case.

11. The judgment of the Central Administrative Tribunal, in so far as it strikes down the retrospective operation of Office Memorandum of 14.4.1987 is, therefore, set aside and the appeals

are allowed. There will, however, be no order as to costs.