

SUPREME COURT OF INDIA

Union of India

Vs.

SPS Vains (Retd.)

C.A.No.5566 of 2008

(Altamas Kabir and Markandey Katju JJ.)

09.09.2008

JUDGMENT

Altamas Kabir, J.

1. Leave granted.

2. Interlocutory Application No.2 of 2006 filed by Major General S.C. Suri (Retd.) and 67 others similarly placed as the respondents is allowed.

3. Only a very limited issue falls for our consideration in this appeal which has been filed by the Union of India through the Secretary, Ministry of Defence and the Chief of Army Staff through the Adjutant General Army Headquarters, New Delhi, against the judgment and order of the Punjab and Haryana High Court allowing the writ petition filed by the respondents herein with the following directions:

"For the foregoing reasons, the writ petition is allowed and the respondents are directed to fix minimum pay scale of the Major General above that of the Brigadier and grant pay above that of a Brigadier as has been done in the case of post 1.1.1996 retirees and consequently fix the pension and family pension accordingly. There shall be no order as to costs."

4. As would be evident from the above, the primary question which falls for decision in this appeal is whether the High Court had in the exercise of its jurisdiction correctly directed that officers of the rank of Major General, who had retired prior to 1st January, 1996, when revision of pay scales took effect, be given the benefit of the provisions of the revised pay scale, notwithstanding the fact that in terms of the policy only those who retired after the said cut-off date would be entitled to such benefit. The larger issue involved is whether there could be a disparity in payment of pension to officers of the

same rank, who had retired prior to the introduction of the revised pay scales, with those who retired thereafter.

5. The case which has been made out in the High Court in the writ petition filed by the respondent herein is that prior to revision of the pay scales from 1.1.1996 the running pay band from Lieutenant to Brigadier, irrespective of promotion, introduced on the basis of the Fourth Pay Commission's recommendations, was Rs.2300-100-3900-EB- 150-4500-EB-5100. The rank pay that was fixed was Rs.200/-, 600/-, 800/-, 1000/- and 1200/- for the ranks of Captain, Major General, Lieutenant Colonel, Colonel and Brigadier, respectively. While a Major General was given a starting salary of Rs.6700/- on the basis of the recommendations of the Fourth Pay Commission, a Brigadier could draw Rs.5,100/- and additional rank pay of Rs.1200/- making a total of Rs.6300/-. Consequently, a Major General always drew higher pay than a Brigadier and the pension payable to officers on the basis of the recommendations of the Fourth Pay Commission was calculated on the basis of salary drawn during the last 10 months prior to retirement. Even on such basis, a Major General always drew more pension and family pension than a Brigadier. It has to be kept in mind that the rank of Brigadier is a feeder post for the promotional rank of Major General.

6. The anomaly arose with the acceptance by the Government of the recommendations of the Fifth Pay Commission which has created a situation whereby Brigadiers began drawing more pay than Major Generals and were, therefore, receiving higher pension and family pension than Major Generals. In view of the recommendations of the Fifth Pay Commission, a Brigadier was given a pay scale of Rs.15350-450-17600 together with rank pay of Rs.2,400/- whereas a Major General was given a pay scale of Rs.18400- 500-22400. In other words, the maximum pay in the pay scale of Brigadier is 17,600/- and the minimum pay in the pay scale of Major General is Rs.18,400/-. Inasmuch as, no rank pay was provided for beyond the rank of Brigadier, the minimum pay provided for a Major General became less than that of a Brigadier who may have reached the maximum point in his scale. Consequently, on retirement, the pension of a Brigadier became more than that of a Major General, since rank pay is also taken into consideration for the purpose of calculating pension and family pension. The pension of a Major General thus became Rs.9,200/-, while that of a Brigadier was Rs.9,550/-.

7. It is this anomaly, when pointed out, which prompted the Government to step up the pension of Major Generals who had retired prior to 1.1.1996, from Rs.9,200/- to Rs.9,550/- giving them the same pension as was given to Brigadiers. Before the High Court it was urged on behalf of the writ petitioners, who at the time of their retirement had held the rank of Major General or Air Vice Marshal, that while the writ petitioners and others similarly placed officers who had retired prior to 1.1.1996

were given the same pension as that of a Brigadier, those officers of similar rank who had retired after 1.1.1996 were given pension according to clause 12(c) of Special Army Instructions 2/S/1998, as a result whereof they were getting much higher pension and family pension than the writ petitioners, despite being of the same rank. It was pointed out that by virtue of the aforesaid Special Instruction the initial pay of an officer promoted to the rank of Major General would be fixed at the stage next above the pay notionally arrived at by increasing his pay, including rank pay of Brigadier, by one increment in the revised scale at the relevant stage. It is this classification within a class which led to the filing of the writ petition before the High Court. Before the High Court it was urged further that such differentiation between officers holding the same rank on the date of retirement was wholly erroneous and violative of the provisions of Article 14 of the Constitution.

8. Rejecting the submissions made on behalf of Government that there could be no fresh fixation of pay once an officer had retired and the only refixation possible would be that of pension, the High Court allowed the writ petition and disposed of the same with the directions indicated hereinabove.

9. The said decision of the High Court has been questioned in this appeal by the Union of India and the Chief of Army Staff. 10. Before us, the Union of India has taken a stand that the High Court misinterpreted the policy relating to fixation of pay of officers of the Defence Services and had also misunderstood the scope of the policy with regard to those officers who had retired prior to the revision of the pay scales and that their pay scales had already been revised at the time of their superannuation from service. In their case, therefore, the question of revision of pay scale could not arise and they could only claim that their pension, including family pension, should not be lower than that of a Brigadier which is a feeder post for the post of Major General having higher and more onerous responsibilities.

11. In this regard reference was made to a communication dated 7.6.1999 addressed to the Chiefs of the three wings of the Defence Services on behalf of the Ministry of Defence, Government of India, in which a differentiation appears to have been made between officers who had retired prior to 1.1.1996 and those who retired thereafter since a reference was made to two of the Ministry's letters dated 3.2.1998 dealing with post 1.1.1996 and the other dated 24.11.1997 dealing with pre 1.1.1996 cases.

12. Reference was also made to Special Army Instruction dated 19.12.1997 indicating that in pursuance of the recommendations of the Fifth Central Pay Commission and the Government decision thereupon, the existing pay scales admissible to Army Officers would be revised with effect from January, 1996. The said Instruction also indicated that the said provisions would apply to all officers who were on the effective strength of the Army as on 1.1.1996 and those who joined thereafter, and also to trainee officers who were

undergoing Pay Commission training on 1.1.1996 and trainee officers who joined after the said date. Reference was also made from the said Instruction to paragraph 9 thereof dealing with the stepping up of pay of Major Generals on promotion from the rank of Brigadier prior to 1.1.1996. In the said paragraph it has been specifically indicated that pay of all officers promoted to the rank of Major General prior to 1.1.1996 would be stepped up to become equal to the pay fixed for Brigadiers in the revised pay scale as on 1.1.1996, subject to certain conditions.

13. Yet another communication to the three Chiefs of the Defence Services dated 3.2.1998 issued by the Ministry of Defence, Government of India relating to the implementation of the Government's decision on the recommendations of the Fifth Central Pay Commission regarding pensionary benefits for officers and personnel below officers rank belonging to the armed forces, retiring on or after 1.1.1996, which would, however, have no application to those who had superannuated prior to 1.1.1996.

14. Learned Additional Solicitor General submitted that the Ministry of Defence, Government of India, had taken a considered decision in fixing 1.1.1996 as a cut-off date since the pay scales were revised with effect from the said date, and the pay scales of officers who had retired prior to the said date had already been fixed and there was no question of refixation of their pay scales and all they were entitled to was pension which was not less than that received by Brigadiers who had been given the benefit of the revision of pay scales and, were, therefore, drawing a higher salary resulting in higher pension.

15. The learned Additional Solicitor General urged that the High Court had erred in directing that the pay of Major Generals who had retired prior to 1.1.1996 be refixed according to the revised pay scales so as to give them the benefit of higher pension than officers of the rank of Brigadier.

16. The case of the respondents however, was that in view of the Constitution Bench decision of this Court in *D.S. Nakara and others vs. Union of India*¹, the fixation of a cut-off date as a result of which equals were treated as unequals, was wholly arbitrary and had been rightly interfered with by the High Court. One of the questions posed in the aforesaid decision was whether a class of pensioners could be divided for the purpose of entitlement and payment of pension into those who retired by a certain date and those who retired thereafter. The question was answered by the Constitution Bench holding that such division being both arbitrary and unprincipled the classification did not stand the test of Article 14.

17. Several other decisions were also relied upon by the respondents, which, in fact, followed *D.S. Nakara's* case (supra) and there is, therefore, no need to deal with them separately.

18. It was also the respondents' case that though there was no dispute that Major Generals were entitled to higher pensionary benefits than that enjoyed by Brigadiers, the appellant erroneously insisted that the cut-off date had to be fixed in view of the limited financial resources available to cover the additional expenses to be incurred on account of revision of pay scales.

19. On behalf of the respondents reliance was also placed on two letters addressed by the Chairman, Chief of Staff Committee, dated 8.2.2006 and 21.2.2006, along with the recommendation made by the Air Chief Marshal on 17.2.2006, stating that it was necessary to correct the injustice and discrimination which had been aimed at denying those officers who had retired prior to 1.1.1996, the benefits of the pension enjoyed by officers who retired after the said date.

20. Mr. Nidhesh Gupta, learned Senior Counsel who appeared for the respondents, submitted that the judgment of the High Court did not call for any interference as the same had been rendered on the touchstone of Article 14 of the Constitution and in consonance with the principle of administrative fair play. He submitted that officers of the rank of Major General, who had retired prior to 1.1.1996 should not be made the target of the bureaucratic error committed by the Government in refixing the scale of pay of Brigadiers after 1.1.1996 in such a manner so that by adding the rank pay to their basic pay, their pay at the time of retirement was higher than that of a Major General which was a superior rank, thereby creating an anomaly in the pension entitlement of officers of the two aforesaid ranks.

21. Mr. P.N. Lekhi, learned senior counsel who appeared for the added respondents, while adopting Mr. Gupta's submissions referred to the decision of this Court in *R.Viswan and others vs. Union of India and others*², on the question of morale and submitted that the arbitrary decision to discriminate between the two sets of officers belonging to the same rank in the matter of payment of pension was bound to adversely effect the morale of senior officers of the rank of Major General which was in fact the feeder post to the rank of Lieutenant General from amongst whom the Chief of Army Staff is ultimately chosen.

22. From the submissions made the dispute appears to be confined only to the question whether officers of the rank of Major General in the army and of equivalent rank in the two other wings of the Defence forces, who had retired prior to 1.1.1996, have been validly excluded from the benefit of the revision of pay scales in keeping with the recommendations of the Fifth Central Pay Commission by virtue of Special Army Instruction 2(S)98.

23. On behalf of the appellant, Union of India, it has been sought to be contended that since the pay scale of those officers who had retired prior to 1.1.96 had already been fixed at the time of their retirement, the question of refixation of their pay scales on account of the revision could not be accepted as they would only be entitled to the benefits of higher pension on account of such revision. The learned Additional Solicitor General, Mr. Vikas Singh, had contended that since an anomaly had been created in the pension payable to officers of the rank of Major Generals, who on account of the revision of pay scales were receiving less pension than Brigadiers who were lower in rank, the Government had stepped up the pension of Major Generals who had retired prior to 1.1.1996, so that they did not receive pension less than what was given to officers of the rank of Brigadier.

24. The said decision of the Central Government does not address the problem of a disparity having created within the same class so that two officers both retiring as Major Generals, one prior to 1.1.1996 and the other after 1.1.1996, would get two different amounts of pension. While the officers who retired prior to 1.1.1996 would now get the same pension as payable to a Brigadier on account of the stepping up of pension in keeping with the Fundamental Rules, the other set of Major Generals who retired after 1.1.1996 will get a higher amount of pension since they would be entitled to the benefit of the revision of pay scales after 1.1.1996.

25. In our view, it would be arbitrary to allow such a situation to continue since the same also offends the provisions of Article 14 of the Constitution.

26. The question regarding creation of different classes within the same cadre on the basis of the doctrine of intelligible differentia having nexus with the object to be achieved, has fallen for consideration at various intervals for the High Courts as well as this Court, over the years. The said question was taken up by a Constitution Bench in the case of D.S. Nakara (supra) where in no uncertain terms throughout the judgment it has been repeatedly observed that the date of retirement of an employee cannot form a valid criterion for classification, for if that is the criterion those who retired by the end of the month will form a class by themselves. In the context of that case, which is similar to that of the instant case, it was held that Article 14 of the Constitution had been wholly violated, inasmuch as, the Pension Rules being statutory in character, the amended Rules, specifying a cut-off date resulted in differential and discriminatory treatment of equals in the matter of commutation of pension. It was further observed that it would have a traumatic effect on those who retired just before that date. The division which classified pensioners into two classes was held to be

artificial and arbitrary and not based on any rational principle and whatever principle, if there was any, had not only no nexus to the objects sought to be achieved by amending the Pension Rules, but was counter productive and ran counter to the very object of the pension scheme. It was ultimately held that the classification did not satisfy the test of Article 14 of the Constitution.

27. The Constitution Bench has discussed in detail the objects of granting pension and we need not, therefore, dilate any further on the said subject, but the decision in the aforesaid case has been consistently referred to in various subsequent judgments of this Court, to which we need not refer.

28. In fact, all the relevant judgments delivered on the subject prior to the decision of the Constitution Bench have been considered and dealt with in detail in the aforesaid case.

29. The directions ultimately given by the Constitution Bench in the said case in order to resolve the dispute which had arisen, is of relevance to resolve the dispute in this case also.

30. However, before we give such directions we must also observe that the submissions advanced on behalf of the Union of India cannot be accepted in view of the decision in D.S. Nakara's case (supra). The object sought to be achieved was not to create a class within a class, but to ensure that the benefits of pension were made available to all persons of the same class equally. To hold otherwise would cause violence to the provisions of Article 14 of the Constitution. It could not also have been the intention of the authorities to equate the pension payable to officers of two different ranks by resorting to the step up principle envisaged in the Fundamental Rules in a manner where the other officers belonging to the same cadre would be receiving a higher pension.

31. We, accordingly, dismiss the appeal and modify the order of the High Court by directing that the pay of all pensioners in the rank of Major General and its equivalent rank in the two other Wings of the Defence Services be notionally fixed at the rate given to similar officers of the same rank after the revision of pay scales with effect from 1.1.1996, and, thereafter, to compute their pensionary benefits on such basis with prospective effect from the date of filing of the writ petition and to pay them the difference within three months from date with interest at 10% per annum. The respondents will not be entitled to payment on account of increased pension from prior to the date of filing of the writ petition.

32. The appeal is accordingly dismissed.

33. There will be no order as to costs.

¹(1983) 1 SCC 305

²(1983) 3 SCC 401