

ALLAHABAD HIGH COURT

Bidhubhushan Malik

Vs.

Union of India

Writ Petn. No. 3281 of 1979

(Satish Chandra, C.J. and B.D. Agrawal, J.)

02.03.1983

JUDGEMENT

B.D. Agrawal, J.

1. Chapter III of High Court Judges (Conditions of Service) Act, 1954 (Act No.28 of 1954) provided for Payment of pension to High Court Judges. Section 14 of Chapter III of the aforesaid Act stated that every Judge shall, on his retirement, be paid a pension in accordance with the scale and provisions in Part I of the First Schedule.

2. Parliament amended this Act by High Court Judges (Conditions of Service) (Amendment) Act of 1976. The Amending Act came into force on March 18, 1976. The Amending Act was given some retrospectively; Section 1 (2) there of provided that the Amending Act shall be deemed to have come into force on October 1, 1974. Inter alia, the Amending Act of 1976 amended the First Schedule of the parent Act. The amended Schedule liberalized the pension admissible to Judges and Chief Justices of High Courts. The following table shows the enhancement in pension :

		Prior Amendment	to	After Amendment	the
Paras. 2 to 5	Chief Justice	Rs. 20,000/-		Rs. 28,000/-	Judge
		Rs. 16,0000/-		Rs. 22,000/-	
Para. 8	Rs. 20,000/-	Rs. 28,000/-			

Chief justice			
Para. 9	Rs. 6,000/-	Rs. 8,400/-	
Judge			

3. Para 10 of the First Schedule introduced by the Amending Act of 1976 stated that the pension at enhanced rates shall be payable to such Judges only who have retired on or after the 1st Oct., 1974.

4. Several Judges, including many Chief Justices, who had retired prior to 1st Oct., 1974, made representations to the Government of India for computation of pension payable to them in accordance with the provisions of the Amended Act. The Government of India, however did not accede to their request. It took the view that the Judges, including the Chief Justices, who had retired prior to 1st Oct., 1974, were not entitled to the benefit of the enhanced pension provided for by the Amending Act of 1976. Aggrieved, some of the Judges, including Chief Justices, have filed the present writ petition.

5. For the petitioners it was urged that there is no rational basis for discrimination in the matter of according pensionary benefits between Judges of the High court who retired before Oct. 1, 1974, and those retiring subsequent to this date. The criteria upon which pension is awarded remains uniform, it is submitted, irrespective of whether the Judge retired prior to Oct. 1, 1974, or he retires on or after this date. The Judges constitute a class for that purpose; the date specified to constitute the demarcating line for giving benefit of liberalized pension is arbitrary having no nexus to the object behind the statutory provision. The discrimination, according to learned counsel's submission, infringes Article 14 of the Constitution.

6. The petition was filed upon these grounds before this Court on May 8, 1979. We are relieved of the burden considerably in view of the recent pronouncement of the Supreme Court dated Dec. 17, 1982 in the case of *D.S. Nakara v. Union of India*¹ upon which the petitioner's learned counsel chiefly relies for his support. In that case the petitioner No.1 had been a civil servant and the petitioner No.2 was a member of the service personnel of the Armed Forces.

The third petitioner was a society sponsoring the cause of the pensioners under the Central Civil Services (Pension) Rules, 1972. Government of India, Ministry of Finance issued O.M. dated May 2, 1979 whereby the formula for computation of pension was liberalized, but made it applicable to Government servants who were in service on March 31, 1979 and retire from service on or after that date. By the memorandum of the Ministry of Defense dated Sept. 28, 1979, the liberalized pension formula introduced for the Government servants governed by the 1972 Rules was extended to the Armed Forces personnel with a condition that the new rules of pension would be effective from April 1, 1979 to those service officers only who became ineffective on or after that date. The petitioner contended that the differential treatment for those retiring prior to a certain date and those retiring subsequently, the choice of the date being wholly arbitrary, would be according differential treatment to pensioners who form a class irrespective of the date of retirement and, therefore, would be violative of Article 14 of the Constitution. It was also contended that classifications based on fortuitous circumstance of retirement before or subsequent to a date, fixing of which is not shown to be related to any rational principle, would be equally violative of Article 14. The enquiry was limited as in the present to non-contributory superannuation or retirement pension paid by Government to its erstwhile employee.

7. Hon'ble Desai, J. speaking for the constitution Bench of the Supreme Court recalled that the antiquated notion of pension being a bounty, a gratuitous payment depending upon the grace of the employer and not claimable as a right had been discarded by the decision of the Constitution Bench in *Deoki Nandan Prasad v. State of Bihar*² wherein the Supreme Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but "the right to receive pension flows to the officers not because of any such order but by virtue of the rules". In *State of Punjab v. Iqbal Singh*³ this view was reaffirmed.

8. The burden lay upon the State to affirmatively establish that the twin tests are satisfied namely that the classification is founded on intelligible differentia which distinguishes persons grouped together from those that are left out of the

group and that the differentia has a rational nexus to the object sought to be achieved by the statutory provision in question. The pensioners for the purpose of pension benefits, it was held, form a class. The classification drawn was devoid of rational principle and arbitrary. At page 142, it was laid –

"If it appears to be undisputable, as it does to us that the pensioners for the purpose of pension benefits from a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criteria unrelated to purpose of revision, and would such classification be founded on some rational principle? The classification has to be based, as is well settled, on some rational principle and the rational principle must have nexus to the objects sought to be achieved. We have set out the objects underlying the payment of pension. If the State considered it necessary to liberalize the pension scheme, we find no rational principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalization was considered necessary for augmenting social security in old age to Government servants then those who retired earlier cannot be worst off than those who retire later. Therefore, this division which classified pensioners into two classes is met based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving some thing more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket the average emolument was the same and both had put in equal number of years of service. How does a fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension. One retiring a day earlier will have to be subject to ceiling of Rs. 8,100/- p.a. and average emolument to be worked out of 36 months' salary while the other will have a ceiling of Rs. 12,000/- p.a and average emolument will be computed on the basis of last ten months average. The artificial division stares into face and is unrelated to any principle and whatever principle, if there be any, has absolutely no nexus to the objects sought to be achieved by liberalizing the pension scheme. In fact this arbitrary division has not only no nexus to the liberalized pension scheme

but it is counter productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Article 14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the matter of computation of pension. A 48 hours difference in matter of retirement would have a traumatic effect. Division is thus both arbitrary and unprincipled. Therefore, the classification does not stand the test of Article 14."

9. Their Lordships of the Supreme Court further affirmed that there is nothing immutable about the choosing of art event as an eligibility criteria subsequent to a specified date "if the event is certain but its occurrence at a point of time is considered wholly irrelevant and arbitrarily selected having no rationale for selecting it and having an undesirable effect of dividing homogeneous class and of introducing the discrimination, the same can be easily severed and set aside." It is well settled that a statute is not retroactive because a part of the requisites for its action is drawn from a time antecedent to its passing. The principle of reading down the enactment was adopted and the contention for the Union of India that principle of severability could not be applied to augment the class was repelled pointing –

"We are not sure whether there is any principle which inhibits the Court from striking down an unconstitutional part of a legislative action which may have the tendency to enlarge the width and coverage of the measure. Whenever classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the resultant effect may be enlarging the class. In such a situation, the Court can strike down the words of limitation in an enactment. That is what is called reading down the measure. We know of no principle that 'severance' limits the scope of legislation and can never enlarge it."

10. Accordingly, both the impugned memoranda were read down for implementation on severing the provision contained in them that they applied to Government servants/service officers retiring/becoming effective on or after March 31, 1979. The date mentioned in the memoranda was found relevant as

being one from which the liberalized pension scheme became operative to all pensioners governed by 1972 Rules irrespective of the date of retirement. It was, however, clarified that arrears of pension prior to the specified date as per computation was not admissible. Omitting the unconstitutional part it was declared that all pensioners governed by the 1972, Rules and Army Pension Regulations shall be entitled to pension as computed under the liberalized pension scheme from the specified date, irrespective of the date of retirement

11. In several cases earlier also the Supreme Court has adopted the principle of reading down the provisions of the statute with a view to provide harmonious, just and reasonable interpretation and to construe the legislation as being within the constitutional limits. In all *Saints High School, Hyderabad v. Govt. of Andhra Pradesh* ⁴ it was observed :-

"This Court has in several cases adopted the principle of reading down the provisions of the statute. The reading down of a provision of a statute puts into operation the principle that so far as is reasonably possible to do so, the legislation should be construed as being within its power. It has the Principal effect that where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters beyond the relevant legislative power, the Court will construe it in a more limited sense so as to keep it within power."

12. Reference was made also to Maxwell on Interpretation of Statutes 12th Ed. page 109 under the caption "Restriction of Operation" :-

"Sometimes to keep the Act within the limits of its scope, and not to disturb the existing law beyond what the object requires, it is construed as operative between certain persons, or in certain circumstances, or for certain purposes only, even though the language expresses no such circumspection of the field of operation."

(See also *State of Karnataka v. Ranganatha Reddy* ⁵ *Kannan Devan Hills Produce Company Ltd. v. State of Kerala*.⁶ In the case of D.S. Nakara and others, supra this approach reached a new dimension. It was held that there is no inhibition against the principle of severability being applied to augment the

class as against confining it to cut down the scope of relevant measure.

13. Viewed in the light of the law laid down in the case of D.S. Nakara (AIR 1983 SC 130) (supra) which entirely covers the dispute, it will be observed that except for the fact that the petitioners retired from service prior to 1st October, 1974, there is no other basis for the denial to them of the liberalized pensionary benefit created under the Amendment Act, 1976. We enquired from the learned Standing Counsel for the Union of India, if there is any relevant or Valid consideration to selection of eligibility criteria, but none could be suggested. In the counter-affidavit the submission made is that the Government of India in Sept., 1974, for the first time considered that the conditions of service of Judges should be liberalized and, therefore, the Amendment Act was enforced with effect from the specified date. This could hardly constitute a legitimate basis for discriminating against those whose retirement had taken place prior to the said date. In the absence of such consideration, the criterion remains arbitrary and irrelevant. The amelioration in the pensionary benefit must extend to all covered under this class without regard to the question whether the Judge/Chief Justice retired from service before or after the 1st Oct., 1974. The division is unsupportable being devoid of rational principle; the object being evidently to give something more in the form of additional pensionary benefit to persons otherwise equally placed the line drawn at the said date is clearly discriminatory.

14. We are consequently of the view that the eligibility for liberalized pension of having retired on or after the 1st day of October, 1974, in the High Court Judges (Conditions of Service) Act, 1974 (as amended) violates Article 14 and is unconditional.

15. The High Court Judges (Conditions of Service) Act, 1954 (as amended) shall be read down as under : in para 10 of the First Schedule, the words "and who has retired on or after the 1st day of October, 1974" are unconstitutional and are struck down. Omitting the unconstitutional part it is declared that the Judges (including the Chief Justices) of the High Court are entitled to pension as computed under the High Court Judges (Conditions of Service) Act, 1954 (as amended) irrespective of the date of retirement. The date October 1, 1974, continues to be relevant as being one from which the liberalized pension

became operative under the High Court Judges (Conditions of Service) (Amendment) Act, 1976, irrespective of the date of retirement and hence there is no question of payment of arrears of pension for the period preceding October 1, 1974.

16. The petition is allowed. Let a writ of mandamus issue to the respondent directing it to compute and pay the pension to Judges (including Chief Justices) of High Court accordingly. No order as to costs.

Petition allowed.

Cases Referred.

1. (AIR 1983 SC 130)
2. (AIR 1971 SC 1409)
3. (AIR 1976 SC 667)
4. (1980 (2) SCC 458 at p. 533): (AIR 1980 SC 1042 at p. 1084)
5. (AIR 1978 SC 215 at page 225/228)
6. (AIR 1972 SC 2301 at p. 2314)