

CENTRAL ADMINISTRATIVE TRIBUNAL  
MUMBAI BENCH

Dated this                      the        16<sup>th</sup> day of July, 2003

Coram: Hon'ble Mr. Justice R.R.K. Trivedi - Vice Chairman  
Hon'ble Mr. Shankar Prasad - Member (A)

O.A. 580 OF 1999

1. All India Retired Railwaymen's Association, Thane Branch, O/o 5-A, Sopan Ram Maruti Road, Thane, West.
2. Mrs. S.A. Sane, Secretary, R/o 5-A Sopan Ram Maruti Road, Thane (West).
3. Shri D.C. Gangal, R/o Gangal's House, Brahmin Co-op Housing Society, Plot No.10, Naupada, Thane (West). - Applicants

(By Advocate Shri S.V. Marne)

Versus

1. Union of India through the Secretary, Railway Board, Rail Bhavan, New Delhi.
2. The Secretary, Ministry of Public Grievances, & Pension, Department of Pension & Pensioner's Welfare, Government of India, New Delhi.
3. General Manager, Central Railway, Mumbai, CST, Mumbai. - Respondents

(By Advocate Shri S.C. Dhawan)

O R D E R

By Hon'ble Mr. Shankar Prasad, Member (A) -

The applicants, who are two individuals and Thane Branch of All India Retired Railwaymen's Association, are aggrieved by the recommendations of the Fifth Central Pay Commission and the subsequent orders of the Central Government in not granting

equality of pension to all the Pensioners irrespective of the date of retirement. It has been contended that the said action of the respondents is not in consonance with the principles enunciated by the Constitution Bench of the Apex court in the case of D.S.Nakara Vs. Union of India, AIR 1983 SC 130.

2. The respondents Railway administration have stated that granting of benefit of pay and pension is a matter of policy and the Government is entitled to take into account various factors including financial implications and availability of resources to decide what benefit or how much benefit should be granted and from which particular time. The cut off date is fixed after taking into consideration the various factors including financial aspects and the objective to be achieved. Such a policy is not open to judicial review unless the same is arbitrary and against the public policy with the object to be achieved.

They have relied on the decision of the Apex Court in the case of Krishna Kumar Vs. Union of India, 1998 (2) SLJ 35 (SC); Union of India Vs. P.N. Menon, AIR 1994 SC 2221 and Commander Headquarters, Calcutta and others Vs. Capt. Biplabendra Chanda, 1997 ( ) SLJ 143 (SC). The Apex Court in the case of state of Punjab & others Vs. Ram Lubhaya Bagga etc., 1998 (2) SLJ 35 (SC) has held as follows -

"When the Government forms its policy, it is based on number of circumstances of facts, law including constraints based on its resources. It is also based on experts opinion. It would be dangerous if Court is asked to test the utility, beneficial effect of the policy or

its appraisal based on the facts set out on affidavits. The court would dissuade itself from entering into this realm which belongs to the executive."

- 4. The Fifth Central Pay Commission in Chapter 137 has considered the Pension Structure. Para 137 explains the concept of pay parity, which is as follows -

"137.7 The concept of parity, which is also known by the term Equalisation of Pension, means that past pensioners should get the same amount of pension which their counterparts retiring on or after 1.1.1996 from the same post will get irrespective of the date of retirement or the emoluments drawn at the time of retirement of the past pensioners. The concept of parity in pension pre-supposes the existence of a universally acceptable system by which comparison can be drawn between past and current retirees. The only possible manner in which this can be made possible is by introducing the system of Rank Pension or one pension for one grade. At present the system of Rank Pension is in vogue only for personnel below officer rank in the Armed Forces. Under this system if the person has held the rank, from which he retires for ten months or more, his pension is calculated with reference to emoluments at the maximum of the scale of pay attached to the rank irrespective of the actual pay drawn by him. If he has not held the said rank for the minimum period of ten months, his pension is computed with reference to maximum pay of the next lower rank which he held for ten months."

The Commission then analysed the disparity in pension and notes the extent of disparity. In Para 137.11 it has noted the demand of absolute parity a principle which has already been conceded in the case of Judges of Supreme Court, High Courts, CAG and to a great extent in respect of personnel of Armed Forces upto certain levels by grant of One Time increment. The view of the Commission and their recommendations are contained in para 137.13 and 137.14 which is as follows -

"137.13 While it is desirable to grant complete in pension to all past pensioners irrespective of the date of their retirement this may not be feasible straightaway as the financial implications would be considerable. The process of bridging the gap in pension of past pensioners has already been set in motion by the Fourth CPC when past pensioners were granted additional relief in addition to consolidation of their pension. This process of attainment of reasonable parity needs to be continued so as to achieve complete parity over a period of time.

137.14 As a follow up of our basic objective of parity, we would recommend that the pension of all the pre-1986 retirees may be updated by notional fixation of their pay as on 1.1.1986 by adopting the same formula as for the serving employees. This step would bring all the past pensioners to a common platform or on the Fourth CPC pay scales as on 12.1.1986. Thereafter, all the pensioners who have been brought on to the Fourth CPC pay scales by notional fixation of their pay and those who have retired on or after 1.1.1986 can be treated alike in regard to consolidation of their pension as on 1.1.1996 by allowing the same fitment weightage as may be allowed to the serving employees. However, the consolidated pension shall be not less than 50% of the minimum pay of the post, as revised by Fifth CPC, held by the pensioner at the time of retirement. This consolidated amount of pension should be the basis for grant of dearness relief in future. The additions to pension as a result of our recommendations in this Chapter shall not, however, qualify for any additional commutation for existing pensioners."

5. The Commission has also considered the demand of one Rank and one pension which has been rejected. The Commission has recommended continuance of existing procedure of determining pension on the basis of emoluments and qualifying service.

6. Yet another demand before the Commission was revision of pension with reference to the maximum pay of the post held by the pensioner at the time of retirement. The Commission considered the concept of modified parity and recommended as follows - /m

"137.20 We have given our careful consideration to the suggestions. While we do not find any merit in the suggestion to revise the pension of past retirees with reference to maximum pay of the post held at the time of retirement, as revised by the Fifth CPC, there is force in the argument that the revised pension should not less than that admissible on the minimum pay of the post held by the retiree at the time of retirement as revised by the Fifth CPC. We have no hesitation in conceding the argument advanced by pensioners that they should receive a pension at least based on the minimum pay of the post as revised by Fifth Pay Commission in the same way as an employee normally gets the minimum revised pay of the post he holds. We recommend acceptance of this principle which is based on reasonable considerations.

137.21 The Commission has decided to enunciate a principle for the future revision of pension to the effect that complete parity should normally be conceded upto the date of last pay revision and modified parity (with pension equated at least to the minimum of the revised pay scale) be accepted at the time of each fresh pay revision. This guiding principle which we have accepted would assure that past pensioners will obtain complete parity between the pre-1986 and post-1996 pensioners but there will be only a modified parity between the pre-1996 and post 1996 pensioners. The enunciation of the principle would imply that at the time of the next pay Commission, say, in the year 2006, complete parity should be given to past pensioners as between pre-1996 and post-1996 and modified parity be given between the pre-2006 and post-2006."

7. The Commission also considered the benefits to employees not governed by Pension Scheme i.e. CPF/SRPF pensioners/~~functionaries~~ and the recommendations of the Commission in respect of these employees are contained in Para 137.43.

8. Subsequent to the decision of the Apex Court in D.S.Nakara's (supra), the Ministry of Finance issued certain orders. Thereafter the Ministry of Defence also issued certain orders. It was argued by the applicants before a Constitution

Bench of the Apex Court in the case of Indian Ex-Services League and others Vs. Union of India, AIR 1991 SC 1182 that as a result of the decision in the case of D.S.Nakara (supra) retirees who held the same rank irrespective of their date of retirement must get the same amount of pension and this should be the amount which was calculated and shown in the appendices to the memorandum challenged in D.S.Nakaras case (supra).

The Apex Court took note of the decision xxxxxxxxxx of the Constitution Bench in the case of Krishna Kumar Vs. Union of India, AIR 1990 SC 1782 and explained the decision in D.S.Nakara's case in the following words -

"12. The liberalised pension scheme in the context of which the decision was rendered in Nakara (AIR 1983 SC 130) provided for computation of pension according to a more liberal formula under which "average emoluments" were determined with reference to the last ten months salary instead of 36 months' salary provided earlier yielding a higher average, coupled with a slab system and raising the ceiling limit for pension. This Court held that where the mode of computation of pension is liberalised from a specified date, its benefit must be given not merely to retirees subsequent to that date but also to earlier existing retirees irrespective of their date of retirement even though the earlier retirees would not be entitled to any arrears prior to the specified date on the basis of the revised computation made according to the liberalised formula. For the purpose of such a scheme all existing retirees irrespective of their retirement were held to constitute one class, any further division within that class being impermissible. According to that decision, the pension of all earlier retirees was to be computed as on the specified date in accordance with the liberalised formula of computation on the basis of the average emoluments of each retiree payable on his date of retirement. For this purpose, there was no revision of the emoluments of the earlier retirees under the Scheme. It was clearly stated that "if

the pensioners form a class, their computation cannot be by different formula by affording unequal treatment solely on the ground some retired earlier and some retired later." This according to us is the decision in Nakara and no more.

13. Ordinarily, it would suffice to mention the gist of Nakara (AIR 1983 SC 130) decision without extensively quoting therefrom. However, we have done so for the reason that the impassioned plea of Shri G.Viswsanatha Iyer, learned counsel appearing for the Army Officers which was reiterated with an added emotive appeal by Shri K.L. Rathee, appearing for the remaining ranks of Armed Forces seems to suggest that denial of petitioner's claim amount to misreading the Nakara decision and refusal of the logical relief flowing therefrom. It is only to dispel this incorrect impression we have quoted from Nakara at some length. We have merely to decide whether the petitioner's claim flows from the decision in Nakara and we are unable to find anything in Nakara to support such claim.

14. Nakara (AIR 1983 SC 130) decision came up for consideration before another Constitution Bench recently in Krishna Kumar Vs. Union of India, (AIR 1990 SC 1782). The petitioners in that case were retired Railway employees who were covered by or opted for the Railway Contributory Provident Fund Scheme. It was held that P.F. retirees and pension retirees constitute different classes and it was never held in Nakara that pension retirees and P.F. retirees formed a homogenous class, even though pension retirees alone did constitute a homogenous class within which any further classification for the purpose of a liberalised pension scheme was impermissible. It was pointed out that in Nakara, it was never required to be decided that all the retirees for all purposes formed one class and no further classification was permissible. We have referred to this decision merely to indicate that another Constitution Bench of this Court also has read Nakara decision as one of limited application and there is no scope for enlarging the ambit of that decision to cover all claims made by the pension-retirees or a demand for an identical amount of pension to every retiree from the same rank irrespective of the date of retirement, even though the reckonable emoluments for the purpose of commutation of their pension be different."

9. The Ministry of Finance had issued an O.M. dated 25.5.1979 treating a portion of Dearness Allowance as pay for the purpose

of retirement benefits in respect of Government servants who retire on or after 30.9.1997. The Apex Court in Union of India Vs. P.N.Menon (supra) considered the question as to whether the said cut off date was arbitrary. The Division Bench of the Apex Court held that -

" Whenever the Government or an authority, which can be held to be a State within the meaning of Article 12 of the Constitution, frames a scheme for persons who have superannuated from service, due to many constraints, it is always not possible to extend the same benefits to one and all, irrespective to the dates of superannuation. As such any revised scheme in respect of post-retirement benefits, if implemented with a cut off date, which can be held to be reasonable and rational in the light of Article 14 of the Constitution need not be held to be invalid. It shall not amount to 'picking out a date from the hat'. Whenever a revision takes place, a cut off date become imperative, because the benefit has to be allowed within the financial resources available with the Government."

10. The Apex Court in K.L.Rathe Vs. Union of India and others, AIR 1991 SC 2763 has considered the following question -

"4. According to the clarification issued by the Ministry of Finance, the revised pension is to be computed on the average emoluments drawn during the last ten months' of service. This rule will apply to all the pensioners. However, the definition of emoluments as in force at the time of the retirement of an employee has not undergone any change. The case of the petitioner is that following Nakara's case (AIR 1983 SC 130) he has to be given the same amount of pension as other employees of of his rank irrespective of the date of retirement."

The Apex Court held -

" Nakara's case reported in AIR 1983 SC 130 is not a case of universal application irrespective of the facts and circumstances of the case. When the Government decided that pension was to be calculated on the basis of

average salary drawn over a period of last ten months, it was held in Nakara that this principle has to be applied even to those persons who had retired before the notified date. That, however, does not mean that the emoluments of the person who were retiring after the notified date and those who have retired before the notified date holding the same status must be treated to be the same. Nakara's case does not lay down that the last ten months emoluments must be deemed to be the same for all the employees at the time of their retirement. The emoluments have to be calculated according to the Government rules at the time of retirement of the employees. But, if the principle of average of last ten months emoluments has been adopted for some employees then that principle must be extended to all the employees who have retired before them. Nakara's case did not lay down that the reckonable emoluments for the purpose of calculation of pension must be the same for a person occupying the same post. Therefore, petitioner is entitled to ask for computation of pension with reference to emoluments which he never got."

ii. Similarly the Apex Court in the case of State of Rajasthan Vs. S.K.H.Samiti, 1995 (2) SLR 121 was considering the constitutional validity of Rule 268H of Rajasthan Service Rules, 1951 which prescribed a cut off date. The Apex Court held -

"23. After considering the respective contentions made by the learned counsel for the parties, it appears to us after the impugned decision was made by the Rajasthan High Court, this Court has considered the import of the decision rendered in D.S.Nakara's case. This court has noticed the ratio in D.S.Nakara's case as indicated in Krishna Kumar's case (supra) and in Indian Ex-Services Leagues' case (supra) and also in Rajasthan Pensioners Samiti's case (supra). It has been clearly indicated by this Court that the Government servants can be governed by different sets of benefit rules with reference to their holding office from a cut off date. In Krishna Kumar's case it has been indicated that in D.S.Nakara's case this Court considered a case where an artificial date was specified classifying the retirees into two different classes even though they were governed by the same rules and were similarly situated. Such classification where both the groups were governed by the same rules amounted to deprivation of one group of the benefit of liberalisation of pension rules. It was only in that situation it was held in D.S.Nakara's case that

specification of the date from which the liberalisation pension rules were to come into force was arbitrary. This Court, in D.S.Nakara's case, clearly indicated that it was not a new scheme but only a revision of the existing scheme and it was not a new retiral benefit. But it was a case of upward revision of existing benefit. In D.S.Nakara's case it was pointed out that if it was wholly a new concept, a new retiral benefit one could have appreciated an argument that those who had already retired could not expect it. The Constitution Bench in Krishna Kumar's case has upheld different sets of retiral benefits being made applicable to the employees retiring prior to April 1, 1977 and retiring thereafter. It has been indicated by the Constitution Bench in Krishna Kumar's case that any argument to the contrary would mean that the government can never change the condition of service relating to retiral benefits w.e.f. a particular date. It has, however, been pointed out that the State cannot back a date out of its hat but it has to prescribe a date in a reasonable manner having regard to the relevant facts and circumstances.

24. In the instant case, the date 29.2.1964 in Rule 268-H under Chapter XXIII-A has not been taken out of hat. The Government has taken into consideration the need for a liberalised pension scheme for those Government servants who were in service on 29.2.1964 and who would be retiring after and the new liberalised Pension Scheme under Chapter XXIII-A was introduced with effect from March, 1964.

25. It is not necessary to go into the question as to whether the liberalised benefit for pension should have also been accorded to the Government servants retiring prior to 29.2.1964 because such exercise being a matter of policy decision for the executive, must be left to the consideration of the State Government. The wisdom in a policy decision of the Government as such is not justiciable unless such policy decision is wholly capricious, arbitrary and whimsical thereby offending the rule of law as enshrined in Article 14 of the Constitution. If a policy decision offends any statutory provision or the provisions of the Constitution. Save as aforesaid, the Court need not embark on uncharted ocean of public policy."


12. It is clear from the above that the decision given in D.S.Nakara's case (supra) has been explained by a Constitution Bench of the Apex Court in Krishna Kumar's case (supra) and the Indian Ex-Services League's case (supra). The same

interpretation has also followed in the remaining three cases cited above. The decisions of the Apex Court are the laws of the land as per Article 141 of the Constitution and they are binding on all Courts and Tribunals.

13. In view<sup>of</sup> what has been discussed above, there is no merit in this OA. The OA is accordingly dismissed. No order as to costs.

*Shankar Prasad*  
(Shankar Prasad)  
Member (A)

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(R.R.K. Trivedi)  
Vice Chairman