

Subrata Sen And Ors vs Union Of India And Ors on 18 September, 2001

Equivalent citations: AIR 2001 SUPREME COURT 3634, 2001 AIR SCW 3639, 2001 LAB. I. C. 3715, 2001 (6) SCALE 382, 2001 (8) SCC 71, 2001 (9) SRJ 443, 2002 (1) SERVLJ 110 SC, (2001) 8 JT 100 (SC), (2001) 6 SCALE 382, 2001 SCC (L&S) 1237, (2001) 99 FJR 526, (2001) 91 FACLR 761, (2002) 1 LAB LN 4, (2001) 4 SCT 424, (2001) 4 SCJ 51, (2001) 7 SUPREME 140, (2001) 4 ESC 609, (2002) 1 CURLR 370

Bench: M.B. Shah, R.P. Sethi

CASE NO.:

Writ Petition (civil) 372 of 1999

PETITIONER:

SUBRATA SEN AND ORS.

RESPONDENT:

UNION OF INDIA AND ORS.

DATE OF JUDGMENT: 18/09/2001

BENCH:

M.B. SHAH & R.P. SETHI

JUDGMENT:

JUDGMENT 2001 Supp(3) SCR 140 The Judgment of the Court was delivered by SHAH, J. This petition under Article 32 of the Constitution of India is filed by the petitioners who were employees of the Indian Oil Corporation Limited (Assam Oil Division) and retired prior to 1st December 1994. It is pointed out that Assam Oil Division was formed by transfer of the Undertaking of the Assam Oil Co. Ltd., a 100% subsidiary of the Burmah Oil Company which has been nationalized w.e.f. 14.10.1981. Petitioners were transferred from Assam Oil Co. Limited to the Indian Oil Corporation - Assam Oil Division (In short" AOD"), As per the Assam Oil Company Staff Pension Fund Scheme, they were getting pension on the following basis :

"A sum equal to 40 percent of the average annual basic salary for the last five years of service immediately preceding the date of retirement"

It is pointed out that the Government of India has issued Notification dated 10.3.1995 providing for revision of pension formula in respect of Indian Oil Corporation (AOD) Officers covered by AOD Staff Pension Scheme which reads thus :

"Pension for the officers retiring from December, 1994, onwards may be computed on the basis of 40% of the average of the last 10 months salary including averages dearness allowance drawn by the officer over the last 10 months of his service. If and when pay revision take place retrospectively, the amount of pension may be adjusted accordingly. No dearness allowance will be paid on pension."

Petitioners submit that the cut-off date is discriminatory and that there cannot be any classification of retiree who have retired prior to December, 1994 and who are to retire from December, 1994 onwards and, therefore, they are entitled to have pension on the basis of revised formula. For this, they have relied on the decision rendered by this Court in D.S. Nakara v. Union of India, [1983] 1 SCC 305. In this petition, they have prayed as under :

- (a) Issue a writ, direction or order in the nature of certiorari of any other appropriate writ, direction or order quashing the cut off date mentioned in the impugned communication No. F. No. F.29011/1/95-IOC dated 10.3.1995 (Annexure 'E'), as December, 1994 as having been arbitrarily fixed; and
- (b) Issue a writ, direction or order in the nature of mandamus or any other appropriate writ, direction or order to the respondents directing them to extend benefits of the impugned communication No. F. No. 29011/1/95-IOC dated 10.3.1995 to all the pensioners of IOC (AOD) irrespective of date of retirement.
- (c) Issue a writ, direction or order in the nature of mandamus or any other appropriate writ, direction or order directing the respondents to liberalize the AOC Pension Scheme so as to include the Ad hoc Pension Relief to all retirees and who are still in service and to superannuate under the AOC Pension Scheme as is being granted to the ex-employees of AOC who stood transferred to OIL;
- (d) Issue a writ, direction or order in the nature of mandamus or any other appropriate writ direction or order directing the respondents to liberalize the AOC Pension Scheme so as to include the benefits of the CLI linked Pension Relief to all retirees and who are still in service and to superannuate under the AOC Pension Scheme, as in being granted to the eligible pensioners of OIL, BPCL and HPCL;
- (e) Issue a writ, direction or order in the nature of mandamus or any other appropriate writ, direction or order directing the respondents to liberalize the pension scheme of the respondent no. 2 so as to include the benefit of restoration of the commuted portion of pension after 15 years as is being granted to the sister companies of the respondent no. 2 i.e. BPCL and HPCL.

At the outset, we may state that Mr. V.R. Reddy, learned senior counsel for the petitioners has not pressed for prayer (c) and with regard to prayers

(d) and (e) as they involve disputed questions of fact, the issues are not required to be decided and are left open. In affidavit-in-reply filed on behalf of respondent No. 2 also it has been submitted that it would have been appropriate for the petitioners to approach the High Court for sorting out the

disputed facts. For the said reliefs, it would be open to the petitioners to approach the competent forum.

Mr. Raj Birbal, learned senior counsel for respondent No. 2 Indian Oil Corporation submitted that in the present case there is no question of applying the principles laid down in Nakara 's case. It is his submission that petitioners were governed by the non-contributory Pension Scheme, namely, IOC (DOD) -Staff Pension Fund approved under the Income Tax Act, 1961. Under the Rules of the Pension Fund, annuity is purchased by the trustees in respect of such members on their retirement/death from LIC and pension is paid by the LIC. The right of and to receive the annuity and the quantum gets crystallized at the time of purchase of the annuity. It is also pointed out that an improvement in the pension scheme in an approved Pension Fund is effected on the basis of the fund's financial position as determined by actuarial valuation based on current resources of the fund and future contribution to be received by the fund only in respect of the existing members in service.

On the question as to when retired employees are entitled to the benefit of revised pension scheme, this Court after considering earlier decisions in V. Kasturi v. Managing Director, State Bank of India, Bombay and Another, [1998] 8 SCC 30 specified two categories as under :

"Category-I Para 22. If the person retiring is eligible for pension at the time of his retirement and if he survives till the time of subsequent amendment of the relevant pension scheme, he would become eligible to get enhanced pension or would become eligible to get more pension as per the new formula of computation of pension subsequently brought into force, he would be entitled to get the benefit of the amended pension provision from the date of such order as he would be a member of the very same class of pensioners when the additional benefit is being conferred on all of them. In such a situation, the additional benefit available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to the date on which the aforesaid additional benefit was conferred on all the members of the same class of pensioners who had survived by the time the scheme granting additional benefit to these pensioners came into force. The line of decisions tracing their roots to the ratio of Nakara case would cover this category of cases Category-II Para 23. However, if an employee at the time of his retirement is not eligible for earning pension and stands outside the class of pensioners, if subsequently by amendment of the relevant pension rules any beneficial umbrella of pension scheme is extended to cover a new class of pensioners and when such a subsequent scheme comes into force, the erstwhile non- pensioner might have survived, then only if such extension of pension scheme to erstwhile non-pensioners is expressly made retrospective by the authorities promulgating such scheme; the erstwhile non-pensioner who has retired prior to the advent of such extended pension scheme can claim benefit of such a new extended pension scheme."

Learned counsel for the petitioners submitted that petitioners would be covered by the Category (1) and would be entitled to get pension under the revised pension scheme.

As against this, learned counsel for the respondents submitted that there is a third category wherein the pension is paid from pension fund scheme and on the date of retirement, right to receive the pension amount is crystallized. Hence, petitioners are not entitled to get benefit of subsequent modification with respect to determinative factor for grant of pension such as qualifying service.

For appreciating this contention, we would refer to the averments made in the affidavit-in-reply and the relevant rules which provided for grant of pension to the petitioners. In the affidavit-in-reply, it has been stated that petitioners were part of the group which came from erstwhile Assam Oil Company and are getting pension on the basis of non-contributory pension scheme, i.e. "they do not contribute at all and are getting the pension on month to month basis and on the other hand, the other employees of respondent no. 2 only get the benefit of contributory scheme."

From the aforesaid admission, it is clear that petitioners were not required to contribute any amount for getting pension. May be that the Company allocated separate fund and created a trust for paying pension to the retiring employees but their right to get pension is crystallized as per the rules and was not dependent upon availability of the fund and was to be determined on the basis of a rule which provided that they would get a sum equal to 40 percent of the average basic salary for the last five years of service immediately preceding the date of retirement.

For this purpose, we would refer to relevant part of the rules of Assam Oil Staff Pension Fund, which read thus :

"1. The following employees shall be Members of the Fund :

(b) Persons who enter into a specified category of service with the Company as detailed hereinafter the 1st day of January, 1973 and who are members of the Burmah Oil (India) Provident Fund or Provident & Insurance Fund (India) Recognised.

2. A Pension will be granted to a Member on retirement from the Service at or after Normal Pension Age provided that at the date of such retirement:

(i) he has completed at least fifteen years of Pensionable Service;

(ii) he shall have been a member of the Provident Fund continuously of not less than ten years.

The pension payable to such a Member:

(a) who has completed at least twenty years' Pensionable Service will be the Basic Figure as reduced by the Authorised Deduction; or

(b) who has completed at least fifteen years' Pensionable Service but less than twenty years' Pensionable Service will be a proportion of the Basic Figure equal to the ratio which the number of years of Pensionable Service (calculated to the nearer month)

bears to twenty years and the amount so calculated will be reduced by the Authorised Deduction.

8. The Trustees may at the request of the Employer withhold or discontinue a pension or annuity or any part thereof payable to a Member or his Dependents or exclude him or them from all or any benefits hereunder if such Member is dismissed for fraud or dishonesty or Misconduct or leaves his employment without the consent of the Employer or having left such employment acts to the detriment of such employer's interest or assigns or charges his rights hereunder or attempts to do so. Any sum so withheld discontinued or excluded shall be forfeited to the Fund.

9. No person shall be entitled to transfer or assign whether by way of security or otherwise however his interest or any part thereof in the Fund and no such transfer or assignment shall be valid and neither the Employers nor the Trustees shall recognise or be bound by notice to them respectively of any such transfer or assignment.

10. Notwithstanding anything to the contrary in the Rules contained:

(a) (b)

(c) All pensions and allowances shall be non-assignable and (subject to the provisions of Rule 4) non-commutable and shall be paid monthly in advance without a proportion to the date of cessation or at the discretion of the Trustees at longer intervals and at such times at such places and in such manner and subject to such evidence of health, age survival, marital status, educational status and identity as the Trustees may prescribe."

Under Rule 16 "Basic Figure" means a sum equal to forty per centam of the Member's average annual Basic Salary for the last five years of Service immediately preceding the date of retirement. Likewise, "Normal Pension Age" means the fifty-fifth birthday for men and the forty-fifth birthday for women.

Keeping in mind the aforesaid rules, we would first refer to the contention of Mr. B.A. Mohanty and Mr. Raj Birbal, learned senior counsel for Union of India and respondent No. 2 respectively who, in support of their submissions, relied upon paragraph 45 of the judgment in Nakara's case, which reads thus:

"45. Let us clear one misconception. The pension scheme including the liberalised scheme available to the government employees is non- contributory in character. It was not pointed out that there is something like a pension fund The payment of pension is a statutory liability undertaken by the Government and whatever becomes due and payable is budgeted for. One could have appreciated this line of reasoning where there is a contributory scheme and a pension fund from which alone pension is disbursed. That being not the case, there is no question of pensioners dividing the pension fund which, if more persons are admitted to the scheme, would pro-rata

affect the share."

In our view the aforesaid para does not in any way support the contention of the respondents. On the contrary, on parity of reasoning, we would also reiterate that let us be clear about this misconception. Firstly, the Pension Scheme including the liberalised scheme available to the employees is non-contributory in character. Payment of pension does not depend upon Pension Fund. It is the liability undertaken by the Company under the Rules and whenever becomes due and payable is to be paid. As observed in Nakara 's case (supra), pension is neither a bounty, nor a matter of grace depending upon the sweet will of the employer, nor an ex-gratia payment. It is a payment for the past services rendered. It is a social welfare measure rendering socio-economic justice ,to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch. May be that in the present case, the Trust for pension fund is created for Income Tax purposes of for smooth payment of pension, but that would not affect the liability of employer to pay monthly pension calculated as per the Rules on retirement from service and this retirement benefit is not based on availability of pension fund. There is no question of pensioners dividing the Pension Fund or affecting the pro-rata share on addition of new members to the Scheme. As per Rule (1) quoted above, an employee would become member of the Fund as soon as enters into a specified category of service of the Company. Under Rule (8) Trustees may withhold or discontinue a pension or annuity or any part thereof payable to a member or his dependants, and that pension amount is non-assignable. Further, the payment of pension was the liability of the employer as per the rules and that liability is required to be discharged by the UOI in lieu of its taking over of the Company. The rights of the employees (including retired) are protected under Section 11 of the Burmah Oil Company (Acquisition of Shares of Oil India (Act 41) Limited and of the Undertakings in India of Assam Oil Company Limited and the Burmah Oil Company (India Trading) Limited Act, 1981.

In support of his contention that petitioners are not entitled to get benefit of revised scheme, learned senior counsel for respondent No. 2, further, relied upon the decision of this Court in Sasadhar Chakravarty and Anr. v. Union of India and Ors., [1996] 11 SCC 1, wherein the Court considered the Indian Oxygen Ltd. Staff Pension Fund and the Pension Scheme thereunder. It was the contention of the petitioners that improvements made in the existing pension scheme after retirement of. employees should also be made available to such retired employees who are the existing pensioners of the Fund. Negating the said contention, the Court held thus :

".....This contention is based on a misunderstanding of the nature of the annuity which is purchased in respect of each employee as under when he retires. The right of an employee to receive the annuity and the quantum of this annuity gets determined at the time when the annuity is purchased. Any subsequent improvements in a given Pension Fund Scheme would not be available to those persons whose rights are already crystallized under the annuity scheme by which they are governed because the amounts contributed by the employer in respect of such persons are already withdrawn from the Pension Fund to purchase an annuity. Any subsequent improvement in the Pension Fund will benefit only those whose moneys form a part of the Pension Fund."

In paragraph 11, the Court further observed :

"In these circumstances the ratio of *D.S. Nakara v. Union of India*, [1983] 1 SCC 305 cannot be applied to extend the benefit of improvement in the pension schemes of such funds to the existing pensioners. By the very nature of this scheme, such benefits are available only to members in service. In the present case, the Pension Fund is created out of contributions made by the employer in respect of its employees who are in service in the manner provided under the Income Tax Act and the Rules. The contribution is in the form of a fixed percentage of salary of each of the employees. There is, therefore, no provision for an employer making any additional payment in respect of its past employees who are the existing pensioners. In *Nakara* case the increase in pension could be met from the general revenue of the Central Government. No such reserve of funds is available to the trustees of an approved superannuation fund."

In our view, the ratio of the aforesaid judgment is not applicable in the present case. In the said case, *Indian Oxygen Ltd.* had set up a 'non- contributory Superannuation fund' known as the *Indian Oxygen Ltd. Executive Staff Pension Fund*. As per the Rules, an employee was entitled to receive an annuity under a policy purchased by the trustee of the Fund from the *Life Insurance Corporation of India*. Petitioners in that case contended that the scheme of such non-contributory approved superannuation fund should be modified so as to provide for disbursement of pension by the fund themselves or in the alternative by a statutory body to be newly constituted under a new scheme. Further, the Fund was constituted for the purpose of providing an annuity to the beneficiaries and the trustees were required to accumulate the contribution in respect of each beneficiary and purchase an annuity from the *Life Insurance Corporation of India* at the time of retirement or death of each employee or on his becoming incapacitated prior to retirement as per Rule 89(2) of the *Income Tax Rules, 1962*. Therefore, when an employee retired; all accumulated contribution in respect of employee concerned made by the employer to the pension fund of the trust was crystallized for the benefit of employee. In that set of circumstances, the Court observed that the right of the employee to receive the annuity and quantum of his annuity gets crystallized at the time of purchase of annuity under the then existing scheme of *Life Insurance Corporation of India*. The Court also observed that the contention was based on misunderstanding of the nature of the annuity which is purchased in the interest of each employee as and when he retires. The position in the present case is altogether different. Right to get pension is obviously different from getting annuity on the basis of accumulated contribution. The rules for grant of pension provide that an employee mentioned in specified category shall automatically be member of pension fund and is entitled to get pension on the date of his retirement. Amount of pension is to be determined as per the Rules. That Rule is modified and the petitioners seek relief on the basis of the amended rule on the ground that there cannot be any discrimination between the employees who retired prior to or after a particular date, as held in *Nakara's* case which is followed by this Court in various decisions including *V. Kasturi (Supra)*. Further, there, is no question of pensioners (retired employees) dividing the pension fund and/ or payment of pension to be made only from the pension fund. The liability to pay pension arises because of provision made in the rules. In this view of the matter, the decision in *Sasadhar Chakravarty (Supra)* would have no bearing.

Further, in All India Reserve Bank Retired Officers Association v. Union of India, [1992] Supp. 1 SCC 661, Ahmadi J., (as he then was) speaking for the Court in the aforesaid decision highlighted the observations in Nakara's case found at p.333 para 46 to the following effect (SCC p. 674 para 7):

"... the pension will have to be recomputed in the light of the formula enacted in the liberalised pension scheme and effective from the date the revised scheme comes into force. And beware that it is not a new scheme, it is only a revision of existing scheme. It is not a new retiral benefit. It is an upward revision of an existing benefit. If it was a wholly new concept, a new retiral benefit, one could have appreciated an argument that those who had already retired could not expect it."

The Court further observed :

".....It must be realised that in the case of an employee governed by the CPF (Contributory Provident Fund) scheme his relations with the employer come to an end on his retirement and receipt of the CPF amount but in the case of an employee governed under the pension scheme his relations with the employer merely undergo a change but do not snap altogether. That is the reason why this Court in Nakara case drew a distinction between liberalisation of an existing benefit and introduction of a totally new scheme. In the case of pensioners it is necessary to revise the pension periodically as the continuous fall in the rupee value and the rise in prices of essential commodities necessitates an adjustment of the pension amount but that is not the case of employees governed under the CPF scheme, since they had received the lump sum payment which they were at liberty to invest in a manner that would yield optimum return which would take care of the inflationary trends. This distinction between those belonging to the pension scheme and those belonging to the CPF scheme has been rightly emphasised by this Court in Krishena case."

Same is the position in the present case. As observed in the aforesaid case, in case of an employee governed under the Pension Scheme, relations with the employer merely undergo a change, but are not snapped altogether. There is no new scheme of payment pension, but it is only a revision of the existing pension scheme. Under the new Pension Scheme, pension is required to be paid on the basis of 40 per cent of the average of the last 10 months salary including average dearness allowance drawn by the officer over the last 10 months of his service instead of earlier 40 per cent of the average annual basic salary for the last five years of service immediately preceding the date of retirement.

In view of the aforesaid legal position, this petition is required to be partly allowed and the Respondents are directed to give pensionary benefits to the petitioners on the basis of notification dated 10th March, 1995 by deleting the Words "retiring from December, 1994 onwards" from the said notification. The Writ Petition stands disposed of accordingly. There shall be no order as to costs.