

Union Of India vs P.N.Menon on 17 March, 1994

Equivalent citations: 1994 AIR 2221, 1994 SCC (4) 68, AIR 1994 SUPREME COURT 2221, 1994 AIR SCW 1985, (1994) 3 JT 26 (SC), 1994 (2) UPLBEC 944, 1994 (3) JT 26, 1994 (2) UJ (SC) 25, 1994 (4) SCC 68, 1994 UJ(SC) 2 25, (1994) 3 SCR 44 (SC), 1994 SCC (L&S) 860, (1995) 2 LABLJ 307, (1994) 2 LAB LN 434, (1994) 1 CURLR 902, (1994) 2 UPLBEC 944, (1994) 4 SCT 91, (1994) 68 FACLR 1212, (1994) 2 SERVLR 335, (1994) 27 ATC 515

Author: N.P Singh

Bench: N.P Singh, A.M. Ahmadi

PETITIONER:
UNION OF INDIA

Vs.

RESPONDENT:
P.N.MENON

DATE OF JUDGMENT 17/03/1994

BENCH:
SINGH N.P. (J)
BENCH:
SINGH N.P. (J)
AHMADI, A.M. (J)

CITATION:
1994 AIR 2221 1994 SCC (4) 68
JT 1994 (3) 26 1994 SCALE (2) 276

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by N.P. SINGH, J.- The respondents, who are retired government servants, filed a writ application before the High Court, questioning the validity of Office Memorandum No. F-19(4)- E.V./79 dated 25-5-1979, issued by the Government of India,

treating a portion of the dearness allowance, as pay for the purpose of retirement benefits in respect of government servants who retired on or after 30-9-1977. According to respondents, who retired from service before 30-9-1977, the said benefits should have been extended to all retired government servants, irrespective of their date of superannuation.

2.A learned Judge of the High Court allowed the said writ application on basis of the judgment of this Court in the case of D.S. Nakara v. Union of India' saying that the said office memorandum was discriminatory in nature. The Division Bench dismissed the appeal filed on behalf of the Union of India.

3.It may be mentioned that Government of India issued on 25-5-1979 two Office Memorandums Nos. F- 19(3)-E.V./79 and F- 19(4)-E.V./79. In the Office Memorandum No. F-19(3)- E.V./79, the computation of pension was liberalised, but it was made applicable to the government servants who were in service on 31-3-1979 and retired from service on or after that date. It introduced a slab system for computation of pension. That office memorandum was the subject-matter of controversy in the aforesaid case of D.S. Nakaral. This Court held that the criteria, "being in service and retiring subsequent to the specified date" for being eligible for liberalised pension in the aforesaid office memorandum, was violative of Article 14 of the 1 (1983) 1 SCC 305 :1983 SCC (L&S) 145 : AIR 1983 SC 130:

(1983) 2 SCR 165 Constitution, being arbitrary and discriminatory in nature.

It was pointed out that the government servants, who retired prior to the specified date, and those who retired thereafter, formed one class. They having been classified in two separate groups for the purpose of the pensionary benefits, the classification was not founded on any intelligible differentia. The said classification had also no rational nexus with the object sought to be achieved.

4.The Office Memorandum No. F-19(4)-E.V./79, with which we are concerned, states that the question of treatment of a portion of dearness allowance as pay had been under consideration of the Government of India and the President had been pleased to decide that "in respect of government servants who retired on or after 30-9-1977, the amount of dearness allowance indicated in para 2 below, shall be treated as pay for the purposes and to the extent specified hereinafter". It further says that part of the dearness allowance, shall be treated 'dearness pay', in different pay ranges specified in the said office memorandum for the purpose of retirement benefits. Up to pay range of Rs 300, 36% of the pay shall be deemed to be dearness pay. Similarly, in respect of pay range above Rs 300 and up to Rs 2157, 27% of the pay subject to a minimum of Rs 108 and maximum of Rs 243 shall be treated as amount of dearness pay. In respect of pay range above Rs 2157 and up to Rs 2399, the dearness pay shall be the amount by which the pay falls short of Rs 2400. In the case of officers drawing pay above Rs 2180 and retiring on or after 1-12-1978, the amount of dearness pay to be treated for the purpose of retirement benefits, has been specified in the said office memorandum. In paragraph 3(1) of that office memorandum, it has been said that the dearness pay shall count as emoluments for pension and gratuity in terms of Rule 33 of the Central Civil Services (Pension) Rules, 1972. But, in the case of persons who have already retired on or after 30-9-1977/ 1-12-1978, but within ten months of those dates, the ultimate average emoluments will be calculated according

to the procedure prescribed. In the case of persons, who retired between 30-9-1977 and 28-2-1978, and on or after 1-12-1978 but not later than 30-4-1979, one-half of the dearness pay, appropriate to the pay equal to such average emoluments, shall be added to the average emoluments. In the case of persons, who retired after 28-2-1978 and after 30-4-1979, full dearness pay appropriate to the pay equal to such average emoluments, shall be added to the average emoluments. It further provides that pension and gratuity of persons, who have already retired on or after 30-9-1977, shall be recalculated on the basis aforesaid and arrears, if any, be paid subject to such adjustment as may be necessary. Paragraph 4 of the said office memorandum says that persons, who retired on or after 30-9-1977 but not later than 30-4-1979, will have an option to choose either of the two alternatives given in the said office memorandum:

"(a) to have their pension and DCR Gratuity calculated on their pay excluding the element of Dearness Pay as indicated in para 2 above in accordance with the rules in force on 30-9-1977, and get graded relief on pension to the full extent admissible from time to time;

OR

(b) to have their pension and DCR Gratuity recalculated after taking into account the element of dearness pay, In such cases, the first four instalments of graded relief sanctioned up to the average index level 272 will not be admissible; these pensioners will be entitled only to the instalments of graded relief sanctioned beyond the average index level 272."

5.The aforesaid office memorandum introduced a scheme to treat a portion of the dearness allowance as pay in respect of government servants, who retired on or after 30-9-1977, With reference to different pay ranges, amount of dearness pay has been fixed; that dearness pay is to be counted as emoluments for pension and gratuity in terms of Rule 33 of the Central Civil Services (Pension) Rules, 1972. Thereafter, an option has been given to persons who have retired on or after 30-9-1977 but not later than 30-4-1979, to exercise an option out of the two alternatives, of getting pension and death-cum-retirement gratuity, calculated either by excluding the element of dearness pay or by including the element of dearness pay. It can be said that the office memorandum in question has evolved a concept of treating a portion of dearness allowance as pay in respect of officers in different pay ranges fixing different percentages of the amount of dearness pay for purpose of retirement benefits. The lower the pay range, the higher is the percentage of the dearness pay. Thereafter, such dearness pay is to be taken into consideration for fixation of pension and gratuity.

6.Now the question which is to be answered is as to whether even this office memorandum suffers from the vice indicated in the aforesaid case of D.S. Nakara"? Is it discriminatory and arbitrary so as to be violative of Article 14 of the Constitution? Does it create classification among the equals? Can it be said that if the concept of treating a portion of the dearness allowance as pay, was to be implemented for the purpose of retirement benefits, then it should have been applied to all the retired government servants, irrespective of their dates of retirement?

7.Public service is bilateral in nature in the sense that a public servant is remunerated for the service he renders to the public. Such public servant shall get pension after retirement, is one of the integral part of his employment. That is why it has been repeatedly said by the courts that pension is not a charity. Every public servant becomes entitled, after retirement for pension under the relevant rules for the service he has rendered to public for years. Keeping in view the services rendered in the past and to ensure that they live and lead a dignified life even after superannuation, the Government has been revising the rates of pension or providing certain additional benefits from time to time. But the demand of retired personnel is that throughout they should be treated on a par and as a class with persons who retire later.

8.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 not always possible to extend the same benefits to one and all, irrespective of 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 fiat", as was said by this Court in the case of D.R. Nim v. Union of India² in connection with fixation of seniority. Whenever a revision takes place, a cut-off date becomes imperative because the benefit has to be allowed within the financial resources available with the Government.

9.A supplementary affidavit has been filed on behalf of the Union of India, stating that the Third Pay Commission in its report recommended:

"We recommend that should the price level rise above the 12- monthly average of 272 (1960 = 100) Government should review the position and decide whether the dearness allowance scheme should be extended further or the pay scales themselves should be revised."

It has been further stated that consequent upon the sharp rise in prices, the employees started demanding the merger of dearness allowance with pay. After negotiation with the staff side, the Government agreed to the merger with pay of the dearness allowance at 272 level, at least for purposes of pension and other retirement benefits, and the aforesaid office memorandum was issued.

10.The concept of 'dearness pay' was evolved in respect of employees in different pay ranges with different percentages of the dearness pay. Thereafter the pension and gratuity were worked out and an option was given to persons, who retired on or after 30-9-1977 but not later than 30-4-1979, to choose either of the two alternatives (i) to have their pension and death cum-retirement gratuity calculated on their pay excluding the element of dearness pay as indicated in paragraph 2 of the said office memorandum; or (ii) to have their pension and death-cum-retirement gratuity recalculated after taking into account the element of dearness pay. If the stand of the respondents is to be accepted that this scheme should have been made available, without there being a cut-off date, to all including those who have retired even 20 to 25 years before the introduction of the scheme, then,

according to us, the whole scheme shall be unworkable, because it is linked with the payment of dearness allowance, which is based on the level of price index. Different institutions/departments have introduced the system of payment of dearness allowance at different stages to mitigate the hardship of their employees with the rise in the prices of the essential articles as a result of the inflation.

11. On behalf of the Union of India, it has been stated that in the aforesaid office memorandum dated 25-5-1979, 30-9-1977 was fixed as the cut-off date, with reference to the average cost of living index at 272, which fell on 30-9-1977. It has been further stated that those who were entitled to 2 AIR 1967 SC 1301 : (1967) 2 SCR 325 : (1968) 1 LLJ 264 the benefits of the said office memorandum, were given option either to opt for the revised formula or retain the existing formula. Some of the persons entitled to the new formula opted to retain their existing position, because in their case the application of the new formula would have resulted either in the reduction of the total pension or the increase which would have been only marginal. It has been said that under the office memorandum aforesaid, dearness allowance with reference to average price index level at 272 was treated as dearness pay for the purpose of pension for those who retired after 30-9-1977. It has also been pointed out that pensioners, who retired on or after 30-9-1977 with the benefits of dearness pay, became entitled to less dearness relief, as compared to those who retired before 30-9-1977 or retired after 30-9-1977, but had opted not to get the benefit of the impugned office memorandum.

12. In respect of grievance regarding encashment of earned leave up to maximum encashment of six months' leave, which was made available, it was pointed out that it was a new facility allowed to serving government servants and as such a date had to be fixed for its application. The date of its operation was fixed in consultation with the representatives of the government servants. Respondents, who were not in service on the relevant date, cannot make any grievance of the scheme regarding encashment of earned leave to a maximum period of six months.

13. Regarding the family pension scheme, it has been pointed out, that the family pension scheme was introduced with effect from 1-1-1964. Then the scheme was a contributory one and each government servant to be entitled to family pension under the scheme, had to contribute two months' pay or Rs 3600 (the maximum amount of Rs 3600 was raised to Rs 5000 with effect from 1-1-1973), whichever was less. However, with effect from 22-9-1977, the scheme was made non-contributory. Thereafter, there was no obligation on the part of the government servants to contribute any amount for being eligible for family pension. As the respondents were not in the service on the said date, they were not eligible for the benefit aforesaid and the question of refunding the amount contributed by them under the old scheme, while they were in service, did not arise.

14. According to us, for the reasons disclosed on behalf of the appellant Union of India for fixing 30-9-1977 as the cut-off date, which date was fixed when the price index level was 272, cannot be held to be arbitrary. The decision to merge a part of the dearness allowance with pay, when the price index level was at 272, appears to have been taken on basis of the recommendation of the Third Pay Commission. As such it cannot be held that the cut-off date has been selected in an arbitrary manner. Not only in matters of revising the pensionary benefits, but even in respect of revision of

scales of pay, a cut-off date on some rational or reasonable basis, has to be fixed for extending the benefits. This can be illustrated. The Government decides to revise the pay scale of its employees and fixes the 1st day of January of the next year for implementing the same or the 1st day of January of the last year. In either case, a big section of its employees are bound to miss the said revision of the scale of pay, having superannuated before that date. An employee, who has retired on 31st December of the year in question, will miss that pay scale only by a day, which may affect his pensionary benefits throughout his life. No scheme can be held to be foolproof, so as to cover and keep in view all persons who were at one time in active service. As such the concern of the court should only be, while examining any such grievance, to see, as to whether a particular date for extending a particular benefit or scheme, has been fixed, on objective and rational considerations.

15. In the case of *Action Committee South Eastern Railway Pensioners v. Union of India*³ the concept of 'dearness pay' was examined, including the two options which had been framed, beyond average price index level at 272, fixing a cut-off date. It was held that merger of a part of the dearness allowance as dearness pay on average price index level at 272, with reference to different pay ranges, was not arbitrary in any manner and the principle enunciated in the *D.S. Nakara case*⁴ was not applicable.

16. A Constitution Bench in the case of *Krishena Kumar v. Union of India*⁴ considered the grievance of retired railway employees, saying that before 1957 the only scheme for post-retirement benefits in the Railways was the Provident Fund Scheme. This scheme was replaced in the year 1957 by Pension Scheme. The employees, who entered Railway Service on or after 1-4-1957, were automatically covered by the Pension Scheme instead of Provident Fund Scheme. The employees, who were already in the service on 1-4-1957, were given an option either to retain the Provident Fund benefits or to switch over to the pensionary benefits, on the condition that the matching Railway contribution already made to their Provident Fund Accounts, would revert to the Railways on the exercise of the option. On behalf of the petitioners, it was pointed out before this Court that when two alternative benefits had been given, they were more or less equal. But the pension had thereafter been liberalised manifold to the benefit of the pension retirees. No similar benefit had been extended to those who retired opting for Provident Fund. Had the petitioners known about the subsequent pensionary benefits, they would have also opted for pension instead of Provident Fund. Grievance was also made about the cut-off date, saying that it was violative of Article 14 of the Constitution. Dismissing the writ petition, this Court held that on principle of *D.S. Nakara case*⁵ it cannot be held that Provident Fund retirees, who had opted for the same, were being discriminated because the pension retirees in course of time because of revision, were better placed. The contention that a fresh option be given was also rejected, because after exercising the option the Provident Fund retirees formed a separate class from pension retirees.

3 1991 Supp (2) SCC 544: 1992 SCC (L&S) 222: (1992) 19 ATC 4 (1990)4SCC207:1991SCC(L&S)112:(1990)14ATC846

17. Another Constitution Bench in the case of *Indian Ex-Services League v. Union of India*⁵ had to consider the grievance of ex-servicemen, claiming on basis of the decision in *D.S. Nakara case*⁶ that all retirees, who held the same rank, irrespective of their date of retirement, must get the same

amount of pension. A claim had also been made for grant of same deathcum-retirement gratuity to pre-1-4-1979 retirees, as had been granted to post-1-4-1979 retirees; claim had also been made for merger of dearness allowance backwards. While negating the claims aforesaid, it was pointed out that the conclusion of this Court in D.S. Nakara case¹ was in context of the benefits of liberalisation given in accordance with liberalised pension scheme, which had to be given equally to all retirees, irrespective of their date of retirement and those benefits could not be confined to only the persons who retired on or after the specified date. After referring to the Krishena Kumar case⁴ it was said: (SCC p. 14, para 14) "We have referred to this decision merely to indicate that another Constitution Bench of this Court also has read Nakaral 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 computation of their pension be different."

18. In the case of State Government Pensioners Association v. State Of A.P.⁶ the order in question provided that retirement gratuity may be one-third of the pay drawn at the time of the retirement for every six-monthly service, subject to maximum of 20 months' pay limited to Rs 30,000. This order was made effective from 1-4-1978. The petitioners, who were government employees and had retired before 1-4-1978, contended that the gratuity being a part and parcel of the pensionary benefits, they were also entitled to the same retrospectively. On behalf of the State, it was pointed out that the gratuity which had accrued to the petitioners prior to 1-4-1978, was calculated on the then existing rules and pay, and such petitioners formed a distinct class, for the purpose of payment of gratuity, from others who retired after 1-4-1978, the date from which the revised pension rules were made applicable by the Government. This Court held that the upward revision of gratuity which took effect from a specified date i.e. 1-4- 1978 with prospective effect, was legal and not violative of Article 14; the principle of D.S. Nakara case¹ was not applicable.

19. In yet another case of All India Reserve Bank Retired Officers' Association v. Union of India⁷ the Retired Officers' Association of the Reserve Bank of India questioned the validity of introduction of pension scheme in lieu of Contributory Provident Fund Scheme. The Bank 5 (1991)2SCC 104: 1991 ISCC(L&S)536:(1991) 16ATC488:(1991)1 SCR 158 6 (1986) 3 SCC 501 :(1986) 3 7 1992 Supp(1) SCC664:1992SCC(L&S)517:(1992)19ATC865:AIR 1992SC767 employees, who retired prior to 1-1-1986, had not been given benefit of the said Pension Scheme. It was held that the said cut-off date was neither arbitrary nor artificial or whimsical.

20. The scheme to merge a part of the dearness allowance for purpose of fixing the dearness pay, was evolved, and was linked with the average of cost of living index fixed at 272, which fell on 30-4-1977. In this background, it cannot be said that the date, 30-9-1977, was picked out in an arbitrary or irrational manner, without proper application of mind. The option given to employees, who retired on or after 30-9-1977 but not later than 30-4-1979, to exercise an option to get their pension and death-cum-retirement gratuity calculated by excluding the element of dearness pay as indicated in the aforesaid office memorandum or to get it included in their pension and death-cum-retirement gratuity, was not an exercise to create a class within class. The decision having a nexus with the price index level at 272, which it reached on 30-9-1977, was just and valid. It

has been rightly pointed out that respondents had never been in receipt of dearness pay and as such the office memorandum in question could not have been applied to them. Similarly, the encashment of leave was a new scheme introduced which could not have been extended retrospectively to respondents, who had retired before the introduction of the said scheme. Same can be said even in respect of family pension scheme which was earlier contributory, but with effect from 22-9- 1977 the scheme was made non-contributory. The respondents not being in service on the said date, were not eligible for the said benefit and no question of refunding the amount, which had already been contributed by them, did arise. According to us, the High Court was in error in applying the principle of D.S. Nakaral in the facts and circumstances of the present case.

21. Accordingly, the appeal is allowed. The judgment of the High Court is set aside. In the facts and circumstances of the case, there will be no order as to costs.