# Action Committee South Eastern Railway ... vs Union Of India (Uoi) And Ors. on 5 September, 1990

## Equivalent citations: JT1991(5)SC8, 1990(2)SCALE456, 1991SUPP(2)SCC544, 1990(3)SLJ147(SC), 1991(1)UJ114(SC), (1990)3UPLBEC1509, AIRONLINE 1990 SC 159, (1990) 3 SERVLJ 147, (1991) 62 FACLR 219, (1991) 1 SERVLR 771, (1991) 1 LAB LN 311, 1992 SCC (L&S) 222, 1991 UJ(SC) 1 114, 1991 SCC (SUPP) 2 544, (1991) 5 JT 8 (SC), (2009) 3 ALLMR 947

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## Bench: N.M. Kasliwal, K. Ramaswamy

JUDGMENT

N.M. Kasliwal, J.

1. This petition under Article 32 of the Constitution of India has been filed by the petitioner No. 1, an, association of the retired employees of the South Eastern Railway and petitioner No. 2 being the convener of the association. For convenience sake we would hereinafter refer the above class of pensioners as petitioners. According to the Railway Board's letter No .PC III/79/DP/1 dated 11.6.1979 the Ministry of Railways extended the benefit of merger of Dearness Pay (D.P.) upto 272 points price index level with average emoluments for calculation of Pensionary Benefits to the Railway servants retired on or after 30.9.1977. It further stipulated that the Railway employees retired on or after 30.9.1977 but not later than 30.4.1979 will have an option to choose cither of the two alternatives i.e. in favour of the existing rule to have their pension calculated without merger of D.P. on 272 points price index level or with merger of the same. Such employees were given time upto 31.12.1979 to exercise their option. It was further stated therein that those who will retain their option in existing schemes will be allowed graded relief on pension to the fullest extent admissible from time to time inclusive of price index level i.e. 272 and those who will opt out of the existing scheme i.e. opt in favour of merger of D.P. shall be allowed to enjoy the instalment of graded relief sanctioned beyond average price index level 272. The pension and gratuity were, therefore, calculated in terms of options exercised by the ex-employees.

2. According to the petitioners at the time of their retirement they were given option as to whether the petitioners would opt for pension and service gratuity/death-cum-retirement gratuity computed after taking into account of a portion of dearness allowance as dearness pay or for pension and service gratuity/death-cum-retirement gratuity excluding dearness allowance as dearness pay. The petitioners opted for pension and service gratuity/death-cum-retirement gratuity to be computed after taking into account dearness allowance as dearness pay. According to the petitioners they have

at all material times drawn pension and service gratuity and death-cum-retirement gratuity calculated and/or computed after taking into account dearness pay only. The case of the petitioners is that according to the above circular only 22% of pay has been treated as dearness pay for computation of pension in the case of the employees including the petitioners who opted for pension and service gratuity/death-cum-retirement gratuity after including dearness pay. In June, 1979, total dearness allowance payable to the railway servants was 45.5% of pay whereas in computation of pension and service gratuity/death-cum-retirement gratuity only 27% of pay was taken into consideration instead of 45.5% of pay. By another order No. 103/82 dated 11.5.1932 further 15% of basic pay was added as dearness pay in lieu of total dearness allowance in computation of pension for those who had opted for dearness pay in computation of pension. At that time the Railway servants in service were drawing 75.5% of pay as dearness allowance.

3. By another order No. 108/83 dated 25.5.1983 a further 0.5% of basic pay was added to dearness pay thus in all 42.5% in lieu of total dearness allowance was permitted in case of pensioners including the petitioners who opted for dearness pay for computation of pension payable to them. At that time such of the petitioners in service and other Railway servants were drawing 99.5% of basic pay as total dearness allowance. Various representations were made on behalf of the Railway servants for taking into account entire dearness allowance for the purpose of computation and calculation of pension and service gratuity/death- cum-retirement gratuity in view of paragraph 501 and 506 of Manual of Railway Pension Rules 1969.

4. The Railway Board by its order No. PC/III/85/DP/I dated 17.5.1985 decided that the enure dearness allowance and ad hoc dearness allowance in addition to dearness pay be treated as part of pay for the purpose of calculating pension and other retirement benefits in respect of Railway servants who retired on or after 31.3.1985. However the petitioners and other Railway servants who happened to retire before 31.3.1985 were not given such benefits. The case of the petitioners is that no reasons have been given why the Railway servants who retired before 31.3.3985 were not given such corresponding benefits as given to those who retired on or after 32.3.85. In the said order dated 17.5.1985 it has been further provided that in case of Railway servants who would retire between 31.3.85 and 30.9.85 one half of dearness pay including therein additional dearness allowance and ad hoc dearness allowance would be added to average emoluments and in case of Railway servants who would retire after 30.9.85 full dearness pay including therein additional dearness allowance would be added to average emoluments for computation of pension, gratuity and other retirement benefits.

5. The petitioners in these circumstances have urged that the order dated 17.5.1985 issued by the respondents is not only discriminatory, arbitrary and designed to deny the petitioners the equal treatment as guaranteed under the Constitution but also malafide and illegal. It has thus been prayed that this Hon'ble Court be pleased to declare that the petitioners and those who have retired prior to 31.3.1985 are also entitled to be treated at par with those who have retired subsequently thereto in the matter of computation of their pension and other retirement benefits in terms of the order dated 17.5.1985 and give a direction to the respondents to extend the benefits of the circular dated 17.5.1985 to the petitioners with effect from the respective dates of their retirement. The petitioners have placed strong reliance in support of their case on D.S. Nakara v. Union of India .

6. The respondents have filed a counter affidavit in which it has been submitted that in the Board's letter dated 11.6.1979 an option was given to either claim benefit of merger of D.P. upto 272 points price index level with average emoluments of calculation of pensionary benefits or to have their pension calculated without merger of D.P. It was further stated therein that those who will retain their option in existing schemes will be allowed graded relief in pension to the fullest extent admissible from time to time inclusive of price index level and those who will opt out of the existing scheme i.e. opt in favour of merger of D.P. shall be allowed to enjoy the instalment of graded relief sanctioned beyond average price index level 272. The pension and gratuity were therefore calculated in terms of options exercised by the ex-employees. Thus the Board's intention was very clear to mitigate the loss by granting graded relief to the pensioners having opted in favour of new scheme by merging of D.P. in average emoluments for calculation of pension. It has been submitted that the amount of D.A. merged as pay in different pay slabs are as follows:

> Pay range Amount of DP i) upto Rs. 300/- 36% of pay. ii) Above Rs. 300/-& upto Rs. 2157/- 27% of pay subject to minimum of Rs. 208/- and maximum of Rs. 243/-. iii) Above Rs. 2157/- & upto Rs. 2399/- Amount by which pay falls short of Rs. 2400/-.

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7. The Respondents further submitted in the reply that the Ministry of Railways further reviewed the order in Estt. SL No. 192/79 and decided to merge D.A. as pay upto average price index level 320 vide Estt. Sl. No. 103/82(Board's letter No. PC III/82/DP/3 dated 30.4.82) giving effect to employees who retired on or after 31.1.1982. The issue was further got examined by the Board and modified vide Estt. Sl No. 108/83 (Board's letter No. PC III/82/DP/3 dated 11.5.1983) allowing a further merger @ 5% D.A. as pay for calculation of pension giving effect from the same day i.e. 31.1.1982. The amount of D.A. merged as pay in different pay slabs are as follows:

> Pay range Amount of DP (i) Upto Rs. 300/- 21% of pay subject to a minimum of Rs. 42/- and maximum of Rs. 60/- (ii) Above Rs. 300/- & upto Rs. 2037/- 15% of pay subject to a minimum of Rs. 60/- and maximum of Rs. 120/-

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> The above amount of Dearness Pay was further modified under Board's letter dated 11.5.1983 as under: A Pay range Amount of DP (a) Upto Rs. 300/- 21.5% of pay subject to a minimum of Rs. 42/- and maximum of Rs. 62/- p.m. (b) Above Rs. 300/- & upto Rs. 800/- 15.5% of pay subject to a minimum of Rs. 62/- (c) Above Rs. 800/- & upto Rs. 2037/- Rs. 100/- plus 3% of pay subject to a maximum of Rs. 127/-.

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8. Thus the date of option by the eligible ex -employees was extended upto 3.9.1983 vide Estt. Sl. No. 108/83. It has been further submitted that the option called for in terms of both the orders were in the line of Estt. Sl. No. 192/79 i.e. to retain the merger of D.P. on average price index level 272 in calculating average emoluments or with merger of D.P. on 320 point price index level and graded relief in cases of employees who opted for merger of 272 price index level were allowed relief in pension beyond 272 price index level and those who opted in favour of merger of 320 price index level beyond 320 price index level.

9. The respondents further submitted in the counter affidavit that the Railway Ministry under their letter No. PC III/85/DP/l dated 17.5.85 decided that the entire ADA/DA & Ad hoc DA sanctioned under their letter No. PC III/85/DA/1 dated 19.1.1985 (Estt. SI. No. 17/85) linked to average index price level 568 be treated as Dearness Pay in addition to D.P. already treated as part of pay vide Ministry's letters dated 11.6.1979, 30.4.1982 and 11.5.1983 for the purpose of retirement benefit of Railway servant retired on or before 31.3.1985 to the extent specified therein. The Railway Ministry vide their letter No. PC.III/85/DP/1 dated 27.6.85 have further clarified that the dearness allowance, ADA & ad hoc DA upto average index level 568 shall be treated as DP with effect from the date from which these were sanctioned. Where the pension calculated results in loss as compared to the total amount of pension plus Relief on pension, admissible at the average index level 320 (i.e. 80% on pension) the loss will be made up by the grant of personal pension. Those pensioners (retired on or after 31.3.85) were eligible for graded relief on pension sanctioned beyond average price index level 568. Board's letter dated 27.6.85 also stipulates that benefit which are advantageous be applied setting aside the question of option as required under Board's letter dated 17.5.1985.

10. It has been further submitted in the reply that the case of D.S. Nakara (supra) is not applicable in as much as Nakara's case applies to pensioners who were treated in one class. In the present case Railway Board's order dated 17.5.1985 and 27.6.1985 apply to the serving employees at the material time. The serving employees and the petitioners who are pensioners fall in two different classes. Thus the principle enunciated in Nakara's case cannot apply in the case of the petitioners. In the present case the question is not about the applicability of liberalised pension formula but the issue is entirely different i.e. modality of treatment of 'pay' for determining retirement benefits.

11. We have heard learned Counsel for both the parties and have perused the record. From the perusal of the above mentioned circulars of the Railway Board issued from time to time it is clear that the pension and gratuity were calculated in terms of options exercised by the petitioners and other employees having retired prior to 31.3.1985. The petitioners admittedly exercised their option for pension and other retirement benefits computed after taking into account dearness allowances dearness pay. It is also admitted position that to mitigate the loss graded relief has been granted to the pensioners having opted in favour of new scheme. The petitioners are admittedly getting dearness allowance in addition to their pension on account of price index level going high. All pensioners falling in the category of the petitioners have been classified in one class and have been given equal treatment. So far as the circular/letter dated 17.5.1985 is concerned it granted the merger of entire dearness allowance as dearness pay in case of those employees who were continuing in service on 31.3.1985. The petitioners in this regard cannot claim any right that their entire dearness allowance should also be merged as dearness pay and to further calculate the other retiral benefits like gratuity, commuted value of pension etc. on that basis. During the course of arguments learned Counsel for the petitioners was unable to show us any material difference in the actual pension drawn by the petitioners with those who retired after 31.3.85. Learned counsel for the petitioners only submitted that if the formula adopted in the case of employees having retired after 31.3.85 vide circular dated 17.5.85 is applied in the case of the petitioners then it would make substantial difference in the calculation of the amount of gratuity and commuted value of pension. As already discussed above no such claim can be allowed nor the same can be permissible on any

principle of equality enshrined under Article 14 of the Constitution in as much as the petitioners form a different class from those who were continuing in service on or after 31.3.85 The petitioners of their own accord had opted for the choice given to them and the principle enunciated in D.S. Nakara's case cannot be applied in the case of the petitioners. A Constitution Bench of this Court in Krishna Kumar v. Union of India and Ors. JT. 1990 (3) 173 after dealing with Nakara's case in detail observed as under:

> Thus the Court treated the pension retirees only as a homogeneous class. The P.F. retirees were not in mind. The Court also clearly observed that while so reading down it was not dealing with any fund and there was no question of the same cake being divided amongst larger number of the pensioners than would have been under the notification with respect to the specified date. All the pensioners governed by the 1972 Rules were treated as a class because payment of pension was a continuing obligation on the part of the State till the death of each of the pensioners, and unlike the case of Contributory Provident Fund, there was no question of a fund in liberalising pension.
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> The argument of Mr. Shanti Bhushan is that the State's obligation towards pension retirees is the same as that towards P.F. retirees. That may be morally so. But that was not the ratio decidendi of Nakara. Legislation has not said so. To say so legally would amount to legislation by enlarging the circumference of the obligation and converting a moral obligation.

12. In the result we find no force in any of the contentions raised on behalf of the petitioners and the writ petition is dismissed with no order as to costs.