

CASE NO.:
Transfer Case (civil) 106 of 2006

PETITIONER:
Union of India

RESPONDENT:
S. R. Dhingra and others

DATE OF JUDGMENT: 14/12/2007

BENCH:
A.K. Mathur & Markandey Katju

JUDGMENT:
J U D G M E N T

MARKANDEY KATJU, J.

1. Writ Petition No. 4648/2002 titled Union of India and another vs. S.R. Dhingra and others was filed in the Delhi High Court and was thereafter transferred to this Court by order dated 9.5.2006 in Transfer Petition (Civil) No. 278 of 2005.

2. It appears that similar matters were pending before the Delhi High Court, Punjab & Haryana High Court and Central Administrative Tribunal and further proceedings in those cases were ordered to be stayed awaiting the judgment in the matter which was transferred to this Court by the order dated 9.5.2006.

3. The facts of the case are that in the Railways there are certain employees such as drivers, guards, shunters etc, who go along with the railway train and are categorized as 'Running Staff'. Such staffs are entitled to an allowance called 'Running Allowance' which is apart from their salary. Computation of pension after retirement in the railways is made on the basis of average emoluments plus a part of the running allowance which is included in average emoluments in terms of Rule 2544(g) of the Indian Railway Establishment Code. The present dispute relates to the pension for the running staff who retired prior to 1986.

4. Prior to its amendment Rule 2544(g) running allowance upto a maximum of 75% of pay and other allowances was added to the pay for computing pension. Subsequently, by notification dated 5.12.1988 Rule 2544 was amended, and the maximum limit of the running allowance was fixed at 45% of the pay in the revised scale of pay. Thereafter by another amendment this was raised to 55% of the average pay.

5. The validity of this amendment was challenged before the Central Administrative Tribunal by means of a petition which was allowed by the Ernakulam Bench by the order dated 20.4.1990 and the impugned notification was quashed to the extent that the amendment of Rule 2544(g) was given retrospective effect.

6. A contrary view was taken by another Bench of the Tribunal and hence the matter was referred to a Full Bench, and the Full Bench agreed with the view taken by the Ernakulam Bench.

7. The matter was then carried in appeal to this Court in Chairman, Railways Board and others vs. C.R. Rangadhamaiah and others 1997(6) SCC 623 which gave its judgment on 25.7.1997, upholding the decision of the Full Bench of the Tribunal.

8. It may be mentioned that the Tribunal had struck down the retrospective operation of the notification dated 5.12.1988 issued in exercise of the power of the President under the proviso to Article 309 of the Constitution whereby Rule 2544 of the Indian Railway Establishment Code was amended with retrospective effect. In the aforesaid decision this Court dismissed the appeals filed by the Union of India and the Railway Administration and upheld the view taken by the Full Bench of the Tribunal.

9. To implement the aforesaid decision of this Court the Railway Board issued instructions on 14.10.1997 that the pension and other retiral benefits of the railway running staff who retired between 1.1.1973 to 4.12.1988 should be re-computed, and arrears on account of re-computation of pension be paid to them accordingly.

10. In the meanwhile the Fifth Pay Commission report was rendered and in implementation of some of the recommendations in respect of the pre-1986 retirees the Department of Personnel & PW issued OM dated 27.10.1997 that pension/family pension will be consolidated w.e.f. 1.1.1996 by adding together their existing pension/family pension, dearness relief, interim relief I and interim relief II and fitment weightage of 40%. The said revision was to be done on the basis of existing pension. It is not in dispute that the said relief was extended to the respondents herein and all those similarly placed with the respondents.

11. In order to implement another recommendation of the 5th Pay Commission to give parity to the pre-1986 retirees with the post 1986 retirees, it was decided to fix the pay of the pre-1986 retirees as on 1.1.1986. However, it was specifically provided that the pay so fixed would be treated as average emoluments. Accordingly, on 10.2.1998, a further Office Memorandum was issued providing for fixation of notional pay of all those Government servants who retired prior to 1.1.1986 as on 1.1.1986. The pay was to be fixed on notional basis in the scale revised with effect from 1.1.1986. It was provided that the notional pay so arrived as on 1.1.1986 shall be treated as average emoluments for the purpose of calculation of pension and accordingly the pension shall be calculated as on 1.1.1986 as per the pension formula then prescribed. (The then formula was 50% of average emoluments. Thus 50% of the pay notionally fixed was to be treated as pension of the respective pre-1986 retirees).

12. Learned Addl. Solicitor General, Shri Amarendra Sharan, appearing for the appellants submitted that the OM dated 10.2.1998 is very clear that what is to be fixed is the pay on notional basis, and pay, according to the rules, does not include running allowance. However, running allowance is a relevant factor for calculating average emoluments. He submitted that the said OM clearly provides that the notional pay so arrived at will be treated as average emoluments, meaning thereby that all other elements provided in rule 2544 which otherwise could have been added to pay for arriving at average emoluments were expressly excluded. He further submitted that the pay notionally fixed includes existing (pre 1986) basic pay, dearness pay, additional dearness allowance, ad hoc dearness allowance, first and second installments of interim relief calculated on basic pay plus 30% basic pay in the existing scale as pay element of running allowance, and fitment weightage at the rate of 20% of existing basic pay.

13. On 24.7.1998, it was clarified by the department that in cases where the amount of revised pension arrived at on the basis of notional fixation of pay as on 1.1.1986 happens to be less than the amount of consolidated pension already drawn by pre-1986 retirees, there is no need to revise the existing pension and issue a revised PPO.

14. Due to certain doubts and confusion, a clarification was sought as to whether running allowance was to be added again while fixing the pay notionally as per the OM dated 10.2.1998. On 29.12.1999, the Railway Board issued clarification that running allowance was not to be taken into

consideration at the time of re-fixation of pay on notional basis on 1.1.1986.

15. The said clarification was challenged by way of an Original Application before the Central Administrative Tribunal by the respondents. On 22.10.2000 the appellants (respondents in OA) contested the original application of the respondents (appellants in OA) before the Central Administrative Tribunal, Principal Bench, New Delhi by filing their detailed counter reply dated 28.5.2001 in which preliminary objections were also raised regarding maintainability of the original applications. It was pointed out that only the pay was to be notionally fixed as per the OM dated 10.2.1998, and therefore, there was no need to add running allowance again since running allowance would be added only if on the basis of pay so fixed the average emoluments was to be recalculated. The said course of recalculation of average emoluments was specifically excluded by the said OM dated 10.2.1998.

16. On 22.1.2002, the Central Administrative Tribunal, Principal Bench, New Delhi passed an order allowing the O.A. of the respondents herein and quashed the Railway Board's clarification dated 29.12.1999. Thereafter various writ petitions were filed in the Delhi High Court and ultimately writ petition No. 4648/2002 was transferred to this Court by order of this Court dated 9.5.2006 (as already stated above).

17. We have carefully perused the record and heard learned counsel for the parties.

18. Learned counsel for the appellant submitted that the pension of the respondents which was recomputed on the basis of the judgment of this Court in *Chairman, Railways Board and others vs. C.R. Rangadhamaiah and others* (supra) is fully protected and the respondents will continue to take the benefits in future also. However, he submitted that the pensionary benefits of the respondents who retired prior to 1.1.1986 was to be determined by fixing notional pay w.e.f. 1.1.1986 and further pension was to be re-fixed w.e.f. 1.1.1986 without taking into consideration the running allowance as per the policy of the Railway Board for implementation of the recommendation of the 5th Central Pay Commission while revising the retiral benefits w.e.f. 1.1.1986. He submitted that there was no infirmity in the policy issued by the Department of Personnel & PW and adopted by the Railway Board, and subsequent circulars issued by the Railway Board regarding release of retiral benefits to the employees who retired prior to 1.1.1986.

19. Learned Additional Solicitor General submitted that while fixing the pension notionally, due to a clerical mistake it had been fixed at much higher amount, and this error, when discovered, was later rectified and the pension of the respondents was correctly revised w.e.f. 1.1.1986.

20. We have carefully considered the submission of the learned counsels for the parties and we are in agreement with the submission of the learned Additional Solicitor General.

21. In this connection it may be mentioned that the Railway Board vide its letter dated 29.12.1999 issued a clarification to the earlier instructions dated 10.2.1998 issued by the Department of Personnel & PW, which is the nodal department of the government of India for framing policy instructions on pensionary matters.

22. It has also been clarified by the Department of Personnel & PW vide their O.M. No. 45/86/97-P&W (A) Pt. III dated 24.7.1998 circulated vide Railway Board's letter No. F(E)-III/98/PN-1/2 dated 2.9.1998 that if the pension revised on notional fixation of pay as on 1.1.1986 happens to be less than the pension already drawn by the pensioner the same should not be reduced to their disadvantage. In the case of Medical Officers, the Department of Personnel & Pensioner's Welfare have already clarified vide their OM No. 45/3/99-P&PW (A) dated 12.10.1999 circulated vide Railway

Board\022s letter No. F(E)-III/98/PN-1/29 dated 12.11.1999 that non-practising allowance which was already taken into account for calculating the pension and other benefits at the time of retirement is not to be added to the pay of the pre-1986 retirees revised on notional basis as on 1.1.1986, as the same is not permissible in terms of para No. 2 of their instructions dated 10.2.1998. The nature of running allowance is similar to that of non-practising allowance, and the Railway Board issued instructions dated 29.12.1999 clarifying that running allowance is not to be added to the pay of pre-1986 retirees revised on notional basis as on 1.1.1986.

23. We are of the opinion that the clarification of the Railway Board issued dated 29.12.1999 clarifying that the running allowance which was already taken into account for pension and other benefits at the time of retirement is not to be added to the pay of pre-1986 retirees revised on notional basis as on 1.1.1986 is valid. It appears that due to a clerical error the notional benefits of the respondents w.e.f. 1.1.1986 was wrongly fixed and such retired employees are getting excess pension. It is well-settled that a mistake does not confer any right to any party, and can be corrected.

24. We are of the opinion that the benefit of running allowance has to be taken into consideration for computing pension only once. It had been taken into consideration while fixing the pension of the respondents at the time of their retirement. In our opinion it is not required to be taken into account again for any future calculation.

25. It is well settled that when two sets of employees of the same rank retire at different points of time, one set cannot claim the benefit extended to the other set on the ground that they are similarly situated. Though they retired with the same rank, they are not of the same class or homogeneous group. Hence Article 14 has no application. The employer can validly fix a cut-off date for introducing any new pension/retirement scheme or for discontinuance of any existing scheme. What is discriminatory is introduction of a benefit retrospectively (or prospectively) fixing a cut-off date arbitrarily thereby dividing a single homogenous class of pensioners into two groups and subjecting them to different treatment (vide Col B.J. Akkara (Retd) vs. Govt of India, (2006) 11 SCC 709, D.S. Nakara vs. Union of India (1983) 1 SCC 305, Krishna Kumar vs. Union of India (1990) 4 SCC 207, Indian Ex-Services League vs. Union of India (1991) 2 SCC 104, V. Kasturi vs. Managing Director, State Bank of India (1998) 8 SCC 30 and Union of India vs. Dr. Vijayapurapu Subbayamma (2000) 7 SCC 662).

26. In view of the above, we are of the opinion that the benefit of running allowance which has been given to the respondent at the time of retirement is not to be given again vide Office Memorandum dated 10.2.1998.

27. Accordingly Writ Petition No. 4648/2002 which has been transferred to this Court is allowed and the order of the Central Administrative Tribunal dated 22.1.2002 is set aside. This decision will govern all similar matters pending in the High Courts or Tribunal.

28. However, any amount already paid to the respondents and other similarly situated persons shall not be recovered from them.

29. The Transfer Case stands allowed.