

A K.S. KRISHNASWAMY ETC.
v.
UNION OF INDIA AND ANR.

NOVEMBER 23, 2006

B [H.K. SEMA AND P.K. BALASUBRAMANYAN, JJ.]

Executive Instructions:

C *Office memorandum merely clarifying an earlier office memorandum—
Held: Does not over-ride the same.*

Administrative law:

D *Policy decision of the Government—Modification of, by Executive
Instructions—Held, cannot be challenged on the ground of estoppel.*

Service law:

*Pay scale—Increase in, on Pay Commission recommendation is a
corresponding increase of pay scale and not of the post.*

E *Constitution of India, 1950 :*

*Article 136—Special leave petition—Dismissal of, by non-speaking
order—Applicability of doctrine of merger—Held: Not applicable.*

F **The Union of India considered the recommendations of the 5th Pay
Commission and on 30.9.1997 notified a Policy Resolution. In the said Policy
Resolution, the scope and extent of the application of the 5th Pay Commission
recommendations accepted by the Government of India was mentioned. The
implementation and acceptance of 5th Pay Commission was followed by a large
number of representations from pensioners. The Government of India issued
Executive instructions in the O.M. dated 17.12.1998 thereby clarifying the
import and intent of application of Policy Resolution notified on 30.9.1997.
The confusion still persisted and the Government issued further Executive
Instructions by way of O.M. dated 11.5.2001.**

H **The question which arose for consideration in these appeals is whether**

the Executive Instruction in the form of O.M. dated 11.5.2001 override the O.M. dated 17.12.1998 and is null and void. The pensioners have preferred appeals against the order of Madras High Court while Union of India have preferred appeal against the Delhi High Court.

Dismissing the appeals of pensioners and allowing the appeals of Union of India, the Court

HELD: 1. The view taken by the Madras High Court that the clarificatory Executive Instructions in O.M. dated 11.5.2001 are an integral part of the O.M. dated 17.12.1998 clarifying the Policy Resolution of the Government dated 30.9.1997 and do not over-ride the original O.M. dated 17.12.1998 is correct law and it is, accordingly, affirmed. The view taken by the Delhi High Court that O.M. dated 11.5.2001 over-rides the original O.M. dated 17.12.1998 and creates two classes of pensioners does not lay down the correct law and is, hereby, set aside. [339-G-H]

2. O.M. dated 17.12.1998 speaks of the minimum pay in the revised scale of pay w.e.f. 1.1.1996 of the post last held by the pensioner. The O.M. dated 11.5.2001 clarifies it as minimum of the corresponding scale as on 1.1.1996 of the scale of pay held by the pensioner at the time of superannuation/retirement. The clarification brought about in the O.M. dated 11.5.2001 is of the last post held by the pensioner as the last scale of pay held by the pensioner at the time of superannuation/retirement. [336-E-F]

3. It is well-settled principle of law that recommendations of the Pay Commission are subject to the acceptance/rejection with modifications of the appropriate Government. It is also well settled principle of law that a policy decision of the Government can be reviewed/altered/modified by Executive Instructions. It is in these circumstances that a policy decision cannot be challenged on the ground of estoppel. In the present case, the recommendations of the 5th Pay Commission were accepted by a Policy Resolution dated 30.9.1997 that the ceiling on the amount of pension will be 50% of the highest pay in the Government. The pension of all pre 1.1.96 retirees including pre-86 retirees shall be consolidated as on 1.1.1996, but the consolidated pension shall not be brought on to the level of 50% of the minimum of the revised pay of the post held by the pensioner at the time of retirement. The subsequent O.M. dated 17.12.1998 clarified the Policy Resolution dated 30.9.1997 by Executive Instructions in O.M. dated 17.12.1998 and further clarified in the form of O.M. dated 11.5.2001 clarifying the contents of Policy Resolution of the Government dated 30.9.1997. They

A are both complementary to each other. Both clarify the Government Policy Resolution dated 30.9.1997. The appellants are not aggrieved by the Executive Instructions in O.M. dated 17.12.1998. Therefore, the contention of the appellant that the O.M. dated 11.5.2001 over-rides the original O.M. dated 17.12.1998, thereby creates two classes of pensioners is absolutely ill-founded and untenable. [337-B-E]

B
 4. It is common knowledge that the increase in the pay scale in any Pay Commission is a corresponding increase of the pay scale and not of the post. Therefore, Executive Instructions dated 11.5.2001 have been validly made keeping in view the recommendations of the Pay Commission accepted by the Policy Resolution of the Government on 30.9.1997, clarified by Executive Instructions dated 17.12.1998. [337-F-G]

D.S. Nakara v. Union of India, [1983] 1 SCC 305, distinguished.

D *State of Punjab & Ors. v. Boota Singh & Anr.*, [2000] 3 SCC 733; *State of Punjab & Anr. v. J.L. Gupta & Ors.*, [2000] 3 SCC 736; *State of West Bengal and Anr. v. W.B. Govt. Pensioners' Association & Ors.*, [2002] 2 SCC 179; and *State of Punjab & Ors. v. Amar Nath Goyal & Ors.*, [2005] 6 SCC 754; *Indian Ex-Services League v. Union of India*, [1991] 2 SCC 104; *K.L. Rathee v. Union of India*, [1997] 6 SCC 7, referred to.

E
 5. The contention of Union of India was that against the decision of the Delhi High Court, an SLP was dismissed by this Court on 8.7.2004 and, therefore, the doctrine of merger applies. It is not disputed that the SLP was dismissed in limine without a speaking order. When the special leave petition is dismissed by the Supreme Court under Article 136 of the Constitution, the doctrine of merger is not attracted. [339-A, B, F]

Kunhayammed & Ors. v. State of Kerala & Anr., [2000] 6 SCC 359 and *V.M. Salgaokar & Bros. (P) Ltd. v. CIT*, [2000] 5 SCC 373, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3174 of 2006.

G
 From the Judgment and Order dated 29-4-2005 of the High Court of Judicature at Madras in Writ Petition Nos.24444 to 24451/2001, 14913, 30047,45135/2002 and 32527/2004.

WITH

H
 Civil Appeal Nos. 3173, 3188, 3189 and 3190 of 2006.

P.A. Kulkarni, Khwairakpam NobinSingh, B. Krishna Prasad and T. Harish Kumar for the Appellants.

A

C.S. Rajan, Harish Chander, A.K. Srivastava, V.K. Verma, Y.P. Mahajan, D.S. Mahra, D.D. Kamat, S. Goswami, P. Parmeswaran, Sushma Suri, Chitra Markandeya, Prashant Bhushan, Aniruddha P. Mayee, Sanjay Visen and Sanjeev Kr. Chaudhry for the Respondents.

B

The Judgment of the Court was delivered by :

H.K. SEMA, J. Civil Appeal Nos. 3174 and 3173 of 2006 are preferred by the pensioners against the judgment and order of the High Court of Madras dated 29.4.2005 in Writ Petition Nos. 24444-24451/2001, 14913/2002 and 32527/2004. Civil appeal Nos. 3188, 3189 and 3190 of 2006 are preferred by the Union of India against the judgments and orders of the Delhi High Court dated 17.8.2005, 5.9.2005, 10.11.2005 and 3.8.2005 passed in W.P. Nos. 17745/2004, 16975/2005, 6831/2004, 4597/2003 respectively.

C

We have heard Mr. P.A. Kulkarni, Mr. T. Harish Kumar, Mr. C.S. Rajan, Mr. Sanjeev Kumar Chaudhary and Mr. Prashant Bhushan, learned counsel appearing for different appellants/respondents.

D

In all these appeals, the controversy relates to the scale of pay recommended by the 5th Pay Commission and corresponding acceptance of the Government by a Policy decision dated 30.9.1997 and Executive Instructions dated 17.12.1998 clarified by Executive Instructions dated 11.5.2001.

E

We may briefly notice the scale of pay enjoyed by the employees at the time of retirement and corresponding increase in the 4th and the 5th Pay Commission.

F

Civil Appeal No. 3174 of 2006

The appellants were holding the post of Superintending Engineers in All India Radio. They retired from service on attaining the age of superannuation between 1982 to 1985. Undisputedly, at the time of retirement, they were holding the scale of pay of Rs. 1500-2000. In the 4th Pay Commission, their scale was revised to Rs. 3700-5000. In the 5th Pay Commission Report, which was accepted w.e.f. 1.1.1996, their scale was correspondingly revised to 12000-16500.

G

H

- A The employees, who had rendered 13 years of service, were granted special grade in the pay scale of Rs. 2000-2250. This special scale of pay was confined to 20 senior incumbents. In the 4th Pay Commission, their scale was correspondingly revised to 4500-5700. In the 5th Pay Commission, this scale was correspondingly revised to 14300-18300 w.e.f. 1.1.1996. It is undisputed that the appellants never enjoyed the special scale of Rs. 2000-2250. They claimed the pensionary benefits on the basis of scale of Rs. 14300-18300, which was rejected by the High Court.

Civil Appeal No. 3173 of 2006

- C The appellant retired on 30.9.1993 as Member (Personnel) Postal Services Board in the pay scale of Rs. 7300-8000. In the 5th Pay Commission, the scale was revised to Rs. 22400-26000 w.e.f. 1.1.1996. The Ministry of Finance, by a Memorandum dated 30.6.1999, revised scale of certain high posts upwards and revised the scale of three posts of Members as 24050-26000. The appellant claimed that he is entitled to the same upward revision of pay. His claim was contested by the Union of India that upward revision of Office Memorandum dated 30.6.1999 is only prospective in nature and, therefore, the same is not applicable to the case of the appellant, as he was a Member only upto 30.9.1993.

Civil Appeal No. 3188 of 2006

- E The respondents were the General Managers in the Indian Railways, retired prior to 1.1.1996. They were holding the pay scale of Rs. 7300-8000/- at the time of their retirement. In the 5th Pay Commission, their scale was correspondingly revised to Rs. 24050-26000. Their claim was rejected by the Tribunal. However, the High Court upset the order of the Tribunal and, hence, the present appeal by the Union of India.

Civil Appeal No. 3189 of 2006

- G The respondent was Technical Adviser in the Department of Women and Child Development, Ministry of Human Resource Development. He retired on 30.11.1995 in the pay scale of Rs. 3700-5000. In the 5th Pay Commission, the scale was correspondingly revised to Rs. 12000-16500. The respondent claimed the scale of Rs. 14300-18300. His claim was rejected by the Central Administrative Tribunal. The Tribunal's order was, however, upset by the High Court by the impugned order.

H

Civil Appeal No. 3190 of 2006

The respondent retired as Director in the Central Secretariat Official Language Service on 30.6.1989 in the scale of Rs. 3700-5000. In the 5th Pay Commission, the scale was correspondingly revised to Rs. 12000-16500. The respondent claimed the benefit of pay scale of Rs. 14300-18300, which was rejected by the Tribunal. However, the order of the Tribunal was upset by the High Court by the impugned order and, hence, this appeal by the Union of India.

At this stage, we may recite briefly the genesis leading to the present controversy. The recommendations of the 5th Pay Commission were considered by the Union of India and on 30.9.1997 a Policy Resolution was notified. In the said Notification the scope and extent of the application of the 5th Pay Commission recommendations accepted by the Government of India was mentioned. The Policy Resolution was notified under the Executive Business Rules of the Government. As is usual, the implementation and acceptance of 5th Pay Commission Report was followed by a large number of representations from pensioners which led to confusion and litigations, culminated the Government of India to issue Executive instructions in the Office Memorandum dated 17.12.1998 thereby clarifying the import and intent of the applications of Policy Resolution notified on 30.9.1997. It may be pertinent to mention here that the substance of the Policy Resolution notified on 30.9.1997 which led to the present controversy was in the following terms:

“Accepted with modification that 40% of the basic pension shall be added while consolidating the pension as on 1.1.1976 but the consolidated as on 1.1.1996 shall not be raised to 50% of the minimum of the revised pay of the post held by the pensioner at the time of retirement.”

The aforesaid Policy Resolution was further clarified by Executive Instructions in the form of Office Memorandum dated 17.12.1998, the substance of which reads as under :

“The President is now pleased to decide that w.e.f. 1.1.1996, pension of all pensioners irrespective of their date of retirement shall not be less than 50% of the minimum pay in the revised scale of pay introduced w.e.f. 1.1.1996 *of the post last held by the pensioner.*”

(emphasis supplied)

A As the controversy/confusion still persisted and for the smooth and efficient implementation of the Policy Resolution, the Government of India issued further Executive Instructions by way of Office Memorandum dated 11.5.2001 clarifying the Executive Instructions issued on 17.12.1998. The substance of the Executive Instructions dated 11.5.2001 (by which the pensioners are aggrieved and the core question in these appeals) reads as under:

B
C
D “In the course of implementation of the above order, clarifications have been sought by Ministries/ Departments of the “post last held” by the pensioner at the time of his/ her superannuation. The second sentence of O.M. dated 17.12.1998, i.e. “pension of all pensioners irrespective of their date of retirement shall not be less than 50% of the minimum pay in the revised scale of pay w.e.f. 1.1.1996 of the post last held by the pensioner”, shall mean that pension of all pensioners irrespective of their date of retirement *shall not be less than 50% of the minimum of the corresponding scale as on 1.1.96, of the scale of pay held by the pensioner at the time of superannuation/retirement.*”

(emphasis supplied)

E The clarification brought out in the O.M. dated 17.12.1998 and O.M. dated 11.5.2001 is clearly discernible. Whereas O.M. dated 17.12.1998 speaks of the minimum pay in the revised scale of pay w.e.f. 1.1.1996 of the *post last held by the pensioner*, the O.M. dated 11.5.2001 clarifies it as minimum of the corresponding scale as on 1.1.1996 of the *scale of pay held by the pensioner at the time of superannuation/retirement*. The clarification brought about in the O.M. dated 11.5.2001 is of the *last post* held by the pensioner as the last *scale of pay* held by the pensioner at the time of superannuation/retirement.

F It is common knowledge that the corresponding increase in any Pay Commission is of the scale of pay and not of the post.

G The grievances raised in the two sets of appeals are the same. The basic question that arises for consideration is as to whether the Executive Instructions in the form of O.M. dated 11.5.2001 over-ride the O.M. dated 17.12.1998 and are null and void. In other words, as to whether the O.M. dated 11.5.2001 over-rides the earlier O.M. dated 17.12.1998 clarifying the Policy Resolution of the Government dated 30.9.1997.

H The main thrust of the submissions of learned counsel for the appellants

is that the O.M. dated 11.5.2001 over-rides the original O.M. dated 17.12.1998 and creates two classes of pensioners. We are unable to accept this contention. As noticed above, the recommendations of the 5th Pay Commission were accepted to the extent of Policy Resolution dated 30.9.1997. The aforesaid Policy Resolution was further clarified by issuing instructions in O.M. dated 17.12.1998, which were clarified by another Executive Instructions in O.M. dated 11.5.2001. It is well settled principle of law that recommendations of the Pay Commission are subject to the acceptance/ rejection with modifications of the appropriate Government. It is also well settled principle of law that a policy decision of the Government can be reviewed/ altered/ modified by Executive Instructions. It is in these circumstances that a policy decision cannot be challenged on the ground of estoppel. In the present case, the recommendations of the 5th Pay Commission were accepted by a Policy Resolution dated 30.9.1997 that the ceiling on the amount of pension will be 50% of the highest pay in the Government. The pension of all pre 1.1.96 retirees including pre-86 retirees shall be consolidated as on 1.1.1996, but the consolidated pension shall not be brought on to the level of 50% of the minimum of the revised pay of the post held by the pensioner at the time of retirement. The subsequent O.M. dated 17.12.1998 clarified the Policy Resolution dated 30.9.1997 by Executive Instructions in O.M. dated 17.12.1998 and further clarified in the form of O.M. dated 11.5.2001 clarifying the contents of Policy Resolution of the Government dated 30.9.1997. They are both complementary to each other. Both clarify the Government Policy Resolution dated 30.9.1997. The appellants are not aggrieved by the Executive Instructions in O.M. 17.12.1998. In our view, therefore, the contention of the appellant that the O.M. dated 11.5.2001 over-rides the original O.M. dated 17.12.1998, thereby creates two classes of pensioners is absolutely ill-founded and untenable.

It is common knowledge that an increase in the pay scale in any recommendation of a pay commission is a corresponding increase in the pay scale. In our view, therefore, Executive Instructions dated 11.5.2001 have been validly made keeping in view the recommendations of the Pay Commission accepted by the Policy Resolution of the Government on 30.9.1997, clarified by Executive Instructions dated 17.12.1998. The Executive Instructions dated 11.5.2001 neither over-ride the Policy Resolution dated 30.9.1997 nor Executive Instructions dated 17.12.1998 clarifying the Policy Resolution dated 30.9.1997. The Executive Instructions dated 11.5.2001 were in the form of further clarifying the Executive Instructions dated 17.12.1998 and do not over-ride the same.

Counsel for the appellants heavily relied on the Constitution Bench

A decision of this Court in *D.S. Nakara v. Union of India* [1983] 1 SCC 305 where this Court at Page 345 SCC observed that “liberalised pension scheme becomes operative to all pensioners governed by 1972 Rules irrespective of the date of retirement.

B *Nakara’s case (supra)* has been distinguished by this Court in *State of Punjab & Ors. v. Boota Singh & Anr.* [2000] 3 SCC 733; *State of Punjab & Anr. v. J.L. Gupta & Ors.* [2000] 3 SCC 736; *State of West Bengal and Anr. v. W.B. Govt. Pensioners’ Association & Ors.* [2002] 2 SCC 179; and *State of Punjab & Ors. v. Amar Nath Goyal & Ors.* [2005] 6 SCC 754.

C *Nakara’s case (supra)* was a case of revision of pensionary benefits and classification of pensioners into two groups by drawing a cut off line and granting the revised pensionary benefits to employees retiring on or after the cut-off date. The criterion made applicable was “being in service and retiring subsequent to the specified date”. This Court held that for being eligible for liberalised pension scheme, application of such a criterion is violative of D Article 14 of the Constitution, as it was both arbitrary and discriminatory in nature. It was further held that the employees who retired prior to a specified date, and those who retired thereafter formed one class of pensioners. The attempt to classify them into separate classes/groups for the purpose of pensionary benefits was not founded on any intelligible differentia, which had a rational nexus with the object sought to be achieved. The facts of *Nakara’s case (supra)* are not available in the facts of the present case. In other words, E the facts in *Nakara’s case* are clearly distinguishable.

F In *Indian Ex-Services League v. Union of India* [1991] 2 SCC 104, this Court distinguished the decision in *Nakara’s case (supra)* and held that the ambit of that decision cannot be enlarged to cover all claim by retirees or a demand for an identical amount of pension to every retiree, irrespective of the date of retirement even though the emoluments for the purpose of computation of pension be different.

G In *K.L. Rathee v. Union of India* [1997] 6 SCC 7, this Court, after referring to various judgments of this Court, has held that *Nakara case* cannot be interpreted to mean that emoluments of persons who retired after a notified date holding the same status, must be treated to be the same.

H In our view, therefore, the ratio in *Nakara’s case (supra)* is not applicable in the facts of the present case.

Lastly, it is contended that against the decision of the Delhi High Court, an SLP was dismissed by this Court on 8.7.2004 and, therefore, the doctrine of merger applies. It is not disputed that the SLP was dismissed *in limine* without a speaking order. This question has been set at rest by a three-Judge Bench of this Court in *Kunhayammed & Ors. v. State of Kerala & Anr.* [2000] 6 SCC 359, where this Court after referring to a two-Judge Bench, of this Court in *V.M. Salgaokar & Bros. (P) Ltd. v. CIT* [2000] 5 SCC 373 held at page 375 (para 22) SCC as under:

“22. We may refer to a recent decision, by a two-Judge Bench, of this Court in *V.M. Salgaokar & Bros. (P) Ltd. v. CIT* [2000] 5 SCC 373 holding that when a special leave petition is dismissed, this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. What the Court means is that it does not consider it to be a fit case for exercising its jurisdiction under Article 136 of the Constitution. That certainly could not be so when appeal is dismissed though by a non-speaking order. Here the doctrine of merger applies. In that case the Supreme Court upholds the decision of the High Court or of the Tribunal. This doctrine of merger does not apply in the case of dismissal of a special leave petition under Article 136. When appeal is dismissed, order of the High Court is merged with that of the Supreme Court. We find ourselves in entire agreement with the law so stated. We are clear in our mind that an order dismissing a special leave petition, more so when it is by a non-speaking order, does not result in merger of the order impugned into the order of the Supreme Court.”

Therefore, when the special leave petition is dismissed by the Supreme Court under Article 136 of the Constitution, the doctrine of merger is not attracted.

For the reasons aforesaid, the view taken by the Madras High Court that the clarificatory Executive Instructions in O.M. dated 11.5.2001 are an integral part of the O.M. dated 17.12.1998 clarifying the Policy Resolution of the Government dated 30.9.1997 and do not over-ride the original O.M. dated 17.12.1998 is correct law and it is, accordingly, affirmed. The view taken by the Delhi High Court that O.M. dated 11.5.2001 over-rides the original O.M. dated 17.12.1998 and creates two classes of pensioners does not lay down the correct law and is, hereby, set aside.

A The net result is that the Civil Appeal Nos. 3174 and 3173 of 2006, preferred by the pensioners, are dismissed and the Civil Appeal Nos. 3188, 3189 and 3190 of 2006, preferred by the employer Union of India, are allowed. The Judgment and order of the Madras High Court dated 29.4.2005 is affirmed. The Judgment and Orders of the Delhi High Court dated 17.8.2005, 5.9.2005, 10.11.2005 and 3.8.2005 are set aside.

B

Parties are asked to bear their own costs.

D.G.

C.A. No. 3173-3174 of 2006 dismissed
and C.A. No. 3188-90 of 2006 allowed.