

(2019) 07 SHI CK 0113

High Court Of Himachal Pradesh

Case No: Letter Patent Appeal No. 28 Of 2019

Reserve Bank Of India And
Others

APPELLANT

Vs

Shadi Lal Sharma

RESPONDENT

Date of Decision: July 30, 2019

Acts Referred:

- Reserve Bank Of India Act, 1934 - Section 58, 58(1), 58(2)(j)
- Constitution Of India, 1950 - Article 14

Hon'ble Judges: V. Ramasubramanian, CJ; Anoop Chitkara, J

Bench: Division Bench

Advocate: Neeraj K. Sharma, Jyotirmay Bhatt

Final Decision: Allowed

Judgement

V. Ramasubramanian, CJ

1. The Reserve Bank of India has come up with the above Letters Patent Appeal questioning the correctness of the order of the learned Single Judge

allowing the writ petition filed by the respondent herein.

2. Heard Mr. Neeraj K. Sharma, learned counsel for the appellant and the respondent appearing in person.

3. The brief facts leading to the above Appeal are as follows:

(i) The respondent herein retired from the Reserve Bank of India as Assistant General Manager on 31.03.2013 after putting in more than 32 years of

service. According to the respondent, the total emoluments as on the date of his retirement, taken into account for the purpose of basic pension, as per

Administrative Circular No. 4 dated 09.09.2010 was Rs. 56,750/Â.

(ii) The pension of the respondent was accordingly fixed before commutation at Rs. 28,375/â, which was 50% of the total emoluments.

(iii) Admittedly, basic pension was fixed on the basis of the average emoluments received during the last ten months preceding the date of his retirement and the respondent also received commutation.

(iv) It appears that the pay and allowances of the employees of the Bank were revised under an Administration Circular No. 7 dated 11.04.2016, with retrospective effect from 01.11.2012. Since the respondent reached superannuation on 31.01.2013, he was granted the benefit of the revised pay and allowances with effect from 01.11.2012 up to the date of his retirement.

(v) After the revision of pay and allowances with retrospective effect, the Management issued advisories for recalculating the pension and commuted value of pension of those employees who retired on or after 01.11.2012.

(vi) It appears that the revised last drawn pay of the respondent was taken as Rs. 1,05,600/â, but the average pay for the purpose of re-fixation of basic pension was taken as Rs. 95,301/â.

(vii) As per Regulation 28 of the Reserve Bank of India Pension Regulations, 1990, (hereinafter referred to the Regulations), the rate of basic pension has to be 50% of the average emoluments. The expression "average emoluments" is defined in Regulation 2 (2) to mean the average of pay drawn by an employee during the last ten months of his service.

(viii) The Reserve Bank of India Pension Regulations, 1990 were amended by a Notification bearing No. Co.HRMD No.6563/21.01/2017â18 dated 28.08.2017. By this Notification, the following words were directed to be inserted, after the words "average emoluments" appearing Regulation 28:

"or the last pay drawn whichever is more beneficial to the employee."

(ix) The impact of the Notification dated 28.08.2017 was that the rate of basic pension should be 50% of "either the average emoluments or the last pay drawn whichever is more beneficial to the employee".

(x) Since the respondent retired on superannuation on 31.01.2013 and since the revision of pay and allowances was granted with retrospective effect

from 01.11.2012, the respondent naturally got the benefit of revised pay for a period of three months, namely November and December 2012 and January 2013.

(xi) If the rate of basic pension as per Regulation 28, as amended by the Notification dated 28.08.2017 was to be fixed, the same could have been

fixed either at 50% of the average emoluments or at 50% of the last pay drawn. The calculation of the rate of basic pension on the basis of the last

pay drawn, rather than on the basis of average emoluments, was to be more beneficial to the respondent, as he had the benefit of revision of pay only

for a period of three months before retirement and that too, by virtue of the revision of pay and allowances being offered with retrospective effect.

(xii) It is pertinent to note that the Notification dated 28.08.2017 amending the 1990 Regulations were published in the Gazette of India on

06.10.2017. It is also relevant to note that Regulation 1(2) of RBI Pension (Amendment) Regulations, 2017 clearly stipulated that the amended

Regulations shall come into force on the date of their publication in the Official Gazette.

(xiii) Therefore, an Administration Circular No. 1 dated 26.10.2017 was issued making it clear that the amended Regulation 28 will take effect from

06.10.2017 and that it will be applicable only to employees retiring from the Bank's service on or after 06.10.2017.

(xiv) However, it appears that immediately after the implementation of the revision of pay and allowances, the respondent was granted a higher

pension on the basis of the last pay drawn rather than on the basis of the average emoluments. This resulted in an excess payment of Rs. 1,14,111/-.

(xv) After realizing the mistake, the excess payment was recovered from the pension of the respondent. Aggrieved by the recovery of the excess

amount and also aggrieved by the non-application of the benefit of the amended Regulations of the year 2017 to persons who retired before 06.10.2017,

the respondent herein came up with a writ petition in CWP No. 2618 of 2016.

(xvi) The said writ petition was allowed by a learned Judge of this Court on the ground (A) that the fixation of the cut-off date of 06.10.2017 for

extending the benefit of the amended Regulations was artificial; and (B) that as per the law laid down by the Supreme Court in D.S. Nakara and

others vs. Union of India (AIR 1983 SC 130), the fixation of such a cut-off date was arbitrary.

(xvii) The learned Judge also directed the Reserve Bank of India to refund the amount recovered from the respondent and further directed the Bank to re-fix the basic pension based upon the last pay drawn.

(xviii) Aggrieved by the said judgment of the learned Single Judge, the Reserve Bank of India has come up with the above Letters Patent Appeal.

4. Before we proceed further, it may be necessary to have a look at the reliefs sought by the respondent in his writ petition. The reliefs sought by the respondent in his writ petition CWP No. 2618 of 2016 are as follows:

“ (i) That the impugned Circular dated 07.06.2016, Annexure P3 may kindly be quashed and set aside, by issuing writ of certiorari.

(ii) That sub para (2) of para 1 of impugned notification dated 28.08.2017 which fixes the date of operation of the amendment as 06.10.2017 may kindly be quashed and set aside as petitioned in paragraph No.23 of this petition.

(iii) That the respondents may kindly be directed to re-fix the basic pension of the petitioner on the basis of “last pay drawn” effective from 01.02.2013 and also pay commuted value of pension on that basis (last pay drawn).

(iv) That the respondent Bank may kindly be directed to refund Rs.1,14,111/(Rupees One Lac Fourteen Thousand One Hundred Eleven) recovered from the petitioner illegally without giving any notice.”

5. The reliefs granted by the learned Judge by his judgment dated 14.12.2018 are to be found in paragraph 23 of the impugned judgment. It reads as follows:

“23. Accordingly, the impugned circular dated 7.6.2016 (Annexure P3) is quashed and set aside and resultantly, the impugned notification dated

28.8.2017 which fixes the date of operation of the amendment as 06.10.2017 is also quashed and set aside and the respondents are directed to re-fix the

basic pension of the petitioner on the basis of “last pay drawn” effective from 01.02.2013 and also pay commuted value of pension on that basis

i.e. last pay drawn. The respondent Bank is also directed to refund Rs.1,14,111/ to the petitioner which was recovered from the petitioner illegally

without giving him any notice.”

6. But as we have pointed out in the paragraph providing the narration of the historical background, Regulation 28 of the RBI Pension Regulations, 1990 as it originally stood, provided only for the calculation of basic pension at the rate of 50% of the average emoluments. The expression "average emoluments" was defined in Regulation 2 (2) to mean the average of pay drawn by an employee during the last ten months of his service.

7. It was only by the RBI Pension (Amendment) Regulations, 2017, issued by way of Notification dated 28.08.2017 and published in the Gazette of India on 06.10.2017 that Regulation 28 was modified so as to enable an employee to seek the fixation of basic pension at the rate of 50% of the last drawn pay. These amendment Regulations were issued by the Central Board of the RBI, in exercise of the power conferred by Clause (j) of sub-Section (2) of Section 58 of the RBI Act, 1934. These amendment Regulations were issued with the previous sanction of the Central Government, as required by the Statute. Regulation 1 (2) of the 2017 Amendment Regulations made it clear that they shall come into force only on the date of their publication in the Official Gazette. Admittedly, the amendment Regulations were published in the Official Gazette on 06.10.2017.

8. Therefore, when a Regulation is issued in exercise of the power conferred by a Statute and that too with the previous sanction of the Central Government, the challenge to such a Regulation could be only on established parameters. Regulation 1(2) of the Notification dated 28.08.2017 did not actually fix any cut-off date. All that it said was that the Regulations will come into force on the date of publication of the Notification in the Official Gazette. Therefore, we do not know how a Regulation which merely says that it shall come into force with effect from the date of its publication in the Official Gazette, can be challenged on the ground that it fixes an artificial cut-off date. In fact Section 58(1) of the RBI Act, 1934 reads as follows:

"58. Power of the Central Board to make regulations. (1) The Central Board may, with the previous sanction of the Central Government, by notification in the Official Gazette, make regulations consistent with this Act to provide for all matters for which provision is necessary or convenient

for the purpose of giving effect to the provisions of this Act.â€

9. Therefore, the Central Board is empowered to make Regulations subject to two conditions, namely (i) previous sanction of the Central Government;

and (ii) notification in the Official Gazette. Any Regulation made without complying with any one of these conditions will be invalid and ultra vires the

Act. Therefore, even if Regulation 1(2) of the RBI Pension (Amendment) Regulations, 2017 had been silent about the date of coming into force of the

Regulations, the Regulations could have taken only prospective effect from the date of publication. Any legislation, including subordinate legislation,

unless otherwise specifically provided for, can take only prospective effect and not retrospective effect. The whole writ petition was filed by the

respondent on the misconception that the prospective coming into operation of a statutory regulation will tantamount to prescription of an artificial

cut-off date.

10. Interestingly, the first part of the relief prayed for by the respondent was to quash a Circular dated 07.06.2016. This circular merely stipulated that

the pay and allowances of employees who were in service as on 01.11.2012 has been revised w.e.f. 01.11.2012 and that, therefore, the pension

sanctioned to employees who retired on or after 01.11.2012 should be re-computed. On the date on which the said Circular dated 07.06.2016 was

issued, the Amendment Regulations 2017 had not even been notified. Therefore, the Circular dated 07.6.2016 merely reflected the statutory position

prevailing on the date of retirement of the respondent, namely, that for the purpose of calculation of average emoluments, in respect of employees who

have retired after 01.11.2012, the pay for the months falling before November 2012 may be taken as pre-revised pay. But subsequently Regulation

28 stood amended w.e.f. 06.10.2017 by the Notification dated 28.08.2017. In any case under the amended Regulations also, the definition of the

expression "average emoluments" did not undergo any change. Therefore, we do not know why and how the Circular dated 07.06.2016 should be

challenged, especially when an amendment had been issued to the Regulations.

11. The main thrust of the argument of the respondent is that in D.S. Nakara and others vs. Union of India (AIR 1983 SC 130), the Supreme Court

has frowned upon the fixation of an artificial cut-off date, creating two categories of retired pensioners without any rational basis. The principles laid down in D.S. Nakara were also followed in a recent decision of the Supreme Court in *II Manipur Pensioners Association vs. The State of Manipur and others* in Civil Appeal No.10857 of 2016 dated 11.07.2016. Therefore, the main ground on which the respondent challenged Regulation 1(2) of the Amendment Regulations 2017 was the principle laid down in D.S. Nakara.

12. But we do not think that the principle laid down in D.S. Nakara has any application to cases of this nature. What happened in D.S. Nakara was, that by a Memorandum dated 25.05.1979, the Government of India liberalized the formula for computation of pension in respect of employees governed by the Central Civil Services (Pension) Rules, 1972. It was made applicable to the employees retiring on or after 31.03.1979. Therefore, it was in the context of a non-statutory scheme framed by the Government that the Supreme Court observed that an artificial classification cannot be made between retired pensioners only on the basis of the date of retirement.

13. But in the case on hand the impugned Regulation 1(2) of the 2017 Regulations does not seek to divide the retired pensioners on the basis of any artificial date, namely, those who retired before 06.10.2017 and those who retired thereafter. By the Amendment Regulations 2017, what was changed was just the method of computation of pension.

Instead of computing the basic pension on the basis of average emoluments, a switchover was permitted by the amended Regulations, to be made on the basis of the last pay drawn. This benefit was conferred for the first time under the amended Regulations. As pointed out elsewhere, the statutory scheme of Section 58(1) of the RBI Act, 1934 prescribes two conditions. Upon the satisfactory compliance of those two conditions, the new formula for calculation of pension came into force. This has nothing to do with the prescription of a cut-off date or the classification of retired pensioners into two artificial categories.

14. It must be remembered that the respondent retired on reaching superannuation on 31.01.2013. The revision of pay and allowances was implemented with retrospective effect from 01.11.2012. Therefore, the respondent could reap the benefit of revised pay and allowances only for a

period of three months, namely, November and December 2012 and January 2013.

15. The respondent did not challenge and could not have challenged the fixation of the date 01.11.2012 for the grant of revised pay and allowances.

The same logic would apply even to the amended Regulations.

16. As a matter of fact if the amended regulations had been directed to come into force with retrospective effect from some earlier date (anterior to

the date of notification or publication), the choice of such a date would have been frowned upon. A regulation, which, by its natural course, would

normally come into force automatically with effect from the date of publication of notification, cannot be challenged on the ground that the date of

publication was illegal.

17. What is in issue in the case is the date of publication of the notification in the Official Gazette and not the fixation of any cut-off date. It is this

distinction that will make the case not to fall within the mischief addressed by the Supreme Court in D.S. Nakara. As a consequence, the ratio laid

down by the Supreme Court in All Manipur Pensioners Association is also not applicable to the case on hand. As could be seen from paragraph 2 of

the decision of the Supreme Court in All Manipur Pensioners Association, the Government of Manipur issued an Office Memorandum dated

21.04.1999 increasing the quantum of pension as well as the pay of the employees, taking into account the rise in the cost of living. But it was

stipulated that the benefit will be applicable only to those who retired on or after 01.01.1996. This resulted in a higher percentage of pension to those

who retired on or after 01.01.1996 and lower percentage of pension to those who retired on or before 01.01.1996. This is why the Supreme Court

applied the twin tests for the applicability of Article 14 and invoked the mantra of D.S. Nakara to grant relief. All Manipur Pensioners Association

case, like D.S. Nakara, also arose out of a non-statutory scheme for revision of pension with retrospective effect. Once a non-statutory scheme is

propounded with retrospective effect from a particular date, the choice of that date would naturally become questionable. But in the case on hand, a

statutory prescription has been made applicable with prospective effect from the date of publication of the Notification in Official Gazette, as required

by Section 58 of the RBI Act, 1934. Hence, the magic wand of D.S. Nakara cannot produce the result sought by the respondent.

18. As observed by the Supreme Court in *State of Punjab and others versus Amar Nath Goyal and others* {(2005) 6 SCC 754}, the refrain of D.S.

Nakara has been played too often to retain its initial charm, which has been worn thin by subsequent dicta. In paragraph 29 of its decision in *Amar*

Nath Goyal, the Supreme Court pointed out that subsequent judgments have considerably watered down the rigid view taken in D.S. Nakara, as for

example in *Tamil Nadu Electricity Board versus R. Veerasamy*.

19. Again in *Government of Andhra Pradesh and others versus N. Subbarayudu and others* {(2008) 14 SCC 702}, the Supreme Court, relying upon

Amar Nath Goyal indicated that the rigid view in D.S. Nakara had already been watered down.

20. A legislation that comes into effect prospectively from the date of its publication in the Official Gazette can never be attacked as one creating a

classification between those who retired before the coming into force of the legislation and those who retired thereafter. By its very nature, all

legislations including subordinate legislations, can come into force only prospectively, unless retrospectivity is clearly spelt out in the Section dealing

with the coming into force of the legislation.

21. Therefore, the entire foundation of the case of the respondent on the basis of D.S. Nakara was completely shaky and hollow. The learned Judge

has omitted to take note of this aspect and hence the appeal deserves to be allowed. Accordingly, the appeal is allowed and the impugned order of the

learned Judge is set aside. The writ petition filed by the respondent shall stand dismissed. However, there will be no order as to costs.