

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP (C) No.6907 of 2002**

% **Judgment Reserved On:28.2.2012**
Pronounced On: 30.3.2012

ALL INDIA RETIRED BANK
EMPLOYEES ASSOCIATION & ORS.

. . . PETITIONERS

Through : Mr. Manoj Swarup, Advocate with
Mr. Shivendra Swaroop, Advocate.

VERSUS

UNION OF INDIA & ORS

. . .RESPONDENTS

Through: Ms.Archana Gaur, Advocate for UOI.
Mr. Rajiv Kapur, Advocate for SBI.
Ms. Anupama Dhurve and Mr.
Yashraj Singh Deora, Advocates.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K.SIKRI,ACTING CHIEF JUSTICE:

1. This petition is filed by the Bank Association which represents the retired employees of different banks. It espouses the cause of those such employees who retired from the service during 1.4.1998 to 31.10.2002. Their grievance is that there has been a reduction in pension payable to those who fall in this category i.e. those who retired between 1.4.1998 to 31.10.2002 and thus challenged it as

unconstitutional and violative of their fundamental rights. Some of the basic facts which need to be stated are recapitulated below.

2. A Memorandum of Settlement dated 29th October, 1993 was arrived at between various banks arrayed as respondents 2 to 29 and the bank employees under the provisions of section 18 (1) of the Industrial Disputes Act, 1947. This is termed as 'Settlement' and is binding on all the banks as well as the employees of the banks. This settlement concerns pension and pension schemes for bank employees and it was *inter alia* agreed that the pension would be introduced as a second retiral benefit in lieu of contributory provident fund where it does not exist for the workmen employees of the bank w.e.f. 1.11.1993. The categories of employees/retired employees who were eligible for such benefit were also mentioned which includes employees in service of the banks as on 31.10.1993 and who on or before 30.6.1994 exercised an option in writing in response to bank notice to this effect. The petitioners were in the employment at that time. Those who wanted to exercise the option were required to refund bank's entire contribution towards the provident fund.

3. The rate of basic pension was to be 50% of the average pay as defined in pension scheme subject to Rs. 375/- per month in case of full time employment and proportionate amount in the case of permanent part time employee drawing such

wages. This settlement culminated into framing of Pension Regulations, 1995. Regulation 35 (2) of the Pension Regulation stipulates rate of pension as 50% of the average emoluments. Average emoluments have been defined in Regulation 2 (2) of these Regulations as the average pay drawn by an employee during the last 10 months of his service.

4. It appears that Officer's Association held discussions with Indian Banks Association on salary revision for officers in Public Sector banks. A Joint Note on 'Salary Revision for Officers' on the calculation of the aforesaid officers between IBA Officers Association was recorded on 14.12.1999. The outcome was enlisted in Annexure-A to this note. Annexure-1 stipulates the pay scales, DA, HRA, Provident Fund etc. It also recorded agreement on 'pay for the purpose of pension' in the following manner:-

"6. Pension

"Pay" for the purpose of Pension shall be the aggregate of pre-revised Pay and Dearness Allowance thereon at CPI 1616 Points."

5. The IBA agreed that it would recommend to the public sector banks to initiate the process of maintaining Officers Service Regulations as well as Bank Employees Pension Regulations, 1995 in order to implement the acceptable norms contained in Annexure-1.

6. This is impugned in the present writ petition. Thereafter 7th bipartite settlement was arrived at between the banks and the Bank Employees Association on 27.3.2000. Under this bipartite settlement, various service conditions including scales of pay, increments, DA, CCA, transport allowance etc. were agreed upon. It also contained provisions for pension which prescribed the 'pay for the purpose of pension'. This provision reads as under:-

“16 Pension

In relation to an employee who retires or dies while in service on or after the 1st day of April, 1998 “Pay” for the purpose of Pension shall be the aggregate of the pay drawn by the member of the award staff in terms of the Sixth Bipartite Settlement dated 14th February, 1995 and the dearness allowance thereon calculated upto index number 1616 points in the All India Average Consumer Price Index for Industrial workers in the series 1960 =100. This shall be subject to the necessary amendments to be made to the relevant provisions of Bank (Employees') Pension Regulations, 1995.”

The IBA issued instructions to its member banks to give option to the employees retiring on or after 1st April, 1998 to opt to take pension either on the basis of revised pay or on the basis of pre-revised pay. In other words the employees were given an option to calculate pension either under the old formula or the formula introduced post amendment.

7. It is the aforesaid definition of the pension with which the petitioners feel aggrieved, as according to them, for the purpose of pension, if the pay is to be calculated keeping in view the aforesaid definition of pension, their pension gets reduced. Thus, the petitioners approached this Court by means of present writ petition seeking quashing of clause 6 of the Joint Note dated 14.12.1999 vide which definition of pay for the purpose of pension is amended and also the consequential amendment in pension Regulations. The petitioners also challenged the validity of clause 16 of the 7th Bipartite Settlement dated 27.3.2000 vide which definition of pay for the purpose of pension was amended. The prayers which are made in the writ petition touching the aforesaid challenge are stated in the following manner:-

“(a) Issue a writ of certiorari quashing Clause 6 of the Joint Note dated 14.12.1999 vide which definition of ‘pay’ for the purposes of Pension was amended. This amendment has civil consequences on the rights of the petitioners and has been passed at the back of the petitioners. This definition of pay is totally unreasonable and artificial. Clause 6 ibid is contrary to the Pension Scheme, 1993 as well as Regulation 35 (2) and 2 (d) of the Employees Pension Regulations, 1995. Respondents are estoppel on the principles of Promissory Estoppel from enforcing and/or implementing this Joint Note dated 14.12.1999 qua the petitioners.

(b) Issue a writ of certiorari quashing the amended Clauses 2(s) of the Pension Regulations, 1995 and 16 of the Seventh Bipartite Settlement dated 27.3.2000 vide

which definition of 'pay' for the purposes of Pension was amended. This amendment has civil consequences on the rights of the petitioners and has been passed at the back of the petitioners. This definition of pay is totally reasonable and artificial. Clause 2(s) of the Pension Regulations, 1995 and Clause 16 ibid are contrary to the Pension Scheme, 1993 as well as the Employees Pension Regulations, 1995. Respondents are estopped on the principles of Promissory Estoppel from enforcing and/or implementing the said clauses of the Seventh Bipartite Settlement dated 27.03.2000 qua the petitioners;

(c) Issue writ or direction to declare the action of the respondents of reducing the rate of pension payable to the Petitioners Association from 50% of their Basic Pay to approximately 41% as arbitrary, discriminatory, capricious and violative of Article 14, & 21 of the Constitution of India;

(d) Issue writ or direction directing the respondents to grant the benefits of pension to the members of the Petitioners Association as being paid to the retired employees of other public sector undertakings, namely, LIC and RBI.

(e) To issue writ or direction directing the respondents to recognize the Petitioners Association in any meetings/conferences/settlement as and when any issues/decisions are decided/taken for/against their behalf;

(f) Pass such other and further order or orders as this Hon'ble Court may deemed fit and proper in the facts and circumstances of the case."

8. In nutshell following prayers are made:-

(i) Quash clause 6 of Joint Note dated 14th December, 1999 vide which the definition of 'pay' for the purposes of pension was amended.

- (ii) Quash amended clauses 2 (s) of pension regulation and para 16 of 7th Bipartite Settlement dated 27th March, 2000 vide which definition of 'pay' for the purpose of pension was amended.

The main grievance of the petitioner is that the Joint Note and the settlement was entered into at the back of the petitioners and their association was not made a party to the settlement. According to the petitioner the said change in the definition of pay reduces the stipulated pension. The said amendment in the Pension Regulations 1995 had not been gazetted when the petitioners preferred the writ petition. The petitioners amended their writ petition to include a challenge to the Notification dated 18th January, 2003.

9. We may also record that it was after the filing of the writ petition, the pension Regulation, 1995 were amended to bring the aforesaid definition of pay for the purpose of calculating the pension. Pursuant thereto, the Joint Note dated 2.6.2005 and 28.6.2005 was also recorded into between the banks and the Associations whereby:-

- (i) The concept of calculating pension of pay last drawn was adopted and;
- (ii) It was, however recorded that arrears prior to 1.5.2005 will not be paid.

10. After the aforesaid Bipartite Settlement and amendment in the Pension Regulations, the petitioners amended their writ petition to include the challenge to the cutoff date as well.

11. From the aforesaid narration of facts, it is clear that the grievance of the petitioners is two fold. First, according to the petitioner the change in definition of 'pay' in the Pension Regulations by virtue of the Joint Note dated 14.12.1999 and Bipartite Settlement dated 27.3.2000 reduces the amount of pension payable to a member of the pension scheme and that the aforementioned settlements were arrived at and entered into without making the Petitioner Association a party and, therefore, not binding on the petitioner. Second, the petitioners are aggrieved by fixation of a cut-off date for the implementation of definition of 'pay' as introduced after the settlement dated 2.5.2005 as the same is made applicable w.e.f. 1.5.2005. We will take up the discussion on each of the aforesaid grievance/issue in seriatim.

12. Before we do that, it would be necessary to complete the events occurring thereafter. Bipartite settlement dated 27th April, 2010 signed at industry level between Indian Banks Association and Workmen Union. Clause 16 (1) of the said settlement provided that Bank Employees Pension Regulation, 1995 shall

not apply to employees who joined service of banks on or after 1st April, 2010.

Clause 16 (2) of the said settlement provides as under:-

“2. Further to Clause 6 of the Bipartite Settlement dated 2nd June, 2005, it is agreed between the parties as under:-

(i) With effect from 1st May, 2005, the pension of employees who retired or died while in service during the period 1st April, 1998 to 31st October, 2002 will be re-fixed based on the definition of ‘pay’ as defined in Clause 6 (ii) of the Bipartite Settlement dated 27th march, 2000. No arrears of pension and commuted value of pension will be payable on account of such re-fixing of pension.

(ii) With effect from 1st may, 2005 the pension of employees who retired or died while in service during the period 1st November, 2002 to 30th April, 2005 will be re-fixed based on the definition of ‘pay’ as defined in Clause 6 (ii) of the Bipartite Settlement dated 2nd June, 2005. No arrears of Pension and commuted value of pension will be payable on account of such re-fixing of pension.

The petitioners have not challenged the above provisions of the settlement dated 27th April, 2010. Joint Note dated 27th April, 2010 was signed between Indian Banks Association and Officers Association on similar lines with regard to pension. The petitioners have also not challenged the above provisions of the Joint Note dated 27th April, 2010.

CHALLENGE TO THE CHANGE AND DEFINITION OF PAY IN THE PENSION REGULATIONS:-

13. Before we spell out the contention of the parties on this aspect, let us recapitulate the pivotal facts relating to this issue. The petitioners' Association is representing the case of those officers who retired between 1.4.1998 to 31.10.2002. In the year 1998 Pension Regulation, 1995 were in force. Regulation 35 (2) of the Pension Regulations, provides for payment of pension @ 50% of the average emoluments. The average emoluments have been defined in Regulation 2 (2) to mean average pay drawn by an employee during the last 10 months of his service.

14. Thereafter when the Joint Note on "Salary revision for officers" was recorded on 14.12.1999 and bipartite settlement dated 27.3.2000 was entered into, the provision in respect of pension, as agreed upon, stipulated that for an employee who retire or dies while in service on or after 1st day of April, 1998, the "pay" for the purpose of pension was changed. Though, there was no amendment in Regulation 2(d) but the "pay" as defined in 2(s) underwent a change. It provided for three categories of employees. In Clause (a) cover those officers who had retired or died on or after 1st day of January, 1986 but before 1st day of July, 1993. Clause (b) related to those officers who retired or died while in service on or

after 1st July, 1993. We are concerned with Clause (c) which pertain to the employees who retired or died while in service on or after the 1st day of April, 1998. In respect of this clause, Regulation 2 (s) states that:-

“2 (s) “pay” includes,

(a) X x x x

(b) X x x x

(c) In relation to an employee who retired or died while in service on or after the 1st day of April, 1998;

i) The basic pay including stagnation increments, if any; and

ii) All other components of pay counted for the purpose of making contributions to the Provident Fund and for the payment of dearness allowance; and

iii) Increment component of Fixed Personal Allowance; and

iv) Dearness allowance thereon on the above calculated upto Index Number 1616 points in the All India Average Consumer Price Index for Industrial Workers in the series 1960=100.;

15. Explanation which was added by way of amendment specifically provided that for calculation of “pay” in terms of scales of pay as payable prior to 1.4.1998 in case of officers. The implication thereof was that those officers, like the petitioners, even when they retired after 1.4.1998 on any date i.e. 1.4.1998 to 31.10.2002 their pension was to be calculated on the basis of pay drawn by them prior to 1.4.1998 and not the last drawn pay i.e. the pay drawn at the time of

retirement. It is this definition of pay with which the petitioners are aggrieved by as their contention is that by taking into consideration the pay drawn by them on 1.4.1998 even when they retired after 1.4.1998 and were drawing higher pay at the time of retirement is not taken into consideration which has resulted in reduction of their pension.

16. It was argued by Mr. Swarup learned counsel appearing for the petitioner that as per the well settled principle enunciated in various pronouncements of the Supreme Court, pension is a right which is akin to fundamental right and right to property. It is held to be deferred salary. For this reason, the pension is required to be calculated on the basis of wages last drawn or else it would amount to denial of certain number of years of service to the employee for the purpose of calculating his pension. In support, the learned counsel placed reliance upon the following judgments:-

(i) In ***Deokinandan Prasad Vs. State of Bihar & Ors.*** (1971) Supl. SCR

634 wherein the Apex Court observed as under:-

“But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant....

...we are of the opinion that the right of the petitioner to receive pension is property under Art. 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also

property under Art. 19 (1) (f) and it is not saved by sub-article (5) of Art. 19...”

- (ii) In ***Grid Corporation of Orissa & Ors. Vs. Rasanand Das*** (2003) 10

SCC 297, the Court held as under:-

“ The appellants having been given better pay scales, as early as in 1969, cannot reduce the pay scales when it comes to granting pensionary/retiral benefits for the period between the age of 58 to 60 years....

There cannot be two types of pay scales, one for the purpose of continuing in service up to the age of retirement and the other, for the period between 58 to 60 years. It must be kept in mind that pension is not a bounty but it is hard-earned benefit for long service, which cannot be taken away.”

- (iii) In ***Bharat Petroleum (Erstwhile Burmah Shell) Management Staff Pensioners. Vs. Bharat Petroleum Corporation Ltd. & Ors.***

(1988) Supl. ISCR 312 following observations were made:-

“Pension is no longer considered as a bounty and it has been held to be property. In a welfare State as ours, rise in the pension of the retired personnel who are otherwise entitled to it is accepted by the State and the State has taken the liability...”

- (iv) In ***All India Reserve Bank Retired Officers Association & Ors.***

Vs. Union of India & Ors.(1992) Supl. 1 SCC 664 the Court held

as under:-

“The concept of pension is now well know and has been clarified by this Court time and again. It is not a charity or bounty nor is it gratuitous payment solely dependent

on the whim or sweet will of the employer. It is earned for rendering long service and is often described as deferred portion of compensation for past service. It is in fact the nature of a social security plan to provide for the December of life of a superannuated employee. Such social security plans are consistent with the socio-economic requirements of the Constitution when the employer is a State within the meaning of Article 12 of the Constitution.

(v) In ***U.P. Raghavendra Acharya & Ors. Vs. State of Karnataka & Ors.***

(2006) 9 SCC 630 the Supreme Court observed as under:-

“Pension as is well known, is not a bounty. It is treated to be a deferred salary. It is akin to right of property. It is correlated and has a nexus with the salary payable to the employees as on the date of retirement.

The impugned order furthermore are opposed to the basic principles of law inasmuch as by reason of executive instructions an employee cannot be deprived of a vested or accrued right.

The appellants had retired from service. The State therefore could not have amended the statutory rules adversely affecting their pension with retrospective effect.”

17. It was also argued that since the Bipartite Settlement dated 7.3.2000 was a settlement under Section 18(1) of the Industrial Dispute Act, this settlement is mandated by law and is binding on the parties to the settlement, therefore, it is open to the petitioners to challenge its validity on the ground of its being arbitrary and discriminatory. According to the learned Counsel, this course of action was permissible having regard to the ratio of Apex Court's decisions in ***Kumari***

Shrilekha Vidyarthi and Others Vs. State of U.P and Others (1991) 1 SCC 212.

He further submitted that in *K.C.P. Limited Vs. Presiding Officer & Ors.* (1996) 10 SCC 446, the Supreme Court clearly held that a settlement under Section 18 (1) of the Industrial Dispute Act could be challenged on the ground of same being unfair and unjust. He referred to the following discussion in the said judgment:-

“Respondents 3 to 14 also would be ordinarily bound by this settlement entered into by their representative Union with the Company unless it is shown that the said settlement was ex facie, unfair, unjust or mala fide.”

18. He also argued that Joint Note dated 2.6.2005/28.6.2005 was given effect to prospectively by the respondents. Petitioners therefore received full pension after this Joint Note. Having implemented this, it was not open to the respondent-banks to reverse the entire track in 2010.

19. Another premise on the basis of which amendment in Pension Regulations, 1995 carried out in the year 2003 was challenged was that when this amendment was carried out, the entire class of the petitioners had retired and thus this amendment could not have retrospective effect to affect the pension of employees who retired between 1998-2002.

24. Mr. Sawroop placed heavy reliance upon the judgment of Madras High Court in the *G. Palani and Ors. Vs. Bank of Baroda and Ors.* dated 28th June, 2011 passed in Writ Appeal No. 1209/2007. In the said case, the Madras High Court came to the conclusion that the settlement entered into by the Union was contrary to the Regulation and was therefore illegal. It was held that though the Joint Note talks about the fixation there is no mention therein about the Regulations 2 (d) and 35 (2), therefore, it goes without saying that ‘the average emoluments’ for the purpose of counting the pension remained as the ‘pay drawn by an employee during the last ten months of his service in the Bank’ and that the basic pension shall be calculated at fifty per cent of the average emoluments.

20. Mr. Kapur, appeared for the State Bank of India and rebutted the aforesaid submissions of the learned counsel for the petitioner. His main plank of the defence was that the petitioners have accepted and availed of various benefits including wage revision giving rise to higher pay, etc. arising out of the joint note dated 14.12.1999 and the settlement dated 27.3.2000 under Section 2 (p) read with Section 18(i) of Industrial Disputes Act, 1947. The petitioners cannot accept the Joint Note dated 14.12.1999 and/or the settlement dated 27.3.2000 in piecemeal or in part. In other words, the petitioners cannot accept only the beneficial portion of it and reject the portion which according to the petitioners, is prejudicial to their interests though in fact, it is not so. The petitioners have accepted the

superannuation benefits, arising out of the joint note dated 14.12.1999 and/or settlement dated 27.3.2000, and as such, they are estopped from challenging that portion of the joint note which revises the definition of 'pay' for the purposes of pension. He also argued that all the employees after having exercised their option to be governed by the amendment are estopped from challenging the same as they have already taken the benefit of higher computation of pension amount.

21. In addition, it was submitted that when the negotiations for wage revision were initiated which culminated into the Joint Note dated 14.12.1999 and/or the settlement dated 27.3.2000, the petitioners were the members of the respective Association(s) and hence the respective Associations had full authority to conclude the negotiations on their behalf, and therefore, the settlement arrived at with the Association(s) was binding on the petitioners under Section 18(1) of the Industrial Dispute Act, notwithstanding their retirement before conclusion of the negotiations.

22. Mr. Dhruv Mehta along with Mr. Gautam appeared for the Indian Banks Association (R-30). In additions to the submissions of Mr. Kapur, he further argued that the Pension Regulations, 1995 are framed by virtue of powers conferred by Section 19 (1)(f) of the Banking Companies (Acquisition and Transfer of Undertakings) Act and, therefore, is a subordinate legislation and has

statutory flavour. The said provision empowers the Board of Directors to unilaterally make Regulations for the Bank. It is settled law that subordinate legislation cannot be challenged on the ground of violation of principles of natural justice. In the present case pursuant to the settlements the Board of Directors in exercise of their statutory power amended the definition of 'pay' under Section 2(s) by way of gazette notification dated 18.1.2003. Therefore, the employees cannot make a grievance that they did not take part in the settlement as principles of natural justice cannot be extended to the legislative sphere, moreso when the statute does not lay down any such requirement. (*Union of India Vs. Cynamide India* (1987) 2 SCC 720). He further argued that in any case, the amendment was the result of negotiated settlement between the banks on the one hand and all the bank employees Associations on the other hand. On that basis, the Joint Note was entered into on 13.12.1999 and, therefore, all the officers retiring thereafter could not even raise any objection as they were bound by the said settlement by virtue of Section 18 (1) and 2 (p) of the Industrial Dispute Act.

23. Mr. Gautam also refuted the contention of the petitioners that the definition of pay reduces the amount of pension payable. His argument on this aspect was that the Pension Scheme in the Public Sector banks was introduced as a second retiral benefit in lieu of bank's contribution to Provident Fund i.e. 10% of Pay. As a necessary corollary, it follows that the pension paid on retirement

should have relation to the bank's contribution to the provident fund. It is for this reason that the term 'pay' has been defined differently based on whether or not an employee has retired prior to or after the effective date of implementation of wage revisions. It is mentioned that though under the settlement the banks were to only contribute the banks contribution towards provident fund i.e. 10% of pay of the pension fund, today the banks are contributing a staggering 26.5% of the pensionable salary of the employee per annum.

24. After considering the respective submissions of the parties, we are of the view that the challenge to the definition of pay as contained in Pension Regulation, 1992 and 1995 is ill-founded. The said Regulations are framed by virtue of power conferred by Section 19 (1) of the Banking Companies (Acquisition and Transfer of Undertakings) Act. They have thus statutory flavour. For making such Regulations, the question of applicability of principle of natural justice does not apply and it is not necessary to hear the concerned employees or allow them to take part in the discussions before making such Regulations. It is not at all stated how the aforesaid Regulations are *ultra vires* to parent act or contrary to any statute or violative of Article 14 of the Constitution.

25. Furthermore, what is more important is that all actions have been the result of negotiated settlement between the Indian Banks Association representing

Banks on the one hand and the Employees Associations on the other hand. These Settlements were arrived at under Section 18 of the Industrial Disputes Act. When the definition of pay for the purpose of pension included in these settlements, the petitioners were still in the service and were the members of the Employees Associations/Workmen Unions and were thus duly represented. Such settlement would be binding on the petitioners as well. Law in this respect is well settled. In the case of *Herbertson Ltd. Vs. The Workmen of Herbertsons Ltd*, 1976 (4) SCC 736 the legal position was explained by the Supreme Court in the following words:-

“17. The Tribunal thought that the question of the quantum of membership of the 2nd respondent did not call for a finding at all in view of this Court's order. As observed above that was not a correct assumption. On the other hand, we feel that this view of the Tribunal has led it to approach the matter in an entirely erroneous manner. The Tribunal is, rightly enough, conscious that under Section 18(1) of the Industrial Disputes Act the settlement is binding on the company and the members of the 3rd respondent union. Even so, the Tribunal devoted nearly half of its order in scanning the evidence given by the company and respondent No. 3 to find out, whether the terms of the settlement had been explained by the President of the union to the workmen or not and whether the workers voluntarily accepted the settlement knowing all the "consequences." This to our mind is again an entirely wrong approach.

18. When a recognised union negotiates with an employer the workers as individuals do not come into the picture. It is not necessary that each individual worker

should know the implications of the settlement since a recognised union, which is expected to protect the legitimate interests of labour, enters into a settlement in the best interests of labour. This would be the normal rule. We cannot altogether rule out exceptional cases where there may be allegations of mala fides, fraud or even corruption or other inducements. Nothing of that kind has been suggested against the President of the 3rd respondent in this case. That being the position, prima facie, this is a settlement in the course of collective bargaining and, therefore, is entitled to due weight and consideration.

21. Besides, the settlement has to be considered in the light of the conditions that were in force at the time of the reference. It will not be correct to judge the settlement merely in the light of the award which was pending appeal before this Court. So far as the parties are concerned there will always be uncertainty with regard to the result of the litigation in a court proceeding. When, therefore, negotiations take place which have to be encouraged, particularly between labour and employer in the interest of general peace and well-being, there is always give and take. Having regard to the nature of the dispute which was raised as back as 1968, the very fact of the existence of a litigation with regard to the same matter which was bound to take some time must have influenced both the parties to come to some settlement. The settlement has to be taken as a package deal and when labour has gamed in the !matter of wages and it there is some reduction in the matter of dearness allowance so far as the award is concerned, it cannot be said that the settlement as a whole is unfair and unjust.

25. There may be several factors that may influence parties to come to a settlement as a phased endeavour in the course of collective bargaining. Once cordiality is established between the employer and labour in arriving at a settlement which operates well for the period that it is in force, there is always a likelihood of further

advances in the shape of improved emoluments by voluntary settlement avoiding friction and unhealthy litigation. This is the quintessence of settlement which courts and tribunals should endeavour to encourage. It is in that spirit the settlement has to be judged and not by the yardstick adopted in scrutinising an award in adjudication. The Tribunal fell into an error in invoking the principles that should govern in adjudicating a dispute regarding dearness allowance in judging whether the settlement was just and fair.”

23. The aforesaid legal position was reiterated by the Apex Court in *Tata Engineering and Locomotive Co. Ltd. Vs. Their Workmen*, 1981 (4) SCC 627 in these words:-

“The conclusion reached by the Tribunal that the settlement was not just and fair is again unsustainable. As earlier pointed out, the Tribunal itself found that there was nothing wrong with the settlement in most of its aspects and all that was necessary was to marginally increase the additional daily wage. We are clearly of the opinion that the approach adopted by the Tribunal in dealing with the matter was erroneous. If the settlement had been arrived at by a vast majority of the concerned workers with their eyes open and was also accepted by them in its totality, it must be presumed to be just and fair and not liable to be ignored while deciding the reference merely because a small number of workers (in this case 71, i.e., 11.18 per cent) were not parties to it or refused to accept it, or because the Tribunal was of the opinion that the workers deserved marginally higher emoluments than they themselves thought they did. A settlement cannot be weighed in any golden scales and the question whether it is just and fair has to be answered on the basis of principles different from those which come into play when an industrial dispute is under adjudication. In this

connection we cannot do better than quote extensively from *Herbertsons Limited v. [Workmen of Herberison Limited and Ors.](#)* : [1977]2SCR15 wherein Goswami, J., speaking for the Court observed.

“We should point out that there is some misconception about this aspect of the case. The question of adjudication has to be distinguished from a voluntary settlement. It is true that this Court has laid down certain principles with regard to the fixation of dearness allowance and it may be even shown that if the appeal is heard the said principles have been correctly followed in the award. That, however, will be no answer to the parties agreeing to a lesser amount under certain given circumstances. By the settlement, labour has scored in some other aspects and will save all unnecessary expenses in uncertain litigation. The settlement, therefore, cannot be judged on the touch-stone of the principles which are laid down by this Court for adjudication.

... ..

It is not possible to scan the settlement in bits and pieces and hold some parts good and acceptable and others bad. Unless it can be demonstrated that the objectionable portion is such that it completely outweighs all the other advantages gained the Court will be slow to hold a settlement as unfair and unjust. The settlement has to be accepted or rejected as a whole and we are unable to reject it as a whole as unfair or unjust. Even before this Court the 3rd respondent representing admittedly the large majority of the workmen has stood by this settlement and that is a strong factor which it is difficult to ignore. As stated elsewhere in the judgment, we cannot also be oblivious of the fact that all workmen of the company have accepted the settlement. Besides, the period of settlement has since expired and we are informed that the employer and the 3rd respondent are negotiating another settlement with further

improvements. These factors, apart from what has been stated above, and the need for industrial peace and harmony when a union backed by a large majority of workmen has accepted a settlement in the course of collective bargaining have impelled us not to interfere with this settlement.”

25. It is also pertinent to mention here that the petitioners are able to get the pension under the aforesaid Pension Regulations. They have accepted the benefits of the Regulations, Joint Notes as well as settlements. Accepting that part of the settlements which benefit the petitioners and at the same time, objecting to a particular part, namely definition of ‘pay’ for the purpose of Pension would clearly be inadmissible and the principle of estoppel in law would apply as held by the Supreme Court in the case of *Bank of India Vs. O.P. Swarankar*, 2003 (2) SCC 721:-

114. However, it is accepted that a group of employees accepted the ex gratia payment. Those who accepted the ex gratia payment or any other benefit under the scheme, in our considered opinion, could not have resiled therefrom.

115. The Scheme is contractual in nature. The contractual right derived by the concerned employees, therefore, could be waived. The employees concerned having accepted a part of the benefit could not be permitted to approbate and reprobate nor can they be permitted to resile from their earlier stand.

116. In Lachoo Mal's case (supra) the law is stated in following terms:

"The general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanctions the non-observance of the statutory provision is *cuilibet licet renuntiare juri pro se* introduction. (See Maxwell on Interpretation of Statutes, Eleventh Edition, pages 375 and 376). If there is any express prohibition against contracting out of a statute in it then no question can arise of anyone entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy. In Halsbury's Laws of England, Volume 8, Third Edition, it is stated in Paragraph 248 at page 1432:

‘As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the Legislature has expressly provided that any such agreement shall be void.”

117. In Brijendra Nath Bhargava's case (*supra*), the law is stated in following terms:

"It clearly goes to show that if a party gives up the advantage he could take of a position of law it is not open to him to change and say that he can avail of that ground. In Dawsons Bank Ltd. case their Lordships were considering the question of waiver as a little different from estoppel and they observed as under:-

‘On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal agrees to waive his principal's rights then (subject to any other question such as consideration) the principal will be bound, but he will be bound by contract.....

But in the context of the conclusion that we have reached on the basis of circumstances indicated above that it could not be held that the tenant had constructed his dichotic or balcony a wooden piece without the consent express or implied of the landlord, in our opinion, it is not necessary for us to dilate on the question of waiver any further and in this view of the matter we are not referring to the other decisions on the question of waiver."

118. In Halsbury's Laws of England, 4th Edition, Vol.16 (Reissue) para 957 at page 844 it is stated:

"on the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate express two proposition:

(1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.

(2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first perused and with which his subsequent conduct is inconsistent."

119. In American Jurisprudence, 2nd Edition. Volume 28, 1966, Page 677-680 it is stated:

"Estoppel by the acceptance of benefits: Estoppel is frequently based upon the acceptance and retention, by

one having knowledge or notice of the facts, of benefits from a transaction contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.

As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.

This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience."

26. Various judgments cited by the learned counsel for the petitioner would be of no avail. No doubt, pension is not bounty. However, at the same time, when the pension is given on the basis of a particular formula of pay defined in the Regulations, it is not open to the petitioners to question the same unless it is arbitrary and violative of Article 14 of the Constitution or ultra vires in statute.

27. It is now time to discuss the judgment of Madras High Court in *G. Palani (supra)* which has taken a contrary view. As noted above, the entire decision rests on the ground that even when there was Joint Note entered into between the employees associations and the management of the banks, no corresponding amendment was made in Regulations 2 (d) and Regulations 35 (2) of the Regulations, 1995. This reasoning, however, misses a vital fact namely amendment

in Regulation 2 (s) which defined “pay” which amendment was sufficient to incorporate the Joint Note/bipartite settlement into the said Regulations. In order to demonstrate the same, we reproduce the definition of “average emoluments” as contained in 2(d):-

“2 (d) “average emoluments” means the average of the pay drawn by an employee during the last ten months of his service in the Bank”

It is clear from the aforesaid that “average emoluments” is the average of “pay” which is drawn by the employee during the last 10 months. Therefore, “average emoluments” is relatable to ‘pay’. Here we point out that definition of “pay” had been amended by interpretation of the Explanation which is reproduced below:-

“For the purpose of this clause, basic pay, other components of pay and Fixed Personal Allowance would mean the basic pay, other components of pay and Fixed Personal Allowance draw by the employee in terms of scales of pay as applicable and the rates at which the other components of pay were payable prior to 01.11.1997 (in the case of workmen) and prior to 01.04.1998 (in the case of officers)”

By this explanation when pay means the pay which was payable prior to 1.4.1998, no amendment in Regulation 2 (d) was required. As far as Regulation 35 (2) is concerned, it deals with the amount of pension for which an officer has to render qualifying service of not less than 33 years and it states that amount of basic pension shall be calculated at 50% of the average emoluments. Thus, in

order to find out the “average emoluments” we have to refer to the definition of “average emoluments” and since “average emoluments” is relatable to pay, we have to refer to the definition of “pay” in Regulation 2 (s). Once that Regulation is amended, it takes care of the situation with no necessity to amend Regulation 2 (d) and 35 (2). Thus, we are in respectful disagreement with the view taken by the Madras High Court.

28. Since, we do not find any infirmity in these settlements, the question of challenging the same on this ground does not arise.

CHALLENGE TO THE CUTOFF DATE OF 1.5.2005 FOR APPLICABILITY OF AMENDED DEFINITION OF ‘PAY’ UNDER THE BIPARTITE SETTLEMENT AND JOINT NOTE DATED 2.6.2005:

29. Vide the aforesaid settlement, the definition of ‘pay’ for the purpose of pension has been revised and the amended definition is liking of the petitioners. Therefore, from the date of this settlement, the manner in which the pension is calculated and paid to them is acceptable, no grievance remains. However, the petitioner felt aggrieved by the provision whereby cutoff date 1.5.2005 is fixed and the effect thereof is that this definition is applicable only prospectively and for the past period, pension is paid to the petitioners in the manner calculated on the basis of definition of pay existing earlier is given. The petitioners have referred to the judgment of the Apex Court in *D.S. Nakara & Ors Vs. Union of India* 1983 (1)

SC 305 to contend that there was no basis for fixing the cutoff date. The Judgment in *D.S. Nakara* (supra) will have no applicability. In paras 21 and 45 of the said judgment, the Supreme Court itself restricted the case where the pension is paid out of a non-contributory superannuation or retirement pension paid by the government to its erstwhile employee. Furthermore, the dispute in the said case was totally different as the benefit of cutoff date was given to certain employees but not to those who had already retired. That is not the situation here. A particular definition of pay for the purpose of pension prevailed earlier which has been amended vide the bipartite settlement dated 1.5.2005. In such circumstances, it is always open to the employer to fix the cutoff date. Above all, in the present case, the date is not unilaterally fixed but with the specific consent of the employees/workmen unions.

30. We, thus, dismiss the present writ petition finding no merit. There shall be no order as to costs.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

MARCH 30, 2012

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