

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.10.2017

CORAM:

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.16154 of 2011

V.Sankaran

... Petitioner

vs.

- 1) The Principal Secretary,
Department of Finance,
Government of Tamil Nadu,
Chief Secretariat,
Fort St.George,
Chennai 600 009.
 - 2) The Principal Secretary / Commissioner,
Department of Treasuries and Accounts,
Panagal Maaligai,
Saidapet, Chennai 600 015
- ... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorarified Mandamus calling for the records relating to G.O.Ms.No.235, Finance (Pay Cell) Department dated 01.06.2009 and quash the same to the limited extent of and in so far as it relates to the discrimination drawn on the basis of the date of retirement namely 01.01.2006 which is unconstitutional and arbitrary and direct the respondents to re-fix the pension of the petitioner irrespective of the date of retirement.

For Petitioner : Mr.S.Subramanian

For RR1& 2

: Mrs.K.Bhuvaneswari
Learned Government Advocate
O R D E R

The relief sought for by the writ petitioner to quash G.O.Ms.No.235, Finance (Pay Cell) Department dated 01.06.2009 and quash the same to the limited extent of and in so far as it relates to the discrimination drawn on the basis of the date of retirement namely 01.01.2006 which is unconstitutional and arbitrary and direct the respondents to re-fix the pension of the petitioner irrespective of the date of retirement.

2.The learned counsel appearing for the writ petitioner rested his arguments mainly on the ground that the pensioners retired prior to 01.01.2006 are discriminated and have been granted 40% of the Basic Pay. Contrarily, the pensioners retired after 01.01.2006 are granted 50% of the Basic Pension. Thus, a discrimination is created amongst the

group of pensioners and the artificial distinction created between these two classes of pensioners are impermissible in law.

3.The next point raised on the side of the petitioners' is that the State is all along following the pay scheme followed by the Central Government and now that the Central Government has revised the pension in respect of pre retirees upto 01.01.2006 and therefore, the State pensioners, who retired prior to 01.01.2006 are also should get their respective pension revised on par with the Central Government pensioners.

4.Thirdly, the cut-off date of 01.01.2006 fixed by the State for the purpose of creating distinction between pre-retiries and post retiries of 01.01.2006, is arbitrary and such a division of single class of pensioners is not in accordance with law.

5.Mainly resting on these grounds, the learned counsel appearing for the writ petitioner has stated that the issue of creating such a distinction between the pre- retirees of 01.01.2006 and the post retirees, the Central Government employees filed an Original Application before the Central Administrative Tribunal in O.A.No.655 of 2017 and the same was allowed by the Tribunal. An appeal taken upto the Hon'ble Supreme Court was confirmed and consequently, the Government of India issued a revised order implementing the order of the Hon'ble Supreme Court by granting the benefits to the pre 01.01.2006 retirees granted to the post 01.01.2006 retirees.

6.The Government of India in proceedings dated 13.02.2013 states that the pension/family pension of 2006, pensioners were stepped upto 50% of the sum of minimum of pay in the pay band and the Grade Pay corresponding to the pre-revised pay scale from which the pensioners had retired, as arrived at with reference to the fitment tables annexed to the Ministry of Finance, Department of Expenditure in O.M.No.1/1/2008-IC dated 30th August, 2008 with effect from 24.09.2012 vide this Department Official Memorandum dated 28.01.2013.

7.Resting reliance on the Government of India Memorandum, the learned counsel for the petitioner contended that since the issue was decided by the Hon'ble Supreme Court of India and the Government of India accepted the same and the State Government ought to have followed the same in respect of State pensioners also.

8.In view of the fact that the Central Pay Commission recommendation adopted by the State Government as it is, the differential pension adopted by the Central Government also to be followed by the State Government. This apart, all the pensioners are treated as a single class and creating a class

between the State pensioners itself is arbitrary and the State Government has no power to create such a class and the same is in violation of Articles 14 and 16 of the Constitution. Thus, the core contention raised by the learned counsel appearing on behalf of the writ petitioners, are that the cut-off date of 01.01.2006, fixed by the State is erroneous, the State has to treat all the pensioners as a group i.e. one class and the benefit extended to the Central Government to be extended to the State Government also.

9.The learned Government Advocate appearing on behalf of the respondents strenuously opposed the contentions raised on behalf of the writ petitioner by stating that the State has not discriminated the pensioners and the State has not created a class within a class.

10.Further, fixing the cut-off date is an executive prerogative of the State Government and such a cut-off date fixed for the purpose of granting monetary benefits on pensioners benefits cannot be questioned by the pensioners. For instance, pre-retiries of 01.01.2006 is a class and post retiries of 01.01.2006 is another class. Thus, the State has not created a class within a class and one group of pre-retiries of 01.01.2006, cannot be compared with the post-retiries of 01.01.2006.

11.In view of the fact that the implementation of the Seventh Pay Commission was under taken with effect from 01.01.2006, there is a relevance in fixing the cut-off date and such a relevancy in relating to the financial burden and other aspects of the State Government. In this view of the matter, the cut-off date fixed is very much relevant for the purpose of granting pensionary benefits and more so, for adopting the recommendations of the Pay Commission in this regard.

12.The learned Government Advocate appearing for the respondents further contended that there are catena of Judgments stating that a class amongst the group of people can be created for the purpose of granting some benefits, but, a class within a class alone is prohibited and to be treated as in violation of Articles 14 and 16 of the Constitution of India. Thus, the pre-retiries of 01.01.2006 and post-retiries of 01.01.2006, belongs to different class of pensioners, which cannot be treated as the State created the class within a class. Further, it is contended that the competency of the State to fix cut-off date cannot be questioned by the petitioners and the differences in pension also cannot be compared in view of fact that it is not necessary that an equal pension to be given in all cadres at all times, in view of the fact that the pensions are sanctioned for the State pensioners based on their respective qualifying service rendered on the basis of the Last Pay Drawn by them. Therefore, the pension vary from one pensioner to another

pensioner and the differences in pension cannot be questioned by other pensioners. This apart, the Rule of stepping up of pay on par with the juniors for in-service candidates are not available to the pensioners, since the pensions are fixed based on the Pension Rules on the basis of the Last Pay Drawn by the respective employees, considering the total length of service rendered by them in the respective cadres.

13.Thirdly, the learned Government Advocate for the respondents contended that whenever the Pay Commission is implemented, such a cut-off date is prescribed and for instance the State has now implemented the Eighth Pay Commission. Right from the First Pay Commission, the cut-off is fixed for the implementation of the Pay Commission recommendations for the purpose of revision of pay, both to the serving employees as well as to the retired employees. Thus, cut-off date cannot be construed as unknown to Service Law and such a cut-off date is necessary under various circumstances. The only point to be considered is, as to whether such a cut-off date fixed by the State have any relevance with regard to the object sought to be achieved in this regard.

14. He further contended that the cut-off date of 01.01.2006 is very much relevant, since both the Central Pay Commission as well as the State Pay Commission were implemented with effect from 01.01.2006. Such being the factum of the case, the writ petitioners cannot be allowed to get the revision of pension and substantial pension are already granted to these writ petitioners. This apart relying on various judgments, the learned Government Advocate has taken this Court to paragraph 18 of the counter, which states that the expenditure on pension has increased manifold and in 2006-2007, the number of pensioners was 5,60,168 and the expenditure was Rs.5,442 crores. In 2015-2016 the number of pensioners increased to 7,14,041 and pension expenditure is estimated at Rs.20,074. The pension and retirement benefits expenditure was at 5.9% of total revenue expenditure in 1990-91 and 14.7% in 2011-12 and it is estimated that it may reach 0.5% during 2030-31. Due to various legal interventions, a number of Government Orders have been issued with huge impact on State Finance by increased expenditure on pension and other retirement benefits, which is unsustainable in the long run and further, retrospective upward revision of the pensionary entitlements and benefits create issues of inter-generational equity. The further revision of pension and other retirement benefits without considering financial constraint of the State will lead to more financial stress and the State cannot implement development and infrastructure schemes.

15.Emphasising the statements made in this affidavit by the State Government, the learned Government Advocate contended that in the event of granting enhanced pension to these pensioners, the State will have to suffer financial

loss. Further, it is contended that the benefits granted to the Central Government Pensioners by the Government of India regarding revision of pension could not be made applicable to the State Government Pensioners due to the financial constraints of the State. The Government have the right to make Policy decisions in respect of the quantum of pension to be granted to the pensioners, retired during different periods of time. The Government fixed various cut-off dates keeping in view the economic conditions, financial constraints and many other administrative and other attending circumstances. The fixing of cut-off date is within the domain of the executive authority. It is well settled that when two sets of employees of the same rank retired at different point 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 group. The method of calculation of revised pension from 01.01.2006 was determined, as was done in the earlier revision. Thus, the contention of the writ petitioners that there is an anomaly in the grant of revised pension between those retired prior to 01.01.2006 and those retired after 01.01.2006, cannot be accepted.

16. Due to the constant increase in the expenditure on pension, Contributory Pension Scheme has been implemented with effect from 01.04.2003. Moreover, all the concessions granted to the Central Government employees/pensioners are not extended to the State Government employees/pensioners. The resources of the State Government cannot be compared with that of the Central Government, but the sources of tax revenue to the State is very much limited like Sales Tax, State Excise, while the Central Government has more buoyant taxes like Corporation Tax, Income Tax, Customs and Central Excise, Service Taxes etc. The fiscal stress associated with the State Level is more severe when compared with that of the Central level, due to broad tax base and the flexibility in levying the taxes. Due to the financial constraints, the State Government could not extend the benefits to its employees/pensioners to the level available to the Central Government employees/pensioners.

17. The learned Government Advocate reiterated that in the event of allowing the writ petition, the Government would tend to incur a huge amount, as it will lead to severe financial constraints and the State would not be able to implement the development and other infrastructural schemes. The State Government has also constituted an Official Committee to recommend revision of pay and pension based on the recommendations of the Seventh Central Pay Commission. Thus, the retrospective relief sought for will certainly cause a great financial concern to the State Exchequer. Accordingly, the learned Additional Advocate General prayed for dismissal of the Writ Petitions.

18. In support of the arguments advanced, the learned Government Advocate cited the Judgments of the Hon'ble Supreme Court rendered in.,

(i) UNION OF INDIA v. P.N.MENON AND OTHERS [(1994) 4 SCC 68. The relevant portions, viz paragraph Nos. 10 & 20 of the said Judgment reads as follows:

"10. The concept of 'dearness pay' was evolved in respect of employees in different pay ranges with different percentages of the dearness pay. Thereafter the pension and gratuity were worked out and an option was given to persons, who retired on or after 30-9-1977 but not later than 30-4-1979, to choose either of the two alternatives (i) to have their pension and death cum-retirement gratuity calculated on their pay excluding the element of dearness pay as indicated in paragraph 2 of the said office memorandum; or (ii) to have their pension and death-cum-retirement gratuity recalculated after taking into account the element of dearness pay. If the stand of the respondents is to be accepted that this scheme should have been made available, without there being a cut-off date, to all including those who have retired even 20 to 25 years before the introduction of the scheme, then, according to us, the whole scheme shall be unworkable, because it is linked with the payment of dearness allowance, which is based on the level of price index. Different institutions/departments have introduced the system of payment of dearness allowance at different stages to mitigate the hardship of their employees with the rise in the prices of the essential articles as a result of the inflation.

20. The scheme to merge a part of the dearness allowance for purpose of fixing the dearness pay, was evolved, and was linked with the average of cost of living index fixed at 272, which fell on 30-4-1977. In this background, it cannot be said that the date, 30-9-1977, was picked out in an arbitrary or irrational manner, without proper application of mind. The option given to employees, who retired on or after 30-9-1977 but not later than 30-4-1979, to exercise an option to get their pension and death-cum-retirement gratuity calculated by excluding the element of dearness pay as indicated in the aforesaid office memorandum or to get it included in their pension and death-cum-retirement gratuity, was not an exercise to create a class within class. The decision having a nexus with the price index level

at 272, which it reached on 30-9-1977, was just and valid. It has been rightly pointed out that respondents had never been in receipt of dearness pay and as such the office memorandum in question could not have been applied to them. Similarly, the encashment of leave was a new scheme introduced which could not have been extended retrospectively to respondents, who had retired before the introduction of the said scheme. Same can be said even in respect of family pension scheme which was earlier contributory, but with effect from 22-9-1977 the scheme was made non-contributory. The respondents not being in service on the said date, were not eligible for the said benefit and no question of refunding the amount, which had already been contributed by them, did arise. According to us, the High Court was in error in applying the principle of D.S. Nakaral in the facts and circumstances of the present case."

(ii) In STATE BANK OF INDIA v. L.KANNAIAH AND ORS [(2003) 10 SCC 499, the Hon'ble Supreme Court has observed as follows:

"6. Para 5 of the circular stipulated that the age limit (viz. not being over 35 years) for admission to pension fund shall continue. Thus the pensioned ex-service personnel were admitted to pensionary benefits with effect from 1.1.1965 subject to the restriction of the age limit of 35 years (which was later on enhanced to 38 years) on that date. As the date of confirmation of the respondents was much earlier to 1.1.1965, the crucial date for admission to the pension fund would be 1.1.1965. On that date, the confirmed employee of the Bank should not have exceeded 35 years of age. That is the combined effect of the staff circular No. 18 dated 8.4.1974 read with the Pension Fund Rules referred to supra. The reason for prescribing the maximum age limit of 35 or 38, as the case may be, for the purpose of induction into pension fund appears to be that the employee would be able to render minimum service of 20 years as contemplated by Rule 22 of the Pension Fund Rules. However, there does not appear to be any rationale or discernible basis for fixing the cutoff date as 1.1.1965, notwithstanding their earlier confirmation in Bank service. True, a new benefit has been conferred on the ex-servicemen and therefore a cutoff date could be fixed for extending this new benefit, without offending the ratio of the decision in D.S. Nakara and others Vs. Union of India [AIR 1983 SC 130]; but, there could be no arbitrariness or irrationality in fixing such date. Minimum qualifying service being the essential consideration, even according to the Bank, there is

no reason why the ex-servicemen like the respondents, who from the date of their confirmation had put in more than twenty years of service, even taking the retirement age as 58, should be excluded. No reason is forthcoming in the counter-affidavit filed by the Bank for choosing the said date. When it is decided to extend the pensionary benefits to ex-servicemen drawing pension, the denial of the benefit to some of the serving employees should be based on rational and intelligible criterion. In substance, that is the view taken by the High Court and we see no reason to differ with that view. "

(iii) In GOVERNMENT OF ANDHRA PRADESH v. N.SUBBARAYUDU AND OTHERS [(2008) 14 SCC 702], the Hon'ble Supreme Court relying on the Judgment of the Constitution Bench in D.S.NAKARA v. UNION OF INDIA [(1983) 1 SCC 305, held as follows:

"5. In a catena of decisions of this Court it has been held that the cut off date is fixed by the executive authority keeping in view the economic conditions, financial constraints and many other administrative and other attending circumstances. This Court is also of the view that fixing cut off dates is within the domain of the executive authority and the Court should not normally interfere with the fixation of cut off date by the executive authority unless such order appears to be on the face of it blatantly discriminatory and arbitrary. (See State of Punjab & Ors. Vs. Amar Nath Goyal & Ors., (2005) 6 SCC 754).

6. No doubt in D.S. Nakara & Ors. vs. Union of India 1983(1) SCC 305 this Court had struck down the cut off date in connection with the demand of pension. However, in subsequent decisions this Court has considerably watered down the rigid view taken in Nakara's Case (supra), as observed in para 29 of the decision of this Court in State of Punjab & Ors. vs. Amar Nath Goyal & Ors. (supra).

7. There may be various considerations in the mind of the executive authorities due to which a particular cut off date has been fixed. These considerations can be financial, administrative or other considerations. The Court must exercise judicial restraint and must ordinarily leave it to the executive authorities to fix the cut off date. The Government must be left with some leeway and free play at the joints in this connection.

8. In fact several decisions of this Court have gone to the extent of saying that the choice of a cut off date cannot be dubbed as arbitrary even if no particular reason is given for the same in the

counter affidavit filed by the Government, (unless it is shown to be totally capricious or whimsical) vide State of Bihar vs. Ramjee Prasad 1990(3) SCC 368, Union of Indian & Anr. vs. Sudhir Kumar Jaiswal 1994(4) SCC 212 (vide para 5), Ramrao & Ors. vs. All India Backward Class Bank Employees Welfare Association & Ors. 2004 (2) SCC 76 (vide para 31), University Grants Commission vs. Sadhana Chaudhary & Ors. 1996(10) SCC 536, etc. It follows, therefore, that even if no reason has been given in the counter affidavit of the Government or the executive authority as to why a particular cut off date has been chosen, the Court must still not declare that date to be arbitrary and violative of Article 14 unless the said cut off date leads to some blatantly capricious or outrageous result.

9.As has been held by this Court in Divisional Manager, Aravali Golf Club & Anr. vs. Chander Hass & Anr. 2008(3) 3 JT 221 and in Government of Andhra Pradesh & Ors. vs. Smt. P. Laxmi Devi 2008(2) 8 JT 639 the Court must maintain judicial restraint in matters relating to the legislative or executive domain."

(iv) In COUNCIL OF SCIENTIFIC AND INDUSTRIAL RESEARCH AND ORS v. RAMESH CHANDRA AGRAWAL AND ANOTHER [(2009) 3 SCC 35], the Hon'ble Supreme Court has observed as follows:

"29. A 'State' is entitled to fix a cut off date. Such a decision can be struck down only when it is arbitrary. Its invalidation may also depend upon the question as to whether it has a rational nexus with the object sought to be achieved. 2.5.1997 was the date fixed as the cut off date in terms of the scheme. The reason assigned therefor was that this was the date when this Court directed the appellants to consider framing of a regularization scheme. They could have picked up any other date. They could have even picked up the date of the judgment passed by the Central Administrative Tribunal. As rightly contended by Mr. Patwalia, by choosing 2.5.1997 as the cut off date, no illegality was committed. Ex facie, it cannot be said to be arbitrary.

30.The High Court, however, proceeded on the basis that the cut off date should have been the date of issuance of the notification. The employer in this behalf has a choice. Its discretion can be held to be arbitrary but then the High Court only with a view to show sympathy to some of the candidates could not have fixed another date, only because according to it, another date was more suitable. In law it was not necessary. The court's power of judicial review in this behalf although exists but is limited in the sense that the impugned action can

be struck down only when it is found to be arbitrary. It is possible that by reason of such a cut off date an employee misses his chance very narrowly. Such hazards would be there in all the services. Only because it causes hardship to a few persons or a section of the employees may not by itself be a good ground for directing fixation of another cut off date.

31. The scheme was a one-time measure. The number of posts was not confined to the posts which have been sanctioned. The validity of the scheme has been challenged as unrealistic, illusive, arbitrary or unworkable. We may at this juncture notice that whereas the Tribunal directed framing of a scheme, this Court directed the appellants to consider the same.

32. Cut off date has been fixed for those who are eligible as per the criteria laid down by the scheme. The service rules were framed in terms of the bye-laws of the society. It would bear repetition to state that the appellant No. 1 is not a statutory authority. It is a research oriented organization. It knows its needs. The research fellows and research associates because of their involvement in the research work are to get priority in their appointments. Particular projects whether funded by the Ministry concerned or others would depend upon the nature thereof. It, by a judicial fiat, could not have been made a continuous scheme."

(v) In STATE OF A.P. & ANR v. A.P. PENSIONERS ASSOCIATION & ORS [(2005) 13 SCC 161], the Hon'ble Supreme Court has observed as follows:

"28. It is trite that, the final recommendations of the Pay Commission were not ipso facto binding on the Government, as the Government had to accept and implement the recommendations of the Pay Commission consistent with its financial position. This is precisely what the Government did. Such an action on the part of the Government can neither be characterised as irrational, nor as arbitrary so as to infringe Article 14 of the Constitution."

Mr. Lalit placed strong reliance on D.S. Nakara and Others Vs. Union of India [(1983) 1 SCC 305] for the proposition that the financial implication for implementation of the recommendations of PRC has not much relevance. Therein, the Constitution Bench came to the conclusion that the increased liability upon the said judgment is not too high to be unbearable or

such as would have detracted the Government from covering the old pensioners under the scheme.

The decisions of this Court which have been noticed in Amar Nath Goyal (supra) categorically point out that financial implication is one of the relevant considerations for the State to deny certain benefits to a class of employees who retire on or before a particular date."

(vi) In TRANSPORT AND DOCK WORKERS UNION AND ORS v MUMBAI PORT TRUST AND ANOTHER [(2011) 2 SCC 575, the Hon'ble Supreme Court observed as follows:

" 38.As regards cut-off dates, this Court in Government of Andhra Pradesh and Ors. vs. N. Subbarayudu and Ors. 2008(14) SCC 702 has observed vide paragraphs 5 to 9 :

"5. In a catena of decisions of this Court it has been held that the cut-off date is fixed by the executive authority keeping in view the economic conditions, financial constraints and many other administrative and other attending circumstances. This Court is also of the view that fixing cut-off dates is within the domain of the executive authority and the court should not normally interfere with the fixation of cut-off date by the executive authority unless such order appears to be on the face of it blatantly discriminatory and arbitrary. (See State of Punjab vs. Amar Nath Goyal 2005(6) SCC 754)

6. No doubt in D.S. Nakara vs. Union of India 1983(1) SCC 305 this Court had struck down the cut-off date in connection with the demand of pension. However, in subsequent decisions this Court has considerably watered down the rigid view taken in Nakara case as observed in para 29 of the decision of this Court in State of Punjab vs. Amar Nath Goyal.

7. There may be various considerations in the mind of the executive authorities due to which a particular cut-off date has been fixed. These considerations can be financial, administrative or other considerations. The court must exercise judicial restraint and must ordinarily leave it to the executive authorities to fix the cut-off date. The Government must be left with some leeway and free play at the joints in this connection.

8. In fact several decisions of this Court have gone to the extent of saying that the choice of a cut-off date cannot be dubbed as arbitrary even

if no particular reason is given for the same in the counter-affidavit filed by the Government (unless it is shown to be totally capricious or whimsical), vide State of Bihar vs. Ramjee Prasad 1990(3) SCC 368, Union of India vs. Sudhir Kumar Jaiswal 1994(4) SCC 212 (vide SCC 5), Ramrao vs. All India Backward Class Bank Employees Welfare Assn. 2004(2) SCC 76 (vide para 31), University Grants Commission vs. Sadhana Chaudhary 1996(10) SCC 536, etc. It follows, therefore, that even if no reason has been given in the counter-affidavit of the Government or the executive authority as to why a particular cut-off date has been chosen, the court must still not declare that date to be arbitrary and violative of Article 14 unless the said cut-off date leads to some blatantly capricious or outrageous result.

9. As has been held by this Court in Aravali Golf Club vs. Chander Hass 2008(1) SCC 683 and in Govt. of A.P. vs. P. Laxmi Devi 2008(4) SCC 720 the court must maintain judicial restraint in matters relating to the legislative or executive domain."

19. In our opinion, there is often a misunderstanding about Article 14 of the Constitution, and often lawyers and Judges tend to construe it in a doctrinaire and absolute sense, which may be totally impractical and make the working of the executive authorities extremely difficult if not impossible.

20. As Lord Denning observed :

"This power to overturn executive decision must be exercised very carefully, because you have got to remember that the executive and the local authorities have their very own responsibilities and they have the right to make decisions. The Courts should be very wary about interfering and only interfere in extreme cases, that is, cases where the Court is sure they have gone wrong in law or they have been utterly unreasonable. Otherwise you would get a conflict between the courts and the government and the authorities, which would be most undesirable. The courts must act very warily in this matter." (See 'Judging the World' by Garry Sturgess Philip Chubb).

21. In our opinion Judges must maintain judicial self restraint while exercising the powers of judicial review of administrative or legislative decisions. "In view of the complexities of modern society", wrote Justice Frankfurter, while Professor of Law at Harvard University, "and the restricted scope of any man's experience, tolerance and humility in passing judgment on the worth of the experience and beliefs of others become crucial faculties in the disposition of cases. The successful exercise of such judicial power calls for rare intellectual disinterestedness and penetration, lest limitation in personal experience and imagination operate as limitations of the Constitution. These insights Mr. Justice Holmes applied in hundreds of cases and expressed in memorable language : It is misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong."

22. In writing a biographical essay on the celebrated Justice Holmes of the U.S. Supreme Court in the dictionary of American Biography, Justice Frankfurter wrote :

"It was not for him (Holmes) to prescribe for society or to deny it the right of experimentation within very wide limits. That was to be left for contest by the political forces in the state. The duty of the Court was to keep the ring free. He reached the democratic result by the philosophic route of skepticism-by his disbelief in ultimate answers to social questions. Thereby he exhibited the judicial function at its purest." (see 'Essays on Legal History in Honour of Felix Frankfurter' edited by Morris D. Forkosch.)

23. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimization of the Judges' preferences. The Court must not embarrass the administrative authorities and must realize that administrative authorities have expertise in the field of administration while the Court does not. In the words of Chief Justice Neely, former Chief Justice of the West Virginia Supreme Court of Appeals :

"I have very few illusions about my own limitations as a Judge. I am not an accountant, electrical engineer, financier, banker, stockbroker or system management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation. It is not the function of a Judge to act as a super board, or with the

zeal of a pedantic school master substituting its judgment for that of the administrator."

24. In administrative matters the Court should, therefore, ordinarily defer to the judgment of the administrators unless the decision is clearly violative of some statute or is shockingly arbitrary. In this connection, Justice Frankfurter while Professor of Law at Harvard University wrote in 'The Public and its Government' -

"With the great men of the Supreme Court constitutional adjudication has always been statecraft. As a mere Judge, Marshall had his superiors among his colleagues. His supremacy lay in his recognition of the practical needs of government. The great judges are those to whom the Constitution is not primarily a text for interpretation but the means of ordering the life of a progressive people."

25. In the same book Justice Frankfurter also wrote -

"In simple truth, the difficulties that government encounters from law do not inhere in the Constitution. They are due to the judges who interpret it. That document has ample resources for imaginative statesmanship, if judges have imagination for statesmanship."

26. In legal scholarship, Roscoe Pound challenged the rigid formalism of Justice Field. Pound strongly argued against a jurisprudence founded upon immutable first principles and sought in the social sciences and related fields a means for making the law responsive to a changing world.

27. As observed by Justice Frankfurter :

"It would be comfortable to discover a Procrustean formula..... If such were the process of Constitutional adjudications in this most sensitive field, it would furnish an almost automatic task of applying mechanical formula and would hardly call for the labors of Marshall or Taney, of Holmes or Cardozo. To look for such talismanic formula is to assume that the broad guarantees of the Constitution can fulfill their purpose without the nourishment of history."

28. In Keshavanand Bharti vs. State of Kerala AIR 1973 SC 1461 (vide paragraph 1547) Khanna, J. observed :

"In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error."

29. In the present case there was a reasonable basis for the classification, and hence there is no violative of Article 14 of the Constitution."

30. In support of their contentions, the learned counsel appearing for the petitioner relied on the Judgment of the Hon'ble Supreme Court in UNION OF INDIA AND ANOTHER v. SPS VAINS (RETD) AND OTHERS [(2008) 9 SCC 125]. The learned counsel appearing for the petitioners also relied on the Judgment of the Constitution Bench of the Hon'ble Supreme Court in D.S.NAKARA, contended that all the exercise irrespective of their retirement should be treated as homogeneous, one class and while extending the benefit of pension, it should be extended to all and fixing of the cut-off date as 01.01.2006, is illegal and violative of the principles laid down in D.S.NAKARA.

31. Such an argument has no force in law, in view of the fact that all the subsequent Judgments to the Judgment of D.S.NAKARA, the Hon'ble Supreme Court has reiterated and emphasized that the legal principles in the case of D.S.NAKARA to be tested with the facts and in the changing circumstances. In other words, the case of D.S.NAKARA was decided in the year 1983 and thereafter, the Hon'ble Supreme Court has considered various aspects of Pension Schemes and laid down the principles holding that fixing of cut-off date cannot be held to be illegal or arbitrary. Further, the date of implementation of the Pay Commission cannot be said to be arbitrary and further the Hon'ble Supreme Court considered the financial constraints of the State, while granting the relief in such kind of cases.

32. In this regard, the Government in its counter affidavit in paragraph No.18, has narrated the statics about the expenditure to be incurred and paragraph No.18, is extracted below:

"18. The expenditure on pension has increased manifold and in 2006-2007, the number of pensioners was 5,60,168 and expenditure was Rs.5,442 crores. In 2015-16, the number of pensioners increased to 7,14,041 and pension expenditure is estimated at Rs.20,074/- crore. The Pension and retirement benefits expenditure was at 5.9% of total revenue expenditure in 1990-91 and 14.7% in 2011-12 and it is estimated that it may reach 20.5% during 2030-3. Due to various legal interventions, a number of Government Orders have been issued with huge impact on State finance by increased expenditure on pension and other retirement benefits, which is unsustainable in the long run. Further, retrospective upward revision of the pensionary entitlements and

benefits create issues of inter-generational equity. The further revision of pension and other retirement benefits without considering financial constraint of the State will lead to more financial stress and the State cannot implement development and infrastructure schemes."

33.No doubt all the pensioners are to be treated as a class, but, while implementing the Pay Commission recommendations, it is necessary to fix a cut-off date. The Government has to consider various aspects before implementing the Pay Commission. This being the duty of the State, they have to see that a class within a class is not created. For instance, the pre-pensioners as on 01.01.2006 are different from the post-pensioners of 01.01.2006. Therefore, this Court cannot come to the conclusion that the cut-off date fixed by the State Government is arbitrary or has no relevance. Certainly, the date has a relevance in respect of implementation of the Pay Commission. Thus, the arguments advanced by the learned counsel for the petitioners that the cut-off date has no sanctity, deserves to be rejected. In this regard, the Seventh Schedule, State List II, Entry 42, of the Constitution of India is extracted hereunder:

"42.State Pensions, that is to say,
pension payable by the State out of
Consolidated Fund of the State."

34. Thus, the Constitution provides power for the State to fix the pension in respect of the State Pensioners. Undoubtedly, it is the prerogative of the State to decide the quantum of pension to be paid the State Pensioners.

35.The learned counsel for the petitioner contended that the State on an earlier occasion had decided to follow the Central Government Pay Commission, both for in-service and pensioners. But, such a Policy has to be adopted by the State Government, while adopting the Policy of the Central Government. This Court is of the view that the State has got every power to modify, alter, reduce or enhance in respect of the quantum of pension and other conditions stipulated in the Pay Commission recommendations. It is not the case as if the Central Pay Commission is to be implemented mutatis mutandis to the State. It is for the State to decide what are all the recommendations to be implemented and the State has got an independent power under the Constitution of India to decide the conditions and quantum of pension to be fixed in this regard. Thus, this Court is of an undoubted view that the power of the State in this regard cannot be questioned and the power is very much traceable in Seventh Schedule, State List II, Entry 42 of the Constitution of India. Thus, this Court is of the view that the arguments advanced by the learned counsel for the writ petitioner in this regard deserves no further consideration.

36. Further, it is argued by the learned counsel for the petitioner that a mere cut-off date in order to create discrimination cannot be followed by the State. This argument deserves outright rejection, in view of the fact that the pension fixed based on the cut-off date more specifically, with regard to the date of implementation of the Pay Commission cannot be construed as a discrimination or violative of Articles 14 and 16 of the Constitution of India. Certainly there is a rationale behind the fixing of the cut-off date in this regard and when the rationale behind the cut-off date is established, and the date fixed for the purpose of implementing the Pay Commission, the State cannot be faulted with. This apart, financial constraint raised by the State Government is required to be considered seriously by the Courts also. When there is no sufficient financial resources available to meet out the growing pension expenditure, the State has to alter its Policy. Thus, the reasons and the statistics furnished by the State in this regard more so, regarding the increasing expenditure on pension has to be taken note of. The Courts cannot close its eyes with regard to the financial constraints and the concerns raised by the State. A planning and pragmatic approach to be adopted in this regard.

37. Thus, the enhancement of pension further from 40% to 50% to the pre-retires of 01.01.2006, cannot be claimed as a matter of right and the pensioners are getting their right of pension as fixed in the Pay Commission recommendations and since the further enhancement may cause increasing financial burden to the State, this Court is not in a position to accept the contentions raised on behalf of the writ petitioners.

38. This apart, if the propositions advanced by the learned counsel appearing for the writ petitioners are accepted, even then, the pensioners who retired prior to 01.01.1996 and 01.06.1988 also will have the scope to claim the same benefit. Third Pay Commission was implemented with effect from 01.04.1978, the Fourth Pay Commission was implemented with effect from 01.10.1984, the Fifth Pay Commission was implemented on 01.06.1988, the Sixth Pay Commission was implemented on 01.01.1996, the Seventh Pay Commission was implemented on 01.01.2006 and the Eighth Pay Commission was implemented on 01.01.2016.

39. If the arguments of the learned counsel appearing for the pensioner are accepted, all the pensioners are to be treated equally, removing the cut-off date, then, logically the cut-off dates fixed in all the Pay Commissions are to be removed, on such event, this Court is unable to foresee the consequences and the future implications involved at the cost of the State Exchequer.

40. Contrarily, fixing of cut-off date is a normal affair of the State wherever necessary. The only point to be

adjudicated is that whether the cut-off date is fixed under capricious manner or otherwise. In the case on hand, the cut-off date is fixed, as the date fixed for the purpose of implementing the Pay Commission recommendations, which cannot be construed as capricious or otherwise. The power of the State in respect of fixing the cut-off date is undoubtedly clear by virtue of the provisions in Seventh Schedule, State List II, Entry 42 of the Constitution of India. Thus, the arguments that the cut-off date to be removed and all the pensioners are to be granted the benefit extended to the Central Government pensioners deserves no merit consideration.

41. In view of the above discussions, the claim set out by the writ petitioner in this regard deserves no consideration and accordingly, the Writ Petition stands dismissed. No costs.

Sd/-
Assistant Registrar (CS V)

//True Copy//

Sub Assistant Registrar

sts

To:

- 1) The Principal Secretary,
Department of Finance,
Government of Tamil Nadu,
Chief Secretariat,
Fort St. George,
Chennai 600 009.
- 2) The Principal Secretary / Commissioner,
Department of Treasuries and Accounts,
Panagal Maaligai,
Saidapet, Chennai 600 015

+1cc to Government Pleader Sr.No.74767

Order in
W.P.No.16154 of 2011

NM: (CO)
SM:27.11.2017

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