

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CWP-16952-2016(O&M)

Date of decision:25.05.2021

Nand Kishore Sharma and others

.....Petitioners

Versus

State of Haryana and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr.Anurag Jain, Advocate, for the petitioners

Ms. Kirti Singh, DAG, Haryana

ANIL KSHETARPAL, J.

1. Through this petition, 5 writ petitioners, who have retired from the aided sanctioned posts as Associate Professors from various non-Government aided colleges during the period 01.01.2006 to 30.6.2006, pray for the parity in the method of calculating the amount of pension with their colleagues who retired on or after the cut off date i.e.12.10.2010.

2. The State has enacted 'The Haryana affiliated Colleges (Security of Service) Act, 1979. Under the aforesaid Act, the State by notifying the Haryana Affiliated Colleges (Pension and Contributory Provident Fund) Rules, 1999 (hereinafter referred to as the 1999 Rules) has made a provision for the grant of pension to the employees like the writ petitioners who have retired from the aided sanctioned posts of

non-government aided colleges. The rules were amended in the year 2001. The petitioners are getting pension in accordance with the 1999 Rules. As per Rule 9, the pension is to be calculated at the rate of 50% of average pay of the last ten months, which is extracted as under:-

“9. **Superannuation pension:-** (1) All employees shall be entitled to the superannuation pension from the date they attain the age of Sixty years.

(2) Pension shall be calculated at the rate of fifty percent of the average pay of the last ten months. The admissibility of full pension shall be on completion of thirty three years qualifying service. The amount of pension is to be determined by length of service. The length of qualifying service for this purpose shall be calculated in terms of completed six monthly period and fraction of a year equal to three months or more shall be treated as a completed six monthly period. The formula will be as under:-

$$\text{Pension} = \frac{\text{Average Emoluments of last 10 months}}{2} \times \frac{\text{Qualifying Service (counted in terms of completed half yearly period)}}{66}$$

If the pension so calculated for the qualifying service of thirty three years falls short of Rs.1275/- (one thousand two hundred seventy five only) the same shall be raised to Rs.1275/- (one thousand two hundred seventy five only) in all cases.”

3. Pursuant to the recommendations of Sixth Pay Commission, the State of Haryana revised the pension scheme of govt. employees as well as of the retirees before 12.10.2010. The petitioners are also receiving revised pension. They are aggrieved by the circulars dated 12.10.2010 which has been further clarified/reiterated vide memo dated 18.04.2016. In the aforesaid circular, it has been provided that the

employees who have retired on or after 01.01.2006 but before the date of issue of notification dated 12.10.2010, will continue to be governed by the provisions of the Pension Rules, 1999 as regards to the manner of calculating the amount of pension payable.

4. Among various recommendations made by the sixth pay commission, one of the changes which has been accepted by the Government is to calculate the pension at 50% of the last pay drawn by the employee, instead of, in accordance with the Rule 9 of the Pension Rules, 1999 which provides for taking last 10 month's average pay to work out the amount of pension payable . They claim that the decision of the State has resulted in discrimination viz a viz the employees who retired on or after 12.10.2010. They mainly rely upon the judgment passed by a Five Judges Bench in **D.S.Nakara vs. Union of India, (1983) 1 SCC 305**. It has been contended that the pensioners from non-Government aided colleges form a harmonious group and therefore, the discrimination in between the pensioners on the basis of cut off date of retirement is arbitrary and illegal.

5. On the other hand, the State has contested the petition by submitting that the petitioners and other similarly situated retirees from non-government aided colleges became entitled to the pension for the first time as per Pension Rules, 1999. Before the enforcement of the 1999 Rules, all identically situated employees including the petitioners herein, who had opted for pension, gave their respective undertakings that the pension shall be calculated at the rate of 50% of the average pay of the last 10 months. It has further been contended that the scheme for pension to the retirees of the non-government aided colleges was

envisaged, based on the employer's share in the Contributory Provident Fund. It has been further pointed out that the provisions regarding pension have been made by the State Government after doing all overall assessment including working out the financial implications involved in the matter. Therefore, the fixing of pension on basis of 50% of the last drawn salary for pension is applicable only to those retirees who retire after issuance of communication dated 12.10.2010, Annexure P-6 . It may be noted here that the State Government has also taken a stand that the pension Rules,1999 were introduced in lieu of Contributory Provident Fund (Employer's Share) so that no additional financial burden is required to be borne by the State Government. The petitioners have filed replication.

6. Heard, learned counsel for the parties at length and with their able assistance, perused the paper book. Learned counsel representing the petitioners has also forwarded their written arguments on the official email of the Court, in which the following points have been taken:-

1. Ministry of HRD, Govt. of India, accepted the recommendations of UGC to grant pension on pay last drawn (Pg. 66 Pa (g) of Ann.P-1/A) for teachers & equivalent cadres in Universities and Colleges.
2. Govt. of Haryana vide meeting dated 27.08.10 (P-4 pg. 90 second last para), recommended that pension of teachers of private aided colleges be calculated on basis of pay last drawn, with 28 years qualifying service.

3. Finance Deptt. Accepted the recommendation of Administrative Deptt. (Ann. P-5, Pg-93)

4. As teachers of private aided colleges and that of Haryana Govt. are discharging same duties, they form homogenous class, therefore, in terms of notification dated 17.04.09 (Ann. P-3), issued by government, which entitles its employees to have pension on pay last drawn; therefore, principle of parity pitches, in making teachers of private aided colleges also eligible for calculation of pension on pay last drawn.

5. Director Technical Education issued a circular on 19.05.10 (Ann. P-3/A), for retirees of aided private technical institutions of Harayana thereby granting benefit of calculation of pension on pay last drawn on the pattern of government notification dated 17.04.09 (Ann.P-3). Instance of implementation of circular Ann.P-3/A, gets proved from Ann.P-13, Pg.123.

6. Writ petition [Ann.P-8 Pg 101(103)] filed by few teachers of Haryana Govt. concluded that in terms of notification of 17.04.09 (P-3), pension is calculated on the basis of pay last drawn for the employees retiring from 01.01.2006 onwards. However prayer for reducing the qualifying service from 33 years to 28 years for teachers who retired between 01.01.2006 to 17.04.09 was dismissed.

7. Vide judgment dated 13.07.16 passed in CWP

1982 of 2015 [P-12 pg. 116 (121)], prayer made by teachers of private aided colleges for predating of impugned executive order dated 12.10.10 (P-6) to 17.04.09, for the purpose of considering qualifying service of 28 years for pension, instead of 33 years, as has been done vide notification 17.04.09 (Ann.P-3) in the case of teachers of Haryana Govt. was granted and the same has attained finality.

8. Govt. in its reply to present writ petition, in para 5 (Pg 134) has admitted that calculation of pension on the pay last drawn is being given to the retirees who retired after issuance of pension revision order 12.10.10 (Ann. P-6) and not to retirees who retired prior to 12.10.10. Also Ann. P-19 with CM No.17218-CWP/2019, shows the factum of pension being paid on pay last drawn.

9. Govt. vide circular dated 7.11.16 made addendum to impugned order P-6 by adding para (iv) after para – I(b) (iii) mentioning therein that for pre 2006 retirees, pensions shall be calculated by taking 50% of minimum of htep ay in pay band + grade pay in the corresponding revised pay scale, in terms of Harayan Civil Service (revised pay) Rules, 2008.

10. Haryana Govt. vide OM dated 08.09.16 (Ann.P-16 Pg-190) for the retirees, who have retired between 01.01.06 to 30.09.06 has observed that pension for

such retirees shall not be less than 50% of the sum of minimum of pay in pay band and grade pay.

11. Haryana Govt. vide notification dt. 11.05.06 (R-1, Pg -173) has granted dearness allowance to the teachers of aided affiliated colleges at par with its employees.

12. All retirees, who have retired during the currency of any pension scheme, irrespective of their date of retirement, form homogenous class, giving them different treatment would amount to invidious discrimination and hence on the basis of their date of retirement, no disparity can be made.

Additional arguments

13. The judgment titled as 'Haryana Adhyapak Sangh Vs. State of Haryana and others', CWP No. 11686 of 2004, is not applicable to the facts of the present case, as the petitioners therein were seeking implementation of assured career progression scheme, which is applicable to the government employees. As have been observed on page no. 18 and thereafter in subsequent part of the judgment, admittedly, ACP scheme was never implemented upon the employees of private aided educational institutions. Further even as per the basic thread of the ACP scheme, the same was/is always applicable to the government employees.

14. In the present case, the pension scheme was already in vogue and the colleagues of the petitioners who have retired prior to 01.01.2006, in terms of *Annexure P-15 Page 186*, are being given the benefit of calculation of pension on the basis of *50% of the pay in the pay band+ grade pay in the corresponding revised scale in terms of Haryana Civil Services Revised Pay Rule* and even the teachers who have *superannuated* are being given pension on the basis of *pay last drawn(Pg 134 of reply and Annexure P-19)*.

15. Ratio decidendi of judgment delivered in CWP No. 1982/2015 {Ann. P-12, page 116(121)} is that *Teachers of private aided colleges are at par with teachers of government colleges*; which has been so held, while placing reliance upon Dr Karan Singh's Rathee case, a Division Bench judgment of this Hon'ble Court.

16. Finance Department of Government of Haryana (Annexure P-5, Page 93), has *accepted the recommendations for grant of pension and family pension to the employees of Haryana Aided Colleges as per recommendations of 6th pay commission w.e.f. 01.01.2006 as applicable to government employees.*

7. Per contra, learned counsel representing the respondents contends that the petitioners are not public servants and therefore, there

is no master and servant relationship between them and the State Government as such. She further points out that in order to regulate the working of non-government aided colleges to a limited extent, the State has made certain provisions in the Act of 1979. While elaborating, she submitted that the employees of the non-government private affiliated colleges became entitled to pension for the first time in the year 1999. Such employees, before 1999, were not entitled to the pension. She further pointed out that such pension is payable only on transfer of employer's share in the contributory provident fund to the State Government. She further, while taking the Court to the Pension Rules of 1999, submitted that such pension is available only to the employees who are working against aided sanctioned posts which means the post for which grant-in-aid is allowed by Higher Education Directorate Haryana. She further submitted that such employees cannot claim parity with the public servants. She highlighted that the recruitment as well as the service conditions of both the sets of employees are different as the appointment of employees in the non-government aided colleges is not through Public Service Commission or Haryana Subordinate Selection Board. She further pointed out that the age of retirement in case of teachers in Private Aided Colleges is 60 years whereas it is 58 years in case of Government employees. Still further Government employees are subject to transfer throughout the State whereas the employees of private aided colleges are ordinarily non-transferable. She further pointed out that Government keeping in view the financial implications has taken a conscious decision on two different occasions; first in the year 2010 when instructions dated 12.10.2010 were issued and

thereafter, in the year 2016 when the Government, after considering all aspects of the matter, took a conscious decision to extend the benefit of manner of calculation of pension only to the retirees who retired on or after 12.10.2010 and not to the retirees who retired prior thereto. Hence, she prayed for dismissal of the writ petition.

8. Before this Bench proceeds to analyze and evaluate the respective contentions of both the parties, it would be appropriate to notice the case law on the subject-matter. The mainstay of argument of the learned counsel representing the petitioners is on judgment of the Five Judges Bench in D.S.Nakara's case (*supra*). In the aforesaid case, no doubt the Hon'ble Supreme Court held that the pensioners form a uniform group and their micro division would not be appropriate. However, thereafter, in various other judgments the matter has been explained further. In **Tamil Nadu Electricity Board vs. R.V. Sami (1999) 3 SCC 414**, the Hon'ble Supreme Court held that the cut off date for grant of pension with respect to retirees on or after 01.07.1986 is valid. In *State of Punjab vs. Amarnath Goyal*, (2005) 6 SCC 754/784, it has been held that the decision of the Government to give revised death-cum-retirement gratuity to the employees who retired or died on or after 01.01.1995 is valid. The judgments passed by the High Courts were reversed in both the cases. Still further, in *Government of Andhra Pradesh vs. N.Subbarayudu* (2008) 14 SCC 702, the cut off date for grant of pension was upheld with the following discussion.

“6. No doubt in *D.S. Nakara v. Union of India* [(1983) 1 SCC 305 : 1983 SCC (L&S) 145] 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* [(1983) 1 SCC 305 : 1983 SCC (L&S) 145] as observed in para 29 of the decision of this Court in *State of Punjab v. Amar Nath Goyal* [(2005) 6 SCC 754 : 2005 SCC (L&S) 910] .

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 v. Ramjee Prasad* [(1990) 3 SCC 368 : 1991 SCC (L&S) 51] , *Union of India v. Sudhir Kumar Jaiswal* [(1994) 4 SCC 212 : 1994 SCC (L&S) 925 : (1994) 27 ATC 561] (vide SCC para

5), *Ramrao v. All India Backward Class Bank Employees Welfare Assn.* [(2004) 2 SCC 76 : 2004 SCC (L&S) 337] (vide SCC para 31), *University Grants Commission v. Sadhana Chaudhary* [(1996) 10 SCC 536 : 1996 SCC (L&S) 1431] , 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. Still further, in **State of Rajasthan vs. Amrit Lal Gandhi**, the cut off date for introducing pension scheme was upheld on the ground that the State is well within its right to decide the cut off date on the basis of its paying capacity. Then, there are two recent decisions. Learned counsel representing the petitioners relies on **2020 (14) SCC 625 (All Manipur Pensioners Association vs. State of Manipur)** in which a Division Bench after relying upon D.S.Nakara (supra) held that the cut off date for grant of revised pension is arbitrary. However, the same Hon’ble Judge authored another judgment in **Himchal Road Transport Corporation vs. Himachal Road Transport Retired Employees Union** **2021 SCC Online SC 127** in which it has been declared that the Government is well within its right to prescribe a cut off date while reversing the judgment of the High Court.

10. Keeping in view the aforesaid position, the question which

arises is 'whether the cut off date prescribed by the Government for prescribing the method of calculation of the pension from the date of issuance of instructions i.e 12.10.2010 is correct or not'?

11. With regard to the first argument of the learned counsel representing the petitioner, it may be noted that acceptance of the recommendations of University Grants Commission by the Ministry of Human Resource Development, Government of India, does not confer any right on the petitioners to claim that the method of calculation of pension should only be on the basis of the last pay drawn. It may be binding on the Central Government, however, it does not bind the State.

12. With regard to the second argument, it may be noted that the Government has ultimately taken a conscious decision to adopt a cut off date. Hence, the recommendations cannot supersede the final decision. Similar is the position with regard to next argument under clause 3.

13. As regards the contention no. 4, it may be noted that the teachers of the private aided colleges cannot claim parity with Government employees. Their service conditions as well as method of recruitment are different. The teachers of private aided colleges hold non-transferrable posts and their age of retirement is 60 years whereas it is 58 years in case of Government employees and they are subject to transfer throughout the State. Still further, the teachers of private aided colleges do not have the protection as provided under Article 311 of the Constitution of India whereas it is applicable to the Government employees. Still further, this Bench while deciding the case of teachers and employees in privately aided colleges/schools in **CWP-11686-2004** titled as '**Haryana State Adhyapak Sangh vs. State of Haryana and**

others decided on 05.05.2021 held that the employees falling in both these categories are different and they do not form a homogenous class.

14. With reference to argument no.6, it may be noted that the final decision has been taken by the Government and therefore, any circular issued prior thereto gets superseded.

15. With regard to argument no.6, it may be noted that the Hon'ble Division Bench has dismissed the writ petition of the petitioners who had claimed the benefit of full pension on completion of 28 years of service. Whereas, as per revised Pension Rules 2009, which came into effect on 17.04.2009, the employees were held entitled to full pension on completion of 33 years of their qualifying service. In other words, the cut off date prescribed by the Government was upheld.

16. As regards argument noted under item no.7, it may be noted that in the aforesaid case, the petitioners have claimed parity with the Government employees for the purpose of entitlement of full pension on completion of 28 years service. The petitioners in the aforesaid writ petition had retired between 30.09.2009 to 31.07.2010.

Still further, with utmost regard, the attention of the Bench was not drawn to the various judgments of the Hon'ble Supreme Court which have been noticed above. Still further, the issue which needs adjudication in the present case is different.

17. With regard to first two arguments under item no.9, it may be noted that Annexure P-15 is a communication dated 07.11.2016 vide which the Principal Secretary to the Government of Haryana, has issued clarification on a number of questions received. From the reading of the aforesaid communication, it is not possible to conclude that the

Government has changed its stand or has taken conscious decision to grant the benefit of calculation of pension at 50% of the last pay drawn instead of the previous method of calculating 50% of the average pay of last 10 months. Similar is the position with regard to document Annexure P-11 referred to in contention no.10. With reference to the argument of grant of dearness allowance to teachers of aided affiliated colleges by the Government, it may be noted that it is a decision of the Government and the petitioners herein are not claiming Dearness Allowance. On the basis of the decision dated 11.05.2006, it is not possible to conclude that the teachers of the aided affiliated colleges have been brought at par with Government employees for all purposes. As regards, argument under item no.12 it may be noted that a cut off date has been adopted for the purpose of method of calculation of pension. For the same purpose, the retirees before the communication dated 12.10.2010, Annexure P-6, do not form a homogenous class with retirees on or after 12.10.2010 has been held by the Hon'ble Supreme Court in the judgments referred to above.

18. In the additional submissions, learned counsel has tried to distinguish the judgment passed in Haryana State Adhyapak Sangh's case (supra). It may be noted here that the aforesaid judgment is on a different issue, therefore the argument of the learned counsel for the petitioners in additional submission is correct, however, that itself does not result in accepting the plea of the petitioners.

19. In the next submission, learned counsel has made a reference to various documents have been placed on file as Annexure P-19, wherein the pension has been calculated. Such communications do

not result in superseding a conscious decision of the Government.

20. Next argument is again with reference to judgment Annexure P-12, which has already been examined.

21. With regard to the last submission, it may be noted that no doubt the Government of Haryana has accepted the recommendation for grant of pension and family pension to the employees of Non Government Aided Colleges, however, the Government has in its own wisdom has decided to provide a cut off date for the purpose of method of calculation of pension. The Government in reply has taken a stand that such decision has to be taken in view of the financial implications involved. The Hon'ble Supreme Court has already held that financial implications is a good ground to provide for cut off date.

22. Still further, as noticed above, the employees of the private aided colleges was for the first time provided pension in the year 2009. The Government extended this concession in order to grant benefit to the employees. In absence of the 1999 Rules, the petitioners and the other identically situated employee would not have been entitled to pension at all. The petitioners are not the employees of Government. They are entitled to pension only on account of the Rules framed. In the year 1999, the Government made calculations on the basis of amount available towards employer's share in the Contributory Provident Fund before notifying the Pension Rules, 1999. Hence, the petitioners cannot claim the benefit beyond the provisions of the Rules.

23. Still further the decision of the Government falls in the domain of the policy decision and unless it proved to be arbitrary or whimsical, the court in exercise of its power of judicial review is not

expected to interfere.

24. Keeping in view the aforesaid discussion, no ground to issue the writ, as prayed for, is made out.

25. Hence, dismissed.

25.05.2021 (ANIL KSHETARPAL)
rekha JUDGE

Whether speaking/reasoned Yes /No
Whether Reportable Yes / No