

IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH AT NEW DELHI

07.

O. A. No. 106 of 2009

Wing Commander (Retd.) V.S. TomarPetitioner

Versus

Union of India & Ors.Respondents

For petitioner: Petitioner in person.

For respondents: Mr. Ankur Chhibber, Advocate.

With O. A. No. 76 of 2011

Sqn. Ldr. (Retd.) S.L. DangiPetitioner

Versus

Union of India & Ors.Respondents

For petitioner: Mr. S.M. Dalal, Advocate.

For respondents: Mr. Ankur Chhibber, Advocate.

With O. A. No. 24 of 2011

With M.A. No. 248 of 2011

Hony Lt. (Retd.) B. KumarPetitioner

Versus

Union of India & Ors.Respondents

For petitioner: Mr. S.M. Dalal, Advocate.

For respondents: Mr. Ajai Bhalla, Advocate.

CORAM:

HON'BLE MR. JUSTICE A.K. MATHUR, CHAIRPERSON.

HON'BLE LT. GEN. S.S. DHILLON, MEMBER.

ORDER
07.12.2011

By Chairperson:-

1. All these three matters involve identical questions of law and therefore they are being disposed of by common order. For convenient disposal of all

the three cases, the facts in the case of **Wing Commander (Retd.) V.S. Tomar v. Union of India & Ors** are taken into consideration.

2. Petitioner by this petition has prayed that para 5 of the Government of India/Ministry of Defence letter dated 11th November 2008 be declared as arbitrary and discriminatory which links grant of full pension on completion of 33 years of qualifying service and substituting it with the retiring pension of commissioned officers retiring/invalided out on or after 1st January 2006 as stipulated in para 4 of Government of India/Ministry of Defence letter No. 17(4)/2008/(2)/D (Pension/Policy) dated 30th October 2009 which grants full pension calculated at 50% of emoluments last drawn or average of reckonable emoluments during the last ten months whichever is more beneficial. Re-fix the notional pay of pre 2006 retiree Wing Commander in PB-4 which a Wing Commander of today would reach on completion of 20 years of service, thereafter 50% of the same shall be arrived at by adding Grade Pay and Military Service Pay ('MSP') for calculation of his pension without any pro rata basis. Lastly he has prayed that grade pay of Wing Commander may be enhanced from Rs. 8,000/- to Rs. 8,700/- by suitably amending SAFI/2S/08.

3. Petitioner was first commissioned in Indian Air Force on 16th June 1976 and he retired as Wing Commander on 31st December 1997. It is also alleged that the 4th Central Pay Commission had introduced integrated pay scale for officers from the rank of Pilot Officer to Air Commodore i.e. 2300-100-3900-EB-150-5100 with varying rank pays for the rank of Flt. Lt. to Air Cmde. Petitioner was placed in pay scale of 13,500-400-17,100 on 1st June 1997

with a rank pay of Rs. 1200 per month on being promoted to the rank of Wing Commander (Time Scale). It is also alleged that because of the large scale resentment over the implementation of the 6th Pay Commission in Defence Services, the Government of India/MoD appointed a Committee in December 1997 headed by the then Defence Secretary Sh. Ajit Kumar to look into the various anomalies and make suitable recommendations for removal of these anomalies. Then a Group of Officers headed by Cabinet Secretary was constituted in May 1998 to collate and give their recommendations on Ajit Kumar Committee. The Government of India accepted the recommendations of Group of Officers report in respect of Squadron Leader and its equivalents and issued two letters to implement the same by issuing a letter dated 14th January 2000 which reduced the length of service from 11 years to 10 years for promotion to the rank of Squadron Leader. The Government of India issued another letter whereby increasing the starting pay of Squadron Leader from Rs. 11,600 to Rs. 11,925. That the Defence Services had been clamouring for parity with their counterparts in the pay scale of Squadron Leader and equivalents with Central Para-Military Forces (Comdt.) and IPS officers (Non Functional Senior Grade) in the 14th year of service. The grievance was that the pay scale of Rs. 14,300-400-18,300 of a civilian in 5th Central Pay Commission has been placed in PB-4 by 6th Central Pay Commission and has been granted grade pay of Rs. 8,700/- while a Wing Commander in the pay scale of Rs. 13,500-400-17,100 has been granted grade pay of Rs. 8,000.

4. The 6th Pay Commission has reduced the number of pay bands to four only. The Central Government employees having pay band of Rs. 14,300-

400-18,100 have been granted grade pay of Rs. 8,700/- per month. Initially, a Wing Commander having starting salary of Rs. 14,700/15,100 were placed in PB-3 by 6th Central Pay Commission with a grade pay of Rs. 7,600 only in the month of May 2009 an amendment to the SAFI/2S/08 has been issued and Wing Commander has been placed in PB-4 with a grade pay of Rs. 8,000/- only. That the pension of pre-2006 retirees as per the impugned order is to be fixed at 50% of minimum of starting salary of PB-4+Grade Pay+ Military Service Pay. The amount so arrived at is to be pro rata reduced if the service rendered by the retiree is less than 33 years while for the post 2006 retiree, the pension is to be fixed at 50% of the sum of Basic Pay + Grade + Military Service Pay last drawn by post 2006 retiree. That after acceptance and implementations of Ajay Vikram Singh's report the promotion to the rank of Wing Commander has become time bound and it is 13 years of Commissioned Service with effect from 16th December 2004 while prior to that selection to the rank of Wing Commander was in the 19th years of commissioned service and 20/21 years of commissioned service for promotion to the rank of Wing Commander (Time Scale).

5. In this background the Petitioner has raised three questions for our consideration. One that the distinction made in the Notification of the implementation of 6th PC dated 11th November 2008 i.e. para 5 creates a discrimination between pre and post 2006 retirees and therefore it would be more relevant to reproduce here para 5 of the implementation of 6th PC which is the basic challenge in this petition. Para 5 reads as under:

"5. The consolidation of pension will further be subject to the provision that the consolidated pension, in no case shall be lower than fifty percent of the minimum of the pay in the pay band plus the grade pay corresponding to the pre revised scale from which the pensioner had retired/discharged including Military Service Pay and 'X' Group pay where applicable. For example, if a pensioner had retired in the pre-revised scale of pay of Rs. 6600-170-9320, the corresponding pay band being 9300-34800 and the corresponding grade pay and Military Service Pay being Rs. 4,600/- and Rs. 2,000/- respectively, his minimum guaranteed pension would be 50% of Rs. 9300 + Rs. 4600 + Rs. 2000 i.e. Rs. 7950 for 33 years of qualifying service. The pension so calculated will be reduced pro-rata, where the pensioner had less than the maximum required service of 33 years for full pension consolidated as per Para 4.1 above is higher than the pension calculated in the manner indicated above, the same (higher consolidated pension) will be treated as Basic Pension with effect from 1.1.2006.

The consolidation of family pension will be subject to the provision that the consolidated family pension, in no case, shall be lower than thirty percent of the sum of the minimum of the pay in the pay band and the grade pay thereon corresponding to the pre-revised pay scale in which the pensioner/deceased Armed Force personnel had retired/died including Military Service Pay and 'X' Group Pay where applicable. In case the family pension consolidated as per Para 4.1 above is higher than the family pension calculated in the manner indicated above, the same (higher consolidated family pension) will be treated as Basic Family Pension with effect from 1.1.2006."

6. The submission of Petitioner appearing in person is that the distinction between pre and post which has been made is an artificial one and in the case of **Union of India and Anr. v. SPS Vains (Retd.) and Ors (2008) 9 SCC 125** the Hon'ble Supreme Court has struck down the distinction of the persons in matter of pension between pre and post. Similarly he has also invited our attention to another decision of the Hon'ble Supreme Court in the case of **Daya Nand v. State of Haryana (2011) 2 SCC (Labour & Services) 224** wherein also for grant of disability pension distinction of para 4 has been found to be bad. The next submission is that once the distinction between pre and post is gone then his pay should be fixed up as given in the chart annexed with letter dated 21st April 2009 by which earlier anomaly treating the Wing Commander in the PB-3 was removed and they were brought into PB-4 and the revised pay scale was as per the Government Notification which has been fixed at Rs. 38,530/- should be taken as a minimum and on that basis his pension should be worked out. Lastly he has submitted that the grade pay should also be fixed to Rs.8,700/- and he has tried to emphasise with reference to the previous history of the Civil Services vis-a-vis the services of IPS and pointed out that persons from same pay band are getting Rs.8,700 as grade pay and therefore he should also be given the same grade pay of Rs. 8,700.

7. A reply has been filed by the Respondents and Respondents have pointed out that the distinction between pre and post has been upheld by the Hon'ble Supreme Court in various decisions and submitted that the case of **Union of India and Anr. v. SPS Vains (Retd.) and Ors.** is distinguishable and pointed out that the pre and post distinction has been already upheld in

various previous cases also. It is also pointed out by learned counsel for the Respondents on instructions that when a Squadron Leader is promoted to the rank of Wing Commander he is fixed in the minimum of PB-4 at Rs. 37,400. He has also pointed out that so far as grade pay of Rs. 8,700/- is concerned that is being paid to the Group Captain and therefore it is not possible to disturb the scheme of things which has been worked out.

8. We have heard both the parties and perused the record.

9. The first and foremost question is that whether the Government Order dated 11th November 2008 which makes a distinction between pre and post retirees for pension is to be sustained or not. In this connection Petitioner appearing in person has invited our attention to the decision of the Hon'ble Supreme Court in **Union of India and Anr. v. SPS Vains (Retd.) and Ors** wherein it has been observed with reference to the case of **D.S. Nakara 1983 (1) SCC 305** and observed in para 13 which reads as under:

"13. The other facet of Art. 14 which must be remembered is that it eschews arbitrariness in any form. Article 14 has, therefore, not to be held identical with the doctrine of classification. As was noticed in **Maneka Gandhi's** case in the earliest stages of evolution of the Constitutional law, Art. 14 came to be identified with the doctrine of classification because the view taken was that Art. 14 forbids discrimination and there will be no discrimination where the classification making the differentia fulfils the aforementioned two conditions. However, in **EP. Royappa v. State of Tamil Nadu**, it was held that the basic principle which informs both Arts. 14 and 16 is equality and inhibition against discrimination. This Court further observed as under:

"From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

Though this was a case with reference to 5th Pay Commission their Lordships has concluded that the Major General and its equivalent ranks in two other wings of the Defence Services after revision of pay scale with effect from 1st January 1996 and thereafter to compute their pensionary benefits. The distinction between pre and post 1st January 1996 in matter of pension was struck down.

10. This case was followed by us in two decisions delivered in the case of **Lt. Col. P.K. Kapur (Retd.) v. Union of India (O.A. No. 139 of 2009 decided on 30th June 2010)** and in the case of **Sq. Ldr. Vinod Kumkar Jain & Ors. v. Union of India & Ors. (O.A. No. 270 of 2010 decided on 14th September 2010)**. We have been told that the decision in the case of **Sq. Ldr. Vinod Kumkar Jain & Ors. v. Union of India & Ors.** has been taken to the Hon'ble Apex Court and it is pending there. So far as decision in the case of **Lt. Col. P.K. Kapur (Retd.) v. Union of India** is concerned we don't know whether that matter has been taken to the Hon'ble Apex Court or not. Be that as it may, the fact remains that we have followed the decision given in **SPS Vains** (supra) which has followed **D.S. Nakara** being later in point of time. Learned

counsel for the Respondents has pointed out that after the decision in **D.S. Nakara** there are various judgment in which the ratio laid down in **D.S. Nakara** has been watered down to a considerable extent and in this connection learned counsel for the Respondents has invited our attention to another decision of Constitutional Bench given in the case of **Indian Ex-Services League and Ors. v. Union of India (1991) 2 SCC 104**. In this case their Lordships has considered the ratio in **Nakara's** case and that has been explained and it has been held that "the Court's decision in **Nakara's** case has to be read as one of limited application and its ambit cannot be enlarged to cover all claims made by the pension retirees or a demand for an identical amount of pension to every retiree from the same rank irrespective of the date of retirement, even though the reckonable emoluments for the purpose of computation of their pension be different." Their Lordships has further discussed the ratio of **Nakara's** case in para 12 which reads as under:

"12. The liberalised pension scheme in the context of which the decision was rendered in **Nakara** provided for computation of pension according to a more liberal formula under which "average emoluments" were determined with reference to the last ten months' salary instead of 36 months' salary provided earlier yielding a higher average, coupled with a slab system and raising the ceiling limit for pension. This Court held that where the mode of computation of pension is liberalised from a specified date, its benefit must be given not merely to retirees subsequent to that date but also to earlier existing retirees irrespective of their date of retirement even though the earlier retirees would not be entitled to any arrears prior to the specified date on the basis of the revised computation made according to the liberalised formula. For the purpose of such a scheme all existing retirees irrespective of the date of their

retirement, were held to constitute one class, any further division within that class being impermissible. According to that decision, the pension of all earlier retirees was to be recomputed as on the specified date in accordance with the liberalised formula of computation on the basis of the average emoluments of each retiree payable on his date of retirement. For this purpose there was no revision of the emoluments of the earlier retirees under the scheme. It was clearly stated that 'if the pensioners from a class, their computation cannot be by different formula affording unequal treatment solely on the ground that some retired earlier and some retired later'. This according to us is the decision in **Nakara** and no more."

11. Thereafter the decision in **D.S. Nakara** came up for consideration in various decisions of the Hon'ble Supreme Court and this was considered in another case by the Hon'ble Supreme Court in **Union of India v. S.R. Dhingra and Ors. (2008) 2 SCC 229**. In this case, I (Mathur, J.) was also party to the judgment and after considering the other judgments having a bearing on the subject we concluded in para 25 as under:

"25. It is well settled that when two sets of employees of the same rank retire at different points 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 homogeneous group. Hence Article 14 has no application. The employer can validly fix a cut-off date for introducing any new pension/retirement scheme or for discontinuance of any existing scheme. What is discriminatory is introduction of a benefit retrospectively (or prospectively) fixing a cut-off date arbitrarily thereby dividing a single homogenous class of pensioners into two groups and subjecting them to different

treatment (vide Col B.J. Akkara (Retd) vs. Govt. of India, (2006) 11 SCC 709, D.S. Nakara vs. Union of India (1983) 1 SCC 305, Krishna Kumar vs. Union of India (1990) 4 SCC 207, Indian Ex-Services League vs. Union of India (1991) 2 SCC 104, V. Kasturi vs. Managing Director, State Bank of India (1998) 8 SCC 30 and Union of India vs. Dr. Vijayapurapu Subbayamma (2000) 7 SCC 662)."

12. The Bench considered all these judgements and the judgment was delivered by Hon'ble Mr. Justice Markandey Katju, J (as he then was). Thereafter same issue came up in the case of **SPS Vains** wherein Hon'ble Katju, J. after referring to **D.S. Nakara** concluded that cut off date was fixed in matter of pension is in rank of Major Generals is arbitrary and violative of Article 14 of Constitution and struck down. Therefore we have no option but to follow the later judgment in point of time though our attention was invited to two more earlier judgments of Apex Court. In the case of **State of Punjab & Ors. v. Amar Nath Goyal & Ors. (2005) 6 SCC 754** their Lordships has accepted the fixation of cut off date as valid with reference to recommendations of Pay Commission implementation in the State of Punjab. Their Lordships has occasion to consider all the cases on the subject in which the ratio laid down in the case of **D.S. Nakara** was watered down to a greater extent. In another case of **All India Reserve Bank Retired Officers Association & Ors. v. Union of India & Anr. 1992 Supp (1) SCC 664** a similar question was considered and their Lordships upheld the fixation of cut off date, with reference to all earlier judgments of Apex Court including **D.S. Nakara's** case. However in face of subsequent judgment of **SPS Vains** which is later in point of time in which **D.S. Nakara's** ratio has been resurrected therefore we have no choice but to follow this judgment. This is

law of land under Article 141 of Constitution and no Courts be High Courts or Tribunals can ignore it. Therefore, we have to honour and accept the latest decision on the subject. It is only when a larger Bench considers the matter and gives a decision then only the problem of dissenting judgment can be solved but not by a Tribunal or a High Court. Therefore we have no option but to accept the **SPS Vains** judgment and declare that Para 5 of the Notification dated 11th November 2008 has to be struck down being discriminatory and violative of Article 14 of the Constitution.

13. Next question that comes up for consideration is the fixation of the Petitioner in the pay scale of Rs. 38,530/- or Rs. 37,400. Learned counsel for the Respondents has after instructions submitted that whenever a Squadron Leader is promoted his pay scale is revised i.e. he is fixed to PB-4 in the minimum of the scale i.e. Rs. 37,400. Therefore Petitioner who has to be fixed in the minimum of the pay scale of PB-4, he will be entitled to be fixed at Rs. 37,400. Therefore this contention of the Petitioner cannot be accepted. Lastly, the Petitioner appearing in person submitted that he should be given the grade pay of Rs.8,700/- and in this connection he has invited our attention to a historical background that prior to 4th CPC a person with the rank of Wing Commander was always treated equal to the Commandant i.e. equivalent to IPS Officer but gradually they have been brought down and now he is being paid Rs. 8,700 as grade pay whereas Petitioner and like him are getting Rs. 8,000/- only in PB-4. Learned counsel for the Respondents has submitted that the grade pay of Rs. 8,700/- has been fixed for the Group Captain and if Rs. 8,700/- is to be paid on equation with that to the Civil Services officers then it will disturb the whole structure. We do not think we can draw any kind

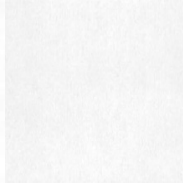
of equation with any other services like IPS or other services for that matter. The Civil Services are governed by their own orders and they are class apart and, therefore, no parity can be sought from the officers of Civil Services as their pay scales are fixed separately. Therefore drawing analogy from Civil Services is totally misplaced in the present case. Petitioner has been given grade pay of Rs.8,000/- which is given to a person in PB-4. Hence, we do not find any merit to accede to the request of the Petitioner.

14. Therefore the petition is allowed in part and para 5 of the order dated 11th November 2008 is struck down. Petitioner's minimum pay will be treated to be Rs. 37,400/- and accordingly his fixation should be done from the date of issuance of the notification. Rest of the two prayers have been turned down.

15. The other two petitions **O.A. No. 76 of 2011 (Sqn. Ldr. (Retd.) S.L. Dangi v. Union of India & Ors.)** and **O.A. No. 24 of 2011 (Hony Lt. (Retd.) B. Kumar v. Union of India & Ors.)** are accordingly disposed of in the light of the aforesaid decision.



A.K. MATHUR
(Chairperson)



S.S. DHILLON
(Member)

New Delhi
December 07, 2011
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