

The Accounts Officer (Pension Sanction) Vs Mariyamma

Court: High Court Of Kerala

Date of Decision: March 24, 2010

Acts Referred: Kerala Service Rules, 1958 " Rule 118(2), 250, 5, 7, 71

Citation: (2010) 2 ILR (Ker) 919 : (2010) 2 KLT 241

Hon'ble Judges: P.N. Ravindran, J; K. Balakrishnan Nair, J

Bench: Division Bench

Advocate: Ashok M. Cherian, for the Appellant; K.P. Dandapani and Millu Dandapani, for the Respondent

Final Decision: Allowed

Judgement

P.N. Ravindran, J.

The appellants are the respondents in W.P.(C) No. 16858 of 2005. The respondent is the petitioner therein. The short

question that arises for consideration in this writ appeal is whether the married daughter of a pensioner, whose marriage is subsisting, is entitled to

payment of contributory family pension u/s VII of Part III of the K.S.R. The brief facts of the case are as follows.

2. The respondent is the daughter of late P.V. Joseph, who was an employee of the Kerala State Electricity Board. He retired from service in the

year 1985. Upon retirement he was paid pension and other terminal benefits. He expired in the year 1997 and thereupon family pension was paid

to his wife and the petitioner's mother Smt. Rebeka Joseph. She passed away on 27.11.2004. The petitioner thereupon moved the Kerala State

Electricity Board claiming payment of family pension by submitting an application dated 17.12.2004. The Accounts Officer in the office of the

Chief Engineer (HRM) declined the said request holding that as the petitioner is a married daughter she is not entitled to get family pension. Ext.P4

letter dated 1.3.2005 was thereupon sent to the Executive Engineer, the second respondent in the writ petition, with copy to the petitioner. The

Executive Engineer was also directed to inform the petitioner accordingly. The Executive Engineer sent Ext.P3 letter dated 23.3.2005 to the

petitioner informing her that she is not eligible for family pension, she being a married daughter of the pensioner. The petitioner, therefore, filed

W.P. (C) No. 16858 of 2005 in this Court seeking the following reliefs:

i) Issue a writ of mandamus or any other appropriate writ, order or direction, commanding the respondents to grant Family Pension to the

petitioner with effect from the date of death of her mother, i.e. 25.11.2004.

ii) call for the records leading to Ext.P3 and P4 and issue a writ of certiorari or any other appropriate writ, order or direction, setting aside the

same,

iii) declare that the petitioner is entitled for Family Pension, as she is widow within the meaning of Rule 90 of K.S.R. Part III.

3. The petitioner contended that the grant of family pension being a welfare measure to wade out the family members of the deceased pensioner

from penury, the petitioner, a daughter who was given in marriage but was deserted by her husband within a few days of the marriage, should be

treated as an unmarried or divorced or widowed daughter. She contended that though she was married to Sri. Jacob in 1971, after a few days of

the marriage he deserted her. She also contended that ever since her husband deserted her, she was depending on her father and later on her

mother late Rebeka Joseph, for her sustenance.

4. The appellants resisted the Writ Petition by filing a counter affidavit. It was contended that as the petitioner was admittedly married to Sri. Jacob

and the marriage has not been dissolved by a decree of divorce granted by a competent court, the petitioner cannot claim that she is an unmarried

or divorced daughter of the pensioner. Relying on Rule 90(6)(e) of Part III K.S.R. it was contended that unmarried daughters above the age of 25

years alone are entitled to family pension. By judgment delivered on 22.12.2009 the learned Single Judge held that the petitioner should be treated

as a divorced or unmarried daughter and family pension be paid to her. In that view of the matter Exts.P3 and P4 were quashed and the appellants

were directed to pay family pension to the petitioner prospectively. Aggrieved thereby, the appellants have filed this Writ Appeal.

5. We heard Sri. Ashok M. Cherian, the learned Standing Counsel appearing for the appellants and Sri. K.P. Dandapani, the learned Senior

Advocate appearing for the respondent. We have also considered the pleadings and materials on record. The fact that the petitioner had married

Sri. Jacob is not in dispute. Though the petitioner claims and Ext.P1 indicates that ever since 1971 the petitioner is residing separately from her

husband, it is not in dispute that the petitioner was given in marriage to Sri Jacob. Then the short question is whether under Rule 90(6) of Part III

K.S.R. the petitioner is entitled to payment of family pension. The learned single Judge has relied on Rule 71 of Part III K.S.R. to hold that the

petitioner has to be treated as an unmarried or divorced daughter of the pensioner for the reason that her husband deserted her shortly after

marriage and therefore she is entitled to payment of family pension. Rule 71 of Part III K.S.R. which defines the term "family", reads as follows:

71. "Family" for the purpose of this Section will include the following relatives of the employee:

- (a) Wife, in the case of a male employee;
- (b) Husband, in the case of a female employee;
- (c) Sons;
- (d) Unmarried/divorced/widowed daughters;
- (e) Brothers below the age of 18 years and unmarried or widowed or divorced sisters.
- (f) Father;
- (g) Mother;
- (h) Married daughters; and
- (i) Children of a pre-deceased son.

6. Rules 80 to 89 of Part III K.S.R., both inclusive, deal with payment of non-contributory family pension. Rule 83 thereof stipulates that family,

for the purpose of payment of non-contributory family pension, will be as defined in Rule 71 except items (h) and (i). If what is claimed is non-

contributory family pension, an unmarried or divorced or widowed daughter of the pensioner will fall within the definition of the term "family".

Though married daughters are also included within the definition of the term "family" in Rule 71, in view of the stipulation in Rule 83 married

daughters are not entitled to non- contributory family pension. Further, payment of non-contributory family pension will not extend beyond a period

of five years from the date of death of the employee. In the instant case, the petitioner's mother (wife of the pensioner) was being paid contributory

family pension u/s VII of Part III K.S.R So, the definition of the term ""family"" in Rule 90(6) is relevant in this case. Rule 90(6) in Section VII of

Part III K.S.R. reads as follows:

90(6) "Family" for purposes of those rules, means the following relatives of the employee, namely:

- (a) Wife, in the case of male employee.
- (b) Husband, in the case of female employee.
- (c) Eldest eligible son/daughter (in the order of seniority) till marriage or till attaining the age of 25 years or till he/she gets employed, whichever is earlier.
- (d) Children suffering from Physical/mental disorder or disability.
- (e) Unmarried daughters above 25 years.
- (f) Son/daughter adopted legally before retirement.

(g) Parents (in equal shares).

(h) Judicially separated wife.

(i) Judicially separated husband.

(j) Disabled divorced daughters.

(k) Widowed disabled daughters.

Note 1. If there are no surviving members of the family as in items (a) to (e) above, Government may sanction family pension to the members,

referred to in items (f) and (g) subject to the conditions prescribed in Sub-rule 6A. If the members referred to in items (a) to (g) are not surviving,

the family pension may be paid to the member specified in items (h) or (i) as the case may be, provided the employee has included the details of

such member also in Form 5A. If judicially separated wife/husband is not included in the details of family furnished in Form 5A, family pension is

not payable to judicially separated wife/husband.

Note 2. Legal marriage after retirement shall also be considered for the purpose of these rules. In such cases, the retired officer shall file a revised

Form 5A before the Accountant General after marriage. In cases where Form 5A has not been filed due to death of the pensioner, the family

pension will be sanctioned after observing the procedure laid down in Rule 118(2) Part III, Kerala Service Rules. In the case of second marriage

after retirement, necessary certificates/documents from the authorities concerned duly certified by the Notary Public of the locality to the effect that

the spouse of the first marriage is not alive and the marriage of the deceased Government servant with the applicant was lawful and legally valid one

shall also be produced.

Note 3. The terms "sons" and "daughters" occurring in clauses (c) and (d) of Sub-rule (6) include posthumous sons and posthumous daughters.

Note 4. In the case of disabled divorced daughter of a deceased employee/ pensioner whose marriage has been legally annulled, family pension is

admissible from the date on which her marriage stands annulled. In the case of widowed disabled daughter of a deceased employee/pensioner,

family pension is admissible from the date of death of her husband.

As per item (c) in Rule 90(6) of Part III K.S.R., the eldest eligible child was included in the definition of the term "family". Item (c) was substituted

by GO.(P) No. 229/2008/Fin. dated 31.5.2008 with effect from 18.10.2004. As per the amended entry, the eldest eligible son/daughter (in the

order of seniority) till marriage or till attaining the age of 25 years or till he/she gets employed, whichever is earlier, alone is treated as the member

of the family eligible for payment of family pension. Therefore, going by the said entry, a daughter will be treated as a member of the family for the

purpose of payment of family pension only till her marriage or till she attains the age of 25 years or till she gets employment, whichever is earlier. As

per item (e) unmarried daughters above 25 years of age are also included within the definition of the term "family". Therefore, the petitioner would

have become entitled to receive contributory family pension only if she had remained unmarried.

7. As per items (e), (j) and (k) of Sub-rule (6) of Rule 90 only unmarried daughters above 25 years of age or disabled divorced

daughters/widowed disabled daughters of the employee are eligible for payment of family pension. The petitioner was admittedly given in marriage

to Sri. Jacob even while her father was alive. Therefore, she is not an unmarried daughter of the employee. She does not also suffer from any

physical or mental disorder or disability. The marriage between her and Sri. Jacob has not been dissolved. Therefore, she cannot be treated as a

disabled divorced daughter. Her husband is alive and therefore, she cannot be treated as a disabled widowed daughter. In our view, on the terms

of Rule 90(6) of Part III K.S.R., the petitioner cannot, therefore, be said to be a member of the family of the employee for the purpose of payment

of family pension.

8. As rightly contended by the appellants as the rules do not contemplate payment of family pension except to specified categories of persons who

come within the meaning of the term ""family"" as defined in the rules, this Court cannot add to the definition of the term ""family"" on grounds of

sympathy and direct payment of family pension to a person who is not included in the definition of the term ""family"". We are, therefore, of the

considered opinion that the direction issued by the learned single Judge to pay family pension to the petitioner by treating her as a

divorced/unmarried daughter of the employee cannot be sustained.

9. Rule 90(6) of Part III K.S.R. as it now stands was substituted with effect from 2.9.8.2001 by GO.(P) No. 344/2005/Fin. Dated 25.7.2005.

Rule 90(6) of Part III K.S.R. sets out the order of preference for payment of family pension. The spouse and minor children including legally

adopted son or daughter, adopted before retirement, are included in the definition of the term "family" as they are obviously dependents of the

employee. Married daughters are excluded for the reason that after marriage there is no dependency on the father or mother. Likewise, parents of

the employee can also be rightly termed as dependents of the employee. Judicially separated wife or husband of the employee continues to be

his/her spouse until divorce. Therefore, they are also treated as a dependant of the employee. But when it comes to divorced or widowed

daughters, only disabled divorced/disabled widowed daughters are treated as members of the family. In other words, a divorced or widowed

daughter is treated as a member of the family only if by reason of her disability, after the loss of her husband, she has to again depend on her father

or mother, as the case may be, for her sustenance. Thus, it is evident from the scheme for payment of family pension that persons eligible for

payment of family pension have been identified based on their dependency on the employee.

10. In the instant case, though the petitioner was given in marriage even during the life time of her father, her husband deserted her in the year 1971

and according to her, she was depending on her father till his death in 1997 and on her mother till her death on 27.11.2004. Ext.P1 certificate

issued by the Vicar of St. Thomas Evangelical Church discloses that the petitioner is not residing with her husband since 19.8.1971 and that the

petitioner has not re-married. Ext.P2 certificate dated 18.12.2004 issued by the Village Officer, Vellathooval Village, where the petitioner is

presently residing, also discloses that the petitioner has not re-married. The petitioner has positively averred in the Writ Petition that ever since

1971 she was depending on her parents for her sustenance. The respondents have rejected the claim of the petitioner for family pension on the

short ground that she is not an unmarried daughter. The petitioner is stated to be 78 years old. With the death of her parents she is put to

considerable hardship, it is stated. However, in view of the stipulations in Rule 90(6) of Part III K.S.R., the petitioner cannot claim family pension

as per rules.

11. Rule 7 of Part I K.S.R. empowers the Government to dispense with or relax the requirement of any rule in the Kerala Service Rules. The

Kerala State Electricity Board has adopted the Kerala Service Rules and therefore, the Board can exercise the power of the Government to relax

the requirements of the rules where the operation of any rule in the Kerala Service Rules causes undue hardship in any particular case. Rule 7 of

Part I K.S.R. reads as follows:

7. Where Government are satisfied that the operation of any rule under these rules causes undue hardship in any particular case, the Government

may dispense with or relax the requirements of that rule to such extent and subject to such conditions as they may consider necessary for dealing

with the case in a just and equitable manner.

Rule 7 of Part I K.S.R. empowers the Kerala State Electricity Board to dispense with or relax the requirements of Rule 90 of Part III K.S.R. or of

any other rule in the K.S.R., if the Board is satisfied that the operation of that rule causes undue hardship. The Board is empowered to dispense

with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a

just and equitable manner.

12. Though the learned Standing Counsel appearing for the Board contended that Rule 7 only confers a discretion on the Board and that the

Board cannot be compelled to exercise that discretion, we are of the opinion that the power conferred on the Board under Rule 7 referred to

above is a power coupled with a duty to act when the circumstances warranting the exercise of that power are shown to exist. A Division Bench of

this Court, to which one of us (K. Balakrishnan Nair, J) was a party, has explained the concept of "power coupled with duty" in Thankappan Nair

v. State of Kerala 2001 (3) KLT 855. The Division Bench in that case was considering the question whether a Police Constable, who was

dismissed from service for accepting Rs. 43/- as illegal gratification, was entitled to compassionate pension under Rule 5(a) of Part III K.S.R. Rule

5(a) of Part III K.S.R. reads as follows:

5. Misconduct or inefficiency:

(a) No pension may be granted to an employee dismissed or removed for misconduct, insolvency or inefficiency, but to employees so dismissed or

removed, compassionate allowances may be granted when they are deserving of special consideration, provided that the allowances granted to

any employee shall not exceed two-thirds of the pension which would have been admissible to him if he had retired on the date of dismissal or

removal.

The Division Bench in Thankappan Nair v. State of Kerala (supra) held as follows:

9. Apart from that, the power under Rule 5 is a power coupled with a duty to act when the circumstances warranting the exercise of that power

are shown to exist. Power is the capacity vested in an authority to affect the rights of others whereas the duty is an obligation to act in a particular

manner which creates a corresponding right in somebody else. The Supreme Court in its decision in Commissioner of Police, Bombay Vs.

Gordhandas Bhanji, has explained the concept of power coupled with a duty. The court was interpreting the rule:

The Commissioner shall have power in his absolute discretion at any time to cancel or suspend any licence granted under these rules.

10. The contention that the said rule only confers a discretion which the Commissioner need not exercise was dealt with by the Supreme Court in

the following manner:

It was objected as to this that there is no specific law which compels him to exercise the discretion. Rule 250 merely vests a discretion in him but

does not require him to exercise it. That is easily met by the observations of Earl Cairns L.C. in the House of Lords in *Julius v. Lord Bishop of*

Oxford (1880) 5 AC 214, observations which have our full and respectful concurrence:

There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something to the

conditions under which it is to be done, something to the title of the person or persons for whose benefit the power is to be exercised, which may

couple the power with a duty, and make it the duty of the person to whom the power is reposed, to exercise that power when called upon to do

so.

The discretion vested in the Commissioner of Police under Rule 250 has been conferred upon him for public reasons involving the convenience,

safety, morality and welfare of the public at large. An enabling power of this kind conferred for public reasons and for the public benefit is, in our

opinion, coupled with a duty to exercise it When the circumstances so demand. It is a duty which cannot be shirked or shelved nor it be evaded,

performance of it can be compelled u/s 45.

The said principle was reiterated by the Supreme Court in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, . The relevant portion of the

judgment is at paragraphs 12 and 13 which reads as follows:

If a statute invests a Public Officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority

in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of

authority are shown to exist. Even if the words used in the statute are prima facie enabling, the courts will readily infer a duty to exercise power

which is invested in aid of enforcement of a right - Public or private - of a citizen.

In the light of the above legal principle, the power conferred under Rule 5 is a power coupled with a duty to be exercised on an application made

by the appellant.

It was held that the power conferred under Rule 5 of Part III K.S.R. is a power coupled with a duty to exercise that power when the party

interested and having a right to apply moves in that behalf and the circumstances for exercise of that power are shown to exist.

13. Rule 7 of Part I K.S.R. empowers the Board to dispense with or relax the requirements of any rule in the K.S.R., if it causes undue hardship in

a particular case. As noticed by the Division Bench in *Thankappan Nair v. State of Kerala* (supra) power is the capacity vested in an authority to

affect the rights of others whereas duty is an obligation to act in a particular manner which creates a corresponding right in somebody else.

Therefore, if the petitioner is able to satisfy the Board that the operation of Rule 90 of Part III K.S.R. or of any other rule in the Kerala Service

Rules causes undue hardship to her, we are of the opinion that the Board is bound to exercise the power vested in it under Rule 7 of Part I, K.S.R.

We, therefore, hold that in the event of the petitioner moving an appropriate representation seeking relaxation of the rigour of Rule 90(6) of Part III

K.S.R., which stands in her way of getting family pension, the Board should consider, after due enquiry as to whether she was residing separately

from her husband ever since 1971 as claimed in the writ petition and was depending on her late parents for her sustenance and take an appropriate

decision thereon.

We, accordingly allow the Writ Appeal, reverse the judgment of the learned single Judge and dispose of the Writ Petition with a direction that in

the event of the petitioner filing an appropriate representation before the Secretary of the Kerala State Electricity Board within one month from

today setting out her claims and grievances and seeking payment of family pension, the Kerala State Electricity Board shall consider the same

exercising the power conferred on it under Rule 7 of Part I K.S.R. and take an appropriate decision thereon within three months from the date of

receipt of such a representation, after due enquiry and after affording the petitioner a reasonable opportunity of being heard.