(2001) 10 KL CK 0065

High Court Of Kerala

Case No: W.A. No. 2966 of 2000

Thankappan Nair		APPELLANT
	Vs	
State of Kerala		RESPONDENT

Date of Decision: Oct. 3, 2001

Citation: (2001) 3 ILR (Ker) 464

Hon'ble Judges: K.S. Radhakrishnan, J; K. Balakrishnan Nair, J

Bench: Division Bench

Advocate: T.P. Varghese, for the Appellant; Joseph Vettikkad, Government Pleader, for the Respondent

Judgement

K. Balakrishnan Nair, J.
The point that arises for consideration in this Appeal is whether a Government savant dismissed for a serious misconduct is eligible for compassionate pension under Rule 5 of Part II of Kerala Service Rules. The relevant facts of the case are as follows:

2. The appellant who was a police constable was dismissed from service on 4.10.1970 for accepting an illegal gratification of Rs. 43/-. At the time of dismissal, he had about eighteen years of service. The appellant submitted Ext. P1 representation dated 21.9.1999 praying that he may be granted compassionate pension. The grounds, according to the appellant, justifying the grant of compassionate pension were stated in Ext. P1. According to him, he is living in penury. He is having a family consisting of his wife and five children. His three sons are unemployed. His wife is suffering from cancer and is undergoing treatment at Regional Cancer Centre. He has incurred a huge debt for her treatment. He is also not keeping good health. On coming to know of the existence of the rule in the nature of Rule 5(a), he represented on 19.1.1998 praying for the grant of compassionate allowance. It was followed by Ext. P1 representation dated 21.9.1999.

3. The claim of the appellant was rejected by the first respondent Government by a communication dated 1.12.1999. The ground for rejection was that he was removed from service for the acceptance of illegal gratification. Therefore, his claim for compassionate

pension is rejected.

4. The appellant challenged Ext. P2 by filing OP No. 31025/2000 which was dismissed in limine by the learned Single Judge by the judgment under appeal, holding that there is no ground to interfere with the decision of the Government.

5. The rule which governs grant of compassionate allowance in Rule 5(a) which 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-third of the pension which would have been admissible to him if he had retired on the date of dismissal or removal".

6. A reading of the rule will show that persons dismissed or removed from service on the ground of misconduct are also eligible for compassionate allowance. Acceptance of illegal gratification is a misconduct and basing on the said misconduct, the appellant has been removed from service also. It is evident from the rule that persons like the appellant t=who are removed from service for misconduct are also eligible to receive compassionate allowance, provided other conditions are satisfied. The mere fact that he is removed from service for a misconduct will not result in his application being rejected at the threshold. Rule 5(a) is not meant for virtuous persons, but on the contrary, it is meant to ameliorate the conditions of sinners dismissed from service. The mere fact that his removal was due to a serious misconduct, appears to us not to conclude the issue. Many other circumstances may be relevant in deciding the claim for compassionate allowance. If an employee has amassed wealth by receiving bribe, his claim for compassionate allowance can be justifiably rejected on that ground alone. There may be cases where dismissal was for a solitary fall from virtue. In our social conditions, a punishment to an employee is in fact a punishment for his wife and children also. The circumstances pleaded by the appellant about health of his wife and the state of unemployment of his children may not be out of context in deciding the payment of compassionate allowances. The financial position can be got verified through the revenue officials. He is one who has served the Government about eighteen years. The Government while passing Ext. P2 order has not taken into account various relevant factors. The Government failed to bear in mind that rule is also meant for the benefit of unworthy fellows who are dismissed from service for serious misconduct. But, even in their case, there may be extenuating circumstances to pay compassionate allowance, albeit they are unfit to be retained in service. Going by "Wednesbury principle", the omission to take into account relevant factors and taking into account irrelevant factors render a decision ultra vires. In the instant case, for the failure to take into account various relevant factors, the impugned

order is liable to be quashed.

7. The order was attempted to be supported on the ground of delay and also pointing out that this is a matter within the discretion of the Government. Normally, delay is fatal to the grant of reliefs for the reason that the long delay might have created rights n favour of others and a belated intervention may result in disturbing them. But that circumstance is not available here. In the case at hand, the Government stood to gain by the belated application. The pension is payable from the date an employee is out of service, till his death. The appellant, it appears, has covered substantial ground in his journey towards his end. His attempt is to get some solace during the remaining period of his weary journey. So, the delay is not ground to reject it.

8. It is true that the grant of compassionate allowance is a matter within the discretion of the Government. But the said discretion has to be exercised fairly taking into account relevant facts and omitting to take into account irrelevant facts. The decision should be according to rules of reason and justice, and not according to the whims and fancies of the decision maker.

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 other whereas the duty is an obligation to act in a particular manner which creates a corresponding right in sombodyelse. 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 status 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.

11. Apart from that, Ext. P2 has been issued without hearing the appellant. He has a right to have his application fairly considered by first respondent. No decision can be fair, if the same is taken without hearing the affected person. Therefore, for this reason also, the impugned order is bad.

12. So, we quash Ext. P2 and remit the matter for fresh consideration in accordance with law by the first respondent after hearing the appellant. We do not express anything on the merits of the case. It is for the first respondent to decide, talking into account various relevant factors, whether the appellant is eligible to receive compassionate allowance. We, also, add a word of caution that the power under Rule 5 has to be exercised sparingly. Its indiscriminate use can cause great harm to public interest. It is not to be doled out to every dismissed employee. "Compassion" means pity or the suffering of others, making cone to want to help them. So the Government should decide whether the appellant really deserves compassionate allowance. Such decision shall be taken by first respondent within four months from the date of receipt of a copy of this judgment.