
(1998) 07 KL CK 0018
In the High Court Of Kerala
Case No : W.A. No. 93 of 1993

Badarudeen

APPELLANT

Vs

Kerala State Road Transport Corporation and Another

RESPONDENT

Date of Decision : 22-07-1998

Acts Referred:

Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 — Rule 1, 11(1), 116(5), 3

Citation : (1998) 07 KL CK 0018

Hon'ble Judges : D. Sreedevi, J; A.R. Lakshmanan, J

Bench : Division Bench

Advocate : P.B. Suresh Kumar, for the Appellant; V. Bhaskara Menon, for the Respondent

Final Decision : Allowed

Judgement

A.R. Lakshmanan, J.—Heard Mr. P.B. Suresh Kumar for the Appellant and Mr. V. Bhaskara Menon for the Respondents.

2. The above appeal is directed against the judgment of the learned Single Judge in O.P. 10422 of 1997 dated 27th February 1997 dismissing the Original Petition filed by the Appellant herein for a mandamus directing the Respondents to disburse the death-cum-retirement benefit due to the Appellant, with interest at 18 per cent per annum.

3. The Appellant was a driver in the service of the first Respondent Kerala State Road Transport Corporation (hereinafter referred to as "the Corporation"). He retired from service on 31st May 1994. According to the Appellant, even after three years of his retirement, he was not disbursed his death-cum-retirement gratuity and that the same was withheld by the Respondent for the reason that the Corporation sustained some loss in connection with a motor accident involving a vehicle owned by the Corporation and driven by the Appellant. Learned Counsel for the Appellant submitted that no liability, whatsoever, has been fixed by the Corporation against the Appellant either before or after his

retirement, and that he was never charge-sheeted by the Corporation for any misconduct, whatsoever; nor has any departmental proceedings been initiated against him by the Corporation at any point of time. The Appellant also submitted that the maximum time prescribed for recovery of liability, if any, of the Appellant to the Corporation was also over. The Appellant made several representations to the 2nd Respondent requesting him to take appropriate action in the matter of disbursing his gratuity, but none of the representations have been considered by the 2nd Respondent. The Appellant, therefore, filed the Original Petition seeking appropriate direction to the Respondents to disburse the death-cum-retirement gratuity due to him with interest.

4. The Respondent Corporation filed a counter affidavit stating that the Corporation has disbursed all the pensionary benefits to the Appellant except death-cum-retirement gratuity, and that the same was withheld by the Corporation on the ground that while he was an employee of the Corporation, he was involved in two accidents on 14th February 1990 and 9th October 1987, which led to proceedings before the Motor Accidents Claims Tribunal, Kollam as O.P. (MV) No. 1057/90 and before the Motor Accidents Claims Tribunal, Attingal as O.P. (MV) No. 314/90 respectively. The Motor Accidents Claims Tribunal, Attingal passed an award on 31st August 1994 in O.P. (MV) 314/90 directing the Corporation to pay an amount of Rs. 28,350 with interest. The Motor Accidents Claims Tribunal, Kollam passed an award in O.P. (MV) 1057 of 1990 on 27th January 1993 directing the Corporation to pay an amount of Rs. 8000 with interest. Our attention was also invited to the finding of the Accident Claims Tribunals that the accident was due to the rash and negligent driving of the bus belonging to the Corporation by the Appellant herein. The learned Counsel for the Corporation contended that the death-cum-retirement gratuity due to the Appellant was withheld to realise a portion of the liability sustained to the Corporation due to the negligence of the Appellant and that the Board of Directors of the Corporation have decided that the apportioned amount of the Tribunal Awards be realised from the employees found in fault, which was to be limited to the death-cum-retirement gratuity admissible to them. According to counsel for the Corporation, the Corporation has issued orders withholding the death-cum-retirement gratuity from the pensionary benefits payable to the Appellant and that the Appellant was a party to the proceedings before the Motor Accident Claims Tribunals and the quantification of the liability was made by the Tribunal after hearing the Appellant also. It is submitted that the Corporation can recover the award amount from the death-cum-retirement gratuity payable to the Appellant by invoking the power under Rule 11(1)(iv)(a) of the Kerala Civil Services (Classification, Control and Appeal) Rules. It is submitted that the recovery made by the Corporation is legal and valid and that the Tribunal has held that the accident happened due to the rash and negligent driving of the bus by the Appellant. The Appellant was a party to the proceedings whereby the Corporation was made liable for payment of compensation. Hence, it is submitted that the Corporation was fully empowered to realise the loss sustained to the

Corporation at the hands of the employee.

5. The learned Single Judge took the view that in so far as the liability of the Appellant to pay compensation has been fixed in the proceedings before the Motor Accident Claims Tribunals, the Corporation can recover the same from the gratuity payable to the Appellant without complying with the provisions of the Kerala Service Rules, and consequently, dismissed the Original Petition. In this appeal we are concerned only with regard to the claim made by the Appellant herein who is the Petitioner in O.P. No. 10422 of 1997. The verdict of the learned Single Judge has been reported in *Joseph v. K.S.R.T.C.* 1997 (2) KLT 912.

The learned Judge, while disposing of the Original Petitions filed by the Appellant and others, observed as follows:

14. In all these cases, no departmental or judicial proceeding as such was initiated by the Corporation. Proceedings were initiated by the victims or their legal representatives in connection with various accidents. In all the awards Petitioners were primarily found liable and the Corporation vicariously liable. In O.P. Nos. 9366, 8764 and 12442 of 1997 awards were passed while the Petitioners were in service. In O.P. No. 6354 of 1997 Petitioner retired from service on 31st December 1992 and the award was passed on 12th April 1993. In O.P. No. 10422 of 1997 Petitioner retired from service on 31st May 1994 and the award was passed on 13th August 1994. In all these cases, awards were passed with the Petitioners in the array of parties. Therefore, as far as Petitioners are concerned, liability has already been fixed by a properly constituted Tribunal with the Petitioners and Corporation in the array of parties. Therefore, there is no question of fixing any liability by the Corporation with notice to the Petitioners.

15. The procedure to be followed for recovery of liabilities fixed from D.C.R.G. is stated in Note 2 to Rule 3 of Part III, K.S.R., which is extracted below:

"The word "pension" used in this rule does not include death-cum-retirement gratuity. Liabilities fixed against an employee of pensioner can be recovered from the death-cum-retirement gratuity payable to him without the departmental/judicial proceedings referred to in this rule, but after giving the employee or pensioner concerned a reasonable opportunity to explain.

Note 3.-The liabilities of an employee should be quantified either before or after retirement and intimated to him before retirement if possible or after retirement within a period of three years on becoming pensioner. The liabilities of a pensioner should be quantified and intimated to him."

(emphasis supplied;)

In the instant case, as already stated, liability has already been fixed by the Motor Accidents Claims Tribunal with the Petitioners and the Corporation in the array of parties. Therefore there is no question of fixing any liability by the Corporation with notice to persons like Petitioner or giving a reasonable opportunity to explain. Note 2 to Rule 3 Part III, K.S.R. is a provision of general

application. In cases where the liabilities have been fixed by the Corporation against an employee or pensioner without the departmental/judicial proceedings the same could be recovered from the D.C.R.G. but the employee or pensioner be given a reasonable opportunity to explain. In other words, liability already fixed by the Corporation against an employee or pensioner could not be recovered without giving the employee or pensioner a reasonable opportunity to explain. In other words, even without departmental/ judicial proceedings, power is given to the Corporation to fix the liability. However, in cases where the liability has already been fixed by a properly constituted judicial or quasi-judicial Tribunal, with notice to the employee or pensioner and the Corporation in the party array, there is no question of giving another opportunity to explain as to why liability be not fixed. In other words, an opportunity has already been given to employee or pensioner by a properly constituted Tribunal. Due to above-mentioned reasons, I am of the view that the Corporation has got the legal right to recover the liability fixed against an employee or a pensioner from the D.C.R.G. in accordance with Rule 3, Part III of the K.S.R. In all these cases liability has already been fixed by properly constituted Tribunals within the statutory time prescribed by Rule 3 of Part in, K.S.R.

In the circumstances, the learned Judge was of the view that the Corporation was justified in adjusting the liability by virtue of the awards by the Motor Accident Claims Tribunals from the death-cum-retirement gratuity due to the Appellant.

6. We have been taken through the relevant provisions of the Kerala Service Rules, the pleadings and also the judgment impugned in this appeal. Counsel for both the parties reiterated the stand taken by them before the learned Single Judge.

7. The only question that arises for consideration in this appeal is, therefore, whether the Corporation can, without following the procedures contemplated under Notes 2 and 3 of Rule 3, Part III of the Kerala Service Rules and without affording a reasonable opportunity to explain adjust the liability by virtue of the awards passed by the Motor Accidents Claims Tribunal from the death-cum-retirement gratuity amount due to the Appellant.

8. We shall now consider Rule 3, Part III of the Kerala Service Rules. Rule 1, Part II of the said Rules provides that the pensions of all employees to whom the Kerala Service Rule apply are regulated by the rules in Part III. Rule 3 states that the Government reserve to themselves the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if in a departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service; including service rendered upon re-employment after retirement. Clause (a) of the proviso to the said rule states that such department proceeding, if instituted while the employee was in service, whether

before his retirement or during his re-employment, shall after the final retirement of the employee, be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service. Note 1 of the said rule clearly shows that as soon as proceedings of the nature referred to in Rule 3 are instituted, the authority which institutes such proceedings should, without delay, intimate the fact to the Audit Officer and that the amount of pension withheld under that rule should not ordinarily exceed one third of the pension originally sanctioned. Note 2 States that the word "pension" used in Rule 3 does not include death-cum-retirement gratuity and that liabilities fixed against an employee or pensioner can be recovered from the death-cum-retirement gratuity payable to him without departmental/judicial proceedings referred to in that rule, but after giving the employee or pensioner concerned a reasonable opportunity to explain. Note 3 is more important. Under that Note the liabilities of an employee should be quantified either before or after retirement and intimated to him before retirement if possible or after retirement within a period of three years on becoming pensioner. The liabilities of a pensioner should be quantified and intimated to him. In our opinion, when the Corporation decide to take further action under Rule 3, Part III of Kerala Service Rules, it shall serve the persons concerned a show cause notice specifying the action proposed to be taken under that rule and the persons concerned will be required to submit their reply to the show cause notice within such time as may be prescribed by the Corporation. The Corporation shall consider the reply and pass necessary orders. What is contemplated under the above notes to Rule 3 is a communication of the liabilities to the pensioner so as to enable him to submit his explanation before recovery is effected.

9. We have already noticed that the Appellant has retired from service on 31st May 1994 and that the Corporation had not issued any notice quantifying the liability payable by the Appellant or afforded any opportunity to the Appellant to explain as to why the death-cum-retirement gratuity due to him should not be adjusted towards the liability. It is not in dispute that the Appellant was driving the vehicle belonging to the Corporation during the relevant time in the course of his employment. It is also not in dispute that the liability, if any, of the Corporation arising out of the accident is vicarious in nature. The learned Judge, in our opinion, is not right in holding that since the Appellant who was an employee of the Corporation, was a party to the proceedings before the Motor Accident Claims Tribunal, there is no need to give an opportunity to him to explain as to why the liability be not fixed. We are also unable to accept the reasoning of the learned Judge that since an opportunity has already been given to employee or pensioner by a properly constituted Tribunal, there is no need to give a notice to the Appellant quantifying the liability and affording an opportunity to explain as contemplated by Notes 2 and 3 to Rule 3. The purpose of the application before the Motor Accident Claims Tribunal was only to determine the compensation payable to the claimant therein and the Tribunal

was called upon to decide in such proceedings only the compensation payable to the claimants and the apportionment of the same among the claimants. Therefore, the issue decided in such a proceedings by the Tribunal will have no application in the context of the right if any of the employer to recover from its employee any loss sustained by the employer on account of any act or negligence of the employee. The learned Judge, in fact, has extracted Notes 2 and 3 to Rule 3, Part III of the Kerala Service Rules. Note 3 clearly states that the employee or pensioner concerned should be given a reasonable opportunity to explain with regard to the liability, if any, fixed against the employee or pensioner, which could be recovered from the death-cum-retirement gratuity payable to him. Note 3 also states that the liability of an employee should be quantified wither before or after his retirement, and intimated to him before retirement if possible or after retirement within a period of three years on becoming pensioner and that the liability of a pensioner should be quantified and intimated to him. The above Notes to Rule 3 are very specific and, therefore, the Corporation has a duty to quantify the amount and intimate the same to the pensioner and also to afford a reasonable opportunity to explain his stand. Unfortunately, the procedure contemplated under Rule 3 has not been complied with at all. The Respondent Corporation has violated the procedure contemplated under the statutory provisions referred to above. It has been held by a Division Bench of this Court in *State of Kerala v. Antony* 1994 (2) KLT 314 that the Government cannot circumvent issuance of notice as contemplated under Note 2 to Rule 3. The relevant portion of the judgment reads as follows:

Note 2 to Rule 3, Part III K.S.R. contemplates reasonable opportunity to the Government servant to explain. Certainly this is to enable him to submit his explanation before actual recovery is effected. Government cannot circumvent issuance of notice as contemplated under Note 2 to Rule 3. As notice is intended for the explanation of the employee/pensioner it cannot be considered as a mere empty formality. Of course it does not mean that the consent of the employee/pensioner has to be obtained before recovering the liabilities from the death-cum-retirement gratuity payable to him. Ruling No. 3 makes the position very clear. When the communication is issued showing the liability it is really intended to enable employee/ pensioner to submit his explanation before the recovery is effected. The communication should specifically state that if no reply is received within 30 days of its issue it will be presumed that the employee/pensioner has no explanation to offer and that further action will be taken on that basis. It is thus apparent that notice cannot be dispensed with under any circumstances.

The above judgment, in our opinion, squarely applies to the facts and circumstances of die case on hand. Therefore, the view expressed by the learned Single Judge that since the Appellant is a party to the proceedings before the Motor Accident Claims Tribunal, the amount which the Corporation had to pay in pursuance of the award passed against it in view of its vicarious liability can be recovered from the death-cum-retirement gratuity due to the Appellant without complying with the provisions contained in Notes 2 and 3 to Rule 3 Part III of the

Kerala Service Rules, is not correct in our opinion cannot be countenanced. As per Note 3 referred above, the liability, if any, of an employee cannot be quantified after three years of his retirement. Ruling 6 to Sub-rule (5) of Rule 116, Part III of the Kerala Service Rules says that if action under Rule 3 is not possible due to the expiry of the time limit prescribed for such action, or due to any other reason, the retired employee will be proceeded against in a Civil Court for recovering the pecuniary loss caused to Government. The Corporation is, therefore, at liberty to invoke/Ruling and may take appropriate action.

10. Another Division Bench of this Court in the decision reported in *Director of Health Services v. Paul* 1992 (1) KLT 313 had occasion to consider an identical question. The Bench comprising of Jagannadha Rao, C.J. and Krishnamoorthy, J. observed as follows:

The Rules make a distinction between recovery of amounts from pension on the one hand, and D.C.R.G. on the other. Inasmuch as Rule 3 mainly concerns itself about conversion of disciplinary inquiries against employees as inquiries for purposes of imposing cuts in the pension, the Explanation to Rule 3 must necessarily be confined to such a situation and not for recovering amounts from D.C.R.G. When the explanation to Rule 3 states that a departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the Employee or pensioner, or if the employee has been placed under suspension; from an earlier date, the said Explanation cannot apply to a case of recovery of amounts from the D.C.R.G. In other words, even if the suspension had been made before retirement, it cannot (before 31st March 1986) help the recovery of amounts from the D.C.R.G. The only provision which deals with recovery from D.C.R.G. is Note 2 set out above. The Note clearly states that the word "pension" used in Rule 3 does not include D.C.R.G. The Note then states when any amount could be recovered from the D.C.R.G. It states that liabilities fixed against an "employee" can be recovered from the D.C.R.G. payable to him without the departmental/judicial proceedings referred to in Rule 3, but after giving the "employee" a reasonable opportunity to explain. The use of the word "employee" alone in Note 2 (before its amendment on 31st March 1986) makes it clear that in principle, the liability must be fastened on the person while he continues as "employee" and not after that, though if the liability is created, it could be quantified after retirement. The Note makes it clear that the liability mentioned in it must have been fixed against a person while he was in employment, and the show cause notice also must have been issued to him while he was in employment. Unless these two conditions are satisfied, there cannot be any question of recovery of any liability from the D.C.R.G., before 31st March 1986. It will be noticed that the amendment by G.O. dated 31st March 1986 now permits liability to be fastened even after retirement, on a pensioner.

In a recent judgment reported in *Yusuf Jan v. Kerala State Road Transport Corporation* ILR 1997 (3) Ker 175 C.S. Rajan, J. has taken the same view. The learned Judge held as follows:

Notes 2 and 3 to Rule 3, Part III of K.S.R. are the relevant provisions to be noticed in this respect. There is no doubt that the liability fixed against an employee which include the pensioner also can be recovered from the D.G.R.G. payable to him without any proceedings. The only safeguard is that he must be given a reasonable opportunity to explain. Note 3 put an embargo on the rights of the Corporation that the liability must be fixed within a period of three years on becoming pensioner.

According to me Note 3 enjoins that liabilities of an employee should be quantified and intimated to him before retirement if possible or after retirement within a period of 3 years. Therefore, final orders regarding fixation of liability must be passed within the above period of limitation.

11. We have already noticed that the Corporation has not followed the procedure prescribed under Notes 2 and 3 to Rule 3, Part III of the Kerala Service Rules in quantifying the liability and intimating and giving an opportunity to the employee/pensioner. In this case the statute clearly prescribes the procedure to be followed in a particular manner, and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. While considering a similar question, a Division Bench of the Madras High Court, of which one of us (A.R. Lakshmanan, J.) was a party, in the decision reported in *Golden Granites Vs. K.V. Shanmugam and Others*, held as follows:

Whenever a statute prescribes that a particular act is to be done in a particular manner, and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory.

It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is settled rule of interpretation that where the statute is penal in character, it must be strictly construed and followed. When a law says that a thing is to be done particularly, it should be done in accordance with the said principles and not otherwise. Since the requirement u/s 2 is mandatory and therefore, non-compliance of the same must result in cancelling the grant made in favour of the grantee.

It is not in dispute in this case that the mandatory requirement of Notes 2 and 3 to Rule 3 of Kerala Service Rules has not been complied with and, therefore, non-compliance of the same shall result in cancellation of the action of the Corporation in adjusting the death-cum-retirement gratuity amount towards the liability by virtue of the awards passed by the Tribunal. Admittedly there is a delay in settlement of pensionary claims. Even according to the Corporation, only 1/3 of the compensation awarded is adjustable from the death-cum-retirement gratuity due to the Appellant. Corporation has not even disbursed the balance amount of gratuity after adjusting 1/3 of the compensation awarded by the Accident Claims Tribunals, but has withheld the entire amount of death-cum-retirement gratuity due to the Appellant and the Appellant was denied the use of

the said amount. Courts have held that pension and gratuity are no longer any bounty to be disbursed by the Corporation to its employees on their retirement, but they are valuable rights accrued to them after their long innings in service and that delay in settlement and disbursement of the same must be visited with penalty of payment of interest at the current market rate. The Appellant, therefore, would be entitled to give interest at the rate of 12 percent per annum for the amounts due to him from the Corporation.

The Writ Appeal is allowed as above. However, there will be no order as to costs.