

(2004) 08 AHC CK 0108
In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 41074 of 2001

Smt. Rohini Srivastava

APPELLANT

Vs

Director, Pension Directorate and Director Mudran Evam
Lekhan Samagri

RESPONDENT

Date of Decision : 03-08-2004

Acts Referred:

Constitution of India, 1950 — Article 162, 309, 311
Uttar Pradesh Liberalised Pension Rules, 1961 — Rule 1(3)
Uttar Pradesh Retirement Benefit Rules, 1961 — Rule 3(3), 7(3), 7(4), 7(5)

Citation : (2004) 5 AWC 5143

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : K.M. Misra and H.R. Misra, for the Appellant;

Final Decision : Allowed

Judgement

R.B. Misra, J.—Heard Sri H.R. Misra learned Counsel for the petitioner and the learned Standing counsel.

2. In this petition prayer has been made for quashing the impugned order dated 1.9.2001 passed by Director Pension Directorate U.P. Lucknow (Annexure-5 to the writ petition) whereby the family pension granted to the petitioner earlier on 22nd July, 1997 was stopped on the ground that the first wife was alive and during life time of first wife the second wife is not entitled for family pension. Therefore, after granting family pension for about four years by order dated 1.9.2001 the family pension was stopped. (2) According to the petitioner her husband late Sri Shyam Mohan Srivastava a regular office Superintendent Grade-II in Government Printing and Stationary Press U.P., Allahabad had died on 26.11.1996. Late Shyam Mohan Srivastava was earlier married with Smt. Shail Kumari Venna who had no issue from the wedlock and had been residing separately and was deployed in some other government department where after retirement she was getting pensionary benefits and had no connection with late

Sri Shyam Mohan Srivastava. However at her no objection late Sri Shyam Mohan Srivastava had married with Smt. Rohini Srivastava and there are three minor children including two sons and one daughter and Smt. Rohini Srivastava was living with Late Sri Shyam Mohan Srivastava till his death as his legally wedded wife with her children. After the death of Late Sri Shyam Mohan Srivastava the petitioner represented for getting family pension and on scrutiny of papers acknowledging her to be a widow of Late Sri Shyam Mohan Srivastava she was being paid family pension and the minor children were being taken care of. There are Uttar Pradesh Liberalised Pension Rules, 1961 (in short called as "Rules 1961" hereinafter) as well as Uttar Pradesh Retirement Benefit Rules, 1961 (in short called as "Retiral Benefit Rules, 1961" hereinafter). The above two files were trained by the Government of Uttar Pradesh in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India However in view of the G.O. dated 24th August, 1986 without affording the opportunity of hearing and disestablishing the status of the petitioner as widow the impugned order has been passed. According to the petitioner the G.O. dated 24.8.1966 whereby New Family Pension Scheme, 1965 was promulgated has indicated the criteria of payment of family pension to the widow or to the widower till the death or till remarriage whichever is earlier, but such conditions according to teamed counsel for the petitioner are only illustrative and not exhausted and the spirit of G.O. is for the welfare of the widow or widower, which has to be interpreted generously, with proper spirit so that the claimant widow may be given family pension. The relevant provisions of Scheme 1965 is given here as under:

3- mi;qZDr ;kstuk dk iz"kklu fuEufyf[kr izdkj ls gksxkA

?d? ifjokj ias"ku lsok esa jgrs gq;s ;k lsok fuo`fRr ds ckn e`R;q gksus ij ml n"kk esa vuqeU; (admissible) gksxh tc lsok fuo`fRr ds ckn e`R;q gksus dh n"kk esa ljdkjh deZpkjh e`R;q ds le; dksbZ izfrdkj (compensation) v"kdrrk (invalid) lsok gks fuo`fRr (retiring) ;k vf/ko"kZrk (superannuation) isU"ku ik jgk gks ;k ik jgk gksrk vkSj lsokdky esa e`R;q gks tkus dh n"kk esa ;fn mlus de ls de ,d o"kZ dh yxkrkj lsok ftlesa HkRrk jfgr NqV~Vh dh vof/k] M~;wVh ds :i esa u ekuk x;k fuyEcu rFkk 20 o"kZ dh vk;q ls igys dh xbZ lsok vof/k lEefyr ugha gks] iwjh dj yh gksA

?[k? bl ;kstuk ds iz;kstu ds fy;s ^ifjokj* esa ljdkjh deZpkjh ds fuEufyf[kr lECU/kh lEefyr jgsaxs %

?1? iRuh@ifr

?2? vo;Ld iq=

?3? vfookfgr vo;Ld] iqf=;kWa]

fVIi.kh 1 % mi;qZDr ?2? vkSj ?3? esa lsok fuo`fRr ls igys oS/k :i ls xksn yh x;h lUrku Hkh lEefyr gksxhA

fVIi.kh 2 % lsok fuo`fRr ds ckn fd;k x;k fookg bl ;kstuk ds iz;kstuska ds fy;s

ekU; ugha le>k tk;sxA

?x? isU"ku fuEufyf[kr n"kkvksa esa miyC/k (admissible) gksxA

?1? fo/kok@fonqj dh n"kk esa e`R;q ;k iqufoZokg] tks Hkh igys gks] ds fnukad

?2? vo;Ld iq= dh n"kk esa tc rd fd mldh vk;q 18 o"kZ dh vk;q u gks tk;A

?3? vfookgr iq=h dh n"kk esa tc rd fd mldh 21 o"kZ dh vk;q ;k fookg] tks Hkh igys gks] u gks tk;A

fVIi.kh % tgka nks ;k nks ls vf/kd fo/kok;sa gksa rks isU"ku T;s"Bre mRrjthoh fo/kok dks ns; gksxA mldh e`R;q@iquZfookg gksus ij ;g isU"ku vxyh mRrjthoh fo/kok] ;fn dksbZ gks] ns; gksxA "kCn ^T;s"Brk* dk rkRi;Z fookg ds fnukad ds funZs"k ofj"Brk ls gSA

??k? bl ;kstuk ds v/khu nh x;h isa"ku ,d gh le; esa ljdkjh deZpkjh ds ifjokj ds ,d ls vf/kd lnL;ksa dks ns; ugha gksxA ;g fuEufyf[kr de ls vuqeU; (admissible) gksxh vFkkZr igys fo/kok@fo/kqj dks] mlds ckn T;s"Bre mRrjthoh vo;Ld iq= dks vkSj rRi"pkr T;s"Bre mRrjthoh vfookgr vo;Ld iq=h dksA

?M-? fo/kok@fo/kqj dk iquZfookg@e`R;q gks tkus ij] isa"ku muds vo;Ld lUrkuksa dsk muds izd`r vfHkHkkod (natural guardian) ds ek;/e ls gh tk;sxh fdUrq fooknLin ekeyksa esa Hkqxrku fof/kd vfHkHkkod (legal guardian) ds ek;/e ls fd;k tk;sxA

?p? "kkLukns"k la[;k th&2&1160 nl&909&1949 fnukad 4 vizSy] 1964] esa Lohd`r rnFkZ o`f) bl ;kstuk ds v/khu Lohd`r ifjokj isa"ku ds fy, vuqeU; (admissible) ugha gksxA

3. According to the counter affidavit when the first wife Smt. Shail Kumari Verma was alive and during her life time Smt. Rohini Srivastava subsequently had married with Late Sri Shyam Mohan Srivastava she being not genuine widow could not be entitled to the family pension, therefore, the benefit being given to the claimant widow was cancelled in view of the prevailing above G.O..

4. According to the petitioner no statutory rules has been framed or proper amendment has not been made to provide any provision for regulating family pensionary benefits and by making modification by Government order or executive order the earlier rules providing family pensionary benefits or settled norm of providing family pensionary benefits could not be altered. The provisions of restricting the benefit to the petitioner by way of government order is in the form of administrative instructions which could not be said to be binding effect and could not be said to over power the spirit of legislation of providing family pension.

5. The text and context of the entire provisions must be looked into while interpreting any of the provision of the Statute. The Court must look to the object, which the Statute seeks to achieve while interpreting the provisions of the Act/Rules/Regulations. A purposive approach for interpreting the provision is

necessary.

6. It is also settled principle of interpretation of law that any interpretation, which leads to hardship and complication, should be avoided. In *Administrator Municipal Corporation, Bilaspur Vs. Dattatraya Dahankar and another*, , the Supreme Apex Court has held that " the mechanical approach to construction is altogether out of play with the modern positive approach. The modern positive, i.e., to effectuate the object and purpose of the Act.

7. In *Colour-Chem Limited Vs. A.L. Alaspurkar and Others*, , the Supreme Court held that the provisions of welfare legislation should be construed in a way to give benefit to the persons for whose benefit the Act or Rules have been enacted and the Court must examine the policy and object of the Act and must advance the cause of enactment.

8. In *Durga Oil Company and Another Vs. State of U.P. and Others*, , the Supreme Court has held that while interpreting the provisions of a Statute or Rule, the purposive interpretation should always be borne in mind. Similar view has been taken by the Supreme Court in *Forest Range Officer v. P. Mohd. Ali* 1993 3 SCC 627. In *The Municipal Corporation of Greater Bombay and others Vs. The Indian Oil Corporation Ltd.*, , the Supreme Court has observed as under:

The language of a statutory provision is not static vehicle of ideas and concepts and as ideas and change, as they are bound to do in any country like ours with the establishment of a democratic structure based on egalitarian values and aggressive developmental strategies, so must the meaning and content of the statutory provision undergo a change. It is elementary that law does not operate in a vacuum. It is not an antique to be taken down, dusted, admired and put back on the shelf, but rather it is a powerful instrument fashioned by society for the purpose of adjusting conflicts and tensions which arise by reason of clash between conflicting interest. It is therefore, intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate.

9. In *S.P. Jain Vs. Krishna Mohan Gupta and Others*, , the Supreme Court has held that law should take a pragmatic view of the matter and response to the purpose for which it was made and also take cognizance of the current capabilities and life-style of the community. It is well settled that the purpose of law provides a good guide to the interpretation of meaning of the "Act". The legislature futility is to be ruled-out so long as the legislative policy permits.

10. In *The Daily Partap Vs. The Regional Provident Fund Commissioner, Punjab, Haryana, Himachal Pradesh and Union Territory, Chandigarh*, , the Supreme court has held that the Court must always keep in view the beneficial and social welfare aspect of the statute. Same view has been reiterated by the Supreme Court in *Dinkar Anna Patil and Others Vs. State of Maharashtra and Others*, ; *Regional Provident Fund Commissioner Vs. S.D. College, Hoshiarpur and others*, ; *Bharat Petroleum Corporation Ltd. Vs. Maharashtra General. Kamgar Union and*

Ors, . In *Vaijanath and Others Vs. Guramma and Another*, , the Supreme Court has held that remedial "Act" should be given beneficial interpretation.

11. However, in *Employees State Insurance Corporation Vs. M/s. M.M. Suri and Associates (P) Ltd.*, , the Supreme Court has held that even if the statute is beneficial, the Court should not stretch it too far. The Supreme Court relied upon its earlier judgments in *Regional Director, Employees" State Insurance Corporation, Trichur Vs. Ramanuja Match Industries*, , wherein it was observed as under:

Counsel for the appellant emphasised on the feature that the statute is a beneficial one and the Court should not interpret a provision occurring therein in such a way that the benefit would be withheld from the employees. We do not doubt that the beneficial legislation should have liberal construction with a , view to implement the legislative intent but where such beneficial legislation has a scheme of its own, there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme.

12. It is well settled that when no statutory rules are made regulating recruitment or conditions of service, the State Government always can in exercise of its executive power issue administrative instructions and laid down conditions of service, vide *B.N. Nagarajan and Others Vs. State of Mysore and Others*, and *Sant Ram Sharma Vs. State of Rajasthan and Another*, .

13. New condition of service cannot be brought into effect by an executive order if it is not inconsistent with the rules. (*Sitaram Jivabhai Gavali Vs. Ramjibhai Potiyabhai Mahala and Others*,).

Where there are no statutory rules, appointment to a post can be regulated by executive instructions *J & K Public Service Commission v. Narender Mohan* AIR 1994 SC 1803, but once rules are made they cannot be by passed through exercise of executive power.

14. Executive Instructions shall be inoperative if these are contrary to provisions of the statutory rules. *Union of India v. Shyama Pada Sidhanta* 1991 (1) SCC 542.

15. The Executive Instructions may be issued to fill up gaps and supplement the rule:- (i) " There can be no quarrel with the proposition that if the statutory rules, framed by the Governor or any law enacted by the State Legislature under Article 309 is silent on any particular point, the Government can fill up the gap and supplement the rule by issuing administrative instructions not inconsistent with the statutory provisions already framed or enacted. The Executive instruction in order to be valid must run subservient to the statutory provisions." *District Registrar, Palghat v. M.B. Koyyakutty* AIR 1979 SC 1060. (ii) It is now well- settled law that even if there are no statutory rules in force on a particular subject or even if the rules exist, they are silent on a particular point, it is competent for the Government to fill in the lacuna while making an

administrative order. Union of India (UOI) Vs. H.R. Patankar and Others, .

16. The departmental instructions are issued only to regulate the rule and not to be inconsistent with the rules, which are valid. Lt. Genl. R.K. Anand Vs. Union of India and another, .

The " executive instructions " can not be issued in the field occupied by laws and rules.

The executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provisions, is without jurisdiction and is a nullity." State of Sikkim v. Dorjee Tshering Bhutia AIR 1991 SC 2148, para 15.

17. The executive Power of the State Government under Article 162 of the Constitution extends to all matters with respect to which the State Legislature has power to make laws and accordingly the State Government can act in exercise of executive power in relation to any matter with respect to which the State Legislature has power to make laws, even if there is no legislation to support such executive action, but such executive section must not infringe the right of any person. If the executive action taken by the State Government encroaches upon any private rights, it would have to support by the legislative authority for under the rule of law which prevails in our country, every executive action which operates to the prejudice of any person must have authority of law to support it. Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, ; Bennett Coleman and Co. and Others Vs. Union of India (UOI) and Others, ; State of Madhya Pradesh v. Thakur Bharat Singh AIR 1967 SC 1170, Naraindas Indurkha Vs. The State of Madhya Pradesh and Others, ; Dr. Ram Ji Dwivedi v. State of Uttar Pradesh 1982 Lab & 1C 1130 (All.) and State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others, .

18. The State in exercise of its power is charged with the duty and the responsibility of carrying on the general administration of the State. So long as the State Government does not go against the provisions of the Constitution or any law, the width and amplitude of its " Executive Power " cannot be circumscribed. If there is no enactment covering a particular aspect, certainly the Government can carry on the administration by issuing administrative direction or instructions. Until the legislature makes a law in that behalf. Otherwise, the administration would come to a standstill. Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others,

19. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily, an executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary

responsibility for the formulation of Government policy and its transmission into law, though the condition precedent to the exercise of this responsibility in its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation maintenance or order, the promotion of social and economic welfare, the direction of foreign policy, in fact carrying on or supervision of the general administration of the State. *Rai Sahib Ram Janaya Kapoor v. State of Punjab (Supra)*.

20. The executive Power of a modern State is not capable of any precise definition. It is neither necessary nor possible to give an exhaustive enumeration of the kinds and categories of executive function which may comprise both the formulation of the policy as well as its execution. In other words, the State in exercise of its executive power is charged with the duty and the responsibility of carrying on the general administration of the State. *Bishamber Dayal Chandra Mohan v. State of Uttar Pradesh (supra)*.

21. Article 162 does not confer Power on the State Government to frame Rules:- Article 162 of the Constitution by itself does not confer any rule making power on the State Government. This article merely indicates the scope of the executive power of the State; it does not confer any power on the States Government to issue rules there under. As a matter of fact, wherever the Constitution envisages issue of rules, it has so provided in specific terms. For example, refer to Article 309, the proviso to which lays down in specific terms that the President or the Governor may make rules regulating the recruitment and the conditions of Service of persons appointed to services and posts under the Union of the State. *Fernandez v. State of Mysore (1968) ISCJ 562* .

22. The Executive power of the State would, in the absence of legislation, extend to making rules regulating the action of the executive. But such rules cannot offend the provisions of the Constitution and should not be repugnant to any enactment of the appropriate legislature. Subject to these limitations, such rules may relate to matters of policy may make classification for purposes of these rules and may determine the conditions of eligibility for receiving any advantage, privilege or any aid from the D.S. *Jayadeviah and Another Vs. Narasimhegowda and Another*, .

23. Power of State Government to make rules is under Article 309 of the Constitution.

By virtue of Article 309 of the Constitution the U.P. Legislature can pass an " Act" in relation to the conditions of service of State Public Servants and once it does so any rule framed shall stand superseded to the extent of the Legislative enactment. The power of the State Government to frame rules is not on independent power but only a delegated power of the U.P. Legislature and can withdraw that power either expressly or by necessary implication.

24. The rule making powers of Government include not only enumerated powers

but also powers incidental for carrying the object of the Act. The Legislature cannot delegate its power to make a law but it can make only to determine some facts.

25. Executive instructions cannot override modify or amend the rules made under Article 309 of the Constitution Union of India (UOI) Vs. Col. J.N. Sinha and Another, .

26. There can be no dispute with the proposition that a rule framed under the proviso to Article 309 of the Constitution cannot be modified by an executive order or instruction. State of Maharastra v. Chandra Kant AIR 1981 SC 990. The Executive instruction cannot override the rules under the proviso to Article 309 of the Constitution as they are equated with the act of a legislature. Thus an administrative instruction under the proviso to Article 309 cannot supplement them. Bhagat Singh v. Union of India 1981 LabIC 1309 : (1983) 1 SCR 686. If the statutory rules framed by the Governor or any law enacted by the State Legislature under Article 309, is silent on any particular point, the State Government can fill up that gap and supplement the rule by issuing administrative instructions nor inconsistent with the statutory provisions already framed or enacted.

27. Statutory rules though invalid to begin with on account of lack of power to frame, would become valid and statutory as a result of amendment by the authority made in these rules 1986 SLR 91 .

28. Rules cannot be framed so as to curtail or trespass on the right of public servants guaranteed by Article 311 of the Constitution.

29. The executive instructions in order to be valid must run subservient to the statutory provisions. B.N. Nagarajan and Others Vs. State of Mysore and Others, ; Sant Ram Sharma Vs. State of Rajasthan and Another, ; Union of India v. N.R. Sunderam 1982 Lab I.C. 1185 and Gurdial Singh Fiji v. State of Punjab 1979 SCC 179.

30. No power to issue executive instructions in the sphere occupied by the statutory rules.- In the sphere occupied by a statutory rule, there is no scope for executive or administrative instructions. Chacko v. State of Kerala 1974 KLT 215; D.P. Pathak v. State of Punjab 1980 LabIC 676; P.K. Nambiar v. K.P. Gopalan Nair 1978 LabIC 409.

31. Executive Instructions if can be given retrospective effect.- The State Government has no lawful authority to prejudicially effect the rights of the Government servant retrospectively by a mere executive fiat otherwise than by his consent, unless the Government is authorised to do so by some express provision of valid law. Their rights, which have already accrued to a Government servant and the benefit that might already have been enjoyed under or by virtue of a pre-existing executive instructions, cannot be taken away with retrospective effect by another executive instruction, Suresh Kumar and Another Vs. Union of

India and Others, .

32. The Governor of a State has the power to amend and abrogate old rules and to make new rules under Article 309 of the Constitution subject to any legislative enactment by the Legislature *Thaivalappil Kunjuvaru Vareed Vs. The State of Travancore-Cochin*,

33. Where no statutory rules are made regulating recruitment or conditions of service, the State Government can, in exercise of its executive power, issue administrative instructions providing for recruitment and conditions of service. *B.N. Nagarajan v. State of Mysore* AIR 1967 SC 1941; *Sant Ram Sharma Vs. State of Rajasthan and Another*, ; *Mallinath Jain v. Municipal Corporation* 1973 (1) SLR 413; *S.B. Pantnayak v. State of Orissa* 1974 (1) SLR 171; *Amerjeet Singh v. State of Punjab*, 1975 (1) SLR 171; *Lalit Mohan Deo v. Union of India* AIR 1972 SC 1995 : 1989 SLJ 149 .

34. Distinction between Executive Instructions and rules and regulations.- Broadly stated, the distinction between rules and regulations on the one hand, and administrative instructions on the other is that rules and regulations can be made only after reciting the source of power, whereas administrative instructions are not issued after reciting the source of power.

Secondly, the executive power of State is not authorized to frame rules under Article 162. The rules under Article 309 on the other hand constitute not only the constitutional rights of relationship between the States and the Government servant, but also establish that there must be specific power to frame rule and regulations. *Sukhdeo Singh v. Bhagat Ram* AIR SC 149.

35. Administration instruction can be modified by other administrative instructions.- The State Government is competent to amend, alter or modify the service conditions based on administrative instruction, but cannot amend, alter, or modify the service conditions incorporated under statutory rules. Instrument or change should be of the same type as the original instrument governing conditions of service. *Dubey Singh v. Municipal Council* 1977 (2) SLR 677 and *D.K. Gupta v. Municipal Corporation* 1979 (3) SLR 4160.

36. Administrative instructions can be issued in any form - Executive/ Administrative instructions can be issued in any form i.e. in the form of letter, memorandum, notification or resolution. *I.N. Saksena Vs. State of Madhya Pradesh*, .

37. Administrative instruction how for binding - Where the Rule is silent or ambiguous or unclear, the Government can step in with the general power of issuing administrative instructions.

In the sphere where there are no statutory rules, the Government can issue administrative instructions which would have the force of binding rules. It may, therefore, be permissible to clarify the statutory rules by means of administrative instructions. *A.C. Bhargava v. Union of India* 1978 (2) SLR 618.

38. In case of conflict between the rules and the executive order rules would prevail.- Where there is conflict between the provisions of a rules made under proviso to Article 309 and the Government order made in exercise of the executive power under Article 162 of the Constitution, the former would prevail over the latter. N. Mohammed Kutty Vs. High Court of Kerala and Others, .

39. Executive order cannot override rules framed under Article 309- When rules framed under Article 309 are enforced no regularisation of an appointee is permissible in exercise of the executive power of the State under Article 162 in contravention of the rules. Any act done in exercise of the executive power cannot overrule the rules framed under Article 309 of the Constitution. B.N. Nagarajan and Others Vs. State of Karnataka and Others, . However, where new posts are created and the same are not covered by the rules, the qualifications etc., in respect of such posts can be laid down through executive instructions, Ajit Kumar v. State of Punjab and Haryana 1979 (3) SLR 161.

40. Administrative order can be reviewed or altered.- An Administrative order is review able for error, procedural defects and also to redress injustice. M. Nagalakshmiah v. State of Andhra Pradesh 1973 (2) SLR 105, Ranbir Chandra v. Union of India 1978 (2) SLR 340.

41. Rule 1(3) () of "Rules 1961" provides the definition of family as below:

(c) "Family" means following relatives of an officer -

(i) Wife in the case of male officer,

(ii) Husband, in the case of female officer,

(iii) Sons, (including step-children

(iv) Unmarried and widowed daughters and adopted children)

(v) Brothers below the age of 18 years and unmarried and widowed sisters (including step-brothers and step-sisters),

(vi) Father,

(vii) Mother,

(viii) Married daughters (including step-daughters), and

(ix) Children of a pre-deceased son.

Rule 3(3) of "Retiral Benefit Rules 1961" provides as under:

3. (3) "Family" includes the following relatives of an officer:

(i) wife, in the case of a male officer;

(ii) husband, in the case of a female officer,

(iii) sons } including such step-

- (iv) unmarried and widowed }children and adopted daughters {children,
- (v) brothers below the aged of 18 years and unmarried and widowed sisters (including step-brothers and step-sisteres),
- (vi) father,
- (vii) mother,
- (viii) married daughters (including step-daughters), and
- (ix) children of a pro-deceased son."

Rule 7 (3) and (4) of "Retiral Benefit Rules 1961" deals with the family pension and relevant provisions as under:

7. (3) No pension shall be payable under this part-

(a) to a person mentioned in Clause (b) of Sub-rule (4) below unless the pension sanctioning authority is satisfied that such person was dependent on the deceased officer for support;

(b) to an unmarried female member of the family, in the event of her marriage;

(c) to a widowed female member of the family, in the event of her re-marriage;

(d) to a brother of the deceased officer on his attaining the age of 18 years; and

(e) to a person who is not a member of the deceased officer's family

(4) Except as may be provided by a nomination under Sub-rule (5) below:

(a) a person sanctioned under this part shall be granted:

(i) to the eldest surviving widow, if the deceased was a male officer or to the husband, if the deceased was a female officer,

(ii) failing the widow or husband, as the case may be, to the eldest surviving son;

(iii) failing (i) and (ii) above, to the eldest surviving unmarried daughter;

(iv) these failing, to the eldest widowed daughter; and

(b) in the event of the pension not becoming payable under Clause (a) the pension may be granted

(i) to the father;

(ii) failing the father, to the mother;

(iii) jailing the father and mother both to the eldest surviving brother below the age of 18;

(iv) these failing, to the eldest surviving unmarried sister;

(v) failing (i) to (iv) above, to the children of a predeceased son in the order it is

payable to the children of the deceased officer under Clause (a) (ii), (iii) and (iv) above.

Note The expression "eldest surviving widow" occurring in Clause (a) (i) above, should be construed with reference to the seniority according to the date of marriage with the officer and not with reference to the age of surviving widows.

Since in "Retiral Benefit Rules 1961" the payment of family pension was to be granted in view of Rule 7 (4) (a) (i) to the eldest surviving widow, if the deceased was a male officer or to the husband, if the deceased was a female officer, whereas in case of not granting to the eldest surviving widow in view of Rule 7 (4) (a) (ii) of above Rules the family pension is to be granted to the eldest surviving son and in case of not granting to the surviving widow or eldest surviving son the same was to be granted to the eldest surviving unmarried daughter in view of Rule 7 (4) (a) (iii). The provisions of the above rules contemplate that even payment of family pension could be made to the eldest surviving son or unmarried daughter. Here the petitioner is the wife already acknowledged by the society as well as for all practical purposes from whom the children of the deceased Sri Shyam Mohan Srivastava were procreated and are surviving. Undisputedly, in any of the "Act" or "Rule" the payment of family pension as indicated above is to be given to the eldest surviving son or surviving unmarried daughter. It is also not contemplated whether the children, son or daughter is to be from legally wedded wife or by divorcee. In case of widow having been divorced the children in view of the above provisions would be given the family pension. It is therefore, evident that since very beginning, the spirit of family pension contemplated in "Rules 1961" as well as in "Retiral Benefit Rules, 1961" is to consider the welfare of the eldest surviving widow and in her absence to the eldest surviving son and in his absence to the eldest surviving unmarried daughter. In any case, the welfare of surviving children are also to be taken care of in the scheme of family pension but through the widow. However, when the surviving children of the deceased Sri Shyam Mohan Srivastava are minor then through whom the family pension is to be disbursed, could be a vital aspect when first eldest surviving issueless widow in the present case had emphatically at her sweet will by writing on her own, has relinquished her claim, even in these circumstances, the children of deceased Sri Shyam Mohan Srivastava are to be taken care of by disbursement of family pension but for the survival of Smt. Rohini Srivastava as first surviving widow. The above two rules were framed in exercise of power under Article 309 of the Constitution by way of executive instructions/Government orders. The spirit of rules could not be modified and the alteration by Government orders shall not occupy the field provided by the statutory rules, therefore, the Government order dated 24.8.1966 would not be said to be taking away the right of surviving children of the deceased.

42. I have heard learned Counsel for the parties. I find that the impugned order dated 1.9.2001 was passed without affording opportunity of hearing to the petitioner. The legitimate expectations had arisen to petitioner for herself and for

children. Undisputedly Smt. Rohini Srivastava was acknowledged by society as genuine wife of Late Sri Shyam Mohan Srivastava and for all practical purpose she is having three minor children out of the wedlock with Late Sri Shyam Mohan Srivastava. The concept of family pension is to take care the welfare of the widow and the children which are not be ignored on the technical ground that the earlier wife is alive, as such the spirit of family pension shall be frustrated specially in view of equity, fair-play and good conscience. The imparting of family pension is to be understood and interpreted generously to uphold and protect the need and rights of a descendents, widow and children in such a manner that the spirit of benevolent legislation might not be synchronized by narrowing down its basic foundation. More so, in view of the facts and circumstances, action of respondents taking away abruptly and snatching behind the back the rights and benefits accrued to the petitioner and her children without affording opportunity of hearing is not be legally sustainable. On first principle alone the action of respondents specifically impugned order dated 1.9.2001 is not legally sustainable. I find force in the contentions of learned Counsel for the petitioner that by bringing new aspect by issuance of government order dated 24.8.1966 in the matter of benevolent legislation of extending benefit of family pension to the deserving persons, is not protected by law. (43) In these circumstances, the order dated 1.9.2001 is set aside and the petitioner is entitled to be given family pension treating to be legal widow of Late Sri Shyam Mohan Srivastava in the great interest of the welfare of the children of the deceased Late Sri Shyam Mohan Srivastava through Smt. Rohini Srivastava.

The writ petition is allowed.