

(2008) 01 KL CK 0051
In the High Court Of Kerala
Case No : W.A. No. 2992 of 2007

V. Moidu

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 08-01-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 300A
Kerala Service Rules, 1958 — Rule 63, 90(7)

Citation : (2007) 4 ILR (Ker) 573 : (2008) 1 KLJ 387 : (2008) 1 KLT 555

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

Bench : Division Bench

Advocate : Kaleeswaram Raj, for the Appellant; N. Manoj Kumar, (SGP) and V.V. Sidharthan, for the Respondent

Final Decision : Dismissed

Judgement

Balakrishnan Nair, J.—The main point that arises for decision in this writ appeal is the constitutional validity of Rule 90(7)(a) of Part III, Kerala Service Rules.

The facts of the case are the following: The appellant is the writ petitioner. He was 4 pensioner, who retired from service on 31-3-1990, while working as the Headmaster of an L.P. School. His second wife Smt. Susheela retired from service as the Headmistress of the very same school. While she was a pensioner, she died on 19-5-1996. She had nominated the petitioner, her husband as eligible for receiving family pension. On her death, the petitioner applied for family pension and the same was sanctioned to him. He was receiving the pension through the Central Bank of India. While so, the Branch Manager of the said Bank, by Ext.P2 communication dated 10-11-2003 informed him of the objection raised by the Accountant General regarding the payment of pension. This was preceded by Ext.P3 communication issued by the Accountant General's office, informing the Branch Manager to stop the payment of pension to the appellant. The appellant, thereafter filed Ex.P5 representation before the Accountant General, detailing the circumstances under which he received the family pension. He prayed for

payment of the pension, which was stopped from December, 2003. The appellant, thereafter moved this Court by filing W.P.(C) No. 22516/2004. The said writ petition was disposed of by Ext.P6 Judgment, directing the Accountant General, the respondent therein to consider his representation. Pursuant to the said judgment of this Court, the Accountant General's office informed the appellant that the payment of family pension was stopped, as he was having another wife living. He was also informed that the Government have been moved for further action in the matter. The Government by Ext.P9 order dated 27-12-2004, ordered that the appellant is ineligible for drawing family pension. The Accountant General forwarded a copy of that order and informed the appellant that the amount paid to him towards family pension between June, 1996 and November, 2003, which will come to Rs. 3,19,059/-, is proposed to be recovered from him. He was asked to represent, if he has got any objection against the same. The Accountant General, later, overruling the objection of the petitioner, decided to recover the amount paid to him, as evidence from Ext.PI 0 communication addressed to the Branch Manager of the Bank. In the above background, the writ petition was filed, challenging the validity of Rule 90(7)(a) of Part III, Kerala Service Rules, which stood in his way of receiving the family pension. In the writ petition the petitioner, the appellant herein also prayed to quash Exts.P2, P3, P7, P8, P9 and P10 and also sought consequential reliefs. The learned single Judge who heard the writ petition, repelled the challenge of the writ petitioner against Rule 90(7)(a) Part III, K.S.R. The learned Judge also declined to interfere with the impugned orders. Hence this Writ Appeal.

2. The learned Counsel for the appellant firstly submitted that the appellant being a Muslim, is entitled to have a second wife. So, the Rule which provides that a living wife will stand in the way of getting family pension in respect of a deceased wife, is arbitrary and discriminatory. Therefore, the same violates his fundamental rights under Article 14 of the Constitution of India. So, the appellant prays for striking down the offending provision in the said Rule. Secondly, it was submitted that the right to receive pension is the right to receive property. The same can be deprived only by a valid law. The same cannot be deprived on the basis of the above invalid Rule. Thirdly, it was contended that in any view of the matter, the amount paid to him cannot be recovered. It was paid in good faith and it was received in good faith. There is no fraud or misrepresentation from his part. Owing to the present physical condition of the appellant, it is impossible for him to repay the amount which was paid to him in monthly installments. In support of this submission, the learned Counsel for the appellant relied on the decision of the Apex Court in N.D.P. Namboodripad (Dead) by LRs. Vs. Union of India (UOI) and Others, . It was a case where the Apex Court interdicted the recovery of the excess amount paid to the deceased appellant from his legal heirs. The learned Counsel also relied on the decision of the Apex Court in Babulal Jain Vs. State of M.P. and Others, . It was a case where excess payment was made while allowing higher pay to the appellant therein, on misconception of law and not due to any mistake, mis-representation or fraud from the part of the

appellant. The Apex Court in the circumstances of the case, prohibited recovery of the excess amount paid to him. The learned Counsel further referred to the decision of the Division Bench of this Court in Krishnakumar S.P. v. Guruvayoor Devaswom ILR 2007(1) Kerala 699. In that case also, though this Court laid down that the excess amount paid can be recovered, did not permit recovery on the particular facts of that case. Lastly, the learned Counsel relied on the decision of the Apex Court in Aleyamma Varghese v. Secretary, General Education Department 2007(3) KLT 700 (SC), where recovery was sought to be made of excess amount paid after the lapse of more than 15 years. The Apex Court prohibited the recovery. The learned Counsel for the appellant submitted that there is no fraud or mis-representation from the part of the appellant. Even assuming by a mistake of law he applied for family pension, the same cannot be treated as a fraud. In support of the said submission, the learned Counsel relied on the words of the learned author Kerr in his book "Law of Fraud and Mistake".

3. The learned Government Pleader, on the other hand, relied on the decision of this Court in Santhakumari Vs. State of Kerala, , wherein it was held that if the employee has received any amount contrary to a statutory provision, the same is liable to be recovered.

4. Rule 90(7)(a) of Part III, K.S.R. reads as follows:

(7) The contributory family pension will be admissible:

(a) in the case of widow / widower upto the date of death or remarriage whichever is earlier and when the widow / widower has not another husband / wife living at the time of death of the employee.

The appellant is trying to condemn this condition imposed for receiving family pension, as grossly arbitrary and unjust and therefore, violative of Article 14 of the Constitution of India. The burden is heavy on the person who attacks a statutory provision, as violative of Article 14 of the Constitution. It is true, it is causing some inconvenience to the appellant and disables him from receiving pension. Even assuming his second marriage is lawful in terms of the Family Law, the contraction of a second marriage is prohibited, unless permitted by the Government, by Rule 63 of Chapter XIV-C of the K.E.R. The said Rule reads as follows:

63. Bigamous Marriages: (i) No teacher who has a wife living shall contract another marriage without first obtaining the permission of the Government, notwithstanding that such subsequent marriage is permissible under personal law for the time being applicable to him.

(ii) No woman teacher shall marry any person who has a wife living without first obtaining the permission of the Government.

The appellant does not have a case that before contracting the second marriage, neither he or Smt. Susheela obtained permission of the Government as contemplated under Rule 63. Family pension to the dependent members of the

family was introduced as a social welfare measure. The said benefit can be availed only subject to the stipulations in the Rules governing the grant of the same. Therefore, we find that the challenge made by the appellant that the said Rule is ultra vires of Article 14 of the Constitution of India, is plainly untenable.

5. Pension is a property at the hands of the pensioner. Pension due to a deceased pensioner may be property at the hands of his legal heirs, which they can claim as of right. But, the right to get family pension after the death of the pensioner, is a right conferred by the Rules, which has to be availed of subject to the conditions prescribed. The contention of the appellant that the family pension is a property at the hands of the family pensioner and therefore, the same cannot be denied to him, cannot be accepted. The Rules concerning family pension contain certain stipulations. The appellant can claim pension only subject to those conditions. The said conditions cannot be attacked relying on Article 300-A of the Constitution.

6. Finally, the point to be decided is whether the recovery of the amount already paid to the appellant should be interdicted. Going by the decisions cited by the appellant, we are of the view that they are decisions rendered on the special facts of the cases concerned. Further, going by the decision in Babulal Jain's case (supra), it would appear that if, by the mistake of the appellant, excess amount was received, the same could be recovered. The " appellant was the retired Headmaster of an L.P. School. He is presumed to know the provisions of Part III, K.S.R., as he has to clear a paper in K.S.R. also for passing the Account Test (Lower), which is one of the mandatory qualifications for promotion to the post of Headmaster. Rule 90(7)(a) expressly says that the appellant is ineligible. In the face of the Rule, the appellant applied and obtained family pension. So, it is a mistake from the part of the appellant, even if it cannot be described as a fraud. Therefore, the payment received contrary to law from public funds, has to be returned by him. This view is supported by the decision of the Division Bench of this Court in Santhakumari's case (supra). So, we are of the view that there are no special mitigating circumstances compelling this Court to interdict the recovery of the amount due from the appellant. He has no right to retain the public money he collected illegally. Therefore, he should return it. We find nothing illegal with the judgment of the learned single Judge, warranting interference in this appeal. Accordingly, the Writ Appeal fails and it is dismissed.