

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFIQUE**

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA, 1937

WA.No. 685 of 2015 () IN WP(C).25296/2012

**AGAINST THE ORDER/JUDGMENT IN WP(C) 25296/2012 of HIGH COURT OF KERALA
DATED 25-11-2014**

APPELLANT(S)/RESPONDENTS:

- 1. UNION OF INDIA
REPRESENTED BY THE SECRETARY
MINISTRY OF HOME AFFAIRS (FREEDOM FIGHTER'S DIVISION,)
LOK NAYAK BHAVAN, KHAN MARKET,NEW DELHI, PIN-110 003.**
- 2. DEPUTY SECRETARY
MINISTRY OF HOME AFFAIRS (FREEDOM FIGHTER'S DIVISION,)
LOK NAYAK BHAVAN, KHAN MARKET,NEW DELHI, PIN-110 003.**

BY ADV. SRI.S.KRISHNAMOORTHY, CGC

RESPONDENT(S)/PETITIONER/3RD AND 4TH RESPONDENTS:

**THANKAMMA KESAVAN ILLIKKALVELI, C.M.C.17
CHERTHALA, ALAPPUZHA-688524**

BY SRI.J.OM PRAKASH

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 3-11-2015, THE
COURT ON 10/12/2015 DELIVERED THE FOLLOWING:**

WA NO.685/15

APPENDIX

APPELLANTS' EXHIBITS

ANNEXURE A1: TRUE COPY OF LETTER NO.65026/FFP-
12/2010/GAD DATED 3.10.2011.

ANNEXURE A2: TRUE COPY OF LETTER NO.65026/FFP-
A2/2010/GAD DT 9.2.2012.

//True Copy//

PS to Judge

Rp

ASHOK BHUSHAN, C.J.

“C.R.”

&

A.M. SHAFFIQUE, J.

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W.A. No. 685 of 2015

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Dated this, the 10th day of December, 2015

J U D G M E N T

Shaffique, J.

This appeal is filed by the respondents in WP(C) No.25296/2012 challenging judgment dated 25/11/2014. The writ petition is filed by the respondent herein, who is hereinafter referred to as the petitioner, seeking for a direction to the appellants to pay pension under the Swatantrata Sainik Samman Pension Scheme, 1980 (hereinafter referred to as the 'Scheme') from 19/5/1998.

2. The short facts involved in the writ petition are; The petitioner's husband Sri.Kesavan died consequent on the firing of police during the Punnapra Vayalar Struggle in October, 1946. When the Punnapra Vayalar Struggle was included under the Scheme, petitioner submitted application dated 14/5/1998 to the Central Government, which was acknowledged by the 2nd appellant on 19/5/1998. Another set of application was sent to

the District Collector on 15/5/1998. Petitioner also produced a list of persons who died in the struggle in which petitioner's husband was the fifth person. Since no action was taken by the State and Central Government, petitioner filed WP(C) 28460/2010. During the pendency of the writ petition, the State Government sent a positive recommendation to the 1st appellant as per letter dated 3/10/2011. Hence direction was issued to the first appellant to dispose of the petitioner's application. By Ext.P7 order dated 23/3/2012, the application was allowed. However, pension was granted only from 14/10/2011. Hence the petitioner has approached this Court stating that when the claim for pension was made on the basis of primary evidence, Ext.P4, pension has to be paid from 19/5/1998, the date of application.

3. A counter affidavit has been filed by the respondent *inter alia* stating that though the petitioner's name was not declared as an eligible application for the grant of dependent pension, the respondent adopted a liberal attitude and granted family pension. It is stated that though the application was received on 19/5/98, the State Government's recommendation

was received by the appellant only on 14/10/2011. Further, it is mentioned that on a perusal of the report of the Tahsildar and the report of State of Kerala, discrepancy was noticed in the name of the petitioner's husband. There was doubt regarding the true identity of the petitioner's husband. It is despite such discrepancy, a liberal view has been taken in the matter keeping in view the age factor of the petitioner and that apart, the appellant was complying with the High Court order dated 27/10/2011 in WP(C) No. 28460/2010.

4. The learned Single Judge taking into account the judgment of the Supreme Court in ***Mukund Lal Bhandari v. Union of India and Others*** (AIR 1993 SC 2127) and the judgment of this Court in ***Union of India v. Radhamony*** (2005 (4) KLT 27) held that the petitioner is entitled for pension from the date of original application, irrespective of whether the application is filed with or without requisite evidence.

5. While impugning the aforesaid judgment, learned counsel for the appellants submits that there is discrepancy in the name of the petitioner's husband in various documents and

therefore, it has to be treated as an instance of doubtful case and it is by giving the benefit of doubt that the pension has been granted. It is also contended that the recommendation was received from the State Government only on 14/10/2011. Therefore, the appellants cannot be called upon to give arrears of pension from the original date of application. It is also contended that as per the Scheme, the application is to be submitted to the State Government also and unless the State Government's recommendation is received, the question of grant of pension does not arise.

6. During the pendency of the appeal, appellants also produced Annexure A2 communication dated 9/2/2012 of the State Government, which was in answer to a query raised by the Central Government. Central Government expressed doubt regarding the name of the petitioner's husband. According to the Central Government, the genuineness of the report of Tahsildar, Cherthala had to be verified as there was some discrepancy in the name of the petitioner's late husband. It is by letter dated 9/2/2012, that the State Government has intimated that the three

names of the respondent's husband are of the same person which was also verified from the list of persons who were killed in the Punnapra Vayalar Struggle. It is in that circumstances that the pension was sanctioned as per letter dated 23/3/2012.

7. It is argued by the learned counsel for appellants that the pension has been granted by giving benefit of doubt as the evidence was not reliable. There was discrepancy in the name of the petitioner's husband. According to them, there was doubt regarding the true identity of the petitioner's husband. However, on receiving the application on 14/10/2011, duly recommended by the State Government, pension was granted. It is contended that the judgment in **Mukund Lal Bhandari** (supra) cannot be made applicable to the case on hand as the judgment has been clarified in subsequent judgments of the Supreme Court in **Government of India rep. by the Secretary v. K.V.Swaminathan** [(1997) 10 SCC 190] and **Union of India v. Kaushalaya Devi** [(2007) 9 SCC 525].

8. It is contended that the petitioner's husband's name was written as Narayanan Kesavan Kaithavelil and in the Kerala

Freedom Fighters pension application, it has been noted as Kaithavelil Kesavan and in the Tahsildar's report, it is noted as Kandan Kunju Kesavan.

9. On the other hand, learned counsel appearing for the respondent relied upon **Mukund Lal Bhandari** (supra) and another judgment of the Division Bench of this Court in **Union of India v. Elizabeth Sipri** [2015 (4) KHC 777(DB)] for the proposition that when the grant of pension is based on primary evidence, the grant has to be effective from the date of application. Learned counsel also relied upon **Mohinder Singh Gill v. Chief Election Commissioner** [(1978) 1 SCC 405] to contend that the Central Government cannot take a contention that the grant of pension was under doubtful circumstances without it being mentioned in the order granting pension.

10. In fact, we had occasion to consider similar issues relating to the grant of pension in WA No.1328/14 and connected cases wherein we have indicated that when pension is granted based on directions issued by the Court, it is open for the Central Government to contend under what circumstances the pension

has been granted.

11. It is relevant to note that in the case on hand, pension is granted as per Ext.P7 order dated 23/3/2012. In the order granting pension, no specific reason had been stated regarding the manner of consideration, that is, whether the grant was based on any material or by giving the benefit of doubt. It only indicates that pension is granted in compliance of the judgment dated 27/10/2011 in WP(C) No.28460/2010.

12. It is borne out from the judgment aforesaid that the petitioner claimed freedom fighters' pension under the aforesaid Scheme. She also sought a direction to the State Government to make a report to the 1st respondent, Central Government for the aforesaid benefit. During the pendency of the writ petition, the writ petitioner produced a communication from the 2nd respondent to the 1st respondent, recommending application for the grant of pension, which is dated 3/10/2011 (Ext.P5). Based on the said recommendation, the writ petition was disposed of directing the Central Government to consider the application made by the petitioner for pension and to pass appropriate orders.

13. Ext.P5 recommendation of the State Government, reads as under;

"I am directed to invite your attention to the reference cited (copy enclosed). Smt.Thankamma Kesavan submitted a representation dated 17/12/2010 through District Collector, Alappuzha for reconsidering the application for Swathantrata Sainik Samman Pension. She claimed that her late husband Narayanan Kesavan Kaithavelil Veedu, died due to the gunshot occurred in connection with Punnapra Vayalar Struggle. Hence she claims that she is eligible for getting the benefit of Swathantrata Sainik Samman Pension in respect of her late husband.

In support of her claim she has produced a list of the persons who participated in the struggle as a result of gun shots or otherwise at Vayalar. As per the list obtained by the petitioner from District Collector, Alappuzha and the petitioners husband's name is included at 5th place.

District Collector, Alappuzha as per their letter dated 26/8/2011 has reported that both the two persons are one and same. District Collector has also reported that her husband was an active freedom fighter and killed in Vayalar due to gun shot in connection with Punnapra Vayalar Struggle for getting the benefit of Kerala Freedom Fighters

Pension in respect of her late husband.

In the circumstance the Swathantrata Sainik Samman Pension case of Smt.Thankamma Kesavan is recommended. A copy of the Swathantrata Sainik Samman Pension application, list of gunshot persons at Vayalar and other available documents are forwarded herewith for further necessary action at your end."

14. According to the Central Government, they were not satisfied with the recommendation as the name of the freedom fighter differed in the application as well as in the report, which again was clarified by the State Government in terms of letter dated 9/2/2012. It is contended by the Central Government that though they were not satisfied with the explanation, pension was granted with effect from the date of receipt of the application along with the recommendation from the State Government. It is relevant to note that though the petitioner claimed to have filed an application on 19/5/1998 to the Central Government, the application submitted before the State Government was also not seen processed and nothing has been done by the petitioner until filing of WP(C) No. 28460/2010. However it seems that the

petitioner submitted a representation to the State Government on 17/12/2010, which was processed by the State Government and the recommendation was issued as per Ext.P5 dated 3/10/2011. It is therefore apparent that there was no recommendation from the State Government for grant of pension until Central Government received the same in terms of Ext.P5 dated 3/10/2011. Even assuming that the application was received by the Central Government on 19/5/1998, as per the Scheme, it was not possible for the Central Government to have sanctioned the pension without recommendation from the State Government. Clause (3), the procedure for grant of pension is relevant, which reads as under;

"3. Procedure

Persons who consider themselves eligible for Samman Pension under the Scheme and desire the Samman Pension, should apply in duplicate on the prescribed application form. The application, duly filled in and supported with required documents as proof of claim of suffering, should be sent to the Chief Secretary of the concerned State Government/Union Territory Administration. A copy of such application should be sent to the Deputy

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Secretary to the Government of India, FF Division, MHA, New Delhi as an advance copy. However, claims can be processed by the Central Government only on receipt of verification & entitlement to pension report from the State Government/U.T. Administration concerned. In case the requirements of the Scheme are fulfilled, Samman pension is granted to the applicant."

15. The facts being so, the Central Government could have processed the application only after receipt of Ext.P5 dated 3/10/2011. According to the Central Government, the same was received on 14/10/2011. Therefore, it is evident that the application with all necessary particulars were received by the Central Government only on 14/10/2011, and pension was granted from 14/10/2011, the date on which the documents were received with full particulars.

16. In fact, two factors stand against the claim for arrears of pension from 19/5/1998. One is that the application with recommendation of State Government was received by the Central Government only on 14/10/2011 which is the date to be reckoned for grant of pension. Secondly, Central Government

expressed doubt regarding the discrepancy in the name of the martyr and they have sanctioned the pension treating the same under doubtful circumstances.

17. In ***Mukund Lal Bhandari*** (*supra*), the Supreme Court held that the claim for pension has to be granted from the date of making the application and not from any earlier date. In this background, the Supreme Court held at paragraphs 6 and 8 as under;

"6. As regards the sufficiency of the proof, the Scheme itself mentions the documents which are required to be produced before the Government. It is not possible for this Court to scrutinize the documents which according to the petitioners, they had produced in support of their claim and pronounce upon their genuineness. It is the function of the Government to do so. We would, therefore, direct accordingly."

"8. Coming now to the last contention advanced on behalf of the Government, viz., that the benefit of the Scheme should be extended only from the date the claimant produces the required proof of his eligibility to the pension, we are of the view that this contention can be accepted only partially."

There have been cases, as in the present case, where some of the claimants had made their applications but either without the necessary documentary proof or with insufficient proof. It is unreasonable to expect that the freedom fighters and their dependents, would be readily in possession of the required documents. In the very nature of things, such documents have to be secured either from the jail records or from persons who have been named in the Scheme to certify the eligibility. Thus the claimants have to rely upon third parties. The records are also quite old. They are bound to take their own time to be available. It is, therefore, unrealistic to expect that the claimants would be in a position to produce documents within a fixed time-limit. What is necessary in matters of such claims is to ascertain the factum of the eligibility. The point of time when it is ascertained, is unimportant. The prescription of a rigid time-limit for the proof of the entitlement in the very nature of things is demeaning to the object of the Scheme. We are, therefore, of the view that neither the date of the application nor the date on which the required proof is furnished should make any difference to the entitlement of the benefit under the Scheme. Hence, once the application is made, even if it is unaccompanied by

the requisite eligibility data, the date on which it is made should be accepted as the date of the preferment of the claim whatever the date on which the proof of eligibility is furnished."

18. In ***Union of India v. Ganesh Chandra Dolai and Others***. [(1997) 10 SCC 289], it was held that since Government of India has categorically stated that the respondents were given benefit of doubt, pension could be given only from the date of order. Para 4 and 5 are relevant, which read as under;

"4. We have heard the learned counsel for the parties. We are of the view that the ratio in Duli Chand case is not applicable to the facts of the present case. In Duli Chand case this Court had by the order dated 16-7-1990 directed the Government of India to pay pension to the petitioners therein w.e.f. 1-8-1980. It was specifically mentioned in the order that all the 41 petitioners had produced the relevant documents supporting their claim and keeping in view the facts of these cases pension was directed to be given w.e.f. 1980. In this case the Government of India has categorically stated that the respondents were given benefit of doubt and as such the pension can only be given from the date of the order.

5. Keeping in view the documents produced by the

respondents before the Government, the respondents have been rightly given pension by the Government of India from the date of the order. We allow this appeal, set aside the impugned order of the High Court and restore the order of the Government of India whereunder pension has been given to the respondents from the date of the order of the Government of India. No costs."

19. In **Government of India rep. by the Secretary v. K.V.Swaminathan** [(1997) 10 SCC 190], after referring to **Union of India v. M.R.Chelliah Thevar** (CA No.7762/1996) decided on 30/4/1996, **Mukund Lal Bhandari** (supra) and **Ganesh Chandra Dolai** (supra), it is held that since the claimant was given the relief on the basis of the benefit of doubt, pension is payable only from the date of order and not from the date of application. The aforesaid judgment reads as under;

"1. Leave granted.

2. This appeal by special leave arises from the judgment of the Madras High Court made on 14-3-1996 in WP No. 15732 of 1994. The respondent claimed the benefit as freedom fighter but the same remained pending for a long time. Ultimately, giving the benefit of doubt to the

respondent, he was granted pension on 18-11-1989. Not feeling satisfied with the relief, the respondent filed writ petition claiming the pension from the date of his application. In the impugned order, the High Court has directed to pay the pension from the date of the application. The controversy is no longer res integra. This Court had considered the entire controversy in Union of India v. M.R. Chelliah Thevar (CA No. 7762 of 1996) decided on 30-4-1996 and held thus:

“Heard counsel for both sides. On behalf of the Union of India strong reliance was placed on the decision of the Division Bench of this Court dated 24-4-1995. On the other hand, learned counsel for the respondent placed reliance on an earlier judgment of this Court in Mukund Lal Bhandari v. Union of India, as well as the decision in Amarnath Malhotra v. Union of India dated 19-10-1996. The distinction, however, is that in the case relied on by the Union of India, the respondents were granted the benefit under the policy not because it was a clear case of the respondents being freedom fighters but because benefit of doubt was given and hence the pension was restricted from the date of the order and not the date of application. In the two cases relied on by the respondents, there was no question of the benefit having been founded on a finding of fact which did not clearly

establish that the petitioners were freedom fighters but on the liberal ground of giving them the benefit of doubt and restricting it from the date of order. We are, therefore, of the opinion that there is a distinction between the decision relied on by the learned Additional Solicitor General on behalf of the Union of India and two decisions relied on by the respondent. In the instant case, since the benefit of doubt was given and the status of freedom fighter was recognised on that basis, the case would be covered by the first-mentioned decision dated 24-4-1995 (Union of India v. Ganesh Chandra Dolai)."

3. *In view of the above-settled legal position, though the respondent was not entitled to the pension as a freedom fighter, he was given the relief on the basis of benefit of doubt. Therefore, he is entitled to the pension only from the date of the order and not from the date of the application. We are informed that pursuant to the order of the High Court, the amount has been released. Under this circumstance, the appellant is directed to deduct the paid amount proportionately from the amount payable in every month, instead of asking him to refund the amount.*

4. *The appeal is accordingly allowed. No costs".*

20. In ***Kaushalaya Devi*** (supra), the Supreme Court after referring to ***K.V.Swaminathan*** (supra) observed that when the claim is allowed on the basis of secondary evidence, and not on the basis of jail certificate produced by the claimant, pension should be granted from the date of order and not from the date of application.

21. Our High Court had occasion to consider this issue in ***Radhamony's case*** (supra) wherein Division Bench relied upon ***Mukund Lal Bhandari*** (supra). In ***Union of India v. Elizabeth Sipri*** (WA No.1858/2013), direction was given by the Division Bench to grant pension from the date of application. All the cases referred above related to the grant of pension for jail suffering on conviction or in cases of underground suffering and based on either primary evidence or secondary evidence, which apparently cannot be applied to the facts of the present case, in which pension is claimed by the widow of a martyr. In such instances, the proof required are the relevant documents from official records and newspapers of the relevant time, which are considered as evidence. Appellants have produced the salient

features of the Scheme. Clause 2.1 relates to eligibility of dependents of martyrs, which reads as under;

“2.1 Eligible dependents of martyrs:- A martyr is a person who died or who was killed in action or in detention or was awarded capital punishment due to participation in the freedom struggle of India. Relevant documents from official records and newspapers of the relevant time are considered as evidences in such cases.”

But in order to enable the Central Government to pay pension as in all other cases, recommendation has to be made by the State Government.

22. As already indicated, Ext.P7 pension sanctioning order dated 23/3/2012 does not indicate whether the Central Government had granted pension based on the materials made available by the State Government whereas reference is only made to the judgment dated 27/10/2011 in WP(C) No.28460/2010. Therefore, it has to be verified whether the grant of pension was based on the materials required to be produced in terms of Clause 2.1 of the Scheme or whether it is allowed giving the benefit of doubt as claimed by the appellants. The

recommendation of the State Government is reflected in Ext.P5 wherein it is stated that the petitioner had submitted a representation dated 17/12/2010 through the District Collector for reconsidering the application for Swatantrata Sainik Samman Pension. It seems that the same was neither rejected or not attended to earlier. What is produced is a list of persons who participated in the struggle as a result of gun shot or otherwise at Vayalar. According to her, the name of petitioner's husband is included at the fifth place and that the District Collector had reported that both the two persons are one and the same. The District Collector had also reported that her husband was an active freedom fighter and killed in Vayalar due to gun shot in connection with the Punnapra Vayalar Struggle. It is therefore apparent from the above recommendation that the same had been issued based on a list available with the District Collector. However, there is difference in the name of the petitioner's husband, which has been clarified by the District Collector as per letter dated 26/8/2011. This, according to the Central Government, has created some doubt regarding the claim and

therefore they were justified in granting pension from the date when the recommendation was received from the State Government.

23. When the Central Government had taken such a view and justified their action in granting pension from 14/10/2011, we do not think that this Court will be justified in sitting in judicial review over such finding of facts and discard the doubt expressed by the Central Government. Though the learned counsel for the petitioner relied upon ***Mohinder Singh Gill*** (supra) to contend that the grant of pension was not based on any doubt expressed and it is not evident from Ext.P7 order, we do not think that the said judgment can be made applicable to the facts of the present case. In the case on hand, pension was granted from 14/10/2011 without thereby mentioning as to whether the grant of pension was based on any evidence, either primary or secondary. Hence, it is open for the Central Government to place materials on record to justify the grant of pension from 14/10/2011. Having regard to the fact that the appellants have sufficiently explained the reason for grant of pension from 14/10/2011, the learned Single Judge

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ought to have considered such materials before arriving at a conclusion. Each case has to be decided on its own facts and the facts of this case clearly justify the action of the Central Government in granting pension from 14/10/2011.

In the said circumstances, this appeal is allowed setting aside the judgment of the learned Single Judge and the writ petition is dismissed.

Sd/-
ASHOK BHUSHAN, CHIEF JUSTICE

Sd/-
A.M. SHAFFIQUE, JUDGE

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