

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

WEDNESDAY, THE 11TH DAY OF NOVEMBER 2015/20TH KARTHIKA, 1937

WP(C).No. 17853 of 2013 (F)

PETITIONER : -

KOCHURANI THOMAS,
EDAKKATT HOUSE, KAVUMBAGAM,
KANJIRAPALLY, KOTTAYAM DISTRICT.

BY ADV. SRI. ROJO J. THURUTHIPARA

RESPONDENTS : -

1. THE STATE OF KERALA,
REPRESENTED BY ITS SECRETARY,
MINISTRY OF CO-OPERATIVE SOCIETIES,
THIRUVANANTHAPURAM-695001.
2. THE REGISTRAR OF CO-OPERATIVE SOCIETIES,
OFFICE OF THE REGISTRAR OF CO-OPERATIVE SOCIETIES,
THIRUVANANTHAPURAM-695001.
3. THE KERALA STATE CO-OPERATIVE EMPLOYEES PENSION BOARD,
P.B.NO. 85, KALANIVAS, CHINMAYA LANE,
KUNNUMPURAM, NEAR AYURVEDA COLLEGE,
THIRUVANANTHAPURAM-695001,
REPRESENTED BY ITS SECRETARY.
4. MUNDAKAYAM SERVICE CO-OPERATIVE BANK LTD.,
NO.K 122, MUNDAKAYAM, KOTTAYAM DIST.,
KERALA-686513, REPRESENTED BY ITS SECRETARY.

R3 BY ADV. SRI. K.R. SUNIL, SC, CO-OP. EMP. PENSION BOARD

R4 BY ADV. SRI. LIJI. J. VADAKEDOM

R1&2 BY SPL. GOVERNMENT PLEADER SRI. D. SOMASUNDARAM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
11-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS : -

- EXT.P1 : TRUE COPY OF THE COMMUNICATION DATED 26/8/2009 SENT BY THE 3RD RESPONDENT TO THE 4TH RESPONDENT, REJECTING THE CLAIM OF THE PETITIONER.
- EXT.P2 : TRUE COPY OF GO(P)NO 53/2011 DATED 7/3/2001.
- EXT.P3 : TRUE COPY OF THE COMMUNICATION DATED 15/3/2011 ISSUED BY THE 4TH RESPONDENT BANK, REGARDING THE REJECTION OF THE PETITIONER'S CLAIM.
- EXT.P4 : TRUE COPY OF THE REPLY DATED 5/3/2013 FROM THE 3RD RESPONDENT, REJECTING THE CLAIM.
- EXT.P5 : TRUE COPY OF THE RELEVANT PAGE OF THE SCHEME (BEFORE AMENDMENT) REGARDING RULE 23 FAMILY PENSION.
- EXT.P6 : TRUE COPY OF THE REPORT SUBMITTED BY THE 3rd RESPONDENT BEFORE THE TALUK LEGAL SERVICE COMMITTEE, KANJIRAPALLY IN THE YEAR 2013.

RESPONDENTS' EXHIBITS : - NIL.

// TRUE COPY //

P.A. TO JUDGE

DMR/-

DAMA SESHADRI NAIDU, J.

W.P.(c) No. 17853 of 2013

Dated this the 11th day of November, 2015

JUDGMENT

The petitioner is a widow of an employee who retired from the service of the fourth respondent Bank on 10.07.2004; he later died on 04.03.2009 while drawing a pension.

2. When the petitioner, being the wife of a deceased pensioner, applied for a family pension, the fourth respondent Bank rejected it through Exhibit P1, and the third respondent Pension Board through Exhibit P4. The reason assigned for denying the family pension to the petitioner is that Clause 23 of Kerala Co-operative Societies Employees Self Financing Pension Scheme ('the Scheme') had been substituted with a new provision that does not contain any reference to persons drawing retirement pension. Aggrieved, the petitioner has filed the present writ petition.

3. The learned counsel for the petitioner has submitted that all along persons who have been drawing superannuation pension and those drawing retirement pension had been treated equally and that all benefits including pensionary benefits were extended to them on an even keel. He has further contended that through Exhibit P2 amendment to or

substitution of Clause 23 of the Scheme, the Government has discriminated against one class of employees, i.e., those who have retired on a voluntary basis rather than after attaining the age of superannuation.

4. Drawing my attention to the additional counter affidavit filed by the respondents, the learned counsel has contended that mere inability on the part of the employer to pay the pension or the viability of the scheme cannot be a ground to deny pension to a person who is otherwise entitled. In support of his submissions, the learned counsel has placed reliance on **Thulasi Devi v. Kerala State Co-operative Employees Pension Board**¹ and **Pepsu Road Transport Corporation, Patiala v. Mangal Singh and Others**².

5. The learned counsel has further submitted that whatever be the reason for demitting the office, be it superannuation or voluntary retirement, the employee's rights could not be affected. For all forms of cessation of service, short of dismissal for misconduct, should be treated alike, and the benefits should also be extended alike. In support of his submissions, the learned counsel has placed reliance on **State**

1 2008(4) KLT 647

2 (2011) 11 SCC 702

Bank of India v. Central Board of Direct Taxes.³

6. The learned Special Government Pleader, on the contrary, has submitted that Clause 23 has not been amended, but in fact was substituted. According to him, once a provision stands substituted, it takes effect as if it had been on the statute book since inception rather than from the date of substitution.

7. In elaboration, the learned Special Government Pleader has submitted that because the substitution obliterates the earlier provision, for all practical purposes, it is deemed that only the substituted provision had been holding the field all along. Thus, even in the absence of any specific statutory provision as to the retrospectivity of the substituted provision, it shall take effect *ab initio*—the date of the original enactment rather than that of the substituted provision. In support of his submissions the learned Special Government Pleader has placed reliance on **Ramkanali Colliery of BCCL v. Workmen by Secy., Rashtriya Colliery Mazdoor Sangh and Another⁴, Hassan Co-operative Milk Producers Societies Union Ltd v. State of Karnataka⁵, Bhagat Ram Sharma v.**

3 2006 (1) KLT 258

4 (2001) 4 SCC 236

5 2014 (3) KLT SN 45

Union of India and others⁶ and Khoday Distilleries Ltd. and others v. State of Karnataka and Others.⁷

8. The learned Special Government Pleader has drawn my attention to Clause 21 of the Scheme to contend that an employee who has put in twenty years of service or who has attained the age of 50 years could be eligible for voluntary retirement. According to him, a person who has put in a minimum service but yet crossed 50 years could be entitled to seek voluntary retirement though he would have contributed a meager amount under Contributory Pension Scheme. If the family pension is to be extended to those persons as well, given the fact that the contribution was minimal, it would make the very scheme unviable.

9. The learned Special Government Pleader, placing reliance on **Khoday Distilleries** (*supra*), has contended that an amendment to be assailed has to be characterized as manifestly arbitrary. In the present instance, Exhibit P2, according to him, cannot be stated to be manifestly arbitrary. Summing up his submissions, the learned Special Government Pleader has urged this Court to dismiss the writ petition.

6 AIR 1998 Supreme Court 740
7 (1996) 10 SCC 304

10. The learned Standing Counsel for the third respondent Pension Board has submitted that there is a clear distinction between the superannuation pension, as has been defined under Clause 20, and retirement pension, under Clause 21. He has submitted that an employee who retires on attaining the age of superannuation would be entitled to pension on his putting in thirty years of service. On the other hand, an employee who seeks voluntary retirement, contends the learned Standing Counsel, needs to attain 50 years of age, irrespective of the length of service.

11. He has eventually contended that since the amendment was effected way back in 2001, and since the petitioner's husband sought voluntary retirement only thereafter, it is deemed that he was fully aware of the consequences that flowed from the substituted provision.

12. In reply, the learned counsel for the petitioner has submitted that the very third respondent Pension Board earlier recommended the case of the petitioner as well as many other similar persons for family pension, the amendment notwithstanding.

13. The learned Standing Counsel is quick to refute the said contention of the learned counsel for the petitioner. He has, in that regard, submitted that the Pension Board has only recommended to the Government that Clause 23 may be further amended to ensure that a broad spectrum of beneficiaries would be brought under the scheme. According to him, until and unless the government takes a stand and makes the necessary amendment, it cannot be contended that the pension board has been estopped from rejecting the petitioner's claim.

14. Heard the learned counsel for the petitioner and the learned Standing Counsel for the Pension Board, as well as the learned Special Government Pleader, apart from perusing the record.

Issue:

Whether Exhibit P2 amendment is discriminatory and is, therefore, unconstitutional, falling foul of Article 14 of the Constitution of India?

15. To begin with, I may have to address one of the primary contentions of the learned Special Government Pleader: that the petitioner's husband voluntarily retired only

after the substitution of Clause 23. He, therefore, was presumed to have been aware of the consequences—the denial of family pension. In that context, it is essential to clarify that the issue in the writ petition does not concern the prospectivity or retrospectivity of Exhibit P2 amendment. On the contrary, the petitioner has sought the judicial invalidation of legislation on the grounds that it offends Article 14 of the Constitution.

16. The learned Special Government Pleader, on his part, has laid much emphasis on the putative subtlety in the expressions 'amendment' and 'substitution'. He has also placed reliance on certain precedents to the effect that once it is a substitution, rather than an amendment, it is deemed to have been holding the field since inception as if it were part of the original enactment. As such, inevitable is the examination of the legal and semantic significance of the expressions 'amendment' and 'substitution' to resolve the principal issue in the writ petition: the Constitutional validity of Clause 23 of the Scheme.

17. It is, therefore, appropriate for us to examine Clause 23 pre- and post-amendment or substitution. Pre-amendment the provision read as follows:

"23. Family Pension - (1) Pension shall be granted to the family of an employee who dies - (a) while in service, provided he has completed a minimum of ten years qualifying service or (b) after his retirement where he was in receipt of a superannuation pension or retiring pension.

(2) The payment of family pension shall, in no case, extend beyond a period of fifteen years from the date of death of the employee or pensioner as the case may be."

Post-amendment, it reads as follows:

"In clause 23 - (i) for sub clause (1), the following sub clause shall be substituted, namely: - "(1) Pension shall be granted to the family of an employee who dies, -

(a) while in service; or

(b) after his retirement where he was in receipt of a superannuation pension."

(ii) The existing sub-clause (2) shall be omitted."

18. As can be seen from the scheme, Clause 20 defines the superannuation pension; whereas Clause 21, the retiring pension. In this regard, both the learned Special Government Pleader and the learned Standing Counsel have contended that an employee who receives superannuation pension serves the employer far more years than an employee who voluntarily retires.

19. In fact, the learned Standing Counsel has contended that an employee who draws superannuation pension puts in thirty years of service. I am afraid this contention is specious. The statute makes it very clear that 30 years is the maximum service; as per Clause 20, the minimum is ten years. On the other hand, a person who retires on a voluntary basis, thereby to be entitled to draw a retiring pension, has to complete a minimum of twenty years of qualifying service or attain the age of fifty years, whichever is earlier.

20. Looked either way, an employee getting superannuated or an employee voluntarily retiring may as well have the same length of service. Expressed differently, it is inconceivable, rather incorrect, to hold that a person who retires voluntarily puts in less service. A person retiring on superannuation needs to put in a minimum service of ten years to get a pension; on the other hand, an employee seeking retirement voluntarily needs to put in a minimum of twenty years.

21. Viewed from another perspective, for voluntary retirement, instead of his completing 20 years of service, an employee can press his claim on his attaining the age of 50.

In such as event, is he going to put in fewer years of service than an employee retiring on his attaining the age of superannuation—a minimum of ten years? If ten years' service is the threshold for a superannuating employee to claim a pension, it is inconceivable to conclude that an employee retiring voluntarily on his attaining 50 years' service will not complete ten years' service. It is well-nigh impossible for a person to secure employment once he crosses 40. Thus, by 50, he will have more than ten years' service.

22. Under these circumstances, I am of the considered opinion that there is not much difference in the minimum length of service of the employees who draw the superannuation pension and those who draw the retiring pension.

Is a substituted provision retrospective by default?

23. In **Bhagat Ram Sharma** (*supra*) a learned Division Bench has held that it is a matter of legislative practice to provide, while enacting an amending law, for the deletion of an existing provision and the substitution of a new provision. Such deletion has the effect of repealing the existing provision. Such a law may also provide for the introduction of a new provision.

There is no real distinction between 'repeal' and an 'amendment'. In this regard, their Lordships have quoted with approval from Sutherland's *Statutory Construction* (3rd Ed.)

24. The learned Special Government Pleader has relied on the judgment of a learned Full Bench of the Karnataka High Court in **Hassan Co-operative Milk Producers Societies Union** (supra). As he has made the said judgment a sheet anchor of his submissions, and as the doctrine of comity requires, I shall pay a close attention to the said judgment.

25. One of the questions that fell for consideration in **Hassan** (supra) is whether Section-28-A(4) of the Karnataka Cooperative Societies Act, 1959, as substituted by the Amending Act, dated 11.02.2013, is prospective or retrospective. A learned Division Bench, initially, observed that when a provision of law had been amended by way of a substitution, it would relate back to the date of the Act unless otherwise specifically stated. Nevertheless, given the judicial cleavage on this aspect occasioned by a divergent view expressed by another co-ordinate Bench, the learned Division Bench has referred the matter to a Full Bench.

26. The learned Full Bench, while answering the reference, has placed a heavy reliance on the judgment of the Hon'ble Supreme Court in **Zile Singh vs. State of Haryana and Ors**⁸. It, therefore, pays to examine the ratio of **Zile Singh**, in which the Apex Court has observed that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication. According to their Lordships, it is especially essential in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole.

27. **Zile Singh** (supra) has further observed that if it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the Statute retrospectivity.

8 AIR 2004 SC 5100

28. In elaboration, **Zile Singh** suggests four factors as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what has the legislature contemplated? (p. 388). The rule against retrospectivity, it is further observed, does not protect from the effect of a repeal a privilege which did not amount to an accrued right. (p. 392)

29. In **Sham Sundar v. Ram Kumar**,⁹ (supra), relied on in **Zile Singh** (supra), a Constitution Bench of the Apex Court has held as follows:

"From the aforesaid decisions the legal position that emerges is that when a repeal of an enactment is followed by a fresh legislation, such legislation does not affect the substantive rights of the parties on the date of the suit or adjudication of the suit unless such a legislation is retrospective, and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of the suit. However, the position in law would be different in the matters which relate to the procedural law but so far as substantive rights of parties are concerned they remain unaffected by the amendment in the enactment. *We are, therefore, of the view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act, such legislation is prospective*

9 AIR 2001 SC 2472

in operation and does not affect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment....."

(emphasis supplied)

30. Eventually, after examining the statutory schema, the learned Full Bench of the Karnataka High Court has observed that the language will have to be examined to find out the intendment of the legislature. Every statute is *prima facie* prospective unless it is expressly or by necessary implications or intendment made to have retrospective operation. The learned Full Bench has also observed that the absence of a provision expressly giving retrospective operation to the legislation is not determinative of its prospectivity or retrospectivity; the other factors will have to be seen to find out whether the amendment was necessarily intended to have retrospective effect.

31. Eventually, having regard to the language employed in the Amending Act and the attending circumstances, the learned Full Bench was satisfied that the amended provision by necessary implication/intendment would operate retrospectively. Thus, evidently, nowhere has the learned Full Bench held that a substituted provision, in contradistinction to

an amended provision, will invariably have a retrospective operation - always. The learned Special Government Pleader has relied on the short notes of the judgment and presumably fallen into an error of believing that the learned Full Bench of the Karnataka High Court held to the contrary, though it did not.

32. In **Ramkanali Colliery of BCCL** (*supra*), the Supreme Court has held that if there are both repeal and introduction of another provision by a single exercise, the expression "substituted" is used. Such deletion repeals the existing provision and also introduces a new provision. In their Lordships' view, there is, thus, no real distinction between repeal and amendment or substitution of a provision.

33. In **Khoday Distilleries** (*supra*), the Apex Court has further held that the tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power.

34. In **State Bank of India** (*supra*), the issue is whether the voluntary retirement from service would fall under the term "termination of employment" within the meaning of Section 17(3) of the Income Tax Act. The other issue is whether the relief under Section 89(1) is admissible after the grant of exemption under Section 10(10C)(viii) of the Income Tax Act. In other words, whether an employee who received compensation under the voluntary retirement scheme from his employer is entitled to get relief under Section 89 (1) read with Section 17 (3) (1) of the Income Tax Act, over and above the exemption provided under Section 10 (10C) (viii) of the same Act?

35. A learned Division Bench of this Court has held that Section 89 (1) is a beneficial provision which has been placed under Chapter VIII dealing with Rebates and Reliefs and, therefore, has to be interpreted in tune with the object and purpose for which the said provision has been incorporated. There is no intelligible differentia, according to their Lordships, between an employee receiving compensation on the termination of his service and another retiring voluntarily; nor is there any rational nexus with the object sought to be

achieved. The object to be achieved is to mitigate or alleviate the hardship that may be caused on account of a high incidence of tax due to the progressive increase of tax.

36. Having observed that a beneficial provision has to be given an extended, liberal meaning, their Lordships have interpreted the term 'salary' expansively.

37. In fact, the learned Division Bench has observed that termination of employment may be due to various reasons: by way of resignation, dismissal, compulsory retirement, superannuation or even by voluntary retirement. Reason for the termination of service is not material. Quoting with approval a decision of the Madras High Court in **C.I.T. v. J. Visalakshi**,¹⁰ the learned Division Bench has further observed that there is no justification to confine the meaning of the word "termination" only to the cases of voluntary retirement or superannuation. The view is that if the meaning of the word "termination" is confined to cases of voluntary retirement or superannuation only, the object of the clause will not be fully achieved, and it would amount to restricting the scope of a beneficial clause.

¹⁰ [1994] 206 ITR 531 (Mad)

38. **Pepsu Road Transport Corporation** (supra) and **Thulasi Devi** (supra) are the cases dealing with the right of a retired employee to receive a pension. They may not need elaboration in the present context. On the Amendment of the provision prior to the retirement of the petitioner's husband estop the petitioner from challenging the vires of the provision.

39. The learned Standing Counsel has contended that Exhibit P2 amendment was prior to the retirement of the petitioner's husband. According to him, all along the petitioner's husband had been aware of the consequences of his seeking voluntary retirement. In other words, because the petitioner's husband was aware that his surviving spouse would not get the pension once he retired voluntarily, now his wife being his successor is estopped from contending otherwise.

40. I am afraid this contention does not hold water. First, the principle of estoppel does not apply *vis-a-vis* a statute; second, the constitutional validity of a provision can always be raised. And a person's knowledge as regards what is said to be an invalid provision prior to the accrual of the cause

of action, in my view, does not deter the said person from laying challenge at an appropriate time against the provision constitutionally susceptible.

41. There is no gainsaying the well-established Constitutional canon that equal protection or benefit of the law is meant that amongst equals law should be equally administered and similarly placed persons should be treated in a similar manner. It is, of course, equally well established that the State does have the power to indulge in positive discrimination on the basis of reasonable classification with intelligible differentia as its bedrock, though.

42. However, what is not to be lost sight of is that the differentia must have a rational nexus with the object sought to be achieved. In this case, it is a classification by way of identification of the source. It cannot be arbitrary. In other words, classification *per se* cannot be considered an anathema; its keeping company with arbitrariness is.

43. In the present instance, the defence on the part of the State is that the persons seeking voluntary retirement put in less service than those who retire on their attaining the age of superannuation. As a corollary, they contribute less to the

pension fund. In fact, in the above paragraphs this fallacy has been exposed. There can be any number of instances where a person retiring after superannuation puts in less service than a person seeking voluntary retirement. I am, therefore, of the opinion that the artificial differentia sought to be introduced between two classes of people who are otherwise identically placed cannot be sustained. It, in fact, falls foul of Article 14 of the Constitution of India.

44. To elaborate, I must observe that the legislative intendment as could be gathered from Ext.P2 amendment does not stand the judicial scrutiny. The employees retiring on their attaining the age of superannuation and those voluntarily retiring cannot be treated as two classes of employees for the purpose of terminal benefits. Indeed, both are, admittedly, entitled to a pension, but as regards the family pension, a differentia was introduced. In my considered view, the differentia thus introduced is without any rational basis; it, therefore, falls foul of the constitutional mandate of equality—equal protection of the law, at that.

45. As a result, this Court cannot but declare the amendment dated 07.03.2001, as is reflected in Ext.P2, to

Clause 23 of Kerala Co-operative Societies Employees Self Financing Pension Scheme is void and unconstitutional its being arbitrary and irrational.

46. As a corollary, in terms of the extant law, the petitioner, it is declared, is entitled to a family pension, as had been the case before the now-defunct amendment.

The writ petition is accordingly allowed. No order as to costs.

**DAMA SESHADRI NAIDU
JUDGE**

DMR/-