

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 29TH DAY OF OCTOBER 2015/7TH KARTHIKA, 1937

WP(C).No. 24591 of 2007 (C)

PETITIONER:

E.L.JOSEPH, EDAKATHUKUDY HOUSE,
KOZHIPPULLY P.O., KOTHAMANGALAM.

BY ADVS.SRI.M.C.CHERIAN
SRI.M.A.THOMAS KUTTY
SMT.ASHA CHERIAN
SRI.P.M.SANEER

RESPONDENTS:

1. KERALA STATE CO-OPERATIVE EMPLOYEES PENSION BOARD, REPRESENTED BY ITS SECRETARY, TRIVANDRUM-1.
2. ADDITIONAL REGISTRAR/SECRETARY, KERALA STATE CO-OPERATIVE EMPLOYEES' PENSION BOARD, THIRUVANANTHAPURAM-1.
3. CHAIRMAN, KERALA STATE CO-OPERATIVE EMPLOYEES' PENSION BOARD, THIRUVANANTHAPURAM-1.
4. GOVERNMENT OF KERALA REP. BY SECRETARY, CO-OPERATION (B) DEPARTMENT, THIRUVANANTHAPURAM.

R1-R3 BY ADV. SRI.K.R.SUNIL
R4 BY SPL. GOVT. PLEADER SRI.D.SOMASUNDARAM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WPC 24591/2007

PETITIONER'S EXHIBITS:

EXT. P1 TRUE COPY OF SALARY STATEMENT OF PETITIONER ISSUED BY
PRESIDENT

EXT. P2 TRUE COPY OF PROCEEDINGS NO.PPO 446/EKM DATED 27.3.2007 OF
RESPONDENTS 1 AND 2

EXT. P3 TRUE COPY OF G.O.(P)NO.129/06/CO-OP: DATED 12.7.2007 AS
CONTAINED IN KERALA CO-OPERATIVE JOURNAL

RESPONDENT'S EXHIBITS: NIL.

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)No.24591 of 2007 C

Dated this the 29th day of October, 2015

JUDGMENT

The petitioner, having put up more than thirty years of service, retired on 31.12.2005 as Secretary from the Kozhippully Service Co-operative Bank. After considerable delay, the first respondent Pension Board, through Exhibit P2 dated 27.03.2007, sanctioned ₹ 10,000/- as monthly pension to the petitioner. Contending that in terms of the then regnant pension regulations, the petitioner ought to have been paid ₹ 13,115/- as monthly pension, the petitioner has filed the present writ petition.

2. The learned counsel for the petitioner has submitted that Clause 22 of the Kerala Co-operative Societies Self-Financing Pension Scheme, 1994 ('the Scheme' for brevity) governs the aspect of fixing the quantum of pension. According to her, though the

petitioner's length of service is beyond thirty years, it can be taken as thirty years in the light of the statutory cap imposed in that regard. Nevertheless, it is the specific contention of the learned counsel that the petitioner's average pay being ₹ 26,231/- per month at the time of his retirement, as per the unamended clause 22 of the Scheme, the petitioner should get ₹ 13,115/- as monthly pension.

3. In elaboration of her submissions, the learned counsel has further contended that the Government in 2006 effected an amendment to Clause 22 of the Scheme through Exhibit P3 - G.O.(P)No.129/2006/Co-op. dated 12.07.2006. According to her, the said amendment is only prospective in nature. In this regard, the learned counsel has drawn my attention to paragraph 2 of the additional statement filed by the Pension Board.

4. Eventually, summing up her submissions, the learned counsel has urged this Court to allow the writ petition and direct the respondent Pension Board to pay to

the petitioner pension at the rate of ₹ 13,115/- per month, by modifying Exhibit P2 order.

5. Per contra, the learned Special Government Pleader has submitted that though the amendment was effected on 12.07.2006, it was subsequently clarified through S.R.O.No.1099/2008 dated 22.10.2008, that the amendment applies across the board to all the employees who have put in even more than thirty years of service. He has further contended that the cap of ₹ 10,000/- as monthly pension should also be read into 2006 amendment.

6. In the alternative, the learned Special Government Pleader has contended that, for whatever reason, if this Court were to hold that Exhibit P3 amendment is only prospective, there is sufficient precedential support to the contention that the Court is duty bound to interpret a provision so as to avoid any arbitrariness. This interpretation, according to the learned Special Government Pleader, is imperative as a matter of 'reading down', even if the

amendment is admittedly prospective.

7. Expressed differently, once a provision, with its literal application, causes prejudice to a section of people, without affecting other similarly placed persons, it needs to be read down. In elaboration, the learned Special Government Pleader has submitted that if the amended Clause 22 were to be applied only prospectively, it would lead to patent discrimination and arbitrariness. In support of his submissions, he has placed reliance on **B.Prabhakar Rao and Others v. State of Andhra Pradesh and Others**¹, **Tamil Nadu Electricity Board and another v. Status Spinning Mills Limited and another**², **Kerala State Co-operative Employees Pension Board v. Nanu**³ and **Velayudhan v. State Co-operative Employees Pension Board**⁴.

¹ AIR 1986 SC 210

² (2008) 7 SCC 353

³ 2012 (4) KLT 163

⁴ 2011 (1) KLT 399

8. The learned Standing Counsel for the Pension Board, on his part, has adopted the submissions of the learned Special Government Pleader. Further, he has contended that even 2006 amendment is clarificatory. The ceiling of thirty years on the length of service and of ₹ 10,000/- on the monthly pension shall be read into Clause 22 since its inception.

9. The learned Standing Counsel has further submitted that the Pension Board extends the facility of monthly pension to the retired employees based on their contribution to the date of their retirement. If such an interpretation is given to the provisions of the Scheme as to render the Scheme unworkable, it will put the very Scheme in peril. In other words, it is the contention of the learned Standing Counsel that given the contribution made by the petitioner, if no cap is applied on the monthly pension, the amount required to be paid back to the petitioner in the form of monthly pension would be far higher than his

contribution, inclusive of interest.

10. The learned Standing Counsel has also further contended that since the Scheme was recently introduced, i.e. in 1993, it has intermittently thrown open many statutory shortcomings. As a result, the Government has kept on issuing either clarifications or amending the provisions as and when it has found any lacuna. He has also submitted that this Court, in the absence of any amendments, has on occasions made the scheme workable and equitable by adopting purposive interpretation.

11. Summing up his submissions the learned Standing Counsel has contended that, if at all the petitioner's contention that the cap of ₹ 10,000/- does not apply to him is accepted, it will open floodgates and many other people would stake similar claims.

12. The learned Standing Counsel has submitted that, prior to Exhibit P3 amendment, only seven people had retired. According to him, from all of them, except the

petitioner, the Board had obtained undertakings to the effect that the cap of ₹ 10,000/- would apply to them as well. In elaboration, he has submitted that since pension was sanctioned to the petitioner only in 2007, there was no occasion for the respondent Pension Board to obtain any undertaking from him, for by then the amendment came into force.

13. Heard the learned counsel for the petitioner, the learned Special Government Pleader, and the learned Standing Counsel, apart from perusing the record.

Issues:

14. Indeed, what fall for consideration in this writ petition are questions of law, and they are as follows:

- (1) Whether Exhibit P3 amendment is retrospective or prospective?
- (2) Whether the very Exhibit P3 amendment is clarificatory in nature or whether it has been clarified through a subsequent amendment in 2008?

(3) Whether Exhibit P3 has to be read down to save it from being discriminatory or arbitrary?

(4) Whether an amendment is to be given retrospective effect—al being, contrary to the legislative will—to save it from rendering itself ultra vires?

In re, Issue No.1:

15. Though the learned Standing Counsel for the Pension Board has expended much time and energy on the issue of retrospectivity of Exhibit P3 amendment, the additional statement filed by the Board betrays his contentions. In other words, the Pension Board—in my view, fairly—has placed on record that Exhibit P3 amendment operates from the date of the Government order, i.e. 12.07.2006. To that extent, the respondent Board is estopped from taking any contradictory stand.

In re, Issue No.2:

16. As to the issue concerning whether Exhibit P3 amendment is clarificatory, we may, to begin with, examine the amendment, which reads, to the extent relevant, as

follows:

“x x x x x x

(d) After the provision to sub-paragraph (1) of paragraph 22, the following proviso shall be inserted, namely:-

Provided further that for calculating pension, the average pay shall be limited to Rs.20,000 (Rupees Twenty Thousand only) in case the length of service is less than 30 years and the pension shall be calculated as follows:-

$$\text{Pension} = \frac{\text{AP} \times \text{Q.S (in number of months)}}{720}$$

17. I am afraid a plain reading of Exhibit P3 amendment, as quoted above, does not admit of a contention that it is clarificatory. Indeed, going by the golden rule of statutory interpretation, i.e. the literal interpretation, it is indisputable that in the above amendment only the qualifying service (QS) and average pay (AP) have been amended.

18. In fact, the Government, after issuing Exhibit P3 amendment, realised that there were certain gray areas. In other words, in the wake of Exhibit P3 amendment, many beneficiaries of the Scheme started contending that once a

person had served beyond thirty years, the provision would not have any application. For, the expression used in Exhibit P3 amendment is 'in case the length of service is less than 30 years'. In that context, the Government came up with another amendment, of course, in the nature of a clarification in S.R.O.No.1099/2008 ('the 2008-amendment' for brevity), which to the extent relevant reads as follows:

“x x x x x x

2. Amendment of the Scheme - In the Kerala Co-operative Societies Employees Self Financing Pension Scheme, 1994, for the second provision to sub-paragraph (1) of paragraph 22, the following provisos shall be substituted, namely:-
Provided further that in the case of employees who are having less than thirty years of qualifying service the pension shall be calculated as follows:

$$\text{Pension} = \frac{\text{A.P} \times \text{Q.S (In number of months)}}{720}$$

Provided also that for calculating pension, the average pay shall be limited to Rs.20,000/- (Rupees twenty thousand only) and the maximum amount of pension shall be limited to Rs.10,000/- (Rupees ten thousand only)”.
(emphasis supplied)

19. In the light of the above-extracted provisions, it is very evident that Exhibit P3 amendment is not

clarificatory; on the other hand, the amendment in S.R.O. No.1099/2008 dated 22.10.2008 is, if at all, clarificatory of Exhibit P3 amendment. To the credit of the learned Special Government Pleader, he has submitted that Exhibit P3 amendment may not be clarificatory and that it may not be retrospective. But by way of reading down, it should be ensured, contends the learned Special Government Pleader, that no person gets an undue advantage owing to any legislative casus omissus.

In re, Issue Nos.3 & 4:

20. The principal issue to be determined is, whether Exhibit P3 amendment has to be read down to save it from falling foul of being arbitrary and discriminatory? Further, has the Hon'ble Supreme Court laid down any proposition of law in the judgments relied on by the learned Special Government Pleader that an amendment is to be given retrospective effect, contrary to the legislative will, to save it from rendering itself ultra vires? To resolve these issues, I

may, with profit, refer to the precedential position, as has been advocated by the learned Special Government Pleader, in this regard.

21. Quirkiest are the facts in B.Prabhakar Rao (supra), for the Apex Court, per O.Chinnappa Reddy J, observes, “A situation such as the one before us had never presented itself to the court previously”. The judgment, in fact, begins poignantly with an observation: “Tossed about by the Executive, the Legislature and, we are sorry to say, by us (the Judiciary) too, and therefore, totally bewildered, several civil servants, employees of . . . are now before us wanting to where they stand and to what justice and relief they are entitled”.

22. The facts, stated very briefly, are that the Government of Andhra Pradesh (United) on 28.02.1983 brought about certain enactment to give effect to the policy of reducing the age of superannuation from 58 to 55. Many were indeed retired. Aggrieved, most of them approached

the courts. Finally, when the matters were pending before the Hon'ble Supreme Court, the Government decided to restore the earlier age of superannuation.

23. Nevertheless, while entering into an agreement with the agitating employees, the Government decided to restore the age of superannuation only after the Apex Court rendered a judgment. In this regard, their Lordships have observed that this waiting for the judgment is with a hope that the Court may declare the right of the legislature, as a matter of policy, to determine the age of superannuation. In fact, the restoration of the age of superannuation was made conditional to the pronouncement of the Court on the issue.

24. As can be seen, rolling the policy back, the Government initially issued Ordinance No.24 of 1984 and later enacted Act No.3 of 1985, amending Act No.23 of 1984 by substituting 58 years for 55 years. The Hon'ble Supreme, finally, rendered the judgment on 23.08.1984. In the interregnum—between 28.02.1983 and 23.08.1984—many

employees were made to retire notwithstanding the Government's decision to reverse the policy.

25. What emerges from the above fact situation is that the Government decided to reverse its policy, brought about the necessary legislation, but deferred its implementation till the apex Court pronounced on the power of the Government to alter the age of superannuation. As it took a while for the judgment to be rendered, many employees crossed 55 years and thus were compelled to be retired. Under these circumstances, the adjudication in *B.Prabhakar Rao (supra)* proceeded.

26. The learned Special Government Pleader placed heavy reliance on what is said to be the observation of the Hon'ble Supreme Court in paragraph 22 of the judgment, as has been extracted under synopsis (B) of the decision reported in AIR. In fact, the first few lines of the extract read as follows:

“It is open to the Court to give retrospective at the to a legislation to which the legislature plainly and expressly refused to give retrospectivity, because, unlike United Kingdom, India has a written constitution which confers justiciable fundamental rights and so that really refusal to make an act retrospective or . . . By itself, create and impermissible classification justifying the striking down of the non-retroactivity or non-application clause, as offending the fundamental right to equality before the law and equal protection of the laws.”

27. If we examine paragraph 22 in the body of the judgment, it actually begins thus:

“22. An argument which requires to be dealt with is that it is not open to the court to give retrospectivity to a legislation to which the Legislature plainly and expressly refused to give retrospectivity. As pointed out in Nakara case the question is not one of retrospectivity at all. The circumstance that the relief given by Ordinance 24 of 1984 and Act 3 of 1985 is not extended to those who had attained the age of 55 years by February 28, 1983 or between February 28, 1983 and August 23, 1984, has the effect of limiting the field of operation of the Ordinance and the Act and introducing a classification which in order to be sustained must be shown to be reasonable and to have a nexus to the object to be achieved besides not being arbitrary. While it is a general rule of law that statutes are not to operate retrospectively, they may so operate by express enactment, by necessary implication from the language implied or where the statute is explanatory or declaratory or where the statute is passed for the purpose of protecting the public against some evil or abuse or where the statute engrafts itself upon existing situations etc., etc. But it would be incorrect to call a statute

“retrospective,” “because a part of the requisites for its action is drawn from a time antecedent to its passing.”
(emphasis supplied)

28. Thereafter, having referred to **R.V.St.Mary, Whitechapel (Inhabitants)**⁵, their Lordships have further proceeded to observe as follows:

“22. [W]e must further remember, quite apart from any question of retrospectivity, that, unlike in the United Kingdom here in India we have a written Constitution which confers justiciable fundamental rights and so the very refusal to make an Act retrospective or the non-application of the Act with reference to a date or to an event that took place before the enactment may, by itself, create an impermissible classification justifying the striking down of the non-retroactivity or non-application clause, as offending the fundamental right to equality before the law and the equal protection of the laws. That is the situation that we have here.

(emphasis supplied)

29. Neither in paragraph 22 nor anywhere else in the body of the judgment have their Lordships laid down the proposition that “it is open to the Court to give retrospective effect to the legislation to which the legislature plainly and expressly refused to give retrospectivity...”. The observation, in fact, is to the effect

⁵ [1842] 12 Q.B.120

that there is no issue of retrospectivity involved in the case. Thereafter, it is, at any rate, observed that a legislation can be invalidated if it has no retrospective application, provided its prospective application results in impermissible classification. The Hon'ble Supreme Court, to my understanding, has not declared that it is open for the Court to give retrospectivity to a legislation to which the legislature plainly and expressly refused to give retrospectivity.

30. Truistically, invalidating a piece of legislation is different from enacting one; the former is in the province of the Courts and the latter, of the Legislature. Ipso facto, imparting prospectivity or retrospectivity to a piece of legislation is a facet of the legislative process and thus is within the province of the Legislature; if it is subordinate legislation, it is within the province of the Executive.

31. Confining to the ratio of B.Prabhakar Rao (supra), I do opine that the Apex Court has not suggested,

much less propounded, that conferring retrospectivity contrary to the express legislative intent is a permissible interpretative device to save a piece of legislation from judicial invalidation.

32. In the concurring judgments of both V.Balakrishna Eradi and V. Khalid JJ, it has been abundantly made clear that while implementing a policy decision taken by the Government, an alteration can legally be brought about with prospective effect, i.e., from the date of the commencement of the operation of the Ordinance, Act or Rule. According to their Lordships, no question of violation of Article 14 or 16 of the Constitution will arise merely because the benefit of the change is not extended to the employees who have already retired from service. Per curiam, the Hon'ble Supreme Court has, however, held that the benefit of enhanced superannaiton has to be extended to the employees who were made to retire in the interregnum for no fault of theirs.

33. The conclusion in the above case, as has been observed by the Apex Court, is rested entirely on the finding arrived at by the Court after considering the factual background as well as the legislative history of the impugned Ordinance and Act. For the underlying purpose and object behind the relevant provisions of the Ordinance and the Act was found to be to set right and nullify a wrong or injustice that had been done to the employees.

34. In Tamil Nadu Electricity Board (supra), the Hon'ble Supreme Court has observed that clarificatory orders by the executive should be given retrospective. The reasoning for the ratio is not far to seek, for a clarification makes explicit what has already been there but clouded by a cognitive controversy or misconception. In the present instance, it has already been held that Exhibit P3 is not clarificatory.

35. In Nanu (supra), the plea of certain retired employees was that the amendment brought with effect

from 12.07.2006 prescribing upper limit of 'average pay' as ₹ 20,000/- is not applicable to them, because they put up more than 30 years' service. When the contention found in favour with a learned Single Judge, the Pension Board, aggrieved, carried the matter in an intra-court appeal.

36. The Pension Board, on appeal, has contended that, even without the amendment, going by the provisions contained in Clause 22(1), there is a limitation in calculating the qualifying service to a maximum of 30 years. It has also contended that Clause 22 of the Scheme was again amended through G.O.(P)No.239/08/Co-op. dated 22.10.2008, and that its impact has to be examined.

37. In response to the above contentions, a learned Division Bench of this Court has held that the upper limit of ₹ 20,000/- on average pay as well as the upper limit of ₹ 10,000/- on monthly pension applies to all Co-operative employees irrespective of their length of qualifying service. In fact, their Lordships have explicitly observed that the

said proposition is clear from the amended Clause 22 of the Scheme.

38. The learned Standing Counsel has, however, latched on to the observation of the Court in the first paragraph of the judgment that the petitioners in the writ petition retired from service between 2004 and 2009: Some of them did retire before Exhibit P3 amendment.

39. On a perusal of the entire judgment, I do not find any reference to the issue of retrospective application of Exhibit P3. In other words, the impact of Exhibit P3 amendment has not at all fallen for consideration. On the contrary, the learned Division Bench has taken into account the 2008-amendment. In this context, it is trite to observe that once an issue, though present by implication, has not been expressly dealt with and pronounced upon, the judgment on the said issue remains sub silentio. Any issue thus rendered sub silentio cannot be treated as a precedent. Facts of a case do not form part of the ratio. Put differently,

the judgment so rendered passes sub silentio.

40. Without further cogitation on the legal concept of sub silentio, it suffices to quote the inexhaustible Salmond on Jurisprudence, 12th Edn., in which it is observed thus:

“11. [A] decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of Point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided Point B in his favour; but Point B was not argued or considered by the Court. In such circumstances, although Point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on Point B. Point B is said to pass sub silentio.”

41. In Velayudhan (supra) the issues that have fallen for consideration are as follows: (1) whether the amendment to Clause 21 as per Government Order dated 04.01.2008 is clarificatory? (2) whether the amendment has any prospective effect?

42. This Court, per a learned Single Judge, has held that the amendment is only clarificatory and curative. Consequently, his Lordship has also held that the

amendment relates back to a time when the prior provision was introduced. In other words, the 2008-amendment takes effect from the date of Exhibit P3; that is, 12th July 2006. Indeed, there can be no quarrel with the proposition laid down in Velayudhan (supra). At any rate, in the present instance the petitioner retired on 31st December, 2015. Ipso facto, the retrospective application of 2008-amendment cannot affect the petitioner's rights.

43. Before parting with the issue, I may have to address the other contention of the learned Standing Counsel: a declaration by this Court that the Monthly Pension @ ₹ 10,000/- does not apply to the employees who retired before Exhibit P3 would open floodgates.

44. I am afraid, it is too well settled proposition of law to be restated that, in an adversarial adjudication, the supposed hardship to one party shall not abrogate the rights of the other person. Even otherwise, the learned Standing Counsel himself has stated that only eight persons

retired prior to Exhibit P3 and that from seven persons, save the petitioner, the respondent Pension Board obtained undertakings not to stake any claim to pension above ₹ 10,000/- per month. Let the vigilant be paid, while the indolent may be content with what they have.

45. In the light of the above discussion, the conclusions are as follows:

- (1) Exhibit P3 judgment is neither clarificatory nor retrospective;
- (2) The 2008-amendment is clarificatory, though, relating back to the date of Exhibit P3; but by then the petitioner stood retired from service;
- (3) There is no occasion, much less a need, for reading down Exhibit P3 on the putative ground that it has to be saved from being discriminatory or arbitrary; and
- (4) Exhibit P3 amendment has no retrospective effect.

46. As a natural corollary to the above discussion, it is, but, essential for this Court to hold that the petitioner is

entitled to have his monthly pension fixed from the date of his retirement without reference to the ceiling @ ₹ 10,000/-. Consequently, this Court further declares that the petitioner is entitled to the pension and all other benefits incidental there to.

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

Dama Seshadri Naidu, Judge

tkv/DMR/-

'C.R.'