

State of J and K and ors. Vs. Shri Jagu Ram and ors.

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Court : Jammu and Kashmir

Decided On : Sep-20-2003

Reported in : 2004(1)JKJ259

Judge : Nisar Ahmad Kakru and; Y.P. Nargotra, JJ.

Acts : [Constitution of India](#) - Article 226; ;Civil Service Rules - Rule 20 - Schedule - Article 249M and 249P

Appeal No. : LPA (S) No. 95/2003

Appellant : State of J and K and ors.

Respondent : Shri Jagu Ram and ors.

Advocate for Def. : R.K. Bhatia, Adv.

Advocate for Pet/Ap. : K.S. Johal, Addl. Adv. General

Disposition : Appeal dismissed

Judgement :

Nisar Ahmad Kakru, J.

1. This Letters Patent Appeal arises out of the judgment of the learned Single Judge pronounced on 22.11.2001 in exercise of the writ jurisdiction in a petition filed by an ill fated father of a police constable of 6th Bn. of JKAP, namely, Shri

Kaka Singh who appears to have fallen victim to the violence of anti social elements subsequent to disappearance in course of his deployment to Manigam, Baramula in connection with law and order duty. Ex gratia relief of rupees one lac was sanctioned and released in favour of the writ petitioner (Respondent herein) but family pension was withheld by the respondent-employer, (appellants herein) leaving no option for him but to knock the doors of the authorities at the helm. The effort bore no results, thus controversy landed in the Court. The facts material for disposal of the lis may be stated. It has a chequered history. First OWP No. 90/1990 filed by the respondent was decided on 26.07.1995 with the following direction :

' It is a novel method of trying to defend this writ petition. It is admitted that Kaka Singh was serving in the Police Department, and he has dis-appeared all of a sudden about five years ago, and the Police Department of the State is still not sure as to what has happened to the person of a constable working with them. It was the job of the respondents to have come to a definite conclusion about the dis-appearance of Kaka Singh. The petitioners are not expected to prove whether Kaka Singh is dead or not In these circumstances, I allow this writ petition and direct the respondents to investigation/inquire into the matter, and come to a definite conclusion as to whether Kaka Singh is alive or dead. In case it is found that he is dead, the pensionary benefits which accrue to his legal heirs must be paid to them. The whole exercise should be completed with a period of two months from today, without fail.'

2. The judgment was not complied with and investigation was not conducted giving rise to the institution of a contempt petition bearing No. COA(W) No. 21/1997 which culminated by a direction dated 22.6.1998, attaching the account head of IGP, Jammu. The judgment was not complied with in its letter and spirit despite coercive mode giving rise to another cause for respondents to approach the court through CMP(W) No. 35/1999 which was treated as writ petition leaving the writ petitioners:respondents free to make amendments if any required. The liberty so granted was availed of by the respondents and the amended writ petition was filed. It was registered and numbered as OWP No. 740/2000. The appellants chose not to file returns and the petition was decided in absence of counter by

judgment dated 22.11.2001. The operative part reads:--

'A perusal of the above communication does indicate that Kaka Singh died while he was on duty. If this be the position, then the petitioner No. 1 who is the father of the deceased is entitled to all benefits which are available to a constable who dies while on duty. Let the claims of the petitioner be considered and the requisite payment made in their favour within a period of two months from the date a copy of this order is made available by the petitioner to the respondents. It is made clear that in case payment is not made in the manner indicated above, then the petitioners would be entitled to interest @ 12% per annum. The interest component would be payable by the person on whose account the delay occurs. It is, however, observed that in case it is not possible to settle the claims of the petitioner within the above stipulated period, the respondents can seek extension of time. In case such a prayer is made, that would have to be made within the aforesaid period, and in that eventuality, each and every days delay would have to be explained.'

3. Being aggrieved, the State has come up in appeal contending that the judgment has been passed without admitting the petition to hearing and without issuing notice to the appellants in utter violation of the mandate of the judgment of the Apex Court in case Union of India v. Daya Ram. To appreciate the contention orders dated 15.09.2000 and 16.10.2000 assume significance which may be noticed:-

'15.09.2000

Mr. R.K. Bhatia, Advocate Mr. Baldev Singh, Govt. Advocate

Petitioner has filed an amended petition. Let this be registered in the current year. This shall stand admitted.

Mr. Baldev Singh has put in appearance on behalf of respondents. He shall file counter to this within a period of ten weeks from today. Be listed in the month of December, 2000.

CMP shall stand disposed of.'

16.10.2000

Mr. R.K. Gupta, Advocate for Mr. R. K. Bhatia, Advocate

Mr. Baldev Singh, Govt. Advocate for the respondents.

Counter in four weeks. Rejoinder, if any, within two weeks

thereafter. Process thereafter for hearing.'

4. These orders contradict the contention of the appellants. The writ petition was admitted to hearing. Sufficient opportunity was granted to the appellants to file counter but they failed to. The wrong notion contracted by the appellants is belied by orders of the Court. Faced with the ground reality, Mr. Johal made an attempt to challenge the maintainability of the writ petition on the ground that application could not have been treated as writ petition but no law is brought to our notice which would prohibit such course of action. Nonetheless we would like to appreciate the submission in the light of settled legal position that power of the High Court under Article 226 is not to be exercised on mere asking of an aggrieved person because such relief is not available as a matter of right and power has to be exercised at the discretion of the court when an affected person invokes such jurisdiction. True it is that in the normal course the aggrieved person has to file a writ petition duly adhering to the rules made by the High Court but departure cannot be said to be impermissible when exercise of power becomes necessary for doing justice but which are those situations where applications can be treated as writ petitions, it is not possible for us to spell out because each case has to be examined upon its own facts and circumstances. As regards the case of the writ petitioners/ respondents, we are of the considered opinion that the exercise of jurisdiction was called for and the circumstances which have prompted us to hold so are that the deceased Kaka Singh was the only earning hand of his father. His death has left him high and dry. He came to the writ court for justice and the writ court has rightly treated the application as writ petition and issued the process. Had the writ court refused to rise to the occasion the bereaved respondent who is affected prejudicially by inaction of the appellants would not have been able to get the relief because of his incapability to pay the fee to the

Advocate for drafting the petition and for representation, resultantly, loss of faith in the judicial system. Thus, we are of the opinion that the High Court would be committing no illegality by exercising the powers under article 226 by treating an application as a writ petition and cannot be said to have acted beyond jurisdiction. Needless to say that by entertaining a motion as writ petition, the petitioner therein is not absolved of the obligation to bring the application in conformity with the rules by making necessary amendments and alterations as the court may direct as was done by the writ petitioners-respondents in the case on hand in compliance with the directions of the court.

5. This brings us to a crucial question as to whether respondents are entitled to the family pension under article 249-P read with Rule 20(bbb) or 249-M(A) of CSR. The contention of Mr. Johal is that the entitlement has to flow to respondents from 20(bbb) read with 249-P which may be noticed :-

'Rule-20(bbb):

Notwithstanding anything contained in sub-clause-(bb) above where a government servant dies while in service after having rendered not less than seven years continuous service, the rate of family pension admissible to the beneficiary of the deceased shall be equal to the pay last drawn by the deceased officer before his death. Pension at the enhanced rates equal to the last pay shall be payable for seven years from the date following the date of death of the government servant or for period upto the date on which deceased government servant would have attained the age of superannuation whichever is earlier.'

Article 249-P

'Notwithstanding anything contained in Article 249P and other allied rules, when an employee disappears leaving family, the family can be paid in the first instance the amount of salary due, leave encashment due and the amount of G.P. Fund having regard to the nomination made by the employee. After lapse of a period of one year, other benefits like D.C.R.G. family pension may also be granted to the family. This is subject to the fulfillment of conditions laid down below.'

Rule 20(bbb) has reference to a government servant who dies in harness after having rendered not less than seven years continuous service and article 249-P takes care of disappeared in service government employee. Neither of these provisions deals with the case of a disappearance of a police personnel in course of performance of duty and rule makers have anticipated the probable eventualities, that is how we have Article 249-M(A) (b) in our Regulations called the 'Jammu & Kashmir Civil Service Regulations, 1956' (CSR for short) which may be extracted

'249-M(A)

Notwithstanding anything contained in the rules relating to D.C.R.G. and the Family Pension Rules as contained in Schedule-XV, Govt. servants including personnel of Police who are killed or get permanently incapacitated/disabled in course of performance of duty which by its nature is exposed to risk of life like getting electrocuted while working in a Power House or are killed or disabled permanently as a result of action by armed hostiles, anti social elements, extremists, dacoits, smugglers etc. etc. be allowed the benefit of pensionary awards as under.'

(b) In the case of death, family pension shall be payable to the beneficiaries at the rate equal to the last pay drawn by the deceased Government servant before his death for a period of seven years from the date following the date of death or for the period upto the date on which the deceased government servant would have attained the age of superannuation whichever is earlier. After the tenability of family pension at enhanced rates (equal to last pay drawn) is over the rate of family pension shall be equal to the pension that the deceased would have been entitled to on the basis of the emoluments on the date of his death but counting service upto the date on which he would have retired in the normal course.'

6. On a plain reading of the rule, it is manifestly clear that it gives relief to the bereaved dependants of a slain deceased who has died in the course of performance of duty. The object is laudable. In absence of this provision there would have been utter confusion and disorder in rank and file of the police formation. We have seen from the print media that when the Legislative Assembly

was attacked by militants at Srinagar, it was timely intervention of the police/security personnel that could save the lives of the Legislators and high ups of the State. Some of the police personnel laid their lives and averted a fatal situation. That single incident is sufficient to justify the insertion of article 249-M(A)(b) in CSR which is essentially an exception to the general rule, empowering the government to provide succour to the bereaved families but before benefit is accorded, it is to be seen by the competent authority whether

(a) death of the deceased occurred in course of performance of duty which by its nature is exposed to risk of life;

(b) whether the deceased was killed as a result of action by armed hostiles, anti-social elements, extremists, dacoits, smugglers etc.etc.

7. We now proceed to examine the attending circumstances of the case so as to arrive at a conclusion whether disappearance and death of the deceased does fall within the ambit of the rule. To begin with reference to the Govt. Order No. 723-GR (GAD) of 1990 dated 10.07.1990 read with Govt. Order No. 1073 GR of 1990 dated 19.11.1990 becomes imperative These government orders make ex gratia relief admissible to the dependants of a government employee/police personnel provided the District Magistrate concerned certifies that the former was killed or is disabled in consequence of due performance of official duty. In the case on hand the District Magistrate vide his order No. 2860/R/487-94/AC dated 05.08.1998 has declared and certified the death of Kaka Singh in terms of the aforementioned government orders on the strength of inquiry conducted. Matter does not end here but the Director General of Police has also accepted the finding and has acted upon it vide his order No. 3430 of 1998 dated 14.10.1998 and has partly released the ex gratia relief in favour of the writ petitioners- respondents, obviously the principle of estoppel would apply and it is not open to the appellants to turn around and take a plea to the contrary. In addition to that it is seen from the averments made in paras 2 and 3 of the writ petition that the writ petitioners- respondents have pleaded in unambiguous terms that Kaka Singh was deployed to Manigam, Baramula for maintenance of law and order where he was killed by the militants. This averment is not refuted even evasively by the appellants in their reply, thus

amounts to admission.

8. Lastly it was contended by Mr. Johal that the respondents are entitled to only one lac in terms of SRO 570 and not to enhancement made vide Govt. Order No. 723-GR (GAD) of 1990. The argument is advanced simply to be rejected because all the claims for ex gratia relief which were pending on 10.07.1990, the date when Govt. Order No. 723-GR(GAD) of 1990 came into force have to be decided as per the terms laid therein. We rule so because it is envisaged by Govt. Order No. 723-GR (GAD) of 1990 itself. Admittedly the ex gratia relief was sanctioned in favour of the respondents much after coming into being of Govt. Order No. 723, therefore, we hold that the said Govt. Order has to apply to the case of the writ petitioners-respondents.

9. We find that the writ court had by its judgment dated 26.7.1995 in earlier writ petition categorically directed the appellants to release the family pension in favour of the writ petitioners-respondents within two months which period has expired on 27.9.1995. Eight years have elapsed but judgment still awaits obedience. So much so the appellants have raised certain questions which stand clinched by earlier judgment. The judgment has gone unassailed and has attained finality yet they have courage to violate its mandate flagrantly, rendering themselves liable to be proceeded against, however, we take a lenient view because of the prayer made by Mr. Johal seeking deletion of all those averments which run contrary to the judgment but how he is going to escape the fall out of delay caused in the disbursement of family pension when it is sufficiently evident that appellants have behaved like an ordinary litigant, least appreciating that the constable Kaka Singh had disappeared and was killed by enemies of the Nation in view of the nature of his job. The appellants have been through and through hostile to the genuine claim of the respondents and have left no stone unturned to delay the disposal of the matter. So much so they filed the appeal against the final judgment passed in second writ petition very leisurely, ex facie after a delay of one year. All these facts go to show that they have delayed the disbursement of the family pension by dilly dallying tactics forcing starvation on the writ petitioners-respondents, therefore, liable to pay costs at least.

10. In the aforementioned backdrop, this LPA is dismissed alongwith connected CMPs, with costs quantified at Rs. 5000/- which shall be deposited by the appellants with the Registry within four weeks to be disbursed to the writ petitioner-respondent No. 1, father of the deceased Kaka Singh on proper identification.

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