

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

**LPASW No.201/2005
MP No.210/2005**

Date of Order: 03.09.2015

State of J and K	Vs.	Nisha Magotra
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Coram:

**Hon'ble Mr. Justice Muzaffar Hussain Attar, Judge
Hon'ble Mr. Justice B. S. Walia, Judge**

Appearing Counsel:

For appellant(s)	:	Mr. P S Chandel, Dy.AG.
For respondent(s)	:	Mr. K S Johal, Sr. Advocate with Ms. Shahla Rafiqui, Advocate.

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| 1. | Whether approved for reporting
in Digest/Law Journal? | : | Yes |
| 2. | Whether approved for reporting
in Press/Media? | : | ---- |
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Muzaffar Hussain Attar(Oral)

1. The Government instruction No.1 appended to Rule 24(c) of the Jammu and Kashmir Family Pension-Cum-Gratuity Rules, 1964 (for short ' rules of 1964') became subject matter of interpretation in SWP No.2248/2003. The learned Writ Court in terms of impugned judgment dated 23.02.2004 struck down second part of Government Instruction No.1 appended to rule 24(c) of the rules 1964 as unconstitutional. It further declared that the writ petitioner/respondent would be entitled to similar treatment as is given in the first part of the Government Instruction No.1 to pensioners. It is also provided that the

respondent/writ petitioner would be entitled to Dearness Allowances on the pay or family pension whichever is higher, from time to time. It is this judgment, the State of Jammu and Kashmir is aggrieved of and has challenged the same in this Letters Patent Appeal.

2. Before dealing with the submissions of the learned counsel for the parties, it is deemed appropriate to give brief narration of the facts projected in the writ petition by the respondent/writ petitioner.

3. The respondent/writ petitioner's husband late Shri R K Magotra was a member of Higher Judicial Services and died in harness on 09.06.2003. At the time of his death, he was posted as Principal District and Sessions Judge, Kathua.

4. The respondent/writ petitioner was appointed on compassionate ground as Junior Assistant in the High Court. The facts as emerge from the impugned judgment would show that at the time of his death, the deceased was drawing Rs.13125 as his basic pay and an amount of Rs.7219/- as Dearness Allowance @ 55 % was admissible under the relevant Rules.

5. The deceased having died in harness after rendering more than seven years of continuous service was entitled to family pension equal to the last pay drawn by the

deceased before his death in view of mandate contained in Family Pension Rules. The Accountant General in terms of Pension Payment Order fixed Pension amount at Rs.13,125/- from 10.06.2003 to 09.06.2010, Rs. 6,563/- from 10.06.2010 to 09.06.2017 and Rs.3,938/- from 10.06.2017 onwards.

6. The respondent/writ petitioner was appointed on compassionate ground as Junior Assistant and at that point of time was getting emoluments which included basic pay of Rs.3050.00, DA @ 55% Rs. 1678 and other allowances, thus was receiving total salary of Rs.5,302.21. The Dearness Allowance admissible on the amount of family pension of Rs.13,125/- as per pre-revised rate of 55% was calculated at Rs.7,219/- and as per the revised rate of 59% it would come to Rs.7,744/-.

7. In pursuance to the implementation of the recommendations of Shetty Commission Report, the basic pay of the deceased on the date of his death would undergo change and consequent to this basic Family Pension would be fixed at Rs.17,950/- and DA admissible on such basic Family Pension at pre-revised rates would be Rs.9,573/- and as per revised rate at Rs. 10,591/-.

8. The grievance of the respondent/writ petitioner was that in terms of Government Instruction No.1 appearing

below the rule 24(c) of the rules 1964, she is deprived of the benefit of Dearness Allowance on the Family Pension which was higher than her own salary as she was entitled only to get Dearness Allowance of Rs.1800/- on her own pay. It is in this factual backdrop, the learned Writ Court while considering the Living Cost Index came to the conclusion that the second part of the Government Instruction is unconstitutional. The learned Writ Court while declaring it to be unconstitutional as already stated further declared that the respondent/writ petitioner would be entitled to DA on pay or family pension whichever is higher from time to time.

9. Government Instruction No. 1 as is reproduced in the impugned judgment is taken note of:

“Government Instruction No.1- Where in any case a pensioner in receipt of service pension is also allowed a ‘family pension’ on behalf of his/her husband/wife as the case may D.A. will be allowed either on ‘Service Pension’ or on ‘Family Pension’ which may have higher rate of D.A. Similarly, if a Government servant in service is also in receipt of family pension on behalf of his/her husband/wife as the case may be, D. A. in such a case shall be drawn on pay alone and not on ‘Family Pension’”.

10. Mr P S Chandel, learned counsel for the appellant in support of the appeal submitted that the judgment

rendered by learned Single Judge is illegal in as much as rule can be declared to be unconstitutional on well settled legal principles which as per submissions have been spelt out in the memo of appeal which inter-alia are that rule can be struck-down and declared to be unconstitutional if it violates the fundamental rights of a person, if it violates the constitutional provisions and is beyond the competence of the competent authority. Learned counsel submitted that these legal grounds of challenge are not available in this case.

11. Learned counsel further submitted that the respondent/writ petitioner who was appointed on compassionate ground as Junior Assistant, in view of impugned judgment would get more emoluments than other junior assistants who are working with her.

12. Learned counsel submitted that if the impugned judgment is allowed to remain as it is, then an anomalous situation will be created in the class of Junior Assistants, in as much as, a junior employee would get more emoluments than the senior 'junior assistants'.

13. Learned counsel for respondent/writ petitioner, Mr. Johal prayed for dismissal of appeal on the following grounds:

- (i) that pension is property of a person and

right to receive the same is his/her fundamental right.

- (ii) Learned counsel further submitted that a person cannot be deprived of his family pension in the manner it is sought to be deprived in terms of second part of the Government Instruction No.1.
- (iii) Learned counsel further submitted that the allowances which are being paid to an employee while in service and which he/she is entitled to receive even after retirement in accordance with rules cannot be taken away from him/her in the manner it has been done by the second part of the Government Instruction no.1.
- (iv) Learned counsel also submitted that it is not for the reasons and facts of the case of the writ petitioner that second part of the government instructions have been struck down but when learned Writ Court found that it violates the constitutional rights of the writ petitioner/respondent, it was struck down.

(v) Learned counsel further submitted that after striking down the second part of the Government Instruction No.1 and until such time government will consider the matter for framing of the rules, Court had to provide some alternative so that benefit flowing from the Government Instruction to the concerned employees is not stopped.

(vi) Learned counsel in support of his contention that pension is property referred to the judgment of hon'ble the Supreme Court reported in AIR 1971 SC 1409. Learned counsel while referring to the impugned judgment also submitted that the learned judge has taken cognizance of the Living Cost Index as well and prayed for the dismissal of the appeal.

14. The Government Instruction No.1 comprises of two limbs. One pertains to class of pensioners who while in receipt of service pension is also allowed a family pension on behalf of his/her husband/wife as the case may be. For this class of pensioners, it has been provided in the first

part of Government Instruction No.1 that DA will be allowed either on service pension or on family pension which may have higher rate of DA. The second part of the Government Instruction No.1 thereafter provides that similarly if a Government servant in service is also in receipt of family pension on behalf of his/her husband/wife as the case may be, DA in such a case shall be drawn on pay alone and not on Family Pension. The government instruction no.1 thus carves out two separate and distinct classes of persons. One of person who is in receipt of service pension and in whose favour family pension is also allowed and the other those in-service Government employees who are also in receipt of family pension on behalf of their spouses as the case may be.

15. In respect of the class of persons who are in receipt of pension, option is provided for receiving DA on service pension or on family pension whichever has higher rate of DA and the second class of persons, i.e., an employee in Government service has been authorised to draw DA on pay alone, and not on family pension.

16. The learned Writ Court while examining the facts of the case in the writ petition found that the deceased employee was having more pension than the salary of the respondent/writ petitioner and thus, would be entitled to

receive higher rate of DA on the pension than what the respondent/ writ petitioner would receive on her pay.

17. The learned Writ Court while referring to the price index held that in such a factual situation, the respondent-writ petitioner is discriminated and it is for this reason the second part of the Government Instruction No.1 has been struck down being unconstitutional.

18. The Government Instruction No.1 as already stated comprises of two parts. It deals with two classes of persons. One being exclusively those who are in receipt of pension and other class is of those Government employees who are also in receipt of family pension on behalf of their spouses. These are two different and distinct classes of persons who have been meted out two different treatments in terms of Government Instruction No.1. The respondent /writ petitioner is getting lesser amount of DA because of drawing lesser pay whereas the pension of her deceased husband was more than her pay and would thus get higher rate of DA on his pension. Take a contrary example; the husband would be alive and would be getting higher salary and DA. Assume the wife died who is getting much less pay and thus lesser rate of DA. In such circumstances, the husband when is permitted to draw DA on pay alone would be benefited.

This eventuality has not been taken into consideration while deciding the case by the learned Writ Court.

19. Even otherwise, as already stated pensioners and in-service Government employees in fact and in law constitute two different, distinct and separate classes. The pensioners are being paid pension which is always much less the amount viz salary and other allowances which is being paid to them while they are in service. It is for this reason that the persons who are in receipt of service pension have been given option to take higher rate of DA either on service pension or on family pension.

20. However, looking to the facts of this case, the respondent/writ petitioner is put to a disadvantageous position. Measures are required to be taken by State for remedying the grievance of writ petitioner, and her class of people.

21. Learned Single Judge after striking down the second part of the Government Instruction No.1 as already stated has provided that the respondent/writ petitioner would be entitled to similar treatment as is given in the first part of Government Instruction No.1 to pensioners and has further held that respondent/writ petitioner would be entitled to DA on her pay or family pension whichever is higher from time to time. By making this declaration about entitlement

of respondent/writ petitioner, the learned Writ Court has re-framed the instructions.

22. The Constitution of India has created three organs of the State viz. executive, legislature and judiciary. The Constitution itself has delineated the boundaries of all these three organs of the State. It is the function of the State legislature and Rule making authorities to frame the laws and rules. Courts do not frame rules and make laws. The job of the judiciary is only to interpret the constitution and laws and to enforce them.

23. The learned Writ Court as already stated has reframed the Govt. Instruction which is not within the competence of the Court.

24. However, the circumstances like the one which has arisen in the facts of this case may arise in some similar cases thus putting such class of employees to disadvantage vis-à-vis class of pensioners. The competent authority will take cognizance of this situation and may reframe the rule in the manner it would avoid giving rise of anomalous situations. The rule making authority may reframe the rule in such a manner which would benefit the class of employees like the respondent/writ petitioner.

25. In view of aforesaid discussion, we allow this appeal, set-aside the impugned judgment. We dispose of the writ

petition by providing that the appellant-rule making authority may take steps for re-framing of the Government Instruction No.1 appearing below the rule 24(c) of the rules 1964 in the manner suggested in the judgment.

(B. S. Walia)
Judge

(Muzaffar Hussain Attar)
Judge

Jammu.
03.09.2015
Raj Kumar