

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Constitution Petition No. D-1530 of 2023

(Mst. Salma Shaikh vs. Province of Sindh & others)

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE
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1. *For orders on office objection at flag 'A'*
2. *For hearing of main case*

Before
Adnan-ul-Karim Memon, J:
Mohammad Abdur Rahman, J

Date of hearing: 23 April 2024

Date of order: 30 May 2024

Mr. Imtiaz Ali Abbasi, Advocate for the petitioner.
Mr. Khuda Bux Chohan, Advocate for respondents No. 3 to 5
Mr. Ali Raza Balouch, Assistant Advocate General, Sindh

ORDER

MOHAMMAD ABDUR RAHMAN, J. Through this Petition, maintained under Article 199 of the Constitution of Islamic Republic of Pakistan 1973, the Petitioner claims a right to a family pension in her capacity as the daughter of one Muhammad Bachal who worked at the Sukkur Municipal Corporation and who admittedly died on 8 March 1996.

2. The Petitioner contends that her father Muhammad Bachal was an employee of Sukkur Municipal Corporation and who died on 8 March 1996 and at which time she was 22 years of age and was unmarried. She contends that on his demise the pension was received by her mother Inayatn who died 13 years later on 15 November 2009.

3. Between the period of 8 March 1996 to 15 November 2009 the Petitioner admittedly was married to one Muhammad Saleem Shaikh and which marriage unfortunately did not last and she was divorced on 26 October, 2009. She contends that as she was divorced she would be classified as an unmarried daughter of Muhammad Bachal at that time of passing her mother and hence she is now entitled to maintain a claim to the Family Pension.

4. In this regard she contends that the pension was in fact paid to her by the Respondents at the rate of Rs. 26,081 (Rupees Twenty Six Thousand Eighty One) per month from November 2009 till April 2022 and thereafter at the

rate of Rs. 19,886 (Rupees Nineteen Thousand Eight Hundred and Eighty Six) per month for two months and finally from August 2022 till December 2022 at the rate of Rs. 20,950 (Rupees Twenty Thousand Nine Hundred and Fifty) month. She contends that from the month of December 2022 the Respondents have failed to pay the Petitioner the Family Pension and which she contends has been done illegally and which has caused her to maintain this petition.

5 Rule 4.10(A)(iii), Rule 4.10 (2) B, (v), (vi) and (vii) and Rule 4.10.5(a) and (b) of the West Pakistan Civil Servants Pensions Rules, 1963 (hereinafter referred to as the "Rules, 1963") determine a persons entitlement to Family Pension and which provisions read as hereinafter:

" ... 4.10.(1) Family for the purpose of payment of family pension shall be as defined in sub-rule (1) or rule 4.7. It shall also include the Government servants relatives mentioned in clause (d) of the 4.8.

4.10.2(A) A family pension sanctioned under this section shall be allowed as under:-

(i)(a) To the widow of deceased, if the deceased is male Government servant, or to the husband, if the deceased is a female Government servant.

(b) If the Government servant had more than one wife, and the number of his surviving widow and children does not exceed 4, the pension shall be divided equally among the surviving widows and eligible children. If the number of surviving widow and children together is more than 3, the pension shall be divided in the following manner, viz, each surviving widow shall get 1/4th of the pension and the balance(if any) shall be divided equally among the surviving eligible children. Distribution in the above manner shall also take place whenever the Government servant leaves behind surviving children of a wife that has predeceased him in addition to the widow and her children if any.

(c) In the case of female Government servant leaving behind children from a former marriage in addition to her husband and children by her surviving husband, the amount of pension shall be divided equally among the husband and all eligible children. In case the total number of beneficiaries exceeds four, the husband shall be allowed 1/4 of the pension and the remaining amount distributed equally among the eligible children.

(ii) Failing a widow of husband, as the case may be the pension shall be divided equally among the surviving sons not above 25 years and unmarried daughter.

(iii) Failing (i) and (ii), to the eldest widowed daughter.

(iv) Failing (i) and (iii), to the eldest widowed of the deceased son of the Government servant.

(v) Failing (i) and (iv), to the eldest surviving son of deceased son of the Government servant.

(vi) Failing (i) and (v), to the eldest un-married daughter of a deceased son of the Government servant.

(vii) Failing these, to the eldest widowed daughter of a deceased son of the Government servant.

4.10.5.(a) If the pension ceases to be granted before the expiry of the period for which it is admissible on death or marriage of the recipient or on account of other causes, to persons failing under sub-clauses A(i) and (ii) sub-rule (2) above, the amount shall be granted to other recipients in equal shares.

(b) If a family pension awarded under the section other than the mentioned in clause (A)(i) and (ii) of sub-clause (2) of this rule ceases to be payable before the expiry of the period up to which it is admissible on account of death or marriage of the recipient or other causes, it shall be re-granted to the persons next lower in order mentioned in sub-rule (2).

On an interpretation of the above referred rules, the Petitioner contends that as per Sub-Clause (i) of Clause (a) of Rule 4.10.2. (A) of the Rules, 1963, at the time of her fathers demise, her mother being the sole wife of her father was the sole beneficiary and was entitled to receive the Family Pension. She further contends that after her mothers demise in November 2009, under Clause (ii) of Rule 4.10.2. (A) of the Rules, 1963, while albeit admittedly she is divorced, she continues to be an “unmarried” daughter of her father and is as such entitled to claim on the Family Pension.

6. It seems the Secretary Finance Department, Province of Sindh has on 5 December 2022 issued a Circular which attempts to clarify an office memorandum dated 7 April 2016 interpreting Rule 4.10(A)(iii), Rule 4.10 (2) B, (v), (vi) and (vii) and Rule 4.10.5(a) and (b) which reads as hereinunder

“ ... (i) If daughter of the deceased pensioner is widow at the time of death of pensioner/family pensioner, she will be entitled for transfer of family pension. However, if she becomes widow after the date of death of pensioner/family pensioner, the family pension shall not be granted/re-granted.

(ii) It is further clarified that if the death of pensioner/family pensioner and husband of daughter of pensioner occur on the same day, the family pension shall be transferred to widow daughter. However, if she becomes widow even a day later after death of pensioner/family pensioner, the family pension shall not be granted/re-granted to her.

(iii) Likewise, if the daughter of deceased pensioner is **divorced at the time of death of pensioner/family pensioner**, she will be entitled for transfer of family pension. However, if she is **divorced after date of death of pensioner/family pensioner**, the family pension shall not be granted/re-granted.

(iv) Further, if the death of pensioner/family pensioner and divorce of daughter of pensioner occur on the same day, she will be entitled for transfer of family pension. However, if the event of divorce occurs even a day after the death of pensioner/family pensioner, the family pension shall not be granted/re-granted.

(v) The above mentioned clarification will also be applicable to widowed and divorced sister also in case of re-marriage of widow and unmarried/widow/divorce daughter/sister.

A literal reading of this clause (iii) of this Circular clarifies that if a daughter is divorced after the demise of her father she would not be entitled to claim on the pension of her father.

7. Mr. Imtiaz Ali Abbasi, entered appearance for the Petitioner and contends that as the Petitioner at the time of demise of her mother was divorced, hence under Clause (ii) of Rule 4.10.2(A) of the 1963, Rules, being an “unmarried” daughter of Muhammad Bachal, she was entitled to claim on the Family Pension and which was correctly being given to her from date of her mother’s demise in the month of November 2009 until December 2022.

8. Conversely, Mr. Ali Raza Balouch the Assistant Advocate General Sindh relying on clause (iii) of the Circular dated 5 December 2022, contends that as the Petitioner was divorced after the date of death of her father hence after the issuance of the Circular and in terms thereof she cannot maintain any claim to the Family Pension.

9. We have heard Mr. Imtiaz Ali Abbasi and Mr. Ali Raz Balouch and have perused the record. The right to a Family Pension is regulated by the Rules, 1963. These rules received constitutional cover under Article 240 read with Article 241 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the “Constitution”) and which reads as hereinunder:

“ ... 240. *Appointments to service of Pakistan and conditions of service*

Subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined –

(a) in the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under Act of 1[Majlis-e-Shoora (Parliament)]; and

(b) in the case of the services of a Province and posts in connection with the affairs of a Province, by or under Act of the Provincial Assembly.

Explanation.–In this Article, "All-Pakistan Service" means a service common to the Federation and the Provinces, which was in existence immediately before the commencing day or which may be created by Act of 1[Majlis-e-Shoora (Parliament)].

241. *Existing rules, etc., to continue*

Until the appropriate Legislature makes a law under Article 240, all rules and orders in force immediately before the commencing day shall, so far as consistent with the provisions of the Constitution, continue in force and may be amended from time to time by the Federal Government or, as the case may be the Provincial Government.

As per the provisions of Article 241 of the Constitution, the Rules, 1963 are to continue to remain in force until a law is made pursuant to Article 240 of the Constitution. Two statutes have been passed since that date, the first is the Sindh Civil Servants Act, 1973 (hereinafter referred to as the "Act, 1973") and which in section 20 deals with issues pertaining to pensions as hereinafter:

" ... 20. Pension and gratuity.-

(1) On retirement from service, a civil servant shall be entitled to receive such pension or gratuity as may be prescribed.

(2) In the event of the death of a civil servant, whether before or after retirement, his family shall be entitled to receive such pension, or gratuity, or both, as may be prescribed.

(3) No pension shall be admissible to a civil servant who is dismissed or removed from service for reasons of discipline, but Government may sanction compassionate allowance to such a civil servant, not exceeding two-thirds of the pension or gratuity which would have been admissible to him, had he been invalidated from service on the date of such dismissal or removal.

(4) If the determination of the amount of pension or gratuity admissible to a civil servant is delayed beyond one month of the date of his retirement or death, he or his family, as the case may be, shall be paid provisionally such anticipatory pension or gratuity as may be determined by the prescribed authority, according to the length of service of the civil servant which qualifies for pension or gratuity; and any over payment consequent on such provisional payment shall be adjusted against the amount of pension or gratuity finally determined as payable to such civil servant or his family."

Clearly the requisite power has been given under Sub-Section (2) of Section 20 of the 1973, Act for the payment of a Family Pension to the members of the Family of a Civil Servant and on that persons demise and which are to be determined "as may be prescribed". The expression "prescribed" has been defined in clause (g) of Sub-Section (1) of Section 2 of the 1973, Act and which means by enacting Rules in terms of Section 26 of that Statute. Section 26 reads as hereinafter:

" ... 26. Rules.

(1) Government or any person authorised by it in this behalf, may make such rules as appear to be necessary or expedient for carrying out the purposes of this Act.

(2) Any rules, orders or instructions in respect of any terms and conditions of service of civil servants duly made or issued by an authority competent to make them in force immediately before the commencement of this Act shall, in so far as such rules, orders or instructions are not inconsistent with the provisions of this Act, be deemed to be rules made under this Act."

To the best of our knowledge no rules have been framed in terms of Sub-Section (1) of Section 26 of the Act, 1973 to regulate matters pertaining to the

payment of a Family Pension and as such until such rules are framed by virtue of Section 23 of the Sindh General Clauses Act, 1956, the provisions of the Rules 1963 shall continue to regulate such duties and obligations.

10. Having concluded that the entitlement of the Petitioner to a Family Pension would be regulated by the Rules, 1963, we are clear that on a literal reading of Clause (ii) of Rule 4.10.2(A) of the 1963 Rules, the Petitioner being divorced would, after her mothers demise, fall within the classification of an “unmarried” daughter and would hence be entitled to maintain a claim for family pension. This position is reinforced by the fact that the Respondents had interpreted Clause (ii) of Rule 4.10.2(A) of the 1963, Rules in the same manner and had since the November 2009 until December 2022 being paying the Family Pension to the Petitioner. Contrarily, it is to be noted that the purported clarification made in that Circular is actually at variance with the literal interpretation of the Rule as it clarifies that even if the daughter was divorced and hence legally unmarried at the time of her mother’s demise, she would nevertheless not be entitled to claim on the pension. It is therefore to be seen whether the Circular dated 5 December 2022 which purports to clarify the abovementioned Rule can in effect override and hence amend that Rule so as to allow for such a variation.

12. In this regard it is noted that both Article 242 and Sub-Section (1) of Section 26 of the Act, 1973 mandate that the Provincial Government shall have the right to make rules. After the decision of the Honourable Supreme Court of Pakistan in **Mustafa Impex, Karachi vs The Government Of Pakistan Through Secretary Finance, Islamabad**¹ it is now settled that the where a statute mandates the Provincial Government to perform an act that act has to performed by the Provincial Cabinet. Hence, any variation to be made to Clause (ii) of Rule 4.10.2(A) of the 1963, Rules can only be made by the Provincial Cabinet amending those Rules and which cannot be made by Secretary to the Finance Department of the Province of Sindh who clearly lacks the jurisdiction to vary, let alone place a binding interpretation on that Rule. This is reinforced by the fact that there is no provision in either the Act, 1973 or the 1963 Rules which permit the Secretary of the Finance Department to issue any clarifications to interpret the rules and as no such jurisdiction exists with the Secretary of the Finance Department, we are of the opinion that the Circular issued was clearly beyond the jurisdiction of the Secretary of the Finance

¹ PLD 2016 SC 808

Department and hence a void act and which cannot be used to interpret the provisions of statutory rules contained in the 1963, Rules. The Petition must therefore be allowed.

13. For the foregoing reasons, we are of the opinion that:

- (i) the reliance placed by the Respondents on the Circular dated 5 December 2022 while interpreting Clause (ii) of Rule 4.10.2(A) of the 1963, Rules is illegal and the Respondents are hereinafter restrained from placing any reliance on that Circular while determining a person entitlement to a Family Pension under that Rule;
- (ii) that on a literal interpretation of Clause (ii) of Rule 4.10.2(A) of the 1963, Rules the Petitioner, despite being divorced, is a person who was unmarried at the time of her mother's death and would hence be entitled to claim on the Family Pension under that Rule;
- (iii) the Respondents are directed to ensure that the Petitioner is paid her family pension from the month of January 2023 onwards with directions that all future payments, from the date of this order, should be paid on a monthly basis while all amounts owing as between the period from January 2023 until the date of this Order should be released to the Petitioner within one month of the passing of this order.

The Petition is allowed in the above terms, with no order as to costs.

J U D G E

J U D G E

M. Ali/steno*