

CASE NO.:
Appeal (civil) 6651-6654 of 2000

PETITIONER:
KERALA STATE ROAD TRANSPORT CORPN.

RESPONDENT:
K.O. VARGHESE AND ORS.

DATE OF JUDGMENT: 17/04/2003

BENCH:
SHIVARAJ V. PATIL & ARIJIT PASAYAT

JUDGMENT:
JUDGMENT

2003 (3) SCR 779

The Judgment of the Court was delivered by ARIJIT PASAYAT, J.

C. A. Nos. 6651 -6654/2000, 6655/2000, 6656/2000, 6657/2000, SLP (C)
Nos. 6820/2001 6518-6521/2001, C. A. Nos. 181-182/2002

Leave granted in SLP(C) Nos. 6820/2001 and 6518-6521/2001.

Since these appeals have some similarity so far as pivotal issues are concerned, are, therefore, disposed of by this common judgment.

Several writ petitions were filed by the respondents herein before the Kerala High Court seeking declaration about their entitlement to receive pension and dearness relief at enhanced rates in par with the employees of the State Government. They were employees of the Kerala State Road Transport Corporation (hereinafter referred to as 'the Corporation') which is the appellant in all these appeals. Though the reliefs sought for were not exactly identical, by the impugned judgment four appeals were disposed of by a Division Bench of the High Court. Two of the writ appeals were filed by the writ petitioners, while two were filed by the Corporation.

The Corporation was formed on 1.4.1965; some persons who were then employed with State Transport Department were absorbed by the Corporation; their service conditions were protected vide Notification No. 4936/TC4/64/PW 22.3.1965 in terms of directions under Section 34 of the Road Transport Corporation Act, 1950 (in short 'the Act'). On the basis of conditions 11 and 12 of the Notification, which shall be extracted infra, pension was paid to erstwhile State Transport Department employees, in terms of Part III of Kerala Service Rules, 1959 (in short 'KSR'). In 1978, other employees who opted for pension were also granted pension at par with these employees. In 1992, (w.e.f. 1.1.1992) a departure was made by fixing subsequent dates of entitlement for dearness relief. Similar was the situation in 1994. While on the first instance date fixed was 1.7.1992, for the latter case it was directed to be operative from 1.11.1996, when the Government had fixed the date to be 1.4.1994.

Huge extra cost involved and shattered financial condition were the reasons indicated as such deferment. Reliance was also placed on a letter of the State Government dated 24.9.1992 which according to it was a direction in terms of Section 34 of the Act. According to this letter, in view of financial position of the Corporation, the matter relating to payment of the enhanced amounts may be deferred for better times. This letter was in response to the Corporation's letter to the effect that since it had no means to pay the enhanced rate of pension as per the Fifth Kerala Pay Commission, the date from which the amount is to be paid should be postponed. There is a great detail of controversy as to the true nature of the said government letter (Ex.P-1). While the Corporation's stand is that

it is an instruction in terms of Section 34 of the Act, the pensioners took the stand that the Government only allowed the Corporation to defer the matter for some time. High Court accepted the stand of the writ petitioners. It also observed that the Government only allowed the Corporation to defer the matter for some time, in fact that was deferred, but full payments including the arrears with effect from the date of implementation in Government service also were made by the Corporation subsequently. High Court noted that till 1991 all the orders relating to enhancement of pension as well as dearness reliefs were paid to the pensioners of the Corporation without any difference in dates. It held that in Ex.P-1, what is mentioned relates to deferment of payment for some time, and revised pension benefits were in fact given with arrears after some time. It further noted that since Part III of the KSR had been adopted, there was no rational for fixing the cut off date for payment of the enhanced pension and the dearness reliefs. In the absence of any rule or regulation framed by the Corporation, KSR is applicable to the employees appointed by it. In respect of employees transferred from State Transport Department, the position was clear that they are to be paid from the date the government servants got it. Reference was made to the conditions of transfer. Accordingly, the appeals filed by the respondents (writ petitioners) were allowed while those filed by the appellant-Corporation were dismissed.

In support of the appeals, it is submitted that the High Court has not examined the respective cases and has broadly taken the view about entitlement of the pensioners, though the writ petitions were not for identical reliefs. There was no pensionable post in the Corporation till 1984. The wage structure is the domain of the employer-Corporation and it has the choice to fix the cut off date for enhanced pension and dearness reliefs. Even if it is accepted for the sake of arguments that the letter of the Government (Ex.P-1) was not an instruction in terms of Section 34 of the Act, yet the Corporation was not denuded of its power to fix the wage structure and when for good and sufficient reasons it fixed the cut off dates, the High Court should not have interfered. Financial stringency is a relevant factor for fixing the cut off date. The High Court acted on erroneous premises by proceeding as if there was controversy as regards the conferment of the benefits. What was really in controversy was the dates while there is no dispute about entitlement. The take over document has not been considered by the High Court properly. It only says that as and when the benefits accrue the relevant rules, notifications and orders of the governments in force and applicable immediately before the transfer had to operate.

Per contra, learned counsel appearing for the respondents who were originally in the State Transport Department submitted that clauses 11 and 12 of the take over notification made the position clear that whatever was given to the governments servants was also to be given to those employees who had been transferred from the department to the Corporation. The entitlements were to be fixed keeping in view the position as it stood on date of transfer. There is no right to vary the cut off date. Even if it is accepted that Corporation's financial health is failing, the old pensioners should not be deprived of their legitimate entitlements of pension. Keeping in view the laudable object for which pension is paid and its socio-economic importance for the old and infirm pensioners, the order of the High Court suffers from no infirmity. The expression "as and when such benefits accrue" was for the purpose of identification of the rules applicable.

Further all the writ petitions did not involve identical issues. High Court's attention was focused on the stand of those employees who originally belonged to the State Transport Department. Their cases stand on a different footing vis-a-vis other employees, even according to the pleadings of the parties. Therefore, in the peculiar circumstances as noted above, we feel the proper course would be to remit the matter back to the High Court for fresh consideration, so that it can deal with the respective

stands of the parties. It shall be open to the parties to place additional materials in support of their respective stands before the High Court which shall decide the matter de novo.

The question of employer having the domain to fix the cut off date has no relevance so far as the present dispute is concerned. There was no question of fixing a different cut off date as the Corporation by letter dated 5.5.1984 took note of the State Government's letter dated 17.3.1984 by which it authorized the Corporation to pay pension to its employees as per Kerala Service Rules. This was the adoption of a statute by incorporation and not by reference.

Learned counsel for the appellants in response to this plea submitted that whether the KSR was applicable by incorporation or by reference has not been decided by the High Court and this may be one of the factors which was to be considered, but it did not have any determinative force on the issue as to whether the Corporation has the power to fix up a different cut off date taking into account several relevant factors like financial stringencies etc.

There is no appearance on behalf of the other respondents.

Before we deal with their respective contentions, it is necessary to appreciate the concept of pension. There are different classes of pensions and different conditions govern their grant. It is almost in the nature of deferred compensation for services rendered. There is a definition of pension in Article 366(17) of the Constitution of India, 1950 (in short the 'Constitution'), but the definition is not all pervasive. It is essentially a payment to a person in consideration of past services rendered by him. It is a payment to a person who had rendered services for the employer, when he is almost in the twilight zone of his life.

A political society which has a goal to set up a welfare state, would introduce and has, in fact, introduced as a welfare measure wherein the retiral benefit is grounded on consideration of State obligation to its citizens who having rendered service during the useful span of life must not be left to penury in their old age. But, the evolving concept of social security is a later day development, and this journey was over a rough terrain. To note only one stage in 1856 a Royal Commission was set up to consider whether changes were necessary in the system established by the operative 1834 Act. The Report of the Commission is known as "Northcote-Trevelyan Report". The Report was pungent in its criticism when it says that: "in civil services comparable to lightness of work and the certainty of provision in case of retirement owing to bodily incapacity, furnish strong inducement to the parents and friends of sickly youth to endeavour to obtain for them employment in the service of the Government, and the extent to which the public are consequently burdened, first with the salaries of officers who are obliged to absent themselves from their duties on account of ill health, and afterwards with their pensions when they retire on the same plea, would hardly be credited by those who have not had opportunities of observing the operation of the system. (See Gerald Rhodes Public Sector Pensions, pp. 18-19)

This approach is utterly unfair because in modern times public services are manned by those who enter at a comparatively young age, with selection through stiff competitive examinations and ordinarily the best talent gets the opportunity.

Let us, therefore, examine; as was done by this Court in D.S. Nakara v. Union of India, AIR (1983) SC 130 as to what are the goals that any pension scheme seeks to subserve. A pension scheme consistent with available resources must provide that the pensioner would be able to live: (i) free from want with decency, independence and self-respect and (ii) at a standard equivalent at the pre-retirement level. This approach may merit the criticism that if a developing country like India cannot provide an

employee while rendering service a living wage, how can one be assured of it in retirement? This can be aptly illustrated by a small illustration. A man with a broken arm asked his doctor whether he will be able to play the piano after the cast is removed. When assured that he will, the patient replied, 'that is funny, I could not before'. It appears that in determining the minimum amount required for living decently is difficult, selecting the percentage representing the proper ratio between earnings and the retirement income is harder. But it is imperative to note that as self-sufficiency declines the need for his attendance or institutional care grows. Many are literally surviving now than the past. We owe it to them and ourselves that they live, not merely exist. The philosophy prevailing in a given society at various stages of its development profoundly influences its social objectives. The law is one of the chief instruments whereby the social policies are implemented and pension is paid according to rules which can be said to provide social security law by which it is meant those legal mechanisms primarily concerned to ensure the provision for the individual or a cash income adequate, when taken along with the benefit in kind provided by other social services (such as free medical aid) to ensure for him a culturally acceptable minimum standard of living when the normal means of doing so failed. (See Social Security Law of Prof. Harry Calvert, p. 1)

Viewed in the light of the present day notions pension is a term applied to periodic money payments to a person who retires at a certain age considered age of disability; payments usually continue for the rest of the natural life of the recipient. The reasons underlying the grant of pension vary from country to country and from scheme to scheme. But broadly stated they are: (i) as compensation to former members of the armed forces or their dependants for old age, disability, or death (usually from service causes), (ii) as old age retirement or disability benefits for civilian employees, and (iii) as social security payments for the aged, disabled or deceased citizens made in accordance with the rules governing social service programmes of the country. Pensions under the first head are of great antiquity. Under the second head they have been in force in one form or another in some countries for over a century but those coming under the third head are relatively of recent origin, though they are of the greatest magnitude. There are other views about pensions such as charity, paternalism, deferred pay, reward for service rendered, or as a means of promoting general welfare (See Encyclopaedia Britannica Vol. 17, p.575). But these views have become otiose.

Pension to civil employees of the Government and the defence personnel as administered in India appear to be a compensation for service rendered in the past. However, as held in *Dodge v. Board of Education*, (1937) 302 US 74:82 Law Edn.58) a pension is closely akin to wages in that it consists of payment provided by an employer, is paid in consideration of past service and the purpose of helping the recipient meet the expenses of living. This appears to be the nearest to our approach to pension with the added qualification that it should ordinarily ensure freedom from undeserved want. Summing up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the foil of life when physical and mental powers start ebbing corresponding to aging progress and therefore, one is required to fall back on savings. One such saving in kind is when you gave your best in the hey day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to an employee is earned by rendering long and sufficient service and therefore can be said to be a deferred portion of the compensation for service rendered. In one sentence one can say that the most practical *raison d'être* for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and pecuniary if there is nothing to fall

back upon.

The discernible purpose thus underlying pension scheme or a statute introducing the pension scheme must inform interpretative process and accordingly it should receive a liberal construction and the Courts may not so interpret such statute as to render them obscure (See American Jurisprudence 24.881).

From the aforesaid analysis three things emerge: (i) that pension is neither bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to the statute, if any, holding the field, (ii) that the pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is a social welfare measure rendering socio-economic justice to those who in the hey day of their life ceaselessly toiled for employers on an assurance that in their ripe old age they would not be left in lurch. It must also be noticed that the quantum of pension is a certain percentage correlated to the emoluments earlier drawn. Its payment is dependent upon an additional condition of impeccable behaviour even subsequent to retirement. That is, since the cessation of the contract of service and that it can be reduced or withdrawn as a disciplinary measure.

In Corpus Juris Secundum, Vol. 70 at p.423, it is stated that the title 'pension' includes pecuniary allowances paid periodically by government to persons who have rendered services to the public or suffered loss or injury in the public service, or to their representatives; who are entitled to such allowances and rate and amount thereof; and proceedings to obtain and payment of such pensions.

In its strict sense a pension is not a matter of contract, and is not founded on any legal liability, it is a mere bounty or gratuity "springing from the appreciation and consciousness of the sovereign", and it may be given or withheld at the discretion of the sovereign. It may be bestowed on such persons and on such terms as the law-making body of the government prescribes, and it is, at most, an expectancy granted by the law. The term 'pension' has been compared and distinguished from 'bonus', 'compensation', 'profits' and 'retirement payment'. A pension fund is to be distinguished from an annuity fund derived in part from voluntary contributions under a statutory option to contribute or refrain from contributing.

In State of Kerala and Ors. v. M. Padmanabhan Nair, AIR (1985) SC 356, it was observed that pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but are valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment. The view was reiterated in Dr. Uma Agrawal v. State of U.P. and Anr., AIR (1999) SC 1212.

It is to be noted that in certain countries wrongful withholding of pension money has been made a criminal offence and it has been observed in some of the western countries that the federal statute making the wrongful withholding of pension money a criminal offence must be strictly construed. The purpose of the statute, it was held, is to protect the pensioner against fraud until the unconditional payment of the money to him. In Halsbury's Law of England, Fourth Edition, Reissue-Vol. 16, it has been observed on the subject as follows:

"Pension means, a periodical payment or lump sum by way of pension, gratuity or superannuation allowance as respects which the Secretary of State is satisfied that it is to be paid in accordance with any scheme of arrangement having for its object or one of its objects to make provision in respect of persons serving in particular employments for providing them with retirement benefits and, except in the case of such a lump sum which had been paid to the employee, that:

(1) the scheme or arrangements is established by Act of Parliament or of the Parliament of Northern Ireland, or other instrument having the force of law, or

(2) the benefits under the scheme or arrangement are secured by an irrecoverable trust which is subject to the laws of any part of the Great Britain; or

(3) the benefits under the scheme or arrangements are secured by a contract of assurance or an annuity contract which is made with:

(a) an insurance company to which the Insurance Companies Act, 1982 applies; or (b) a registered friendly society; or (c) an industrial and provident society registered under the Industrial and Provident Societies Act, 1965; or

(4) the benefits under the scheme or arrangement are secured by any regulation or other instrument, not being a regulation or instrument having the force of law, made with the authority of a Minister of the Crown or with the consent of the Treasury for the purpose of authorizing the payment to persons not employed in the Civil Service of the State of such pensions, gratuities or other like benefits as might have been granted to person so employed; or

(5) the scheme or arrangement is established by an enactment or other instrument having the force of law in any part of the Commonwealth outside the United Kingdom; and that the provision made to enable benefits to be paid, taking into account any additional resources which could and would be provided by the employer, or any person connected with the employer to meet any deficiency, is adequate to ensure payment in full of such benefits.

'Pension' includes any part of the pension. 'Pension' does not include:

(i) a payment of an employee which consists of solely of a return of his own contributions, with or without interest;

(ii) that part of a payment to an addition which is attributable solely to additional voluntary contributions by that employee made in accordance with the scheme or arrangement;

(iii) a periodical payment or lump sum, in so far as that payment or lump sum represents compensation under statutory compensation scheme and is payable under a statutory provision whether made or passed before, on or after 31st July, 1978.

If in any case the Secretary of State is satisfied that benefits under the scheme or arrangement are wholly or mainly provided for the benefit of persons not resident to Great Britain, he may, if he thinks fit and subject to such conditions, if any, as he thinks proper, waive the requirement contained in head (2) above in respect of a scheme or arrangement the benefits under which are secured by an irrecoverable trust or the requirements of head 3(a), 3(b) or 3(c) above in the case of a scheme or arrangement the benefits under which are secured by a contract of assurance or an annuity contract."

In Union of India v. P.N. Menon, AIR (1994) SC 2221, this Court observed that not only in the matters of revising the pensionary benefits, but also in respect of revision of scales of pay a cut off date on some rational or reasonable basis has to be and can be fixed for extending the benefits. The cut off date may be justified on the ground that additional financial outlay is involved or the fact that under the terms of appointment the employee was not entitled to the benefit of the pension on retirement. (See Union of India and Ors. v. Lieut (Mrs.) E. locals, [1997] 7 SCC 334. Depending upon financial conditions a cut off date can be fixed when a new

pension scheme is being introduced. (See State of Rajasthan and Anr. v. Amritlal Gandhi and Ors., [1997] 2 SCC 342.

The High Court has referred to the fact that the Corporation did not frame any regulation and on following Part III of KSR it was paying pension to the employees at par with the government employees with some conditions. That according to the High Court made the position clear that no fixation of cut off date was involved.

From the perusal of the order passed by the Division Bench, it appears that it proceeded on the basis as if the questions for consideration related entitlement to receive enhanced pension and dearness reliefs. As noted above, there was no dispute about entitlement and what was in controversy related to the date for which the payment was to be made. The High Court further proceeded on the basis that there was no question of any cut off date since Part III of the KSR was being adopted in the past. The same prima facie is not correct. Stand of the Corporation right through has been that it had fixed the date from which the payments were to be made and for that purpose relied on Ex.P-1, letter of the Government. Whether the letter (Ex.P-1) constituted a direction under Section 34 of the Act is an issue which is linked with several other issues like power of the Corporation to fix a different date de hors any special direction of the Government under Section 34 of the Act. Even if it is held that the letter in Ex.P-1 was not in the nature of a special direction, the other issues were required to be considered. That has apparently not been done.

One of the issues which needed consideration was indication of KSR Part III on the question of paying pension in Corporation's order dated 5.5.1984. A distinction has been made between a mere reference or citation of one statute into another and incorporation. A statute may instead of referring to a particular previous statute or to any specific provision therein refer to the law on the subject generally. In such cases a reference is construed to mean that the law is as it reads thereafter including amendments subsequent to the time of adoption, as was noted by Sutherland in Statutory Construction Vol.2, 3rd Edn., p.550 and supplement (1956), P.I 19.

The legislation by referable incorporation falls into two categories. That is (i) where a statute by specific reference incorporates the provisions of another statute as at the time of adoption and (ii) where a statute incorporates by general reference. The law concerning a particular subject has a genus. In the former case the subsequent amendments made in the referred statute cannot automatically be read into the adopting statute. But in the second category it may be presumed that the legislative intent was to include all the subsequent amendments also made from time to time in the generic law on the subject adopted by the general reference.

In the former case a modification, repeal or re-enactment of the statute that is referred will also have effect on the statute in which it is referred; but in the latter case any change in the incorporation statute by way of amendment or repeal has no repercussion on the incorporating statute. The rule that the repeal or amendment of an Act which is incorporated in a later Act has no effect on the later Act or on the provisions incorporated therein is subject to four exceptions. They are (i) where the later Act and the earlier Act are supplemental to each other, (ii) where the two Acts are in pari materia, (iii) where the amendment of the earlier Act if not imported in the later Act would render it wholly unworkable and (iv) where the amendment of the earlier Act either expressly or by necessary intendment also applies to the later Act. Even though only particular sections of an earlier Act are incorporated into later statute, in construing the incorporated provisions it may be necessary and permissible to refer to other parts of the earlier statute which are not incorporated. This does not however mean that a provision in the nature of a proviso or exception in the earlier Act which is not brought in by incorporation can be read in a manner so as to limit the meaning of the provision incorporated. Reference to other provisions of the earlier

statute is only permissible to cull out meaning of the provision incorporated.

In the illuminating words of Lord Esher MR: "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed on it." (See *Re. Wood's Estate, Ex Parte, Works and Buildings Commissioners* (1986) 31 Ch.D. 607).

It may be added that clear intention of the incorporating Act cannot be defeated by such provision of the earlier Act which have not been incorporated. In the interpretation of an incorporated provision, the Court is some times required to formulate variations of details in the context of the incorporating statute. [See *Mariyappa v. State of Karnataka*, JT (1998 1 SC 734)]. The merit of legislation by incorporation is brevity which is some times counterbalanced by difficulties and obscurities which it is likely to create.

In *Minister of Housing and Local Government v. Hartnell* (1965) 1 All E.R. 490(HL), it was observed that there is a regrettable modern tendency to overdo legislation by reference and to attempt brevity at the expense of lucidity.

What is the effect of the letter dated 5.5.1984 and its impact on the authority, if any, of the Corporation to fix cut off date has not been examined by the High Court.

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In addition to the general questions raised in other appeals, one other aspect which needs to be noted is that some amount was sought to be recovered from the respondents on the ground that they were paid amounts in excess of their legal entitlements. The attempt to recover the amount was resisted by the respondent-employees who filed writ petitions before the High Court which at the first instance directed disposal of the representations filed by them. On fresh consideration, orders were passed for recovery. The ground taken for directing recovery was that there was wrong fixation of pay. That was again challenged before the High Court. Taking note of the fact that pay was fixed in 1974 and the writ petitioners were not responsible for any wrong fixation of pay, the recovery of the amount was held to be inequitable by learned Single Judge of the High Court. The writ appeal was also dismissed. In addition to the questions raised in other appeals, the Corporation has assailed the directions of the High Court not to recover. On hearing learned counsel for the parties and taking note of the peculiar circumstances noticed by the High Court, we do not find any scope for interference with that part of the High Court's directions which related to recovery of the amounts allegedly paid extra to the employees. So far as other issues are concerned, this shall be examined by the High Court afresh as directed.

The appeals are disposed of accordingly but in the circumstances with no order as to costs.