

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 373 of 1991
T.A. No.

DATE OF DECISION 3-10-1991

K Padmini _____ Applicant (s)

Mr M Girijavallabhan _____ Advocate for the Applicant (s)

Versus

Secretary, M/o Defence, _____ Respondent (s)
New Delhi & 2 others

Mr KA Cherian, AGCSC _____ Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. AV Haridasan, Judicial Member

~~THE HON'BLE MR. JUDGE~~

1. Whether Reporters of local papers may be allowed to see the Judgement? *Yes*
2. To be referred to the Reporter or not? *Yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *Yes*
4. To be circulated to all Benches of the Tribunal? *Yes*

JUDGEMENT

The short question to be decided in this application is whether the recipient of family pension on the death of an re-employed Ex-Serviceman dying in harness is entitled to be given a right to opt to receive civil service pension or the pension due under Army Instruction 2/S/64, in cases where the employee had either exercised option under Rule 54(13-A) (iii) and (iv) of the Civil Service Pension Rules or failed to exercise such option.

2. The facts can be briefly stated thus. One Shri G Gopalan Nair, after serving the Indian Army from 26.2.1952

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to 2.4.1968 retired from Military service earning Military Pension. Thereafter, he got re-employed under the second respondent as a civilian M.T.Driver in July 1968. While in service, he died on 11.2.1989. While in service, Shri Gopalan Nair was receiving Military Pension. As he had served under the second respondent for more than 20 years, if he had been alive and superannuated, he would have been eligible for Military Pension as well as Civil Service Pension. The applicant is the widow of the abovesaid Gopalan Nair. She is therefore eligible for ~~XXXXXX~~ Pension under Rule 54 of the CCS Pension Rules, 1972 or the family pension admissible to her under Army Instruction 2/S/64. According to Rule 54 (13-B) of the CCS Pension Rules, the applicant is entitled to get either the family pension as per the Army Instructions 2/S/64 or under Rule 54 of the CCS Pension Rules and not to both. When the applicant demanded family pension under Rule 54 of the CCS Pension Rules, expressing her willingness to forgo the family pension under Army Instructions 2/S/64, she was told that as her husband did not on confirmation exercise an option to receive family pension admissible under Rule 54 of the CCS Pension Rules and to forgo the family pension under Army Instructions 2/S/64, it would be deemed that he had opted to have his case governed by the scheme of Army Instructions 2/S/64 and that therefore for that reason, the applicant was not entitled to the Civil Service Pension under Rule 54. The applicant submitted a representation to the Commanding Officer, INS Garuda, Naval Base, Cochin stating that the option if at

all necessary should have been obtained from her husband by administration in time and that as she is the person to receive the family pension, she should be given an opportunity to opt and that as she has opted for receiving the civil service pension, the matter may be reconsidered and she may be given the family pension under the CCS Pension Rules. To this representation, the third respondent issued to her the impugned order at Annexure-C dated 27.11.1990 stating that as Shri Gopalan Nair did not exercise his option for Family Pension under CCS(Pension)Rules, 1972 within a period of three months from the date of his confirmation in the civil post, the pensioner was deemed to have opted for Family Pension under Army Rules and that the family of Shri Gopalan Nair is not eligible for civil service pension as they would get only the family pension under Army Instruction No.2/S/64.

Aggrieved by the above communication, the applicant has filed this application under Section 19 of the Administrative Tribunals Act praying that the order at Annexure-C and the provivions contained in Rule 54(13-A)(iii) and (iv) in so far as they areinconsistant with the provisions of Rule 54 (13-B) may be declared illegal, arbitrary and unconstitutional that declaring that the applicant who is a beneficiary of the scheme is entitled to exercise an option under proviso to Rule 54(13-B), the respondents may be directed to afford the applicant an opportunity to exercise an option under proviso to Rule 54(13-B) to act on the basis of the said option and to grant her the family pension

accordingly with retrospective effect from 12.2.1989. It has been averred in the application that since the respondents have not obtained an option from Shri Gopalan Nair within three months of his confirmation in service, the decision of the respondents to treat that Shri Gopalan Nair had opted for family pension authorised under Army Instruction No.2/S/64 is unjustified. It has also been averred that as the person who is entitled to receive family pension is not the employee, the provisions of Rule 54(13-A)(iii) & (iv) dealing with the option are meaningless and unsustainable.

3. The respondents in the reply statement have contended that as Shri Gopalan Nair did not exercise his option as required under Rule 54(13-A) of the CCS Pension Rules, 1972 within 3 months after his confirmation in service to forego family pension under the Army Instruction No.2/S/64 and to receive the family pension under Rule 54 of the CCS Pension Rules, it was deemed that Shri Gopalan Nair had opted for family pension authorised under the Army Instruction No.2/S/64 and that there is no provision in the rule permitting the next of kin of a deceased employee who is entitled to receive the family pension to exercise option for family pension either under CCS Pension Rules, 1972 or Amy Instruction No.2/S/64. Therefore the respondents have contended that the applicant will be entitled only to the family pension authorised under Army Instruction No.2/S/64 and not to the pension under Rule 54 of the CCS Pension Rules.

4. I have heard the argument of the learned counsel on either side and have also gone through the pleadings. The question to be decided is whether a person entitled to family pension/^{if he} is already in receipt of another family pension or is eligible for receiving such family pension is entitled to an option to receive either of ^{there} pensions even if the employee based on whose service pension is to be given has exercised the option under Rule 54(13-A) ~~xxxxxxxxxxxxxx~~ of CCS Pension Rules or has failed to exercise such option. In this case the applicant's husband, Shri Gopalan Nair, an Ex-serviceman was drawing a military pension while in service. He had not exercised option as required under Rule 54(13-A) of ~~xxxxxx~~ of the CCS Pension Rules which reads as follows:

"if on confirmation in a civil service or a civil post in the course of his re-employment, he has opted to retain military pension for the past military service in terms of clause(a) of sub-rule(1) of Rule 19 of these rules, he shall exercise another option to receive family pension admissible under this rule or the family pension, already authorised under Army Instruction No.2/S/64 or the corresponding Navy or Air Force Instruction. The option shall be exercised within a period of three months of the date of the issue of orders of substantive appointment to a civil service or civil post or if he is on leave on that day, within three months of his return leave, whichever is later. If no option is exercised within the period aforesaid, the pensioner shall be deemed to have opted for family pension authorised under Army Instruction No.2/S/64 or the corresponding Navy or Air Force Instruction, and ..."

Since Shri Gopalan Nair had not exercised the option, the stand of the Department is that it should be deemed that he had opted for family pension authorised under the Army Instruction No.2/S/64 and therefore there is no question of the applicant getting an opportunity to exercise the option. The learned counsel for the applicant invited my attention to Sub Clause 2

which it
of Rule 19 of the CCS Pension Rules, under/ is obligatory on
the part of the authorities issuing the order of substantive
appointment to require the employee to exercise his option
under Sub Rule 1 of Rule 19 within 3 months of date of issue
of such order, if he is on leave on that day, within 3 months
of his return from leave, whichever is later and to bring to
his notice the provisions of Clause(b) that if no option is
exercised within the period referred to in Clause(a), the
Government servant should be deemed to have opted for Clause
(a) of Sub Rule(1). The learned counsel argued that since in
the case of Shri Gopalan Nair, the authority issuing him order
of substantive appointment has not obtained from him the option
as required under Rule 54(13-A)(iii), it cannot be held that
the stand taken by the respondents that Shri Gopalan Nair should
be deemed to have
/ opted for family pension authorised under Army Instruction No.
is correct.
2/5/64/ He further argued that since the person who is entitled
family
to receive/pension can never be the employee, there is absolutely
no meaning in getting an option from him regarding family
pension because the option should be of the person who is en-
titled to get ~~the~~ pension. I am convinced that there is much
force in this argument. Though family pension is granted to
on his death
the dependent of a Government employee/during the life time
of the Government servant he never gets the family pension and
he will never have disposing power over the family pension. As
per rules, he has no right to say that his widow or the person
who would be entitled to get family pension on his death should

not be paid family pension. So family pension is not something which is due to the Government employee but it is due only on his death. There is no meaning in giving an option to a person to receive one ^{family} pension or the other when he will not be entitled to receive any family pension at all. Further, the quantum of family pension would depend on the length of service of the employee. So it maynot be possible for an employee while in service to decide whether it would be beneficial for his family to opt for the family pension available under the Army Instruction or according to the civil service pension rules. In that view of the matter also, it is only proper that the person who is entitled to receive the family pension is given the right to opt which of the pensions he or she should receive. It is exactly for that purpose the proviso to Sub Rule(13-B) of Rule 54 to CCS Pension Rules was enacted. Sub Rule(13-B) of Rule 54 reads as follows:

"Family Pension admissible under this rule shall not be granted to a person who is already in receipt of Family Pension or is eligible therefor under any other rules of the Central Government or a State Government and/or public sector undertaking/autonomous body/Local Fund under the Central or a State Government:

Provided that a person who is otherwise eligible for family pension under this rule may opt to receive family pension under this rule if he foregoes family pension admissible from any other source."

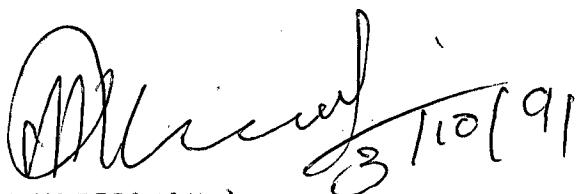
The applicant in this case who is eligible for family pension under the Army Instruction No.2/S/64 and family pension under Rule 54 of the CCS Pension Rules therefore should be given an opportunity to opt to receive either the family pension under the CCS Pension Rules or the family pension authorised under Army Instruction No.2/S/64. Inspite of the fact whether the

Government servant had opted or failed to opt to forego the family pension under Army Instruction No.2/S/64, the person who is entitled to receive the pension has to be given an option under proviso to Sub Rule(13-B) of Rule 54 of CCS Pension Rules. Therefore, I am of the view that the applicant in this case should be given a right to opt to receive either the family pension under the Army Instruction No.2/S/64 or the family pension under the CCS Pension Rules.

5. Though the applicant has prayed that the provisions of Sub Rule(13-A) in so far as it is repugnant to the proviso to Sub Rule(13-B) of Rule 54 of the CCS Pension Rules, should be declared as arbitrary and unconstitutional, I am of the view that it is not necessary to make any such declaration because inspite of Sub Rule(13-A) of Rule 54, the interest of the recipient of the pension is safeguarded by the proviso to Sub Rule (13-B) of Rule 54. Now that the applicant has expressed her Family option to receive the CCS/Pension to which she is eligible under Rule 54 of the CCS Pension Rules and to forego the family pension authorised under Army Instruction No.2/S/64, I am convinced that in the circumstances of the case, it will be just and sufficient if the respondents are directed to accept this option and to disburse to her the family pension due under Rule 54 of the CCS Pension Rules.

6. In the facts and circumstances, I allow the application in part, set aside the impugned order at Annexure-C and direct

the respondents to determine the family pension due to the applicant under Rule 54 of the CCS Pension Rules, treating that she has opted to forego the family pension authorised under Army Instruction No.2/S/64 and has opted for civil service family pension, to disburse to her the family pension so determined w.e.f. 12.2.1989 within a period of two months from the date of communication of this order. There is no order as to costs.


(AV HARIDASAN)
JUDICIAL MEMBER
3-10-1991

trs