

Before Hemant Gupta & Rajiv Narain Raina, JJ.

RAJWANT KAUR—Petitioner

versus

UNION OF INDIA AND OTHERS—Respondents

CWP No. 13297 of 2012

8th August, 2012

(A) Constitution of India, 1950 - Art. 14 & 226 - Territorial Army Act, 1948 - Writ Petition - Scope - Writ Court not to act to substitute the wisdom of the pension granting authority which has made a policy for grant of family pension.

Held, that it is not possible for us to accept such an interpretation or to hold that "Embodied Service" "Disembodied Service" and "Regular Army Service" fall in the same classification or belong to an identical or homogeneous group. If the pension granting authority in its wisdom has made policy in which cases to grant or not to grant family pension, it is not for the writ court to substitute its wisdom and declare that Disembodied Service would also be good enough for Ordinary Family Pension in the event of death of a member of the Territorial Army.

(Para 3)

(B) Constitution of India, 1950 - Art. 226 - Pensions Regulations for the Army, Part 1, 2008 - S. 2 - Reg. 62(ii) - Ordinary Family Pension - Territorial Army Act, 1948 - Application of - "Embodied Service" cannot be equated with "Disembodied Service" for members of Territorial Army - Reasonable Classification between the two kinds of service which is based on intelligible differentia which has nexus with the object to be achieved - Husband of Petitioner died in road accident when not performing "Embodied Service" - Held, widow not entitled to Ordinary Family Pension.

Held, that in the very nature of Territorial Army Service, a member of such service is not required to perform army duties throughout the year or career. Members of the Territorial Army are permitted to pursue avocations

and occupations as fall to their fate. While doing so, they lead a civil life. However, they are called upon from time to time to perform Embodied Service in the exigencies of call of army duty. It is true that they would have the protection of Regulation 62 and in case of death during Embodied Service, there can be no dispute that the widow would be entitled to Ordinary Family Pension.

(Para 3)

Further held, that the fact remains that the husband of the petitioner was not on active duty when he died and it is only active duty which would create a right of the kind pressed in this petition. Embodied and Disembodied services are dissimilar. It is also the mandate of Article 14 of the Constitution that un-equals cannot be treated equally. Between the two kinds of service there is reasonable classification and the classification is based on intelligible differentia which has nexus with the object sought to be achieved.

(Para 3)

Arun Gosain, Advocate, *for the petitioner*.

RAJIV NARAIN RAINA, J.

(1) The petitioner is the widow of late Didar Singh who served the Territorial Army from 16.3.1993. He died in a road accident on 6.11.2010 during the period of disembodiment. The widow's claim for ordinary family pension was rejected with the remarks "*individual died during disembodied period, hence ordinary family pension is not admissible in this case*". These remarks are contained in the impugned letter dated 28.4.2011/26.5.2011. The impugned rejection letter has not been placed on record, though reference of it has been made in the reply dated 3.10.2011 (Annexure P-4) to the legal notice dated 15.9.2011 issued by the petitioner.

(2) In the face of rejection of the case for Ordinary Family Pension, the petitioner has filed the present petition challenging Regulation 62, sub regulation (ii) to Section-2 to the Pension Regulations for the Army, Part-1 (2008) which reads as under:-

"Section 2: Ordinary Family Pension

62. These Regulation shall not apply to the following:-

(i) XXX XXX XXX XXX

(ii) Members of the Territorial Army other than those who die while rendering "Embodied Service" or after retirement with pension under these Regulations.

(ii) XXX XXX XXX XXX

(3) Regulation 62 deals specifically with members of the Territorial Army. It would, therefore, apply to the case in hand. The rule making authority has in clear and unambiguous terms excluded such members of the Territorial Army who die while rendering "Embodied Service". In the present case, it is not disputed that when the husband of the petitioner died in a road accident, he was not performing "Embodied Service". Members of the Territorial Army are governed by the Territorial Army Act, 1948. In the very nature of Territorial Army Service, a member of such service is not required to perform army duties throughout the year or career. Members of the Territorial Army are permitted to pursue avocations and occupations as fall to their fate. While doing so, they lead a civil life. However, they are called upon from time to time to perform Embodied Service in the exigencies of call of army duty. It is true that they would have the protection of Regulation 62 and in case of death during Embodied Service, there can be no dispute that the widow would be entitled to Ordinary Family Pension. Learned counsel for the petitioner urges us to equate "Disembodied Service" with either "Embodied Service" or "Army Service of a regular kind". It is not possible for us to accept such an interpretation or to hold that "Embodied Service" "Disembodied Service" and "Regular Army Service" fall in the same classification or belong to an identical or homogeneous group. If the pension granting authority in its wisdom has made policy in which cases to grant or not to grant family pension, it is not for the writ court to substitute its wisdom and declare that Disembodied Service would also be good enough for Ordinary Family Pension in the event of death of a member of the Territorial Army. It may be that technically the "employee" and "employer" relationship has not come to an end during "Disembodied Service", but the fact remains that the husband of the petitioner was not on active duty when he died and it is only active duty which would create a right of the kind pressed in this petition. Embodied and Disembodied services are dissimilar. It is also the mandate of Article 14 of the Constitution that un-equals cannot be treated equally. Between the two kinds of service there is reasonable classification and the classification is based on intelligible differentia which

has nexus with the object sought to be achieved. In view of the above classification and distinction between the two kinds of service the challenge to the vires of Regulation 62, Sub Regulation (ii) of Section 2 to Pension Regulations for the Army, Part-1 (2008) is repelled as satisfying the test of Article 14 of the Constitution. In an analogous situation, the Supreme Court while dealing with Paragraph 179, Para I, of the Pension Regulations of the Army, 1961, in a case of injury resulting in disability in an accident involving a military personnel on annual leave has rejected the claim of disability pension in **Union of India and another versus Talwinder Singh (1)**, by holding that :-

“A person claiming disability pension must be able to show a reasonable nexus between the act, omission or commission resulting in an injury to the person and the normal expected standard of duties and way of life expected from such person. As the military personnel sustained disability when he was on an annual leave that too at his home town in a road accident, it could not be held that the injuries could be attributable to or aggravated by military service. Such a person would not be entitled to disability pension.”

Consequently, the writ petition is dismissed. No costs.

S. Gupta

Before Ajay Kumar Mittal & Gurmeet Singh Sandhawalia, JJ.

SHANTI SARUP SHARMA—Petitioner

versus

STATE OF PUNJAB AND OTHERS—Respondents

CWP No. 6507 of 2011

1st May, 2012

(A) Constitution of India, 1950 - Art. 226/227 - State Financial Corporation Act 1951 - S. 29, 31 & 32G - Liability of Guarantor/Surety - Borrower convicted under Section 406 IPC after defaulting in repayment of loan and became mentally unfit - Whether

proceedings under Section 29 of the Act can be invoked against Guarantor and liability of surety be enforced under Section 31(aa) - Held, no - Corporation, in case of default in repayment of any loan, shall have right to take over management or possession or both of Industrial concern and realize the property pledged, mortgaged, hypothecated or assigned to the Corporation.

Held, that we find force in the submission of learned counsel for the petitioner. Section 29 of the Act specifically provides that whenever an industrial concern which is under liability to the Financial Corporation in pursuance to an agreement and makes any default in repayment of any loan or advance in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Corporation shall have the right to take over the management or possession or both of the industrial concern and realize the property pledged, mortgaged, hypothecated or assigned to the Corporation.

(Para 7)

(B) Constitution of India, 1950 - Art. 226/227 - State Financial Corporation Act 1951 - S. 29, 31 & 32G - Whether parties can by Agreement confer jurisdiction on Financial Institution to proceed against Guarantor in exercise of powers under Section 29 of the Act - Held, no - That parties can not confer jurisdiction under the statute which was not provided.

Held, that after taking into consideration the provisions of the bond of guarantee and the judgment of the Apex Court in Karnataka State Financial Corporation's case (*supra*), the Full Bench came to the conclusion that the parties could not confer jurisdiction under the statute which was not provided and accordingly, held that the Corporation has no right to proceed against the guarantor under Section 29 of the Act and only proceed against him under Sections 31 and 32G of the Act.

(Paras 10)

Further held, that the Full Bench further noticed that the Division Bench judgment of this Court in *Jasbir Kaur and another Vs. Punjab State Industrial Development Corporation Ltd., Chandigarh* and another AIR

2002 Punjab and Haryana 74(1) was decided prior to the judgment of Hon'ble Supreme Court in Karnataka State Financial Corporation's case (supra) and, therefore, it was no longer good law. The judgment of the Full Bench of this Court in Paramjit Singh Ahuja's case (supra) was held not to be binding precedent in view of decision in Karnataka State Financial Corporation's case (supra). Accordingly, in view of the binding precedent of the Full Bench in Shiv Charan Singh's case (supra) and the judgment of the Apex Court in Karnataka State Financial Corporation's case (supra), the issue stands squarely covered against the Corporation and in favour of the petitioner.

(Para 11)

Further held, that in view of the above and the principle of law enunciated in Karnataka State Financial Corporation's case (supra) and Shiv Charan Singh's case (supra), it is held that the provisions of Section 29 of the Act cannot be invoked against the surety/guarantor and can be exercised against the industrial concern alone and the property mortgaged by it.

(Para 14)

Prateek Pandit, Advocate, *for the petitioner*.

Gaurav Garg Dhuriwala, DAG, Punjab for respondent no.1.

B.B.Sethi, Advocate for respondents No.2 and 3.

G.S. SANDHAWALIA, J.

(1) The present writ petition has been filed under Articles 226/227 of the Constitution of India seeking a writ in the nature of Certiorari for quashing the proceedings initiated by respondents no.2 and 3 Punjab Financial Corporation (hereinafter referred to as "Corporation") under Section 29 of the State Financial Corporation Act, 1951 (hereinafter referred to as "the Act") in respect of the residential property belonging to the petitioner bearing No.2709/2719 situated in Ward No.8, Sirhind Mandi, District Fatehgarh Sahib and for issuance of a writ in the nature of Mandamus directing the release of the said property.

(2) The case of the petitioner as pleaded is that son of the petitioner Rupinder Kumar Sharma was the sole proprietor of industrial concern M/s Aditi Agro Mills, Fatehgarh Sahib which had obtained a term loan of Rs.40 lacs from the Corporation vide mortgage deed dated 31.3.1993. The house in question bearing No.2709/2719 situated in Ward No.8, Sirhind Mandi, District Fatehgarh Sahib was the absolute ownership of Ved Parkash Sharma, father-in-law of the present petitioner and said Ved Parkash Sharma being the maternal grandfather of Rupinder Kumar Sharma in his capacity as surety/guarantor offered the said house as collateral security with respondent no.2 for the purpose of raising loan and the same was, thus, mortgaged with the Corporation as per mortgage deed dated 31.3.1993. The properties belonging to the industrial concern measuring 1 kanals 14 marlas as well as the factory building alongwith the machinery was also mortgaged. The said industrial concern M/s Aditi Agro Mills, Fatehgarh Sahib started committing default from 15.3.1994 and accordingly, the Corporation took over the property under Section 29 of the Act. The father-in-law of the petitioner Ved Parkash Sharma passed away on 4.2.2008 executing a will dated 13.11.2006 whereby he bequeathed the said residential house in favour of his son-in-law, on the basis of which the present petitioner has become owner of the property. The Corporation purportedly exercising its powers under Section 29 of the Act has taken over the deemed possession of the house on 17.10.2002 in order to enforce the liability of the guarantor/surety. It is further pleaded that an FIR was also lodged against the son of the petitioner under Section 406 IPC at Police Station, Sirhind and he was convicted vide judgment dated 2.11.2007 and the son of the petitioner lost his mental equilibrium and left his house and thereafter the son of the petitioner was found with great efforts and till today he needs constant supervision and medical care having been rendered mentally unfit. It is further pleaded that proceedings under Section 29 of the Act could not be invoked against the guarantor and the Corporation had a right under Section 31(aa) for enforcing the liability of any surety and the claim of the Corporation was also time barred as default in repayment of loan was on 15.3.1994 and the last payment was due against the industrial concern on 15.3.2001. The Corporation had also written to the Nagar Council, Sirhind, District Fatehgarh Sahib that the house was mortgaged with the Corporation and, therefore, the ownership of the house should not be changed in the name of any other person vide letter dated 6.11.2009. It is further pleaded that

the Corporation had no such right as the house could always be transferred to any person subject to the mortgage in favour of the Corporation. The property of industrial concern had also been sold away by the Corporation at throw away price of Rs.12,18,100/- and also the machinery for Rs.3,50,000/- whereas the Corporation had raised a demand of Rs.2,69,82,610/- as per letter dated 10.12.2010 in response to a RTI query. The petitioner had been asked to make a payment of Rs.40,67,392/- i.e. 15% as upfront amount for taking benefit of OTS scheme and in such circumstances the action of taking over the residential property of the guarantor was challenged.

(3) The petition was contested on the ground that the will had not been probated and the petitioner did not have any right and the writ petition suffers from delay and laches as the possession of the house in question was taken on 17.10.2002 and the petition has been filed after a lapse of 9 years whereas the dues against the loan advanced has accumulated beyond Rs.2.69 crores. It is averred that the suit property being under mortgage with the special stipulation that the Corporation has a right to sell the property without court intervention, the writ petition was not maintainable. It was pleaded that the liability of the principal debtor and the surety was co-extensive and the value of the property was highly insufficient to discharge the liability and since the principal debtor has committed default in not paying the amount so advanced with stipulated interest, the Corporation was justified in taking action under Section 29 of the Act for recovery of the loan with interest by taking over possession of the residential house. It was further averred that Ved Parkash Sharma the original owner of the house was signatory to the mortgage deed dated 31.3.1993 and the mortgage agreement itself provided the power to sell the mortgaged properties without intervention of the court. The value of the house was stated to be Rs.12 lacs which was highly inadequate for recovery of loan and there was no other way to recover the same except by way of sale of the property. The provisions of Section 31 of the Act were supplemental and not in derogation of Section 29 of the Act and, therefore, this case was fully covered by **A.P. State Financial Corporation versus M/s GAR Re-rolling Mills and another (1)**. It is further pleaded that the Act being a special Act, the general provisions of Limitation Act are not applicable and the interest of the State

exchequer was involved. It is alleged that the son of the petitioner Rupinder Kumar Sharma had sold the machinery and he had been convicted by the Additional Chief Judicial Magistrate, Fatchgarh Sahib and the Corporation is yet to recover Rs.2.69 crores with further interest and the house was still to be put to auction.

(4) Replication has been filed by the petitioner and it was controverted that the property has been legally inherited by the petitioner and the Corporation was under obligation to act fairly and the Corporation has been in unauthorised possession of the house in question without following the proper procedure and the petitioner had been staying in an Ashram in Haridwar. It is denied that outstanding loan had accumulated to Rs.2.69 crores and it is alleged that the clause in the mortgage deed was in contravention of the provisions of the State Financial Corporation Act, 1951 and parties could not contract in contravention of the statutory provisions. The original owner of the house Ved Parkash Sharma had only offered the property as collateral security and the Corporation could not have enforced the liability of the surety without taking recourse to Section 31 of the Act.

(5) Counsel for the petitioner has placed reliance upon the judgment of the Apex Court in **Karnataka State Financial Corporation versus N. Narasimhaiah and others (2)** and judgment of this Court in **Mrs. Parkashwati Jain and another versus Punjab State Industrial Development Corporation and others (3)** to contend that the right of the Financial Corporation under Section 29 of the Act would only be against the borrower industrial concern and act of the corporation in taking deemed possession of the property of the surety/guarantor was not justified.

(6) Mr. B.B.Sethi, learned counsel appearing for the Corporation contended that the liability of the guarantor was co-extensive and placed reliance upon the judgment of the Apex Court in **H.S.Basavaraj (dead) by his L.Rs. and another versus Canara Bank and others (4)** and **Punjab Financial Corporation versus Surya Auto Industries (5)**. It was next submitted that since the original owner Ved Parkash Sharma was

(2) AIR 2008 SC 1797

(3) 2011(4) PLR 242

(4) (2010) 12 SCC 458

(5) 2010 (1) PLR 404

himself signatory to the mortgage deed, therefore, he had entered into contract with the Corporation and as such he was bound by the same and placed reliance upon Clause (ix) of Clause 5 of the mortgage deed to contend that action could be taken under Section 29 of the Act against mortgaged property of the surety also.

(7) We find force in the submission of learned counsel for the petitioner. Section 29 of the Act specifically provides that whenever an industrial concern which is under liability to the Financial Corporation in pursuance to an agreement and makes any default in repayment of any loan or advance in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Corporation shall have the right to take over the management or possession or both of the industrial concern and realize the property pledged, mortgaged, hypothecated or assigned to the Corporation. Similar matter came up for consideration before the Hon'ble Apex Court in *Karnataka State Financial Corporation's case (supra)* where while upholding the judgment of the Karnataka High Court, it was held that Section 29 confers an extraordinary power upon the Corporation and it is expected to exercise its statutory powers reasonably and bona fide. The powers of the Corporation under Section 31 & 32G of the Act were also taken into consideration and it was observed that there would not be any default as envisaged in Section 29 of the Act by a surety or a guarantor and the power was granted to the Corporation against the surety only in terms of Section 31 of the Act and not under Section 29 of the Act. The relevant paragraph reads as under:-

“14. Section 29 of the Act nowhere states that the corporation can proceed against the surety even if some properties are mortgaged or hypothecated by it. The right of the financial corporation in terms of Section 29 of the Act must be exercised only on a defaulting party. There cannot be any default as is envisaged in Section 29 by a surety or a guarantor. The liabilities of a surety or the guarantor to repay the loan of the principal debtor arises only when a default is made by the latter.

27. The legislative intent, in our opinion, is manifest. The intention of the Parliament in enacting Sections 29 and 31 of the Act was not similar. Whereas Section 29 of the Act consists of the property of the industrial concern, Section 31 takes within its sweep both the property of the industrial concern and as that of the surety. None of the provisions control each other. The Parliament intended to provide an additional remedy for recovery of the amount in favour of the Corporation by proceeding against a surety only in terms of Section 31 of the Act and not under Section 29 thereof.”

(8) The Hon’ble Supreme Court in *A.P.State Financial Corporation’s case (supra)* was dealing with the case regarding the right of the Corporation to withdraw and take recourse to provisions under Section 29 of the Act and abandon the remedy under Section 31 of the Act. After adverting to the said pronouncement the Apex Court in *Karnataka State Financial Corporation’s case* had laid down the proposition of law as enunciated hereinbefore.

(9) The contention of the learned counsel for the respondent Corporation fails to convince us in view of the recent Full Bench decision of this Court in *Shiv Charan Singh versus Haryana State Industrial & Infrastructure (6)*. The question which was referred to the Full Bench was as under:-

“Whether the parties can agree to confer jurisdiction to the financial Institution to proceed against the guarantor in exercise of the powers conferred under Section 29 of the Act?”

(10) After taking into consideration the provisions of the bond of guarantee and the judgment of the Apex Court in *Karnataka State Financial Corporation’s case (supra)*, the Full Bench came to the conclusion that the parties could not confer jurisdiction under the statute which was not provided and accordingly, held that the Corporation has no right to proceed against the guarantor under Section 29 of the Act and can only proceed against him under Sections 31 and 32G of the Act. The conclusion part reads as under:-

“21. Keeping in view the aforesaid principles, an agreement between the parties conceding a right to the Corporation to act against the guarantor under Section 29 of the Act is akin to conferment

of jurisdiction on the Corporation to exercise jurisdiction to take over possession of the assets of the guarantor. Section 29 of the Act is restrictive in nature as it confers right on the Corporation to act against the industrial concern, engaged in the manufacture, preservation or processing of goods etc., as defined in Section 2(c) of the Act alone. A guarantor does not fall within the definition of industrial concern either expressly or impliedly. The right to take over the management and possession is of industrial concern and not of assets of a guarantor. The Corporation has a right to proceed against a guarantor under Section 31 of the Act or under Section 32G of the Act, but Section 29 of the Act confers limited jurisdiction on the Corporation to act against the industrial concern alone. The parties cannot by agreement confer jurisdiction on the Corporation, which the Act does not contemplate. Therefore, Clause 8 of the mortgage deed will not enable the Corporation to take possession of the assets of the guarantor and to sell the same in exercise of powers conferred under Section 29 of the Act.

VI. Conclusion

22. In view of the above, we hold that the parties by an agreement cannot confer jurisdiction on the Corporation to proceed against the guarantor under Section 29 of the Act as the jurisdiction under the aforesaid provisions of law can be exercised only against the industrial concern.”

(11) The Full Bench further noticed that the Division Bench judgment of this Court in **Jasbir Kaur and another versus Punjab State Industrial Development Corporation Ltd., Chandigarh and another** (7) was decided prior to the judgment of Hon'ble Supreme Court in **Karnataka State Financial Corporation's** case (supra) and, therefore, it was no longer good law. The judgment of the Full Bench of this Court in **Paramjit Singh Ahuja's** case (supra) was held not to be binding precedent in view of decision in **Karnataka State Financial Corporation's** case (supra). Accordingly, in view of the binding precedent of the Full Bench in **Shiv Charan Singh's** case (supra) and the judgment of the Apex Court in

Karnataka State Financial Corporation's case (supra), the issue stands squarely covered against the Corporation and in favour of the petitioner.

(12) In all fairness to learned counsel for the respondents, reference is made to the judgments relied upon by him. The judgments relied upon by the counsel for the respondents are not applicable to the facts and circumstances of this case.

(13) The judgment in **H.S. Basavaraj's** case pertains to the suit filed by the bank for recovery of the loan amount and it was in such circumstances, the Hon'ble Apex Court held that guarantor/surety's liability would be co-extensive to that of the borrower. Similarly in **Surya Auto Industries'** case (supra), the Hon'ble Supreme Court had set aside the judgment of this Court wherein action taken under Section 29 of the Act had been quashed. This Court had framed the question that whether the Corporation has absolute power of retaining the property without taking any steps and to continue to charge the interest and penal interest without any limit. It was in such circumstances the judgment was set aside on the ground that there was no specific challenge to the terms of the agreement entered into between the Corporation and the respondent and the rate of interest could not be altered.

(14) In view of the above and the principle of law enunciated in **Karnataka State Financial Corporation's** case (supra) and **Shiv Charan Singh's** case (supra), it is held that the provisions of Section 29 of the Act cannot be invoked against the surety/guarantor and can be exercised against the industrial concern alone and the property mortgaged by it.

(15) Accordingly, the present writ petition is allowed. The action of the respondents in taking symbolic possession of the residential house No.2709/2719 Ward No.8, Sirhind Mandi, District Fatehgarh Sahib is quashed and the Corporation is further directed to deliver the possession of the house in question to the petitioner as prayed for within four weeks from the date of receipt of certified copy of this order. However, the petitioner shall not alienate the house till the clearance of the liability under the deed of guarantee of the loan amount by the principal borrower which ever is earlier.