
(2016) 12 KL CK 0033
In the High Court Of Kerala
Case No : WP(C).No. 29557 of 2010

Asst. Excise Commission

APPELLANT

Vs

A. Ellias Kunju

RESPONDENT

Date of Decision : 15-12-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 1 KLT 987

Hon'ble Judges : Smt. P.V. Asha, J.

Bench : Single Bench

Advocate : Santhosh Peter, Advocate, for the Petitioner; John Joseph Vettikad and C. Joseph Johny, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Smt. P.V. Asha, J.—This writ petition is filed challenging Ext.P4 order of the Lok Ayukta by which the petitioner was directed to sanction revised pensionary benefits including commuted value of pension and DCRG taking into account the period of eligible leave granted to the 1st respondent as qualifying service, reckoning the total period of service rendered by him as 23 years. The petitioner challenges the order on the ground that the Lok Ayukta does not have any jurisdiction to issue positive orders. More over it is contended that the 1st respondent was not entitled to get his pension fixed reckoning the total service as 23 years including the period during which he was kept under suspension which was later regularised as leave without allowance.

2. The 1st respondent has filed a counter affidavit pointing out that the petitioner has already complied with the order passed by the Lok Ayukta based on which the Accountant General had already revised the pensionary benefits.

3. An affidavit was thereafter filed on behalf of the petitioner, by the Excise Inspector, stating that the Lok Ayukta had posted the case to 12.7.2010 for action taken report and in those circumstances, the Commissioner of Excise had

forwarded a proposal to Accountant General, on 8.7.2010 in terms of the Lok Ayukta's order revising the pensionary benefits. On 9.7.2010, Government directed to file appeal against the Lok Ayukta's order. The Accountant General had proceeded on the basis of the proposal placed by the Commissioner of Excise. However no further action was taken for disbursement since the order of Lok Ayukta was challenged in this Writ Petition as directed by the Government. It is pointed out that the benefits on the basis of the revision effected in terms of the Lok Ayukta's order have not been granted. This court has by order dated 24.9.2010 stayed the proceedings on the basis of the order of the Lok Ayukta.

4. The facts leading to the order Ext.P4 are as follows:

5. The 1st respondent entered service on 29.4.1976 in Excise Department and retired from service while working as Preventive Officer on 30.9.1999. When pensionary benefits were authorised, the qualifying service was counted as 22 years. His case was that he had completed 23 years of service and the Accountant General issued pension payment orders on 29.9.1999 without reckoning the period of leave without allowance. According to him, he was placed under suspension on two spells; (1) for a period of 59 days since 24.12.1988 to 20.2.1989 (2) for a period of 164 days from 23.9.1993 to 5.3.1994 and the period of suspension was treated as eligible leave. In support of his claim, he relied on the endorsement in the service book produced as Ext.R-1(f) along with letter dated 29.4.2009 of the Deputy Commissioner of Excise, which he had received on application under the Right to Information Act. The said endorsement, read as follows "granted 5 days earned leave from 23.9.1993 to 27.9.1993, 62 days half pay leave from 3.8.93 to 4.10.93 and 152 days leave without allowance from 5.10.93 to 5.3.94 is sanctioned to Sri.A. Ellias Kunju, Excise Guard, Excise Circle Officer. The regularisation of suspension period from 23.9.1993 to 5.3.1994 is sanctioned as per order No.P1-10987/95/L.Dis dated 13.12.1995." The 1st respondent approached the Lok Ayukta, filing Ext.P2 complaint No.709/2009 on 30.6.2009 alleging that the Deputy Commissioner of Excise had By Ext.P7 order dated 18.3.2009 (produced along with Ext.P2 complaint) informed him that the period of 152 days during which he was kept under suspension which was later regularised as leave without allowance would not be reckoned for the purpose of pension as qualifying service and hence the denial of pension was improper and amounted to maladministration. He therefore prayed for a direction to the Lok Ayukta to sanction the revised pensionary benefits on the basis of qualifying service reckoning the period of eligible leave.

6. The petitioner filed a statement of facts. It was stated that the entire pensionary benefits due to the 1st respondent was already paid. It was also stated that the 1st respondent was placed under suspension for unauthorised absence; the period under suspension which was regularised as leave without allowance cannot be reckoned for pensionary benefit under rule 28 of part III KSR.

7. However the Lok Ayukta passed Ext.P4 order allowing the complaint. It was

held that Rule 26 of Part III KSR provides that the time passed on leave of all kinds with or without allowances will count as qualifying service unless otherwise provided and that there was nothing to hold that leave was granted to the 1st respondent specifying any condition that it will not count for qualifying service and it had to be held that the said period of service has to be reckoned for pensionary benefits. Accordingly Lok Ayukta directed the respondents in the complaint to sanction revised pensionary benefits including commuted value of pension and DCRG taking into account the period of eligible leave granted to him towards qualifying service i.e reckoning the qualifying service of the 1st respondent as 23 years. The case was thereafter posted to 12.7.2010 for action taken report. It was under the above circumstances that this writ petition was filed.

8. The learned Government Pleader points out that it is settled law that the Lok Ayukta does not have jurisdiction to issue any positive directions and therefore Ext.P4 order is liable to set aside. Apart from that it is also pointed out that in view of rule 28 of Part III KSR the period of leave without allowance, on regularisation of the period of suspension was not liable to be reckoned as qualifying service unless it was specifically provided in the order of regularisation.

9. I heard Sri. John Joseph Vettikattil, the learned counsel for the 1st respondent, who vehemently argued that the Lok Ayukta had rightly issued directions. It was also pointed out that even assuming that no positive directions can be issued, the finding of the Lok Ayukta was perfectly justified and therefore the petitioners should not have approached this court, especially when orders were already passed in compliance of the directions of the Lok Ayukta and therefore this writ petition is liable to be dismissed. It was further pointed out that the first respondent had not received any order finalising any disciplinary proceedings against him or intimating any order regularising the period of suspension.

10. I have considered the contentions raised on either side.

11. It is seen that the 1st respondent had retired from service as early as on 30.6.1999. The pensionary benefits were sanctioned to him even according to the averments in the complaint Ext.P2 on 26.11.1999. He chose to approach the Lok Ayukta by filing a complaint on 30.6.2009. At any rate, I have considered the contentions on merit.

12. Sri. Santhosh Peter, the learned Senior Government Pleader relied on judgments of this court in *State of Kerala v. Bernard* : 2002 (3) KLT 254, *George v. Sarala Kumari* : ILR 2007 Kerala 442, *Kamalu v. State of Kerala* : 2003 (2) KLT 227, *State of Kerala and others v. Sheela S. and others*: ILR 2009 (2) Kerala 660 etc and argued that Ext P4 order is liable to be set aside. In all these cases this court has held and reiterated that the Lok Ayukta does not have jurisdiction to issue positive orders. In this Ext.P4 order the Lok Ayukta has directed the petitioner to revise and refix the pensionary benefits reckoning 23 years of

service. Therefore Ext.P4 order issued with such positive direction is unsustainable.

13. However, since the matter relates to grant of pensionary benefits this court is not precluded from considering the claim of the petitioner for pensionary benefits independent of the direction of the Lok Ayukta, since the matter was argued at length.

14. 1st respondent raised his claim for reckoning the period of leave without allowance for the purpose of qualifying service after a period of 10 years of grant of pension, as can be seen from the proceedings of the Accountant General, which he himself has produced as Ext.P2, which was issued on 26.11.1999 in which the qualifying service was reckoned as 22 years. The complaint is seen filed on the basis of the information collected by the 1st respondent under Right to Information Act. The details furnished under the Right to Information Act are the endorsements which were available in the service book of the 1st respondent as can be seen from Ext.P1, as early as on 13.12.1994. The Lok Ayukta considered the matter and the 1st respondent claimed the same on the basis of rule 26 of Part III KSR. The judgment of the Division Bench was also relied on by the 1st respondent. But in this case the relevant provision is rule 28. Rule 28 of Part III KSR reads as follows:

28. Period of suspension:- Time passed under suspension does not count for pension unless otherwise ordered by the authority competent to do so.

Time passed under suspension pending enquiry into conduct counts in full where, on conclusion of the enquiry, the Government employee has been fully exonerated or the suspension is held to have been wholly unjustified; in other cases, the period of suspension does not count unless the authority competent to pass order under rule 56, Part I, expressly declares at the time that it shall count, and then it shall count only to such extent as the competent authority may declare.

15. In this case the absence of the 1st respondent during the period of suspension was regularized as leave without allowance. There is a specific provision contained in rule 28, how such period under suspension/leave without allowance have to be reckoned for the purpose of service benefits. When there is a specific provision, the qualifying service of 1st respondent was liable to be considered only in terms of that provision and therefore the 1st respondent cannot have any claim for pension, reckoning the said period of leave without allowance as long as the order of regularisation does not provide that the same can be reckoned for the service benefits or pension. It is also pertinent to note that it is not a case where the 1st respondent requested for leave and the petitioners sanctioned the said leave on the basis of his application. The period of leave without allowance mentioned in Ext.P1 is one which was made available to 1st respondent in order to regularise his absence on account of suspension after finalisation of the disciplinary action. When there is a specific provision regarding

the regularisation of suspension period and reckoning of the same for the purpose of the pension is restricted, the 1st respondent cannot have any claim to get the same reckoned towards qualifying service for the purpose of pension. While Rule 26 provides that the period of leave has to be reckoned for pension, unless provided otherwise, Rule 28 which specifically provides for the regularised period of suspension, provides that it cannot be reckoned for pension unless it is specifically provided. Therefore the claim of the 1st respondent or the finding of the Lok Ayukta on Rule 26, is totally unsustainable. Each of the provisions are to be applied in different circumstances as provided in the rules without giving room for any transgression to the area covered by each of it.

16. 1st respondent cannot raise any claim on the basis of the proceedings of the Accountant General, issued in terms of the Lok Ayukta's order issued only because of the posting of the case before the Lok Ayukta for action taken report, which is admittedly not implemented. Thus on merits also 1st respondent is not entitled to any enhanced pension on the basis of any addition to the qualifying service.

17. Under the above circumstances I set aside Ext P4 and allow the writ petition.