

(1993) 01 KL CK 0017

In the High Court Of Kerala

Case No : O. P. No. 11474 of 1992 conformed in W. A. 330/93

Dr. Davis Paul

APPELLANT

Vs

State and others

RESPONDENT

Date of Decision : 28-01-1993

Acts Referred:

Citation : (1993) 2 KLJ 91

Hon'ble Judges : Mathews P. Mathew, J

Bench : Single Bench

Advocate : C.S. Rajan, for the Appellant; V.J. John and P.N.K. Achan (Sr. Advocate), for the Respondent

Final Decision : Allowed

Judgement

Mathews P. Mathew J.

1. The petitioner was advised for appointment as Tutor in T.B. and Chest Diseases as per the advice of the P.S.C. dt 31-7-1991. He was temporarily appointed as Tutor pursuant to the said advice by Ext. P1 order dt 19-8-1991. The appointment was regularised with effect from 30-8-1991 as evidenced by Ext. P2 order. The 4th respondent had been advised for the same post vide advice dt. 14-12-1990. He joined duty on 4-2-1991. As he was undergoing Post Graduate Studies in General Medicine, he left the very next day to continue his studies after applying for leave. The leave was sanctioned as per Ext. R4 (d) dt. 23-12-1991. It is seen from Ext. R4 (d) that the leave was granted to the 4th respondent from 5-2-1991 to 30-8-1998 for study purpose in relaxation of Rule 88(ii) Part 1 K.S.R. subject to the specific condition that the leave period will not count for any service benefits including pension as provided in G.O. (P) 524/84/Fin. dt. 18-9-1984. The said Government Order dt. 18-9-1984 is produced alongwith the reply affidavit marked as Ext. P7. The 4th respondent completed his Post Graduate Studies and sought permission to rejoin duty. Accordingly, the 2nd respondent issued Ext. P5 order permitting the 4th respondent to rejoin duty and in order to make room for the 4th respondent, the petitioner is directed to

be ousted from service from the date of joining of the 4th respondent. A consequential order namely., Ext. P6 dt. 9-11-1992 was served on the petitioner informing him about the ouster from service. The petitioner challenges Exts. P5 and P6 and also seeks a direction to respondents 1 to 3 not to terminate the services of the petitioner.

2. The learned advocate for the petitioner, Sri. C.S. Rajan contends that from a reading of Ext. R4 (d), it is clear that the 4th respondent was granted leave in relaxation of Rule 88 (ii) Part 1 K.S.R. The 4th respondent who joined the services as probationer on 4-2-1991 had no leave to his credit to enable him to pursue the Post Graduate studies. As such, he had necessarily to seek relaxation of Rule 88 (ii) to proceed on leave on the very next day of his joining duty and leave was granted specifically in terms of EM. P7 Government Order. Ext. P7 Government Order stipulates that in cases where the Officers are not eligible for leave under Rule 91, Part 1 of K.S.R. and the grant of leave without allowance for the purpose of study requires relaxation of Rule 88(ii) Part 1 K.S.R., such relaxation may be allowed and the leave without allowances sanctioned only subject to certain conditions. The first of such conditions stipulates as follows:-

The officers will start afresh and complete their probation on return from leave. In other words, the officers will forfeit the service benefits that have accrued to them prior to their proceeding on leave and they will be deemed as new entrants to Government service on return from leave. What is protected is only their right to rejoin Government Service in the same grade as if they were new entrants.

3. Inasmuch as the 4th respondent was granted leave in terms of the above mentioned Government Order, according to the learned advocate for the petitioner, the 4th respondent cannot claim to be a probationer or claim any of the rights a probationer enjoys. Rule 7 of the K.S. & S.S.R deals with the manner in which retrenchment should be effected due to want of vacancies in the case of probationers and approved probationer. The said Rule says that it should be done in the order of juniority. However, this Rule is to be applied in deciding the right of retention as between probationers or approved probationers not in a case where one of the claimants is not a probationer or an approved probationer. Inasmuch as the 4th respondent ceased to be a probationer by virtue of Ext. R4 (d) order he is not entitled to preference in the matter of being retained in service. The learned advocate also referred to the decisions reported in Shareef Rawther v. State of Kerala (1977 KLT 814) to substantiate the contention that a person who has proceeded on leave while on probation is not entitled to treat the period of leave as part of the period of probation. A reference in this connection is made to the decision reported in Krishna Pillai v. State of Kerala (1988(2) KLT 106) to show that the expression "any other service benefits" would indicate the rights in respect of seniority as well. Accordingly the advocate for the petitioner submitted that Exts. P5 and P6 are unsustainable in law.

4. The learned advocate for the 4th respondent Sri P.N.K. Achan submitted that the relevant Rules applicable in deciding the issue involved in this case is Rule 27

of the K.S. & S.S.R. Rule 27, according to the learned advocate clearly provides that seniority of a person in service, class category or grade shall, unless he has been reduced to a lower rank as punishment, be determined by the date of the order of his first appointment to such service, class category or grade. In this case, there is no dispute that the 4th respondent was appointed first to the service. He is admittedly senior to the petitioner and if he is senior no other aspect need weight with the authorities in determining the question as to who should be retained in service.

5. The learned Government Pleader appearing for respondents 1 to 3 submits that the petitioner is directed to be ousted from service on the sole ground that as per Rule 27 of K.S. & S.S.R. he was found to be junior to the 4th respondent.

6. In deciding the question as to whether the 4th respondent has the right to rejoin the service by ousting the petitioner, Rules 5, 6 and 7 of the K.S. & S.S.R. are relevant. The said Rules are extracted hereunder:-

5. Method of recruitment. - Where the normal method of recruitment to any service, class or category is neither solely by direct recruitment nor solely by transfer but is both by direct recruitment and by transfer (a) the probation or order in which the Special Rules concerned may require vacancies to be filled by persons recruited and by those recruited by transfer shall be applicable only to substantive vacancies in the permanent cadre;

(b) a person shall be recruited direct only against a substantive vacancy in such permanent cadre, and only if the vacancy is one which should be filled by a direct recruit under the Special Rule referred to in clause (a), and

(c) recruitment to all other vacancies shall be made by transfer.

5. Right of probationers and approved probationers to reappointment - A person in any service, class or category not being a vacancy which should be filled by direct recruitment under the Special Rules referred to in clause (a) of rule 5 shall not be filled by the appointment of a person who has not yet commenced his probation in such service, class or category when an approved probationer or a probationer therein is available for such appointment.

6. Discharge and re - appointment of probationer and approved probationers - (a) The order in which probationers and approved probationers shall be discharged for want of vacancies shall be :-first the probationers in order of juniority and second the approved probationers in order of juniority.

(b) Approved probationers and probationers who have been discharged for want of vacancies shall be re - appointed as vacancies arise in the inverse of the order laid down in sub - rule (a)....."

In terms of Rule 5 and in the light of Ext.P1 order of appointment" is to be taken that the petitioner was appointed against a substantive vacancy. He was not appointed against any leave vacancy or any other kind of vacancy of short

duration. The 4th respondent was granted leave without allowances in relaxation of rule 88 (ii) Part 1 K.S.R. in terms of Ext. P7 order. Thus by Virtue of ext. R4 (d) issued in terms of Ext. P7 for all practical purposes the probation of the 4th respondent stood terminated with effect from 5-2-1991 with the sole right of re-entry into service as if he were a new entrant. Cessation of the 4th respondent's probation was at his own volition. But that was permitted by the government on the specific condition that he would forfeit all his service benefits except the right to (sic)rejoin the service as new entrant. The effect of the condition imposed by Ext. P7 which is specifically referred to in Ext. R4 (d) is that the entitlement of the 4th respondent to service benefits under the rules would remain in suspended animation till his re-entry into service. On his re-entry all the rights conferred on the government employees would resurrect to him, but for that he will have to wait for his turn to re-enter the service.

7. it is evident from the facts of the case that when the petitioner was appointed as Tutor in T. B. Chest Diseases, he was undergoing Post -Graduate Studies in General Medicine. Obviously he did not want to give up his studies in General Medicine but at the same time did want to lose the chance of an entry into government service. Therefore he accepted the appointment, worked for one day and left the very next day applying for leave. Leave was granted in terms of Ext. P7 government order which merely conferred a right of re - entry into government service. Probably that was all the 4th respondent bargained for at that time, because that enabled him to continue his studies without forfeiting his right for an entry into government service.

8. A reading of Ext.P7 clearly shows that any person who takes advantage of the relaxation of Rule 88 in terms of the said Government Order has to forego all service benefits accrued in his favour. The said Government Order categorically lays down that those who avail of the benefit under the Order shall forfeit all service benefit that have accrued to them prior to their proceeding on leave and they will be deemed as New entrants to Government service on return from leave. The only right that would be left with a person who takes leave in terms of Ext. P7. Government Order is that they will have the right to rejoin government service and such right will of course be subject to the existence of vacancy. The mere fact that a Government servant is granted a right to rejoin duty does not presuppose that as and when he decides to return the government should keep a post ready for him. In the present case, there is admittedly no post vacant. The 4th respondent has claimed reentry on the expiry of the leave and the respondents 1 and 2 are bound to allow him to rejoin duly subject to the availability of vacancy. But respondents 1 and 2 have no obligation to provide - just as the 4th respondent has no right to claim - a post to the 4th respondent immediately on the expiry of his leave in the peculiar facts and circumstances of the case, The 2nd respondent has sought to create a post for the 4th respondents by terminating the services of the petitioner. The petitioner's service can be terminated only under Rule 7 of the K.S.R. & S.S.R. In terms of Rule 7 he can be sent out only for the purpose of retaining a senior probationer

or an approved probationer and not for making room for one waiting his turn for re-entry into service as in the case of the 4th respondent. In the circumstances, I am of the view that Exts. P5 and P6 are unsustainable in law and as such they are set aside.

The Original Petition is allowed to the extent indicated above. Issue photocopy on usual terms.