

(2007) 10 KL CK 0003
In the High Court Of Kerala
Case No : O.P. No. 156 of 2003 (R)

Haridasan C. and Another

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 11-10-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100A
Constitution of India, 1950 — Article 154, 163, 166, 166(2), 166(3)
Kerala Service Rules, 1958 — Rule 12(16A), 60
Kerala State and Subordinate Services Rules, 1958 — Rule 3

Citation : (2007) 3 KLJ 615

Hon'ble Judges : T.R. Ramachandran Nair, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : T.K. Marthandan Unnithan, V. Jayakumar and K.P. Unnikrishnan, for the Appellant; R. Lakshminarayan, GP, M.V. Mathai Muthirenthu, Joy George and C. Unnikrishnan, SCs., for the Respondent

Final Decision : Dismissed

Judgement

K. Balakrishnan Nair, J.—The point that arises for decision in this Original Petition is, what is the age of retirement of N.M.R. workers, who were absorbed into the regular establishment and who were holding Class III posts in the Kerala Water Authority at the time of their superannuation.

2. The brief facts of the case are the following: The 1st petitioner was appointed in the erstwhile Public Health Engineering Department through the Employment Exchange as C.L.R. Operator and thereafter, he was posted as N.M.R. Operator in 1968. The 2nd petitioner was also appointed in the P.H.E. Department on being sponsored by the Employment Exchange as N.M.R. Operator in 1968. The petitioners were absorbed into the post of Operator in the regular establishment from the category of N.M.R. Operator, as per the orders issued by the Government with effect from 12-10-1981. Later, when the Kerala Water Authority was formed, the petitioners were absorbed in the said authority. They were Class III employees in the P.H.E. Department and also in the Kerala Water Authority.

3. The Government issued Ext.P1 order, G.O.(P) No. 106/85/PW & T. dated 17-9-1985, ordering to regularize the N.M.R. workers, who have completed 5 years" service as on 19-5-1983 in the P.W.D. The said order provided that the age of retirement of N.M.R. workers appointed after 7-4-1970 shall be 55 years. The persons recruited before this date shall be retained in service till they attain the age of 58 years. It was also ordered that all the rules and regulations applicable to Government Servants shall be made applicable to N.M.R. workers, when they are regularized as Government Servants.

4. A dispute arose regarding the retirement age of N.M.R. workers regularized in service. A few writ petitions were filed before this Court and this Court directed the Government to consider the matter and pass appropriate orders. Based on the said direction, it was clarified that the N.M.R. workers appointed prior to 7-4-1970, on regularization, will be allowed to continue in service till they attain the age of 58 years and those appointed after 7-4-1970 will have to retire at the age of 55 years. A copy of the said order dated 9-9-1986 is produced as Ext.P2 in the O.P. The provision in Ext. P1 regarding the exercise of option by those persons who have completed 55 years of age as on 19-5-1983 was deleted by the said order. Though, Exts.P1 and P2 were Government orders meant for the Public Works Department, it is common case that the Kerala Water Authority has adopted the said orders and is following them.

5. While working in the Water Authority in the post of Operator, the petitioners were promoted to the post of Head Operator, which is also a Class III post. Though, they were promoted as Head Operators, it was only a grade promotion and they continued to discharge the functions of the Operator, as evident from Ext. P3, it is submitted.

6. Both the petitioners continued in service up to the age of 58 and retired on 28-2-2001 and 30-11-2001 respectively. Though, pension papers were submitted in time, the pensionary benefits due to them were not released in time. While so, the 1st petitioner was informed by Ext. P4 letter that his pensionary claims are being settled, treating that he retired from service at the age of 55. The pension, he was told, will be finalised after the decision of the High Court before which the dispute regarding the age of retirement is pending. The 2nd petitioner was also informed by Ext.P5 letter that his pensionary claims are being settled, treating his age of retirement as 55 years and the pensionary benefits will be finalised on the disposal of the cases before the High Court. Feeling aggrieved by those intimations, the petitioners filed Exts.P6 and P7 representations before the Water Authority, pointing out that they are entitled to continue in service up to the age of 58 years, by virtue of Exts. P1 and P2 Government orders and are, therefore, entitled to get all consequential benefits. While so, they came to know that a Division Bench of this Court has rendered Ext.P8 judgment, holding that persons similarly placed like them are entitled to get pensionary benefits, treating them as having retired at the age of 55. They will be entitled to get only the salary for the period they worked, after attaining the age of 55. The said judgment was

rendered by this Court, relying on Ext.P9 clarification issued by the Secretary to Government to the Managing Director of the Kerala Water Authority. The said letter says that those N.M.R. workers regularized in service can get the benefit of continuance in service up to the age of 58 years, if only they are continuing in the very same post in which they were regularized. On promotion they became Class III employees and therefore, they are ineligible to continue beyond the age of 55. Pursuant to Ext.P9, the Water Authority issued Ext. P10 letter to the lower authorities to settle the pensionary claims, in the light of Ext.P9 clarification. They were also directed to terminate the services of the employees who have crossed the age of 55 and who are not eligible to continue up to the age of 58 years.

7. The petitioners are aggrieved by Exts.P9 and P10. They pray to quash those exhibits and also pray for a mandamus to grant them pensionary benefits, treating their age of retirement as 58 years. They submit, Ext. P1 and P2 are Government orders. The rights flowing from them cannot be watered down, by issuing a clarificatory order in the nature of Ext.P9. So, Ext.P9 is invalid. Since the above aspect was not considered by the Division Bench, Ex.P8 judgment requires reconsideration, it is submitted.

8. The 2nd respondent has filed a counter affidavit, supporting the impugned order. It is stated that the post of Operator is a Class III post and therefore, Class III employees have to retire at the age of 55. On regularisation and promotion, the petitioners ceased to be N.M.R. workers. The N.M.R. workers who continue in the absorbed post without further promotion alone are eligible to continue up to the age of 58 years, it is submitted.

9. When the O.P. came up for final hearing before the learned single Judge, it was contended that Exts. P1 and P2 are Government orders issued in terms of Article 166 of the Constitution of India. Ext.P9 dated 1-3-2000, being a letter signed by the Additional Secretary for the Secretary to Government, cannot be treated as a Government order in terms of Article 166 of the Constitution. So, Ext.P9 cannot dilute the terms of Exts. P1 and P2, it was submitted. The learned Judge was of the view that there is force in the submission of the learned Counsel for the petitioners. It was observed that the Division Bench proceeded on the footing that Ext.P9 is a Government order. As Ext. P9 is not issued under Article 166 and therefore, not an order of the Government, the very foundation of the decision is shaky. So, the learned Judge felt that it is a decision rendered per incuriam and so, the same requires reconsideration. Accordingly, the O.P. was referred to the Division Bench for disposal.

10. We had learned Counsel Sri. T.K.M. Unnithan for the petitioners, Sri. C. Unnikrishnan, learned standing counsel for the Kerala Water Authority and also Sri. R. Lakshminarayanan, learned Government Pleader for the State. The learned Counsel for the petitioners reiterated the contentions of the petitioners noticed above. According to the learned Counsel, Exts. P1 and P2 are orders issued under Article 166(2) of the Constitution of India in the name of the

Governor. Ext.P9 is only a letter issued by a Government Secretary. The same cannot be treated as an order issued under Article 166. Therefore, the same cannot take away the benefits conferred on the petitioners by Exts.P1 and P2. In support of his submissions, the learned Counsel for the petitioners relied on the decision of the Apex Court in *Kamal Kumar Dutta v. Ruby General Hospitals Ltd.* (2006) 7 SCC 613, wherein the Apex Court stated that the words of a statute cannot be overridden by the letter of the Law Minister. The Apex Court was dealing with Section 100A of the C.P.C. When the words of the Section are clear, it was held that the statement of the Minister in Parliament or in a communication cannot be relied on to interpret or restrict the meaning of the provision. Relying on the above statement of law made by the Apex Court, the learned Counsel submitted that the letter of the Government Secretary cannot modify the effects of Exts. P1 and P2 Government orders. The learned Counsel next relied on the decision in *Bansal v. State of Rajasthan* 2003 (2) KLT SN 126 Case No. 161 and submitted that till the decision of the Council of Ministers is accepted by the Governor, the same will not crystallize into an action of the State. He also relied on the decision of the Hon'ble Supreme Court in *Grid Corporation of Orissa and Others Vs. Rasananda Das*, and contended that the service conditions of the absorbed employees are saved, even if they are granted a higher grade. The learned Counsel also relied on the decision of the Apex Court in *Babaji Kondaji Garad Vs. Nasik Merchants Co-operative Bank Ltd., Nasik and Others*, and submitted that while construing a statutory provision, the opinion of the executive Government is not relevant and the court should not abdicate its function to interpret the statute in favour of such opinion.

11. The learned Counsel for the respondents on the other hand submitted that even in the absence of Ext.P9, the petitioner cannot continue in service beyond the age of 55, as they are admittedly Class III employees, working under the Water Authority. According to them, Ext.P9 does not add to or subtract from anything in Exts. P1 and P2. So, all the contentions raised by the petitioners are untenable and liable to be rejected. According to them, the petitioners are liable to be non-suited, even without the support of Exts.P9.

12. We considered the rival submissions made by the learned Counsel on either side. The relevant provisions of Ext.P1, which we are called upon to interpret, are quoted below for convenient reference:

7. In the circumstances, Government are constrained to disagree with the advice of the Commission and they are pleased to issue the following orders;

(i)

(ix) The retirement age of N.M.R. workers appointed after 7-4-1970 shall be 55 years. The persons recruited before this date shall be in service till attaining the age of 58.

Para 7(xix) reads as follows:

(xix) All the rules and regulations applicable to the Government servants shall be made applicable to N.M.R. workers when they are regularised as Government servants.

The relevant portion of Ext.P2 reads as follows:

3. Government have examined the question in detail and are pleased to issue the following orders:

(i) The N.M.R. workers appointed prior to 7-4-1970 on regularisation will be allowed to continue in service till the age of 58.

(ii) The N.M.R. workers recruited after 7-4-1970 on regularisation will retire from service at the age of 55.

The relevant portion of Ext. P9 reads as follows;

Government have examined the matter in detail and are pleased to issue the following clarifications:

(i) The benefit ordered in para 3(1) of GO.(P) No. 110/86/PW & T dated 9-9-86 is applicable only to those NMR Employees who were absorbed into regular establishment and who continue in the same post. Those NMR Employees who were promoted to Higher posts after regularisation automatically will become Class III employees. They should retire from service on superannuation on attaining the age of 55 as in the case of other Class III employees in Government service.

(ii) The benefit order in para 3(1) of GO.(P) No. 110/86/PW & T dated 9-9-86 is applicable to the NMR Operators, NMR Fitters and NMR Skilled categories of workers also, provided they continue in the same post in which they were absorbed in the regular establishment.

By the above clarification contained in Ext.P9, the petitioners submit, the right which they got under Exts. P1 and P2 has been restricted. Now, to get the benefit of superannuation at the age of 58 years, they should continue in the same post in which they were regularized.

13. All Government servants are governed by Rule 60 of Part I, K.S.R., in the matter of age of retirement. Para 7(xix) of Ext.PI quoted above clearly specifies that all rules applicable to the Government servants will be applicable to the N.M.R. workers, when they are regularized as Government servants. It is common case of the petitioners as well as the respondents that they were Class III employees on their absorption into the Government service. They got further grade promotion also. Rule 60 of Part I, K.S.R. reads as follows:

60(b) Except as otherwise provided in these rules the date of compulsory retirement on an officer shall take effect from the afternoon of the last day of the month in which he attains the age of 55 years. He may be retained after this date only with the sanction of Government on public grounds which must be

recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances.

(aa)

(b) Officers in the Last Grade Service on 7th April, 1970 will retire on the afternoon of last day of the month in which they attain the age of 60 years provided that this benefit will be available to them only as long as they continue to be in the Last Grade Service as defined in Rule 12(16A).

Going by the above Rule, the petitioners are bound to retire at the age of 55. No executive order can modify the above statutory Rule. So, normally, the executive orders should be read in tune with the statutory provision. Of course, the Government have the power to relax any of the provisions in the K.S.R. in appropriate cases. The concession granted to N.M.R. workers on their absorption into regular service, to continue in service up to the age of 58 years can be treated as such an exemption. Normally, an exemption has to be read strictly as confining to the matters expressly mentioned therein. So, going by Exts. P1 and P2, we are of the view that the petitioners, who were Class III employees in the Water Authority, are liable to retire at the age of 55 years. All Class III employees, who came through the P.S.C. are liable to retire at the age of 55 years. The petitioners came to the N.M.R. post through the Employment Exchange. Their absorption into regular establishment is something akin to a back door entry, on the basis of special orders issued by the Government, overruling the opinion of the P.S.C. and in relaxation of Rule 3(a) of K.S. & S.S.R., which provides that all first appointments to the services under the State shall be made only on the basis of the advice of the P.S.C. So, the petitioners, who belong to the above group of employees, cannot claim any special rights over other regular employees. The attempt to put their right in relation to superannuation on a higher pedestal, when compared to the other regular employees, cannot be upheld. So, we are of the view that even in the absence of Ext. P9, the petitioners were liable to be superannuated at the age of 55. In this view of the matter, we feel that the decisions relied on by the learned Counsel for the petitioners are not relevant to the facts of the case.

14. The clarificatory order issued in the form of Ext. P9 need not be authenticated as contemplated under Article 166(2) of the Constitution of India. The views of the Government on a matter can be definitely conveyed by the Secretary to Government or the Additional Secretary to Government to the Water Authority. The said opinion need not be authenticated in the form of a Government order issued in the name of the Governor. The Secretary, the Additional Secretary, the Joint Secretary, the Deputy Secretary and the Under Secretary to Government can issue orders on behalf of the Government as per the Rules of Business. Such orders are, in the eye of law, orders of the Government. The Governor can, on the advice of the Chief Minister, allocate the business of the Government to various Ministers. Again, on the advice of the Council of Ministers, the Governor, by rules, can further allocate the business of

the Government to various officers, under Article 166(3) of the Constitution of India.

15. The nature of discharge of governmental functions by such officers has been dealt with by the Apex Court in *Samsher Singh Vs. State of Punjab and Another*, , in the following words:

30. ...It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. Neither Article 77(3) nor Article 166(3) provides for any delegation of power. Both Articles 77(3) and 166(3) provide that the President under Article 77(3) and the Government under Article 166(3) shall make rules for the more convenient transaction of the business of the Government and the allocation of business among the Ministers of the said business. The Rules of Business and the allocation among the Ministers of the said business all indicate that the decision of any Minister or officer under the Rules of Business made under these two articles, viz., Article 77(3) in the case of the President and Article 166(3) in the case of the Governor of the State is the decision of the President or the Governor respectively.

31. Further the Rules of Business and allocation of business among the Ministers are relatable to the provisions contained in Article 53 in the case of the President and Article 154 in the case of the Governor, that the executive power shall be exercised by the President or the Governor directly or through the officers subordinate. The provisions contained in Article 74 in the case of the President and Article 166(3) in the case of the Governor that there shall be a Council of Ministers to aid and advise the President or the Governor, as the case may be, are sources of the Rules of Business. These provisions are for the discharge of the executive powers and functions of the Government in the name of the President or the Governor. Where functions entrusted to a Minister are performed by an official employed in the Minister's department there is in law no delegation because constitutionally the act or decision of the official is that of the Minister. The official is merely the machinery for the discharge of the functions entrusted to a Minister.

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34. The functions of the Governor under the rules of business of Madras Government in regard to a scheme for nationalisation of certain bus route were considered by this Court in *Sanjeevi Naidu's case* (supra). The validity of the scheme was challenged on the ground that it was not formed by the State Government but by the Secretary to the Government pursuant to powers conferred on him under Rule 23-A of the Madras Government Business Rules.

35. The scheme was upheld for these reasons. The Governor makes rules under Article 166(3) for the more convenient transaction of business of the Government of the State. The Governor cannot only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any

particular function. But that could be done on the advice of the Council of Ministers. The essence of Cabinet System of Government responsible to the Legislature is that an individual Minister is responsible for every action taken or omitted to be taken by the civil servants. The Minister lays down the, policies. The Council of Ministers settle the major policies. When a civil servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. The officers are the limbs of the Government and not its delegates. Where functions are entrusted to a Minister and these are performed by an official employed in the Minister's department, there is in law no delegation because constitutionally the act or decision of the official is that of the Minister.

Emphasis supplied)

16. In view of the above authoritative pronouncement of the seven Judges Bench of "the Apex Court, the Secretary can issue clarifications in the nature of Ext. P9 and the same shall be treated as the clarification issued by the Government. The Government which issued the order must be conceded the power and authority to clarify its orders. Such clarifications need not be in the form of a Government order issued in the name of the Governor.

17. In the result, the Original Petition fails and it is dismissed.