

(1982) 06 KL CK 0013
In the High Court Of Kerala
Case No : O.P. No. 5793 of 1981-D

K. Janardhanan

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 25-06-1982

Acts Referred:

Kerala Service Rules, 1958 — Rule 12(16A), 2, 3, 60, 7

Citation : (1982) 06 KL CK 0013

Hon'ble Judges : S.K. Kader, J

Bench : Single Bench

Advocate : C.P. Sudhakara Prasad and B. Reghunathan, for the Appellant;
Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Kader, J.—The Petitioner herein was appointed as a Night Watchman on 4th April 1967 in the Aftercare Home, Quilon. While the Petitioner was working in the Aftercare Home, special rules, called Service (Special Rules applicable to the Employees of the Grant-in-aid Institutions of Kerala under "Social and Moral Hygiene and Aftercare" and "Social Welfare" Programmes), were framed as per G.O. Ms. 18/70/Home, dated 23rd January 1970 and the same also were published in the Kerala Gazette No. 7, dated 17th February 1970 Part I. Thereafter, conditions of services of the Petitioner were governed by these rules; Ext. P-3 is a true copy of the rules produced along with the Original Petition. As per G.O. (Ms) 157/76/LA and SWD, dated 6th July 1976, a true copy of which is Ext. P-1, the Petitioner and other non-supervisory staff working in the welfare institutions under the administrative control of the Department of Social Welfare were absorbed into the Government service. It has been clearly stated in Ext. P-1, that services rendered by employees as non-supervisory staff of the welfare institutions will be counted for pension and that protection will be given to the pay drawn by the employees in their capacity as non-supervisory staff at the time of the absorption into the Government Service. Subsequently, further orders

in this regard were issued by Government, by which the non-supervisory staff working in welfare institutions under the Department of Social Welfare who were absorbed into Government Service were allowed to count the service rendered by them as non-supervisory staff in the welfare institutions for fixation of pay, etc. Ext. P-2 dated 29th December 1976 is a true copy of the said order. The Petitioner having come to know that he had to retire from service on completion of 55 years made a representation to the Government contending that by virtue of Exts. P-1 to P-3, he is entitled to continue in service till he completes the age of 60. As per Ext. P-4 dated 28th August 1981 the Petitioner was informed that he was to be treated as a Government servant only from 6th July 1976, the date of absorption into Government service, and hence his request for extension of service cannot be considered.

2. It was on receipt of the above communication that the Petitioner approached this Court praying that this Court may be pleased to issue a writ of certiorari, or other appropriate writ, or order, calling for records leading to Fxt. P-4 and quash the same, and also grant consequential reliefs.

3. The argument of the learned advocate for the Petitioner was two-fold. The main ground taken by him in the petition is that by virtue of Exts. P-1 to P-3 he was entitled to continue in service till he attains the age of 60; and, the other ground, which he took only in his reply affidavit filed to the counter affidavit filed by Government was that in view of the fact that the Petitioner has not exercised any option as contemplated under Rule 2(ii)(c), Part I, Kerala Service Rules, the Kerala Service Rules, will not apply to the Petitioner, and therefore, there is no question of applying Rule 60(b) in his case, and as per Rule 7 of the special rules in Ext. P-3 he is entitled to continue till he attains the age of 60.

4. Rule 60(b) reads:

Officers in the Last Grade Service on 7th April, 1970 will retire on the afternoon of the 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(16-A).

The stand taken by the learned Government Pleader is that the Petitioner has been a Government servant only from 6th July 1976, the date on which services of the Petitioner was absorbed into Government service as per Ext. P-1, and therefore, he was not an officer of the last grade in Government service on 7th April 1970, and as a result, he is not entitled to the benefit of continuing in service till he attains the age of 60 conferred under Rule 60(b) of the Kerala Service Rules.

5. The counsel appearing for the Petitioner very strenuously contended that even on 7th April 1970, the Petitioner was in service as a last grade employee, that by virtue of benefits given under Ext. P-1 and P-2 the Petitioner is entitled to count the service he had rendered in the welfare institution prior to the date of absorption for the purpose of pension, fixation of salary etc., and therefore, his

services in the welfare institution on 7th April 1970 should be deemed to be Government service for the purpose of Rule 60(b). The alternative plea taken by him as referred to earlier, was that in any view, particularly when the Petitioner has not exercised his option under Rule 2(ii)(c) he is entitled to the benefit conferred under Ext. P-3 and he should be permitted to continue till he attains the age of 60.

6. The first argument has absolutely no merit. Ext. P-3 special rules which is relied on by the Petitioner itself shows that the period of the service of the Petitioner under the welfare institution cannot be treated as Government service. This is clear from the definition of employee in Ext. P-3. This apart, it was only as per Ext. P-1 that the Petitioner was absorbed into Government service, even according to the Petitioner. If really the service he was having under the welfare institution was Government service or was on a par with Government service, there was no necessity of absorbing him into Government service as per Ext. P-1. The Clauses in Exts. P-1 and P-2, by which protection has been given to the Petitioner in the matter of pay drawn by him etc., are not at all sufficient, for him to justifiably claim the benefit of Rule 60(b). It is only for the limited purposes mentioned in Exts. P-1 and P-2 that the services rendered, by the Petitioner in the welfare institution were to be counted and not for the purpose of fixing or determining the age of retirement. Therefore, by virtue of Exts. P-1 and P-3, the Petitioner cannot claim that he was in Government service on the relevant date viz., 7th April, 1970 and therefore, entitled to the benefit under Rule 60(b). Rule 2(ii)(c) of the Kerala Service Rules reads:

2. Subject to the provisions of rule 3,

* * * *

(ii) the remaining rules shall apply to every person in the whole time employment of the Government (other than a person so employed in the contingent or work establishment),--

* * * *

(c) who was absorbed to Government service on or after 1st November, 1956, but who prior to such date was in the service of any quasi-Government or other institution and whose appointment and conditions of service were governed by any law or rule made under any law for the time being in force, if such person exercises his option to be governed by these rules, subject to such conditions as may be laid down by Government in this behalf.

It is not disputed that the Petitioner is an employee of the last grade service and that Rule 2(ii)(c) applies to him. An option is given to the Petitioner who was absorbed into Government service after 1st November 1956 to signify his consent to be governed by the Kerala Service Rules. It was argued that the Petitioner has not been asked to exercise option under Rule 2(ii)(c) of the Kerala Service Rules and that he has not till now exercised his option thereunder opting

to be governed by the Kerala Service Rules. There is nothing in the rule, which, either expressly or impliedly, shows or indicates that it is obligatory on the part of the Government to remind or alert an employee to exercise his option in accordance with the requirement of Rule 2(ii)(c). It is left to the employee to exercise or not to exercise option. Admittedly the Petitioner has not exercised his option under this rule to be governed by the Kerala Service Rules. There is therefore force in the contention raised on behalf of the Petitioner that the Kerala Service Rules cannot be applied to him. If that is so, Rule 60(b) is not applicable to the Petitioner.

7. The necessary consequence then is that the special rules under Ext. P-3 have to govern the Petitioner. Under Rule 7 of Ext. P-3, the Petitioner has been given a right to continue in service till he attains the age of 60. The Petitioner is therefore entitled to continue in service in accordance with Rule 7 of Ext. P-3 and the request of the Petitioner in this regard has been wrongly turned down. To that extent, Ext. P-4 is illegal and has to be interfered with.

8. The counsel appearing for Government rightly pointed out that the Petitioner cannot claim the benefits under the Kerala Service Rules and those under Ext. P-3 simultaneously, or one after the other or have the benefits under the general rule and special rule. If it is found that he is not entitled to be governed by the Kerala Service Rules, he can claim only benefits conferred under Ext. P-3.

In the result, the Original Petition is allowed, Ext. P-4 is set aside and it is declared that in respect of the matters covered by the Kerala Service Rules, Part I, the Petitioner will be governed by Ext. P-3 special rules and by virtue of Clause 7 therein, he is entitled to continue in service till he attains the age of 60.

Counsel for the Petitioner pointed out that this Court had issued a direction to allow the Petitioner to continue in service and he has been continuing in service from 1st December 1981 till now and his salary during this period has not been paid and therefore there may be a direction, in the light of the decision of this case, to pay the salary due to him. The Petitioner will be entitled to draw the salary due to him for this period, if he has been continuing in service as alleged, and the same will be disbursed to him as expeditiously as possible.