
(2010) 09 KL CK 0264

In the High Court Of Kerala

Case No : Writ Petition (C) No. 15196 of 2004 (H)

K.M. Ramachandran Nair

APPELLANT

Vs

State of Kerala and The Commissioner

RESPONDENT

Date of Decision : 02-09-2010

Acts Referred:

Citation : (2010) 09 KL CK 0264

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

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

Final Decision : Allowed

Judgement

S. Siri Jagan, J.—The petitioner was an Executive Officer of the Hindu Religious and Charitable Endowments (Administration) Department of the Government of Kerala at the time of filing this writ petition. He subsequently retired from service. While he was in service, a question arose as to whether executive Officers of the Devaswom are entitled to Dearness Allowance on par with Government employees. In respect of the same, Exts.P1, P2 and P3 orders have been passed by the Government granting the benefit of Dearness Allowance to Executive Officers of the Devaswom at the rates applicable to Government employees from time to time. Two other similarly placed Executive Officers approached the Government for fixation of pay in accordance with Exts.P1, P2 and P3, pursuant to which Exts.P7 and P8 orders were passed granting fixation of benefits to those persons. Those employees were M/s. T. Narayanan Nair and T. Lakshmana Tharavanar. Petitioner also filed a representation before the Government seeking the very same benefit of fixation given to those employees as per Exts.P7 and P8. Considering that representation by Ext.P11 order the Government directed that the petitioner also be given the very same benefit as in Ext.P7 and P8. In accordance with Ext.P11 Government Order, Ext.P12 order has been passed by the second respondent fixing the petitioners pay and

allowances in accordance with Ext.P11 order. Subsequently based on Ext.P15 order of the Government the fixation granted to the petitioner as per Ext.P12 order was cancelled by the second respondent by Ext.P14 order. Challenging the cancellation, petitioner filed O.P. No. 17830/2002 in which Division Bench of this Court passed Ext.P16 judgment. In that Original Petition the Government took a contention that a decision has been taken to cancel orders issued in favour of T. Narayanan Nair and T. Lakshmana Tharavanar. The petitioner filed a reply affidavit denying that averment and taking the stand that the said persons continued to enjoy benefit granted by Exts.P7 and P8. In view of the said averments in Ext.P16 judgment the Division Bench held that if the state of affairs is as submitted by the petitioner, there is merit in the contention of the petitioner that the cancellation done as per the impugned order is unsustainable because the very order allowing his claim for Dearness allowance was passed in the light of the orders passed in the case of T. Narayanan Nair and T. Lakshmana Tharavanar. Accordingly, the Division Bench directed the Government to reconsider the issue. Pursuant to the same Ext.P17 order has been passed by the first respondent without specifically stating as to whether Exts.P7 and P8 orders have been cancelled holding that the petitioner is not entitled to the fixation benefit granted by Ext.P12 order. Petitioner is challenging that order in this writ petition.

2. According to the petitioner there is no evidence whatsoever to prove that Exts.P7 and P8 have been cancelled at any time. Therefore the petitioner would contend that by virtue of the finding in Ext.P16 judgment of the Division Bench to the effect that if those orders were not cancelled, the contention of the petitioner is sustainable, the impugned order is liable to be quashed.

3. A counter affidavit is filed on behalf of the first respondent, wherein also the contention appears to be that the orders in favour of T.Narayanan Nair and T.Lakshmana Tharavanar were cancelled. But strangely after stating in one paragraph that those orders were cancelled, in another paragraph it is stated that orders are being issued, cancelling Ext.P7 order.

4. In view of the contention in the counter affidavit the petitioner obtained Exts.P18 letter from the Managing Trustee of Sree Ayyappankavu Devaswom, in which the said T. Lakshmana Tharavanar was working, to the effect that the order in favour of Sri. T. Narayanan Nair has not been cancelled yet. He obtained Ext.P19 letter from the said T. Lakshmana Tharavanar to that effect also. Petitioner has produced Ext.P12 letter from T. Narayanan Nair, who also stated that he has not received any orders cancelling the order in his favour, passed earlier. Petitioner has also produced Ext.P21 plaint in O.S.No.38 of 1999 filed by T. Narayanan Nair, wherein also the said T. Narayanan Nair demanded payment of some additional amount based on the fixation already granted. In that suit the Assistant Commissioner of Hindu Religious and Charitable Endowments (Administration) Department, admitted the claim of Sri. T. Narayanan Nair, pursuant to which a compromise decree was also passed. Again petitioner

approached the concerned Devaswom for information under The Right of Information Act in respect of the cancellation of Exts.P7 and P8 orders, to which Ext.P27 reply has been given to the effect that the files of the Commissioner of the Malappuram Devaswom Board, Kozhikode do not contain any such orders cancelling Exts.P7 and P8.

5. I have considered the rival contentions in detail. I am of opinion that in view of Ext.P16 judgment the issue narrows down to the question as to whether Exts.P7 and P8 have been cancelled, in so far as in Ext.P16 judgment, the Division Bench of this Court has categorically found that if the state of affairs are as submitted by the petitioner, the contention of the petitioner has to be accepted. Although in the counter affidavit filed by the respondent it is stated that Exts.P7 and P8 orders cancelled, copies of those orders were not produced along with the counter affidavit. Strangely in paragraph 3 it is stated that the orders were cancelled. In the later paragraph it is stated that after hearing all parties, an order is being issued cancelling Ext.P7 order and the order of fixation granted to Sri. Lakshmana Tharavanar in No. A2/2552/99 dated 2.2.2000 and consequently orders for recovery will be issued. Subsequent to the filing of counter affidavit the petitioner has filed two reply affidavits as well as additional documents in his efforts to prove that no orders cancelling Exts.P7 and P8 orders have been issued by the Government. Despite these happenings the first respondent has not chosen to file any pleadings in respect of the additional documents produced by the petitioner nor to produce the so called cancellation orders, referred to in the counter affidavit. The Supreme Court had occasion to consider validity of such kind of pleadings without producing proof thereof, in the decision of Bharat Singh and Others Vs. State of Haryana and Others, wherein it was held thus:

In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the CPC and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. So, the point that has been raised before us by the appellants is not entertainable. But, in spite of that, we have entertained it to show that it is devoid of any merit.

6. Therefore, I have to accept the contentions in the counter affidavit, the first respondent ought to have produced the orders cancelling Exts.P7 and P8, especially since those orders were stated to have been passed by the

Government themselves. In view of the fact that the first respondent has not cared to do the same, following the Supreme Court Judgment, I am not inclined to accept the said averments in the counter affidavit on the face value. In the above circumstances, I have no other choice but to accept the contention of the petitioner that Exts.P7 and P8 orders have not been cancelled yet and that said Sri. T. Narayanan Nair and T. Lakshmana Tharavanar continue to draw salary only in terms of Exts.P7 and P8 in Ext.P16 judgment, which has become final. The Division Bench has in that judgment categorically held as follows:

7. A perusal of Ext.P11 would clearly show that the petitioner was allowed the benefit on the ground that two other similarly situated persons were granted D.A. at the rates claimed. It would also show that the Government did not consider the claim made by the petitioner on the basis of any other ground or orders on the subject. The reason now stated in the impugned orders for cancellation of the benefit already granted to the petitioner is that, orders passed in the case of the other two persons have been cancelled and the benefit given to them stands withdrawn. But the petitioner asserts that that has not in fact been done. If the state of affairs is as submitted by the petitioner, we find merit in the contention of the petitioner that the cancellation done as per the impugned order is unsustainable because the very order allowing his claim for D.A. Was passed in the light of the orders passed in the case of T. Narayanan Nair and T. Lakshmana Tharavanar. Government which found justification in extending similar benefit to the petitioner, is not justified in withdrawing the benefit given to the petitioner alone while retaining the benefits granted to the other two persons. On the other hand, if the factual situation is as stated in the counter affidavit of the 2nd respondent, with regard to the withdrawal of the benefit granted to the other two persons, then the petitioner will not be able to sustain the benefit granted as per Exts.P11 and P12. Be that as it may, Exts.P14 and R2(a) are difficult to be sustained in law, for, the said orders were issued without affording opportunity of being heard to the petitioner. A benefit already granted cannot be taken away without notice to the beneficiary of that order. Accordingly, we quash Ext.P14 and Ext.R2(a) as violative of the principles of natural justice. It is made clear that, as and when notice is issued the petitioner will be entitled to put forward all contentions available to him in law to satisfy the Government that he is entitled to get D.A. And consequential emoluments as claimed by him. The 1st respondent Government shall consider the merit of the petitioner's contentions and take appropriate decision in accordance with law, failing which the petitioner shall be given the benefit of Exts.P11 and P12 within three months from the date of receipt of a copy of this judgment.

The Division Bench categorically found that if the contention of the petitioner that, the orders in favour of M/s. T. Narayanan Nair and T. Lakshmana Tharavanar have not been cancelled, the cancellation of Ext.P12 order issued in favour of the petitioner is unsustainable. In view of my finding that there is no evidence to show that Exts.P17 and P18 orders are cancelled, naturally, the petitioner is entitled to the relief prayed for by him, in view Ext.P16 judgment of

the Division Bench. Accordingly, Exts.P14, P15, and P17 are quashed. It is declared that the petitioner is entitled to the fixation given to him as per Ext.P12. His pay and retirement benefits shall be recomputed in accordance with Ext.P12 fixation. Orders shall be passed and arrears shall be paid to the petitioner as expeditiously as possible at any rate within two months from the date of receipt of a copy of this judgment.

The writ petition is allowed as above.