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**(1986) 09 KL CK 0025**  
**In the High Court Of Kerala**

Kochu Kunju and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

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**Date of Decision :** 09-09-1986

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (1987) 1 LLJ 280

**Hon'ble Judges :** V.S. Malimath, C.J.; Bhaskaran Nambiar, J

**Bench :** Division Bench

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**Judgement**

Malimath, C.J.—The petitioners in all these cases were admittedly in contingent service as on the 7th of April, 1970. Some of them were in contingent service on part-time basis and others were in contingent service on full time basis on the said date. Subsequently, their services were regularised by the Government by its order No. G.O.(P) 133/7I/Fin, dated: 26th March 1971 with effect from 1st April 1971. When they were sought to be retired from service on attaining the age of superannuation of fifty-five years, they have come to this Court with the respective Original Petitions under Article 226 of the Constitution of India for a direction to the respondents not to retire them from service on attaining the age of 55 years on the ground that they are entitled to remain in service until they complete 60 years of age, they not having attained the age of 60 years. This claim is made by them on the ground that Clause (b) of Rule 60 of Part I of the Kerala Service Rules, hereinafter referred to as the Rules, is applicable to them. The stand taken on behalf of the respondents on the other hand is that they are governed by Clause (a) of Rule 60 and therefore they are liable to retire on attaining the age of 55 years. The principal question for examination therefore is as to whether the petitioners who were in contingent Service, either, as part-time or full-time, on the 7th of April 1970 are governed by Clause (b) of Rule 60 of Part I of the Rules, after their services stood regularised from the 1st of April 1971.

2. Rule 60 of Part I of the Rules prescribes the age of superannuation describing

as compulsory retirement, and the same for convenience is extracted as below:

60 (a). Except as otherwise provided in these rules the date of compulsory retirement of 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.

(b) Officers in the Last Grade Service on the 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 (16A).

This rule regulates the age of retirement of all government servants who are governed by the Rules. Whereas 55 years of age is the age of superannuation as prescribed by Clause (a) of Rule 60 in respect of Government servants governed by the Rules, a higher age of 60 as the age of retirement is available for the specified category of Government servants who are governed by Clause (b) of the Rules. Clause (b) of the Rule provides that officers who were in the Last Grade Service on the 7th of April, 1970 will retire on attaining the age of 60 years, provided they continued to be in Last Grade Service as defined in Rule 12(16A) of the Rules. In other words, on ceasing to be in Last Grade Service, the benefit of Clause (b) of Rule 60 becomes unavailable. It is necessary to point out that prior to 7th April 1970 Government servants who were in Last Grade Service were entitled to the higher age of superannuation of 60 years. With effect from 7th April 1970, those in the Last Grade Service were brought in par with other Government servants with the result that they also have to retire on attaining the age of 55 years. With a view to protect the rights of Government servants who were in Last Grade Service on the 7th of April; 1970, who were governed by the higher age of superannuation of 60 years, Clause (b) came to be introduced in the Rule. It is clear from Clause (b) that it is in the nature of an exception to Clause (a). If the Government servant governed by the rules cannot satisfy the conditions specified in Clause (b), he would be governed by Clause (a) of Rule 60. There are two conditions for the applicability of Clause (b) of Rule 60. The first condition is that the Government servant concerned must have been in Last Grade Service on the 7th of April, 1970. The second condition is that the benefit of Clause (b) would be applicable only as long as such person continues to be in the Last Grade Service as defined in Rule 12 (16A) of the Rules.

3. The petitioner's service having been regularised with effect from 1st April 1971, it is not disputed that the rules became applicable to them with effect from the said date. It is also not disputed that from that date they were serving in pensionable posts. If on the 7th of April, 1970 the petitioners were governed by the Rules, which prescribed the higher age of 60 years as the age of superannuation, their right to continue in service till they attain the age of 60 years stands protected by Clause (b) of Rule 60, as long as they continue to be in

the Last Grade Service. Hence, we have to examine as to whether the petitioners who were in Last Grade Service on the 7th of April, 1970 were governed by the then existing provisions fixing the higher age of retirement of 60 years. This takes us to the examination of the relevant rules by which persons like the petitioners who were in contingent service were governed by the rules as on 7th of April, 1970. It is clear from Rule I of Part I of the Rules that Parts I and 11 are deemed to have come into force with effect from 1st November, 1959 and those in Part III are deemed to have come into force from the 1st November, 1956. Rules 2 and 3 of Part I of the Rules, which are relevant for our purpose, may be extracted as follows:

2. Subject to the provisions of Rule 3?

(i) the rules in Part II relating to travelling allowance 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):

(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)--

(a) who was not in the service of the government of Travancore--Cochin or the Government of Madras on 31st October, 1956; or

(b) who was in the service of the Government of Travancore--Cochin or the Government of Madras on 31st October, 1956, and who continued to be in the service of the Government of Kerala, but has opted to be governed by these rules in accordance with such conditions as may be laid down by the Government in this behalf; or

(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.

3. (i) These rules shall not apply to,--

(a) persons for whose appointment and conditions of employment special provision is made by or under any law for the time being in force;

(b) persons in respect of whose conditions of service, pay and allowances, pension, leave or any of them, special provision has been made by agreement entered into before these rules were made or entered into thereafter in pursuance of the provisions of Rule 8.

Provided that in respect of any matter not covered by the provisions special to him, his service or his post, these rules shall apply to any person coming within the scope of Clauses (a) and (b) above, to whom but for those clauses the rules

would otherwise apply.

(ii) Notwithstanding anything contained in Rule 2 the Government may, by notification in the Gazette, exclude wholly or in part from the operation of these rules any officer or any class of such officers to whom the Government shall declare that the rules cannot suitably be applied, and these rules shall thereupon to the extent of such exclusion, cease to apply accordingly.

Though Rule 2 is subject to the provisions of Rule 3, it does not bear any examination as it is not the case of the petitioners that the provisions of Rule 3 are applicable to them. Clause (i) of Rule 2 provides that rules in Part II 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. It is unnecessary for the purpose of this case to advert to the other conditions. It is clear from this clause that the provisions contained in Part I of the Rules are applicable to persons in the whole-time employment of the Government. It is expressly provided therein that they are not applicable to persons employed in the contingent or work establishment. In other words, Clause (ii) of Rule 2 makes it clear that the Rules do not apply to persons in contingent service. The Rule does not make any distinction between the persons holding part-time or full-time jobs in the contingent service. All persons in contingent service are treated alike and the rules do not apply to them. Therefore, it follows that Rule 60 which is in Part I is not applicable to persons in contingent service. That was the position on the 7th of April, 1970. Therefore, persons who were in contingent service on the 7th of April, 1970 were not governed by the rules and were therefore not regulated by the provisions contained in the rules regulating their age of retirement, it is only those persons who were governed by the rules on the 7th of April 1970 that could claim the benefit of higher age of retirement of 60 years if the conditions in Clause (b) of Rule 60 are satisfied. As those in contingent service were not at all governed by the age of superannuation fixed by the rules, they did not have any fixity of tenure in the service, and they were not regarded as Members of the service. Support for this inference of ours is also available from Rule 14-A of Part III of the Rules, which provides that contingent employees absorbed in regular establishment will be allowed to count 50 per cent of the contingent service for the purpose of pension. It is clear from this provision that contingent employees can be regarded as Members of the service governed by the Rules only on their absorption in the regular establishment. Until their absorption in regular establishment they are not regarded as Members of the regular service and therefore cannot claim the benefit of the age of superannuation. Only on the absorption of contingent employees in the regular establishment, 50 per cent of the contingent service can be counted for the purpose of pension. If contingent employees were regarded as persons who were governed by the age of superannuation fixed by the rules the service rendered by them as contingent employees could not be ignored to the extent of 50 per cent on their absorption in the regular establishment. Rule 14-A of the Rules in Part III, clearly indicates that the intention of the rule-making authority was to

treat contingent employees as coming in the regular service only on their absorption and prior to that they were not regarded as Members of the regular service governed by the age of superannuation, until their absorption. It is obvious that prior to their absorption the petitioners were not in pensionable service and they did not have any fixity of tenure. On the 7th of April, 1970 the petitioners who were in contingent service as on that date were not governed by Rule 60 Clause (a) and they were not entitled to claim any age as the age of superannuation. It is only after their absorption in service with effect from 1st April 1971 that for the first time the rules became applicable to them and they became liable to be governed by Rule 60 of the rules which prescribed the age of superannuation. All persons who come to regular service are governed by Clause (a) of Rule 60, the age of their superannuation being 55 years. Clause (b) of Rule 60 is applicable only to those persons who were governed by the higher age of 60 years as the age of superannuation if they were in Last Grade Service as on the 7th day of April 1970. Even if the nature of the duties performed by the petitioners on 7th April, 1970 were those of the Last Grade Servants, they could not be regarded as regular Members of the Last Grade Service, as they were admittedly in contingent service as on 7th April, 1970. They can be regarded as Members of the Last Grade Service only on their absorption in regular service with effect from 1st of April, 1971. As the petitioners cannot be regarded as persons who were in Last Grade Service on the 7th of April, 1970, they did not fulfil the essential condition for the applicability of Rule 60(b). Hence, in our opinion, they are not governed by Clause (b) of Rule 60 of the Rules and are therefore not entitled to the benefit of Clause (b) of Rule 60 of the Rules. They are governed by Clause (a) of Rule 60 and they are liable to retire on attaining the age of 55 years as they have become regular government servants on their absorption with effect from 1st April 1, 1971.

4. It was however contended by the learned Counsel for the petitioners that a contrary view has been taken by this Court in 1983 KLT 357 Govindan Nair v. State of Kerala. That was a Judgment rendered by a learned single Judge of this Court. Particular reliance was placed by the petitioners on the following observations in the said Judgment:

In this case, the petitioner was appointed on 14th August 1968 as a Full Time Contingent Chairman in the Land Revenue and Survey and Land Records Department of the Board of Revenue. That being the position, the petitioner, by virtue of the provisions contained in Rule 60 (b) of the Kerala Service Rules, Part I, is entitled to continue in service till he attains the age of 60 years.

On the basis of this observation, it was contended that the fact that the petitioner in that case was a contingent employee did not come in the way of the court coming to the conclusion that Rule 60(b) providing for higher age of superannuation is attracted. Though the said observation prima facie supports the case of the petitioners, with great respect, we find ourselves unable to agree with the view taken by the learned Single Judge. The provisions of Rule 2 (ii) of

the Rules and Rule 14A of Part III of the Rules were not taken into consideration by the learned Single Judge for the obvious reason that those provisions were not pressed into service. As the said decision has been rendered without considering the effect of those provisions, with respect, we are inclined to take the view that the said decision does not lay down the law correctly. The other two decisions relied on by the learned Counsel for the petitioners reported in 1984 (2) Ker 597 Mariam v. District Educational Officer and 1982 KLT 638 Chellappan Pillai v. State of Kerala do not pertain to persons employed in contingent service and have therefore no bearing on the question to be decided in these cases.

5. In some of these cases, the petitioners were permitted to continue in service on the strength of the interim orders made during the pendency of these cases. Notwithstanding the dismissal of these writ petitions, it is made clear that they were entitled to be paid their salary during the actual period during which they worked on the strength of the interim orders of this Court, Consequently, the authorities are not entitled to either withhold payment of salary of such persons for the said period or direct refund of the salary if already paid.

For the reasons stated above. O.P. Nos. 6787 of 1982, 6852 of 1982, 10106 of 1985 and 9665 of 1985 are hereby dismissed. Writ Appeal No. 122 of 1985 is consequently dismissed. Writ Appeal No. 348 of 1986 is allowed and the judgment of the learned single Judge is set aside and O.P. No. 4791 of 1985 stands dismissed. In the circumstances, the parties are directed to bear their costs in all these cases. As it is submitted that the appellant in Writ Appeal No. 122 of 1985 has not been granted his pensionary benefits because of the pendency of these proceedings, we direct that the question of granting pension and retirement benefits be considered, expeditiously, now that the proceedings stand terminated.