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**(2012) 12 KL CK 0091**

**In the High Court Of Kerala**

**Case No : Writ Petition (C) No. 6074 of 2011**

M. Muruga Das

APPELLANT

Vs

Regional Commander and Others

RESPONDENT

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**Date of Decision : 20-12-2012**

**Acts Referred:**

**Citation :** (2013) 1 KLJ 698 : (2013) 1 KLT 780 : (2013) 2 SCT 817

**Hon'ble Judges :** P.R Ramachandra Menon, J

**Bench :** Single Bench

**Advocate :** R.V. Sreejith, for the Appellant; P. Parameswaran Nair, (ASG of India), T.P.M. Ibrahim Khan, (Asst. SG of India) and Laly Vincent, (CGC), for the Respondent

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## **Judgement**

P.R Ramachandra Menon, J.—The issues involved in these two writ petitions, filed by the same petitioner, are closely interlinked. The petitioner who was originally working as "Pradhan Naik" under the respondents, was denied promotion to the post of "Adh (SA)". The denial of promotion to the petitioner was quite contrary to the actual facts and figures and the relevant provisions of law, virtually defeating the rights and interest of the petitioner, which made him to approach this Court by filing W.P. (C) No. 23711/2011, which is stated as still pending. After approaching this Court, the petitioner was however given promotion as "Adh (SA)"; but subsequently he came to be transferred to Kavaratti as per Ext. P6 order dated 12.01.2011, which transfer is under challenge in W.P. (C) No. 6074/2011. The petitioner, by virtue of the personal reasons, was not in a position to move out; particularly in view of the surgery undergone by his wife who was taking rest; the ailments of his child, the illness of his father-in-law and brother-in-law who were also residing with the petitioner and such other frustrating factors. It was in the said circumstance, that the petitioner submitted Ext. P8 request before the Concerned authorities, to retain the petitioner for a further period of "three months" without implementing the transfer and this was duly recommended by the higher officials as borne by Ext. P9. Simultaneously, the petitioner also filed Ext. P10 application for voluntary retirement on

18.02.2011 and thereafter approached this Court by filing W.P. (C) No. 6074/2011 challenging the transfer (Ext. P6), which was admitted on 25.02.2011 also granting interim stay.

2. The respondents filed I.A. No. 6364/2011 to vacate the interim order, but it was rejected and the interim order was not intercepted in any manner, as borne by the proceedings dated 02.06.2011. The respondents have filed a detailed counter affidavit, also producing copies of the relevant documents as Ext. R1(a) to R1(d). The case of the petitioner is that, the transfer of the petitioner ordered as per Ext. P6 is nothing but an instance of malafides, particularly in view of the fact that the petitioner had earlier approached this Court by filing a writ petition seeking for promotion. It is the case of the petitioner that, he was compelled to withdraw the said writ petition, which was not acceded to; which was to the chagrin of the respondents concerned, and hence the animosity, leading to the transfer order. On considering the pleadings and proceedings, this Court finds that, the plea of malafides is not specific and the same has not been substantiated by the petitioner. So also, it is settled law, that if "malafides" is to be established, the person against whom the plea of malafides is raised, has to be necessarily impleaded in the party array in his personal capacity; which has not been done in the instant case. As such this, Court does not find any merit in this regard.

3. Coming to the scope of challenge against transfer, it is stated by the respondents that it has been ordered only in view of administrative exigency; which arose as a result of the requirement to widen the sea shore and check the high rated piracy that is going on. Considering the nature of the duty that is being performed by the respondents and the onus upon the members of the disciplined force, it was very much obligatory for the petitioner to have moved out, on passing of Ext. P6 order. It is also brought to the notice of this Court that the petitioner had requested to keep the transfer order in abeyance only for a period of three months, mainly referring to the ailments of his wife, who had undergone a surgery. This Court finds that the request made by the petitioner as per Ext. P8 was very specific, as given in paragraph 2 of the request to differ the transfer, which reads as follows:

2. I hereby submit following for your kind consideration and favourable action please.

(a) I am under transfer to ICGS Kavaratti with DOR on 07 Mar 2011.

(b) I am staying with my wife and 02 children (Girl child - 05 years and a boy - 01 Yr).

(c) My wife had gone through surgeries of Umbilical Hernia repair and Abdominal Tubectomy on 18 Jan 2011. (Certificate of Hospital enclosed).

(d) My wife is being advised by the doctors to take complete rest for 03 months to improve her health conditions.

(e) View my wife's health conditions, I am the only person to take care of my wife and children.

(f) My daughter aged 05 years suffering from hearing loss (Medical report enclosed) and undergoing treatment also needs constant attention of my self and my wife and due to my wife's health condition I the only person to look after both my wife and my daughter.

(g) In this stage, my transfer to ICGS Kavaratti will definitely affect health conditions of my wife and may make her feelings of my ignorance on her health conditions.

(h) Further there is no medical facility available for further treatment if any at Kavaratti view being remote.

(i) My presence with my family in Kochi for at least 03 months will definitely help her in improving her health condition.

4. Obviously, the petitioner requested to keep the transfer in abeyance only for a period of "three months", so as to take care of the situation. This in turn was recommended by the higher authorities as borne by Ext. P9, to have the petitioner retained at Kochi for a further period of three months. But as on date, by virtue of the interim order passed by this Court on 25.02.2011, the petitioner is still continuing at Kochi, enjoying the benefit of retention much longer than the three months requested for, i.e., to an extend of 22 months. This being the position, this Court finds that there is absolutely no ground to continue the interim stay regarding the transfer, as it has overreached the relief which was originally sought for by the petitioner vide Ext. P8. In the said circumstance, this Court finds that nothing further remains to be considered in the writ petition.

5. Coming to the relief sought for in W.P. (C) No. 22800/2011, application for voluntary retirement was submitted by the petitioner (copy of which has been produced as Ext. P6 in this case), as early as on 18.02.2011; with reference to Rule 48A of the CCS (Pension) Rules 1972. In spite of the receipt of the said application, no order was ever passed or communicated to the petitioner. As a natural consequence, by virtue of the "proviso" to the said Rule, the application for VRS was liable to be deemed as having been sanctioned and the petitioner ought to have been permitted to proceed on VRS, which is the relief sought for in this writ petition.

6. The respondents have filed a detailed counter affidavit also producing a copy of the proceedings dated 11.08.2011, (Ext. R1(a)) whereby the claim of the petitioner for VRS is stated as rejected, along with the rejection of similar claims made by two other employees. The petitioner has filed a reply affidavit as well, producing some additional documents as Exts. P20 to P22.

7. The point to be considered in this case is whether the "deeming provision", by virtue of the "proviso" is automatically attracted, so as to hold that the petitioner stands retired on "VRS", for the fact that no order was passed in the application

filed by the petitioner within the stipulated period of three months. Rule 48A of the CCS (Pension) Rules, 1972 which stipulates for VRS, reads as follows:

48-A. Retirement on completion of 20 years" qualifying service.

(1) At any time after a Government servant has completed twenty years" qualifying service, he may, by giving notice of not less than three months in writing to the Appointing Authority, retire from service.

Provided that this sub-rule shall not apply to a Government servant, including scientist or technical expert who is-

(i) on assignments under the Indian Technical and Economic Co-operation (ITEC) Programme of the Ministry of External Affairs and other aid programmes.

(ii) posted abroad in foreign based offices of the Ministries/Department,

(iii) on a specific contract assignment to a foreign Government, unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year.

(2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the Appointing Authority:

Provided that where the Appointing Authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

(3) Deleted.

(3-A) (a) A Government servant referred to in sub-rule (1) may make a request in writing to the Appointing Authority to accept notice of voluntary retirement of less than three months giving reasons therefor;

(b) On receipt of a request under Clause (a), the Appointing Authority subject to the provisions of sub-rule (2), may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that the curtailment of the period of notice will not cause any administrative inconvenience, the Appointing Authority may relax the requirement of notice of three months on the condition that the Government servant shall not apply for commutation of a part of his pension before the expiry of the period of notice of three months.

(4) A Government servant, who has elected to retire under this rule and has given the necessary notice to that effect to the Appointing Authority, shall be precluded from withdrawing his notice except with the specific approval of such authority:

Provided that the request for withdrawal shall be made before the intended date of his retirement.

(5) The pension and [retirement gratuity] of the Government servant retiring under this rule shall be based on the emoluments as defined under Rules 33 and 34 and the increase not exceeding five years in his qualifying service shall not entitle him to any notional fixation of pay for purposes of calculating pension and gratuity.

(6) This rule shall not apply to a Government servant who-

(a) retires under Rule 29, or

(b) retires from Government service for being absorbed permanently in an Autonomous Body or a Public Sector Undertaking to which he is on deputation at the time of seeking voluntary retirement.

Explanation-For the purpose of this rule, the expression "Appointing Authority" shall mean the authority which is competent to make appointments to the service or post from which the Government servant seeks voluntary retirement.

8. Ext. P6 application for VRS was submitted by the petitioner on 18.02.2011. The Rule contemplates a minimum service of 20 years for enabling a person to apply for VRS under Rule 48A and there is no dispute in this regard. It is also conceded by the petitioner that, the qualifying service of 20 years will be completed by the petitioner only on 12.07.2011. If this be the position, the questions to be considered are whether the petitioner was eligible to have made an application under Rule 48A as on the date of applying for VRS and whether Ext. P6 application preferred by the petitioner is a "valid application" to have acted upon.

9. Even a plain reading of the said Rule shows that only a Government servant, who has completed 20 years of qualifying service can prefer an application, for having the benefit of VRS, by giving a notice of not less than "three months" in writing, to the Appointing Authority. Whether the application has to be "preferred after acquiring the qualifying service as above, or whether the application submitted even before acquiring the qualifying service can be considered later on, when the petitioner acquires the qualifying service of 20 years, is the question to be considered. The learned counsel for the petitioner submits that the Rule has to be interpreted in such a manner that irrespective of the fact that the petitioner had not acquired the qualifying service of 20 years at the time when the application was submitted, he shall be permitted to retire from the service at any time after the completion of 20 years of service; for which he has necessarily to give a notice of three months" in writing to the Appointing Authority. This Court finds it difficult to accept the said proposition for two different reasons. Firstly, the Rule is quite categorical, when it says that, at any time after a Government servant has completed 20 years of qualifying service he may apply. The basic requirement to make a person eligible to apply for VRS under Rule 48A, is completion of 20 years of qualifying service. This is more so, when the pension rules also enable persons to retire from service in such other manner as well, as provided under Rule 8 and on such other circumstances dealt

with elsewhere.

10. That apart, if the proposition mooted by the petitioner is accepted, it is open for any person to apply for VRS even after completing 10 or 15 years of service, stating that he should be deemed as having retired on completion of the qualifying service of 20 years. This may cause a liability upon the respondent/Appointing Authority to retain a separate register and to be vigilant as to the date of submitting the application, the date when the actual right to have VRS approved and such other particulars of the persons concerned. Notice of "three months" has necessarily to be within a reasonable time, after completing the qualifying service of 20 years. The mandate of the Rule is also discernible from the Government of India Decision No. ii, which reads as follows:

(ii) Verification of qualifying service before giving notice-Before a Government servant gives notice of voluntary retirement with reference to Rule 48-A, he should satisfy himself by means of a reference to the appropriate administrative authority that he has, in fact, completed twenty years" service qualifying for pension.

11. The above stipulation clearly shows that there is a duty cast upon the concerned employee, before making an application, to ensure that he has completed 20 years of qualifying service (even by making a reference to the appropriate administrative authority that he has acquired the eligibility in this regard). This being the position, the idea and understanding of the petitioner as to the scope of Rule 48 A of the CCS (Pension) Rules is quite wrong and misconceived and it is held accordingly.

12. Coming to the instant case, it remains an admitted fact that the petitioner preferred Ext. P6 application for VRS on 18.02.2011; whereas he would have completed 20 years of qualifying service only on 12.07.2011 i.e., he made the application before completing the 20 years of qualifying service; which stands contrary to the mandate of the Rule and also to the Government of India "Decision No. ii as mentioned herein before. This being the position, Ext. P6 application preferred by the petitioner could not have been considered as a Valid application", which did not call for any consideration at the hands of the respondents. The fact remains that the same was considered by the authority concerned, who however rejected the same as per Ext. R1(a). But, this by itself cannot widen the scope of the Rule, as nobody can rewrite the Rule, merely by virtue of agreement or otherwise.

13. During the course of hearing, the learned counsel for the petitioner sought to place reliance on paragraph 13 of the decision rendered by the Apex Court in State of Haryana and Others Vs. S.K. Singhal, , which is extracted below:

13. Thus, from the aforesaid three decisions it is clear that if the right to voluntarily retire is conferred in absolute terms as in Dinesh Chandra Sangma case by the relevant rules and there is no provision in the rules to withhold permission in certain contingencies the voluntary retirement comes into effect

automatically on the expiry of the period specified in the notice. If, however, as in B.J. Shelat case and as in Sayed Muzaffar Mir case the authority concerned is empowered to withhold permission to retire if certain conditions exist, viz., in case the employee is under suspension or in case a departmental enquiry is pending or is contemplated, the mere pendency of the suspension or departmental enquiry or its contemplation does not result in the notice for voluntary retirement not coming into effect on the expiry of the period specified. What is further needed is that the authority concerned must pass a positive order withholding permission to retire and must also communicate the same to the employee as stated in B.J. Shelat case and in Sayed Muzaffar Mir case before the expiry of the notice period. Consequently, there is no requirement of an order of acceptance of the notice to be communicated to the employee nor can it be said that non-communication of acceptance should be treated as amounting to withholding of permission.

14. In view of the discussion as aforesaid, this Court finds that the law laid down by the Apex Court as above does not come to the rescue of the petitioner in any manner. The issue considered by the Supreme Court was only with regard to the scope of the "deeming provision" and not whether an application preferred before acquiring the prescribed qualifying service for VRS could be treated as a valid application, to be dealt with as and when the employee acquires the eligibility. The employee in the said case was a Medical Officer, who had joined service on 04.06.1975 and had already acquired the eligibility of 20 years" of qualifying service to have VRS, when he applied for the same, giving three months" notice on 16.08.1995. The respondents, on the other hand, sought to place reliance on the decision of the Apex Court in Padubidri Damodar Shenoy Vs. Indian Airlines Limited and Another, as to the scope of VRS. Reliance is also sought to be placed on Himachal Pradesh Horticultural Produce Marketing and Processing Corporation Ltd. Vs. Suman Behari Sharma, to contend that merely by serving a notice, there cannot be any presumption as to granting of VRS and that it is not automatic. It is also brought to the notice of this Court that the challenge raised against the validity of the Rule, particularly in prescribing 20 years of qualifying service under Rule 48A had come up for consideration before this Court and the validity has been upheld as per the decision reported in Prakash Vs. Director General of Boarder Roads, .

15. During the course of hearing, it is brought to the notice of this Court by Mr. Sanjay, the learned Central Government Counsel that in such cases an application under Rule 48A of the CCS (Pension) Rules is also to be considered in the light of the Coast Guard General Rules, 1986, particularly "Rule 27" and that the request can be acceded to only after assessing the manpower requirement and such other aspects.

16. The learned Counsel for the petitioner however submits that, in spite of the alleged exigency of service, (referring to the imminent requirement to have the petitioner posted and shifted to Kavaratti as per the transfer order dated

12.01.2011), the post is still lying vacant and nobody has been posted at Kavaratti, which is not disputed from the part of the respondents. It is also brought to the notice of this Court by the learned Counsel for the petitioner that the request of the person named at SI. No. (b) Shri JK. George, as given in Ext. R1(a) in W.P. (C) 22800 of 2011, whose claim for VRS was rejected along with the claim of the petitioner, had been subsequently considered on submitting a fresh application and he was permitted to retire on VRS. With reference to Ext. P20 order dated 03.07.2006 produced along with the reply affidavit dated 22.11.2011, it is pointed out that another person by name AJ Singh was also permitted to retire on VRS, in accordance with the provisions of Rule 48-A of CCS (Pension) Rules, 1972, read with Rule 27 of the Coast Guard (General) Rules, 1986. A copy of similar order has been produced in respect of some other persons, as named in Ext. P21, who have been permitted to retire on VRS, wherein a person by name K. Ibrahim at SI. No. 10, who was also of the same rank as that of the petitioner, was permitted to retire on VRS on 01.08.2011.

17. Considering the above facts, the question is whether the petitioner should be denied the benefit of applying for VRS in view of the adverse circumstances, he is facing. Coming back to Rule 48-A of the CCS(Pension) Rules, the Government of India's Decision No. (iii). throws some light upon the circumstances under which a claim for VRS can be normally rejected by a competent authority. The said guidelines read as follows:

(iii) Guidelines for acceptance of notice:-

A notice of voluntary retirement given after completion of twenty years" qualifying service will require acceptance by the appointing authority if the date of retirement on the expiry of the notice would be earlier than the date on which the Government servant concerned could have retired voluntarily under the existing rules applicable to him (e.g. FR 56 (k) Rule 48 of the Pension Rules. Article 459(i) of CS Rs. or a any other similar rule). Such acceptance may be generally given in all cases except those (a) in which disciplinary proceedings are pending or contemplated against the Government Servant concerned for the imposition of a major penalty and the disciplinary authority, having regard to the circumstances of the case, is of the view that the imposition of the penalty of removal or dismissal from service would be warranted in the case, or (b) in which prosecution is contemplated or may have been launched in a Court of Law against the Government servant concerned. If it is proposed to accept the notice of voluntary retirement even in such cases, approval of the Minister-in-charge should be obtained in regard to Group "A" and Group "B" Government servants and that of the Head of the Department in the cases of Group "C and Group "D" Government servants. Even where the notice of voluntary retirement given by a Government servant requires acceptance by the appointing authority, the Government Servant giving notice may presume acceptance and the retirement shall be effective in terms of the notice unless the competent authority issues an order to the contrary before the expiry of the period of notice.

From the above, it is clear that only in respect of cases where "disciplinary proceedings" are pending or contemplated against a Government servant or where prosecution is contemplated or may have been launched in a Court of law that the claim can be rejected.

18. There is no case for the respondents that any disciplinary proceedings or criminal proceedings are contemplated or pending against the petitioner. The transfer ordered to Kavaratti has been intercepted by this Court by virtue of the interim stay, which was subsisting till this date. Since, this Court has already found that the petitioner cannot insist to continue at Kochi and that there is no merit in W.P. (C) 6074 of 2011, thus dismissing the same; it is now for the petitioner to report for duty in the concerned post at Kavaratti within a reasonable time. Considering the particular facts and circumstances, the proximity/distance between Kavaratti and Kochi, the lack of conveyance between the Mainland and the Island and such other adverse circumstances, the petitioner is hereby permitted to have one month's time to join duty at Kavaratti. In view of the finding of this Court that Ext. P6 application preferred by the petitioner could not have been a valid application, as the same was submitted by him before attaining the qualifying service of 20 years, it is always open for the petitioner to file a fresh application seeking for the benefit of VRS. Even otherwise, no restrictive provision under the CCS (Pension) Rules, 1986 is brought to the notice of this Court, which stipulates that once an application for VRS is rejected, the person will lose his opportunity to make any further applications. In the said circumstance, it is open for the petitioner to submit a fresh application before the competent authority after joining duty at Kavaratti. If any such application is preferred, the same shall be considered in accordance with the relevant rules, particularly, the mandate under the Government of India's Decision No. (iii) (the Government of India's Decision having prime consideration and importance, in view of the stipulation under Sub-rule 2 (and elsewhere) of Rule 27 of Coast Guard (General) Rules.) The application shall be positively considered in the light of the above observations and also in view of the fact that the respondents have already considered the application of Mr. JK George, whose application was rejected earlier, as per Ext. R1(a), but permitting him to proceed on VRS later on and also permitting other similarly situated persons to proceed on VRS. Appropriate orders shall be passed in this regard and the same shall be communicated to the petitioner before the proposed date of retirement, which has to be mentioned in the application to be submitted by the petitioner.

W.P. (C) No. 6074 of 2011 is dismissed as devoid of any merit, while W.P.(C) No. 22800 of 2011 is disposed of in the above terms.