
(2014) 07 KL CK 0119

In the High Court Of Kerala

Case No : Writ Appeal No. 1072 of 2012 in WP(C). 28771/2004

M. Radhakrishnan Nair

APPELLANT

Vs

The Secretary to Government

RESPONDENT

Date of Decision : 22-07-2014

Acts Referred:

Citation : (2014) 3 ILR 545 : (2014) 3 KHC 325 : (2014) 3 KLT 433 : (2015) LabIC 452

Hon'ble Judges : Ashok Bhushan, J;A.M. Shaffique, J

Bench : Division Bench

Advocate : B. Unnikrishna Kaimal, Advocate for the Appellant; Rinni Stephen Chamaparambil, Government Pleader, Advocate for the Respondent

Judgement

Ashok Bhushan, J.—This Writ Appeal has been filed by the appellant, who was the writ petitioner in W.P.(C). No. 28771/2004, challenging judgment dated 21.11.2011 by which judgment, the Writ Petition was dismissed by the learned Single Judge.

2. Brief facts of the case giving rise to the appeal are: The appellant (referred to herein as "writ petitioner") was appointed as Lower Division Clerk in the Education Department. Subsequently, he was appointed as Legal Assistant Grade-II in the Law Department in the Secretariat on 7.11.1980. He was promoted as Legal Assistant Grade-I on 28.1.1983. While working as Legal Assistant Grade-I, he applied to the Public Service Commission (PSC) for selection to the post of Block Development Officer under the method of appointment by transfer. PSC selected the petitioner and advised for appointment as Block Development Officer. The petitioner was appointed as Block Development Officer by order dated 29.4.1988. He joined duty as Block Development Officer on 2.5.1988. By order dated 23.12.1989, he was promoted in the Law Department as Section Officer. However, the petitioner continued to work as Block Development Officer. Promotion list dated 20.10.1998 was issued in the Law Department promoting Section Officers as Under Secretaries in which list, name of the petitioner was

not included. The petitioner submitted a representation to the first respondent to consider his case for promotion as Under Secretary. The petitioner also submitted a representation dated 5.10.1998 to the Law Secretary to Government for reversion to the Law Department with consequential benefits. Petitioner's case for reversion was considered, but no final decision could be taken in his favour. Petitioner, in the meantime, was promoted as Assistant Development Commissioner in the Rural Development Department in the year 1998. The petitioner submitted further representation dated 19.10.2002 to the Minister for Revenue and Law for reversion to the Law Department. The petitioner received a letter dated 15.1.2003 intimating that his request cannot be considered in view of the status quo order passed by the Supreme Court in S.L.P. No. 14996/98. The petitioner submitted another representation on 2.2.2003 and thereafter filed W.P.(C). No. 14893 of 2004 before this Court seeking a direction to pass order in the matter of reversion of the petitioner to the Law Department with consequential benefits. The Writ Petition was disposed of on 7.6.2004, directing the second respondent therein, Secretary to Government, to consider the case of the petitioner. An order dated 8.7.2004 was issued confirming large number of Block Development Officers, in which list, name of the petitioner was also included. The State Government ultimately passed order dated 3.9.2004 in compliance with the judgment of this Court dated 7.6.2004 in W.P.(C). No. 14893 of 2004 rejecting the claim of the petitioner for reversion to the Law Department. The Government held that since the petitioner is confirmed in the Rural Development Department, he cannot be reverted to the Law Department. The order dated 3.9.2004 was challenged by the petitioner in W.P.(C). No. 28771 of 2004, which has been dismissed by the learned Single Judge on 21.11.2011 giving rise to this Writ Appeal.

3. Learned counsel for the appellant, in support of the appeal, has submitted that under Rule 8 Part II of the Kerala State and Subordinate Services Rules (KS & SSR), 1958, the petitioner had a right to be reverted to his parent department, but the State Government erroneously rejected his claim. He submitted that a Full Bench of this Court in Balakrishnan Nair and Others Vs. Ram Mohan Nair and Others, had laid down that the benefit of Rule 8 Part II KS & SSR is available to the member of a service getting appointment in another service on the basis of applications invited by the Government. It is submitted that at the time when the petitioner had submitted representation in the year 1998, he was not confirmed in the Rural Development Department and his claim was rejected only on 3.9.2004. Hence, there was no impediment in reverting him to his parent department, i.e., Law Department. It is submitted that the judgment in the above Full Bench case has also been confirmed by the Apex Court by its decision reported in Ali M.K. and Others Vs. State of Kerala and Others, . It is submitted that the Government has accepted the case of similarly situated officials, who were granted benefit of reversion to the parent department. Reference has been made to the order dated 23.3.2010 issued by the Government in the case of P.N. Ramesh Raju.

4. It is submitted that the learned Single Judge, without considering the entitlement of the petitioner to be reverted to parent department, has dismissed the Writ Petition, only on the ground that the petitioner has retired from service in the year 2005.

5. The learned Government Pleader rebutted the submission of learned counsel for the petitioner and contended that the claim of the petitioner for reversion was rightly rejected by the Government. The petitioner having already confirmed in the Rural Development Department, had no right to be reverted to the Law Department. It is submitted that the Law Department was not the parent department of the petitioner, since he was initially appointed in the Education Department. It is submitted that the cases of officers, who claimed reversion to the parent department, were not applicable to the petitioner and in no manner help the petitioner.

6. We have considered the submissions of learned counsel for the petitioner and the learned Government Pleader. We have also perused the records.

7. The challenge in the Writ Petition by the petitioner was against Exhibit P16 order of the State Government dated 3.9.2004 by which the petitioner's request for repatriation in Law Department has been rejected. The issue is as to whether the said order was erroneous and the petitioner was entitled to be repatriated to Law Department with consequential benefits. In the order of the State Government rejecting the claim of the petitioner it has been stated that the petitioner was not confirmed in the Law Department, whereas his juniors were confirmed. It has been further observed that the petitioner has been confirmed in the Rural Development Department vide order dated 8.7.2004, hence, he does not have a lien in the Law Department. Rule 8 Part II KS & SSR relied on by the petitioner reads as under:

8. Members absent from duty.-The absence of a member of a service from duty in such service, whether on leave, other than leave without allowances for taking up other employment, on foreign service or on deputation or for any other reason and whether his lien in a post borne on the cadre of such service is suspended or not, shall not, if he is otherwise fit, render him ineligible in his turn,-

(a) for re-appointment to a substantive or officiating vacancy in the class, category, grade or post in which he may be a probationer or an approved probationer;

(b) for promotion from a lower to a higher category in such service; and

(c) for appointment to any substantive or officiating vacancy in another service for which he may be an approved candidate;

as the case may be, in the same manner as if he has not been absent. He shall be entitled to all the privileges in respect of appointment, seniority, probation and appointment as full member which he would have enjoyed but for his

absence:

Provided that subject to the provisions of rule 18 he shall satisfactorily complete the period of probation on his return:

Provided further that a member of a service who is appointed to another service and is a probationer or an approved probationer in the latter service, shall not be appointed under clause (c) to any other service for which he may be an approved candidate unless he relinquishes his membership in the latter service in which he is a probationer or an approved probationer:

Provided further that this rule shall not have retrospective effect so as to disturb the decisions taken by the Travancore-Cochin Government in respect of the Travancore-Cochin personnel:

Provided also that this rule shall not apply in the case of a member of a service whose absence from duty in such service is by reason of his appointment to another service not being Military service, solely on his own application, unless such appointment is made in the exigencies of public service.

Note 1.-An appointment made in pursuance of applications invited, sponsored or recommended by Government or other competent authority shall be deemed to be an appointment made in the exigencies of Public Service for the purpose of this rule.

Note 2.-The benefit of this rule shall not be available to a person holding a post in any class or category in a service if his appointment to that post was from a post in another class or category in the same service."

8. From the facts as noted above, it is clear that first appointment of the petitioner was in the Education Department. Thereafter he was appointed in the Law Department. In Rural Development Department he was selected and recruited by the PSC by transfer. The appointment order of the petitioner has been brought on record as per Exhibit P1 order dated 29.4.1988. The said appointment order mentions the name of the candidates, who was advised by the PSC for appointment as Block Development Officer. The said order further mentions that all the candidates will be on probation for a period of two years. Much reliance has been placed by learned counsel for the petitioner on the Full Bench decision reported in Balakrishnan Nair's case (supra). Rule 8 Part II KS & SSR came for consideration before the Full Bench, after noticing Rule 8 Part II, the following was observed by the Full Bench at paragraphs 8 and 10 of the judgment:

8..... The above Rule enables a member of a service who is absent from duty in such service to return back to that service, if he is not otherwise ineligible. On return, he is eligible for appointment to a substantive or officiating vacancy in the class, category, grade or post in which he may be probationer or an approved probationer; (2) for promotion from a lower to a higher category; and (3) for appointment to any substantive or officiating vacancy. The Rule contemplates a

situation when the member is absent from duty on leave, on foreign service, or on deputation or for any other reason. The fourth proviso to R.8 is as follows:

Provided also that this rule shall not apply in the case of a member of a service whose absence from duty in such service is by reason of his appointment to another service not being Military Service, solely on his own application, unless such appointment is made in the exigencies of public service.

The meaning of the above proviso is that if a member of a service is appointed in the exigencies of public service, then he will be entitled to get the benefit of the main section. What is exigency in public service is clarified by Note 1 to R.8. Note 1 says that an appointment made in pursuance of applications invited, sponsored or recommended by Government or other competent authority shall be deemed to be an appointment made in the exigencies of public service for the purpose of this rule. Thus, if a member of a service gets appointment in another service on the basis of applications invited by Government or when he is sponsored or recommended by the Government or competent authority he is entitled to get the benefit of the main Section. Note 2 denies the benefit to a member of a service when he is appointed to another post in the same service. In the present case, we are not concerned with Note 2. Learned counsel for the appellants submitted that in view of Note 1 the appellants and similarly situated persons are entitled to the benefit of R.8, if the conditions in R.8 are satisfied.

xx xx xx

10. The next question to be considered is after the appellants were selected for appointments in the Co-operative Department and after they joined the Co-operative Department whether they are entitled to come back to the Rural Development Department. The answer to this question depends upon whether the appellants have relinquished their rights or put it in the service language "their lien" in the Rural Development Department once they joined the Co-operative Department pursuant to their selection and appointment in that Department. If lien is not lost in the parent Department, the appellants will be entitled to come back on the basis of R.8. So, the question for consideration is whether the appellants lost their lien in the Rural Development Department when they joined the Co-operative Department. In that context, it is also necessary to consider whether the appellants had obtained a lien in the post to which they were appointed in the Cooperative Department. We shall refer to the relevant provisions in this context."

9. The preposition laid down by the Full Bench in the above case was that if lien is not lost in the parent department, the appellants will be entitled to come back on the basis of Rule 8. The question, which came up for consideration before the Full Bench was as to whether the appellant lost his lien in the Rural Development Department, when he joined the Co-operative Department. Noting the facts in the above case before the Full Bench, it was observed that the appellant has not been confirmed in the Co-operative Department and lien in the parent

department has not been terminated. The Full Bench has observed in paragraph 12 of the judgment which is as follows:

12.....Thus, on facts, it is seen that the appellants have not been confirmed in the Cooperative Department and their lien in the parent Department has not been terminated.

10. The concept of "lien" is now well settled. In P. Ramanatha Aiyar's "Law Lexicon", 3rd edition, the word "lien" has been defined as follows:

"Lien" connotes the right of a civil servant to hold the post substantially to which he is appointed. When a person with a lien against a post is appointed substantially to another post, he acquires a lien against the latter post. Then the lien against his previous post automatically disappears.

11. An argument was also raised before the Full Bench that most of the appellants have completed their probation and hence they should be deemed to be substantively appointed to a permanent post. Referring to Rule 24, the Full Bench held that an order has to be passed for confirmation. The following was laid down by the Full Bench in paragraphs 13 and 14:

"13. Counsel for one of the respondents in the appeal submitted that most of the appellants have completed their probation and hence they should be deemed to be substantively appointed to a permanent post and hence according to the counsel, their lien in the parent Department is terminated as per R. 15 of K.S.R.. Counsel is not right in his submission. He was not able to produce any order passed by the Co-operative Department confirming the appellants in their posts. Even if it is admitted for argument sake that the appellants have completed their probation that doesn't enable them to get automatic confirmation unless under R. 24 of Part II of K.S.S.R. they are confirmed in that post R. 24 of K.S.S.R. is as follows:

24. Appointment of full members: (a) Subject to the provisions of R. 8 an approved probationer shall be appointed to be a full member of the service in the class or category for which he was selected, at the earliest possible opportunity, in any substantive vacancy which may exist or arise in the permanent cadre of such class or category and if such vacancy existed from a date previous to the issue of the order of appointment, he may be so appointed with retrospective effect from the date or, as the case may be, from any subsequent date from which he was continuously on duty as a member of the service in such class or category or in a higher class or category.

This shows that an order has to be passed appointing the approved probationer as a full member of a service on a substantive vacancy. The order is the order of confirmation even though such a term does not find a place in the K.S.S.R.. The order of confirmation is necessary for the conferment of full membership of the service in the class or category for which a person is selected. As has been held in *Rajmohan v. Asst. General Manager*-ILR 1985(1) Kerala 488-from the mere

fact that an employee is allowed to continue in the post after the expiry of the specific period of probation it cannot be held that he should be deemed to have been confirmed. Thus, so far as the present case is concerned, the appellants have not been confirmed in the post in the Co-operative Department. Under R. 16 Part I of KSR, a member of a service loses his lien previously acquired in other post only when he is appointed substantively to a permanent post. Since at the time when the order of reversion was passed the appellants have not been confirmed under R. 24, it cannot be said that they lost their lien in the parent Department.

14. Thus, on going through the provisions of K.S.S.R. and K.S.R., we find that there is no inhibition for a member of a service, who got appointment in another service, to come back to the parent Department. The only condition being that before he comes back, he should not have lost his lien in the parent Department. The above being the provisions under the relevant Rules, we shall now consider the correctness of the judgments in the Writ Appeals.

12. The Full Bench had also on an occasion to refer to judgment of the Apex Court reported in T.R. Sharma Vs. Prithvi Singh and Others, and another judgment of the Apex Court reported in Triveni Shankar Saxena Vs. State of U.P. and others, . It is useful to quote paragraphs 21, 25 and 26 of the Full Bench judgment, which read as follows:

21. Now let us consider the view taken by the Supreme Court in various decisions. In T.R. Sharma Vs. Prithvi Singh and Others, -Supreme Court was considering this particular question with regard to Punjab Civil Services Rules. Under R. 3.12 unless otherwise provided, a Government servant on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired on any other post. Under R. 3.14(a) when a person, who is holding substantively a permanent post, takes up a permanent post outside the cadre on which he is borne, the competent authority shall suspend the lien of a Government servant on the permanent post which he got. R. 3.15(a) says that except under certain circumstances" a Government servant"s lien on a post may, in no circumstances, be terminated, even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post. In that case, it was held by the Supreme Court thus:

When the appellant was appointed as Block Development and Panchayat Officer in a substantive permanent capacity, his case squarely fell within the ambit of R. 3.14(a)(2) as the post of Block Development and Panchayat Officer was outside the cadre of Agricultural Inspectors to which the appellant belonged. In the circumstances, it was imperative for the competent authority to suspend the lien of the appellant on the permanent post of Agricultural Inspector which he had held substantively. The competent authority, however, failed to suspend the lien of the appellant on the post of Agricultural Inspector. The appellant plainly cannot suffer because of such inaction or omission on the part of the competent authority. A reading of the rule leaves no doubt that a duty is cast upon the

competent authority to suspend the lien of a Government servant on a permanent post which he holds substantively if he is appointed in a substantive capacity to a permanent post outside the cadre on which he is borne. The imperative nature of the rule is also clear from the use of the word "shall" in clause (a) as against the use of the word "may" in clause (b) of that rule. The appellant, in our opinion, cannot be penalised because of the omission of the competent authority to act in accordance with the mandatory provisions of R. 3.14(a)(2).

25. In *Triveni Shankar Saxena Vs. State of U.P. and others*, The Supreme Court referred to the decision in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, - which was to be following effect:

a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier.

Another decision cited was *Sarala Vs. State of Kerala*, . There the Court held that the fourth proviso to R. 8 of K.S.S.R. applies only to such a member of a service who absent from duty in that service and not those absent from one category in the service to another category in the same service. It was held that the petitioner was not absent from the service. Hence, the benefit under R. 8 of K.S.S.R. was not given to the petitioner therein. The facts in that case are different from the facts in the present case.

26. Thus, on the basis of the above decisions and the relevant Rules in the KSR and K.S.S.R., we are of the view that the lien of a member of a service to a post in the parent Department is not lost automatically when he joins another Department. The lien can be terminated only after hearing the concerned person. By mere completion of probation it cannot be said that a person has been substantively appointed to a permanent post. Unless a person is confirmed under R. 24 of K.S.S.R., it cannot be said that the person has been substantively appointed to a permanent post. In the present case, we find that the appellants have not been confirmed in the Co-operative Department. Hence they have no lien in the Co-operative Department. Their lien in the Rural Development Department has not been terminated. In that view of the matter, sending them back to the parent Department is legal.

13. The Apex Court has also in *Ali M.K.'s case (supra)*, while confirming the judgment of the Full Bench in *Balakrishnan Nair's case (supra)* has laid down that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier. Paragraph 18 of the said decision reads as under:

18. A faint attempt was made to submit that the non-official respondents had lost their lien as they were appointed to posts of substantive nature. Reference was made to R. 28 to submit that on completion of probation and in case of promotion, it is to be presumed that there was substantive appointment. The Full Bench has recorded a factual finding that non-official-respondents have not been

confirmed in the posts in the Co-operative Department. It has been specifically recorded that no material was placed to show that any order has been passed by the Co-operative Department confirming the employees concerned in their posts. With reference to R. 24 it was noted that mere completion of probation does not result in automatic confirmation. It is a settled position in law that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier. (See *Triveni Shankar Saxena Vs. State of U.P. and others*, and *Parshotam Lal Dhingra Vs. Union of India (UOI)*,).

14. Thus, it is clear that in the event the writ petitioner can be said to have not acquired a lien in Rural Development Department, he was entitled to get benefit of Rule 8 Part II KS & SSR. The petitioner himself has brought on record a copy of the order dated 8.7.2004 as Exhibit P15 by which the petitioner was confirmed in the Rural Development Department. The said order was not under challenge in the Writ Petition. The State has also filed a counter affidavit in which, they have taken a stand that the petitioner has been confirmed in the Rural Development Department and had no lien in the Law Department, hence his request could not have been considered. It is useful to quote the pleadings in paragraph 10 of the counter affidavit filed by the State, which reads as under:

10. But the petitioner's request is for reversion to Law Department with the original rank and seniority, had he not left Law Department on request to assume charge as BDO in the Rural Development Department through Public Service Commission. Law Department is not the parent department of the petitioner but his 2nd establishment. Ext. P11 itself is self explanatory and is clear proof against the averment of the petitioner that Sri. P.K. Gopinathan Nair, Deputy Secretary was on O.D. as Registrar in the T.G. Medical Council. The petitioner vide Ext. P12 tried to prove that his case is similar to that of the case of petitioner in O.P. No. 6005/2002 whose prayer was for reversion to his parent Department. The request of the petitioner in WP(C).28771/04 is for reversion to his second establishment and not to his parent Department i.e. to the Education Department. And now the petitioner became a full and permanent member of Rural Development Department and hence his request for reversion to any other Departments invite no attention.

15. One more rule, which is relevant for the present case, is Rule 26 Part II KS & SSR, which is to the following effect:

26. Membership of more than one service.-No person shall at the same time be a full member of more than one service.

A probationer, approved probationer or full member of one service who is appointed to be a full member of another service shall cease to be member of the former service."

16. Rule 24 Part II KS & SSR provides for appointment of full members, which reads as under:

24. Appointment of full members.-(a) Subject to the provisions of rule 8 an approved probationer shall be appointed to be a full member of the service in the class or category for which he was selected, at the earliest possible opportunity, in any substantive vacancy which may exist or arise in the permanent cadre of such class or category and if such vacancy existed from a date previous to the issue of the order of appointment, he may be so appointed with retrospective effect from the date or, as the case may be, from any subsequent date from which he was continuously on duty as a member of the service in such class or category or in a higher class or category:.....

17. Order dated 8.7.2004 is an order appointing the petitioner as a full member in accordance with Rule 24(a). Rule 26 provides that no person shall at the same time be a full member of more than one service. The petitioner had become full member of service under Rural Development Department, hence he could not have remained member of any other earlier service. Rule 26 further states that a member probationer or full member of one service, who is appointed to be a full member of another service shall cease to be member of the former service. It clearly means that on appointment of a full member to another service he shall cease to have any lien in earlier service. Thus, lien is lost in earlier service by appointment of a full member to another service. The petitioner having been confirmed as Block Development Officer in Rural Development Department, he lost his lien, if any, in earlier service and had acquired a lien in the Rural Development Department. Thus, the State Government did not commit any error in passing Exhibit P16 order rejecting the claim of the petitioner for repatriation to the Law Department.

18. In view of the aforesaid discussion, we are of the view that no error was committed by the learned Single Judge in dismissing the Writ Petition. The petitioner is not entitled for any relief. The Writ Appeal is dismissed accordingly.