

(2016) 04 KL CK 0005

In the High Court Of Kerala

Case No : W.A. No. 822 of 2010 in W.P. (C).16350 of 2004 (Against The Judgment In WP (C) 16350/2004 of High Court of Kerala Dated 15.12.2009)

M.K. Asokan

APPELLANT

Vs

Cochin Port Trust

RESPONDENT

Date of Decision : 04-04-2016

Acts Referred:

Citation : (2016) 3 KHC 451 : (2016) 3 KLT 54

Hon'ble Judges : Mr. Ashok Bhushan, CJ. and Mr. A.M. Shaffique, J.

Bench : Division Bench

Advocate : Sri. N. Sukumaran (Sr.) and Sri. S. Shyam, Advocates, for the Appellant; Sri. George Thomas (Mevada) (Sr.) Sri. Manu George Kuruvilla Sri. Susheel Joseph Cyriac, Advocates, for the Respondent Nos. 4-5; Sri. Abraham Joseph Markos Sri. V. Abraham Markos Sri

Final Decision : Dismissed

Judgement

Ashok Bhushan, C.J.—This appeal has been filed against the judgment dated 15.12.2009 in W.P.(C).No.16350 of 2004. The petitioner is the appellant. Brief facts necessary for deciding the appeal are as follows:

The petitioner and private respondents 4 to 6 were working in the Cochin Port Trust as Mazdoors. While so, Port Trust published circular dated 29.10.2001 calling for applications from qualified experienced and willing Mazdoors in Electrical division for appointment against four vacancies of Oilman (Power House), in pursuance of which a rank list was prepared in which petitioner was shown above respondents 4 to 6. Both petitioner and respondents 4 to 6 were appointed as Oilman and a draft seniority list was published in which petitioner is shown as No.1 and respondents 4 to 6 were at ranks 4, 3 and 2 respectively.

2. Objections were filed by respondents 4 and 5 and the seniority list was revised. The petitioner was pushed down to serial No. 3. An objection was filed by the petitioner and another seniority list was issued as per Ext.P11 where

petitioner was at serial No. 4. Fourth respondent was promoted to the immediate higher post. i.e., Driver (Power House), as per Ext.P13 order dated 13.7.2004. The petitioner aggrieved by the aforesaid action filed the writ petition praying for following reliefs:

"A. Call for the records relating to Exts.P6 to P12 from the respondents 1 to 3.

B. Quash Exts.P9, P11 and P13 by the issue of a writ of certiorari or other appropriate writ, direction or order and declare that the selection of respondents 4 and 5 as Oilman as per Ext.P2(a) and their appointments as Oilman on its basis are illegal and unsustainable.

C. Issue a writ of mandamus commanding the respondents 1 and 2 to promote the petitioner to the existing vacancy of Driver (Power House) under them."

3. Counter affidavit was filed, wherein the respondents sought to justify the preparation of the seniority list on the ground that the seniority of Mazdoor in which respondents 4 to 6 were senior to the petitioner is to be maintained and selection to the post of Oilman was to be on the basis of transfer. The learned Single Judge heard the parties and held that as per the statutory rules, the selection to the post of Oilman is to be made by direct recruitment and when a rank list was prepared in which petitioner was shown at Serial No. 1, petitioner is entitled to be treated as senior to respondents 4 to 6. The learned Single Judge set aside the seniority list and also the promotion granted to the fourth respondent. The learned Single Judge however did not accede to the claim of the monetary benefits to the petitioner, however directed that retrospective promotion should be granted to the petitioner, which shall only be notional without monetary benefit. By the following order the writ petition was allowed:

"xxxx

Therefore it is declared that all promotions in violation of seniority position in Ext.P6 are unsustainable. Consequently, all further promotions in violation of such seniority position as between petitioner and respondents 4 to 6 are liable to be reviewed and the petitioner shall be given his due promotions ahead of respondents 4 to 6 as on the earliest date of such promotion. Orders in implementation of the above shall be issued by the competent among respondents 1 to 3, as expeditiously as possible, at any rate, within one month from the date of receipt of a copy of this judgment. Although, petitioner presses for monetary benefits also, insofar as the petitioner has not worked in the promoted post, I direct that the retrospective promotions to be granted to the petitioner shall be only notional without monetary benefits. But the petitioner shall be entitled to all other consequential service benefits other than monetary benefits."

Being aggrieved by the said judgment, the writ petitioner had come up in appeal.

4. The only contention raised by the learned Senior Counsel Sri. N. Sukumaran in support of the writ appeal is that, when it was held that petitioner was senior to

respondents 4 to 6 and promotion granted to the respondents was also set aside, he was entitled for promotion on the date that it was given to the respondents and all monetary benefits including the salary on the promoted post was entitled to be given to him. It is submitted that the petitioner could not have been deprived of the benefit of salary since it was not due to his fault that he was not promoted. It is submitted that actually the petitioner was prevented from working in the promoted post on account of wrong action of the concerned respondent. Learned counsel for the petitioner also relied on the judgment of the Division Bench of this Court in *State of Kerala v. Bhaskaran Pillai* 2003 (1) KLT 60.

5. The learned counsel appearing for the Port Trust rebutting the submission submits that the promotion was granted on the basis of seniority then existing and there was no deliberate action on the part of the said respondent not to promote the petitioner. The seniority list as was finalised at the relevant time was taken for promotion and the respondents who were promoted had also worked in the promoted post and had received salary. It is contended that in the judgment of the learned Single Judge all benefits including the retrospective promotion had been directed and notionally he will be entitled for the benefit of fixation except the salary or any other monetary benefit in the promoted post. He submits that present is not a case where petitioner could have been allowed payment of salary.

6. We have heard the submission made by the learned counsel for the appellant and perused the record.

7. From the sequence of events which have been brought on record, it is clear that the seniority list was finalised after receipt of objections and on the basis of seniority list promotion was granted to respondent Nos. 4 and 5 which was challenged by the petitioner in the writ petition. The respondent who was promoted after his promotion which took place in the year 2004 continued to hold the post till the learned Single Judge passed the judgment dated 15.12.2009 setting aside the promotion. The respondents who have worked against the promoted post have received the salary for the said period. The learned Single Judge, after declaring the petitioner senior, has directed for retrospective promotion with notional benefits. The judgment of the learned Single Judge directing retrospective promotion with notional benefits cannot be faulted. The present is not a case where the petitioner ought to have been allowed payment of salary for the period 2004-2009, when actually the promoted post was held by respondents who have received the salary. The order of the learned Single Judge has balanced the equities and has done substantial justice by directing for retrospective promotion of the petitioner with notional benefit.

8. We do not find any error in the judgment of the learned Single Judge warranting our interference in this writ appeal. The judgment relied by the learned counsel for the petitioner in *Bhaskaran Pillai's* case *supra*, was a case where an employee has claimed promotion which was denied to him. Subsequently it was held that he is entitled for promotion from the date he made an application i.e., 15.6.72. The case is not a case where any other person was

promoted on the post. His claim was accepted for promotion and from the date of application, monetary benefit was granted. Paragraphs 21 to 23 are relevant which are as follows:

"21. The three classes of cases referred to in *Philomina* are:-

- i. When such promotee is kept out of work or denied or deprived of his rightful place by an illegal order which, upon the declaration or admission of its illegality becomes wholly destitute of legal efficacy.
- ii. Where the authority has acted malevolently and without bona fides such as where the authority is shown to have deliberately and wilfully denied the officer his due promotion or other benefits with intent to injure him.
- iii. Where the authority has in disobedience of a direction of a competent court, denied the officer what has been held to be his due.

If the case on hand falls under any of the above three categories there could be no deprivation and all monetary benefits will have to be restored to such a promotee. of course if such person is guilty of any contumacious conduct, behaviour, negligence or want of due diligence in the prosecution of his own cause, he cannot be permitted to claim such monetary benefits and encumber the coffers of the State unnecessarily by claiming such monetary benefits.

22. In short the normal rule must be that where there is no fault on the part of the officer concerned, he must be paid the monetary benefits due to him consequent to the retrospective promotion. In appropriate cases it could be denied to him for valid reasons. In the three categories of cases enumerated in *Philomina* such benefits cannot be denied to him. The dictum in *Philomina* cannot be held to be valid any more in view of the decisions of the Supreme Court referred above to the extent that it stipulates a rule of general application that no Government servant is entitled to be paid for work which he has not done. This conclusion appears to be inevitable in view of the subsequent declaration of law by the Supreme Court in the decisions referred above.

23. Coming to the facts it is evident from the data available that it was on 15.6.1972 that the petitioner filed a petition claiming the promotion due to him with effect from 15.9.1961. He approached this Court with O.P. 585 of 1975 only in 1975. That Original Petition was disposed of only on 12.8.1977 and the Government was directed to consider the petitioner's application dated 15.6.1972. There is nothing before us to show that between 15.9.1961 and 15.6.1972 the petitioner was diligently representing or prosecuting his cause. The submission that he has been making periodical representations is by itself insufficient to persuade us to hold that he has been diligently prosecuting his cause. He had put forward diligently all his claims by filing O.P. 585 of 1975 in which the only prayer was that his petition dated 15.6.1972 must be considered. In these circumstances we are of opinion that the final conclusion of the Single Judge that the petitioner/appellant is entitled to monetary benefits with effect

from 15.6.1972 is absolutely just and equitable. We cannot lose sight of the fact that the petitioner/ appellant who has been engaged in a long fight had to retire from service on 31.7.1980 before he enjoyed the benefits which were granted to him. It is taking into account all the relevant circumstances including the fact of his retirement on 31.7.1980 that we choose to accept that the petitioner/ appellant is entitled for monetary benefits with effect from 15.6.1972. Ordinarily we might have been inclined to direct such payment only with effect from the date of the judgment in O.P. 585 of 1975 or from a date after elapse of a reasonable period from the date of such judgment."

9. The above case has been decided on its own facts and does not help the petitioner. The writ appeal is dismissed.