
(2002) 09 KL CK 0043
In the High Court Of Kerala
Case No : O.P. No. 27193 of 2000

Pushpangadan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 06-09-2002

Acts Referred:

Citation : (2002) 09 KL CK 0043

Hon'ble Judges : K. Balakrishnan Nair, J

Bench : Single Bench

Advocate : P.J. Mathew and Thomas John Ambooken, for the Appellant; K.J. Josemon, Government Pleader and K.V. Vinod Kumar, for the Respondent

Judgement

K. Balakrishnan Nair, J.—The petitioner is a High School Assistant working in St. Paul's High School, Kozhinjampara. He was first appointed in that school in 1979 and has got continuous service from 2.6.1980. He is due to retire on 30.4.2003. In the year 1987, he met with an accident and he applied for leave without allowance prefixing the summer vacation of 1987. The same was granted. Since he did not recover, again he applied for leave without allowance on medical ground for about two years from 1.6.1987 to 11.7.1989. The application was accompanied by the requisite medical certificate, submits the petitioner. But, when leave without allowance on medical ground was granted as per Ext. P1, it was ordered that leave for one year from 1.6.1989 to 31.5.1988 will be leave without allowance on medical ground and the leave from 1.6.1988 to 11.7.1989 will be leave without allowance on regular basis under Rule 88 Part I KSR. There is no reason for bifurcating the leave into two as the application was accompanied by only one medical certificate covering the entire period.

2. The petitioner chose not to challenge the said order then. But, by Order dated 16.12.1989 he was granted the first higher grade with effect from 1.1.1990. It was granted reckoning the leave without allowance period also. But by Exts. P3 and P4 dated 10.11.1999, objection was raised by the audit party against reckoning the above said period covered by leave without allowance for granting

first higher grade. The aggrieved petitioner moved the Government by filing Ext. P5 representation. But, it was rejected by Ext. P7 dated 29.7.2000. In fact, in Ext. P5, the prayer of the petitioner was to modify Ext. P1 and to grant leave without allowance on medical ground for the entire period. The petitioner was constrained to make this motion in view of the provisions contained in Rule 33 of Part I KSR. As per Rule 33(b), leave without allowance on medical certificate will count for increments. Therefore, that service will be reckoned for higher grade also.

3. Ext. P7 order was issued on the ground that the petitioner's application to modify Ext. P1 is highly belated. The petitioner challenges Exts. P1, P3, P4 and P7 on various grounds. He prays for a direction to treat the period from 1.6.1988 to 11.7.1989 as leave without allowance on medical ground. The respondents have filed a counter affidavit resisting the claim of the petitioner. I heard both sides.

4. If Ext. P1 is modified as prayed for, the petitioner's grievance will be redressed. But, the prayer for modification made by the petitioner has been rejected only for the reason of delay. Normally, an adverse order should be challenged before the competent forum within a reasonable time limit. But, another method of challenge against an adverse order i.e., collateral challenge, is also recognised by law. An individual can ignore an order if it is, according to him, illegal or unenforceable and choose to resist it when the same is pressed into service against him. In the case at hand, Ext. P1, though issued on 3.1.1990 was not enforced as against the petitioner. For all practical purpose, it was ignored also. But, only by Ext. P3 dated 10.11.1999, the higher grade granted to him was sought to be reviewed relying on the leave without allowance granted under Ext. P1. Therefore, immediately, the petitioner has moved for appropriate reliefs. All modern authors recognise the concept of collateral challenge against adverse orders. Professor P.P. Craig has dealt with this aspect in "Administrative Law" (Third Edn.) in the following words:

"It should not, however, be thought that an aggrieved individual must always challenge an action directly via the prerogative orders in order to prevent its application to him. If the decision requires, for example, a payment by the individual to a public body then the individual could resist the demand, wait to be sued, and then attack the decision collaterally. In this limited sense statements by Lord Denning M.R. that there is no need for an order to quash a nullity are correct: the individual does not need to seek a prerogative order or declaration as a mechanism of direct attack, but can impugn the decision collaterally. If the finding is not attacked directly or collaterally it will, however, remain valid irrespective of whether, if it had been challenged, it would have been deemed to be ultra vires. It will not in some Houdini sense disappear".

5. In view of the fact that the petitioner has applied for leave without allowance on medical ground, he is entitled to get the leave granted as applied for. The Government cannot grant a leave which was not in fact applied for by the

Government servant. Therefore, the stand taken in Ext. P7 is unjustified. It is accordingly quashed and the Government is directed to reconsider the request made by the petitioner as prayed for in Ext. P5 within three months from the date of receipt of a copy of this judgment, in the light of the observations contained hereinabove. The petitioner shall be heard before a decision is taken as directed above.

The Original Petition is disposed of accordingly.