
(1991) 01 KL CK 0049

In the High Court Of Kerala

Case No : O.P. No's. 2386/87 and 2055 and 2116/88

R. Mohanan and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 11-01-1991

Acts Referred:

Kerala State and Subordinate Services Rules, 1958 — Rule 2(9), 31, 33, 9

Citation : (1991) 01 KL CK 0049

Hon'ble Judges : Varghese Kalliat, J

Bench : Single Bench

Advocate : S. Ramesh Babu, for the Appellant; M.C. Gopi, Government Pleader, for the Respondent

Judgement

Varghese Kalliat, J.—These Original Petitions relate to a common question regarding the right of persons appointed under Rule 9(a)(i) of the Kerala State and Subordinate Services Rules (hereinafter referred to as "the Rules"). The question is whether persons appointed on the advice of the Employment Exchange are entitled to increment.

2. There is a clear provision in second proviso to Rule 9(a)(v) of the Rules that the persons appointed temporarily through Employment Exchanges shall not be eligible for increment in the time scale even if they complete the prescribed period of service fixed for sanctioning such increment. Now I shall quote Rule 9(a) (v) of the Rules in full:

There shall be paid to a person appointed under Clause (i) or Clause (ii) the minimum pay in the time scale of pay applicable to such service, class or category:

Provided that, if the person appointed is a member of another service, he shall be paid the pay admissible to him in the higher time scales based on the pay in the lower time scale applicable to him under the rules regulating the fixation of pay, if such pay is higher. He shall be paid increments in the time scale at the

time intervals, as fixed by the Government from time to time:

Provided further that persons appointed temporarily through Employment Exchanges shall not be eligible for increment in the time scale even if they complete the prescribed period of service fixed for sanctioning such increment.

The provision that "He shall be paid increments in the time scale at the time intervals, as fixed by the Government from time to time" in the first proviso was added by an amendment.

3. Counsel submitted that in view of the fact that persons who were members of another service are given entitlement for increments by virtue of the amendment adverted to by me, the Petitioners who are appointed under Rule 9(a)(i) of the Rules on the advice of the Employment Exchange are also entitled to increments. In fact, they have been paid increments. Government Pleader submits that it has been done by mistake and so they sought recovery of the excess amount paid from the Petitioners.

4. Counsel wanted me to examine this question in the light of certain decisions of the Supreme Court. He submitted that all persons appointed under Rule 9(a)(i) whether they came from another service and whether they were members of another service and those who are appointed on the advice of the Employment Exchange are doing the same work and so they are entitled to same pay on the basis of equal work and equal pay. The question is whether this principle can be extended in the matter of increment and whether this Court can say that the second proviso to Rule 9(a)(v) of the Rules is unconstitutional. The question regarding increments depends not only on that fact that a Government servant is doing a work of the same kind and nature as that of a member of the service who has got entitlement to increments. This aspect of the matter was considered in the decision of this Court reported in 1989 (2) KLT 155 (Mohammedkutty v. State of Kerala). This Court said that appointment under Rule 9(a)(i) of the Rules is clear that the appointment is made only for a limited period which can be 90 days or 180 days. It will have the minimum time-scale of pay. Certainly the appointment does not carry entitlement for continuous service for an indefinite period of time. This Court said thus:

If the appointment has to be at the minimum of the time scale only, there is no question of any increment being granted on completion of one year of service, as is obligatory under Rules 31 and 33 of Part I, Kerala Service Rules. It is, therefore, clear that provisional appointees are not entitled to annual increments. The period of service, by itself, would not entitle regular employees to increment. There is no reason why the period of service alone shall entitle a provisional employee to increment in preference to more competent, qualified and meritorious employees. Even in the case of a probationer, the period of his service will be counted for purposes of increment under Rules 31 and 33(a) of Part I, Kerala Service Rules only if his appointment is followed by confirmation. It is not as if provisional appointees will be entitled to increment as a matter of

course on completion of the period of one year of service, without any of the hurdles as are contemplated by Rules 31 and 33(a), Part I, Kerala Service Rules.

5. Counsel submitted that the observation in the decision reported in 1989 (2) KLT 155 has to be considered in the light of the amendment in the first proviso to Rule 9(a)(v) of the Rules. It is true that by virtue of the first proviso certain persons appointed under Rule 9(a)(i) are given entitlement for increments. But those persons, who at the time of appointments under Rule 9(a)(i) are members of another service. This is a vital distinction and that distinction has to be reckoned for the purpose of deciding the question whether the second proviso is valid or not. Counsel submitted that there is no difference between the persons coming within provisos 1 and 2. I cannot agree. Persons under proviso 1 are members of another service and member of a service is defined under Rule 2(9) of the Rules. It reads thus:

"Member Service" means a person who has been appointed to that service and who has not retired or resigned, been removed or dismissed been substantively transferred or reduced to another service, or been discharged otherwise than for want of a vacancy. He may be a probationer, an approved probationer or a full member of that service.

A plain reading of the definition makes it clear that a provisional employee under Rule 9(a)(i) is not a member of a service. This is the distinction between the persons coming within the first and second provisos. I am of the view that this is a material and relevant distinction in the matter of granting increments.

6. Now I shall advert to the decision cited by counsel for the Petitioners. He argued the case very ably after making some research in the matter and that has to be encouraged. Counsel referred me to *Dhirendra Chamoli and Another Vs. State of U.P.*, . This case relates to that great principle "equal pay for equal work". This is a very important doctrine in the light of the constitutional provisions and it has to be given effect to the largest extent possible. In the case reported there was no distinction between the workers whose salaries were fixed under different scales, even though they were doing the same work. In a case where there is no distinction at all between the workers who are employed and who are doing the same work, the Supreme Court very emphatically said that the principle of "equal pay for equal work" had to be given effect to. In this view, this decision cannot be applied to the facts revealed in the case at hand.

7. Same is the position in regard to *Surinder Singh and Another Vs. Engineer-in-chief, C.P.W.D. and Others*, another case cited by counsel appearing for the Petitioners in these Original Petitions. Counsel also referred me to *Ajit Singh and Others Vs. State of Punjab and Another*, This case relates to a totally different question. Here the question relates to the probation of an employee. Of course, there is a condition that the probationer is only a provisional employee. The Court did not accent it. In this case, services of certain employees, who were probationers, were terminated. The Court found that there was no adequate

reason for their termination and a direction was given to reinstate them. When once, they are reinstated finding that there is no reason for termination of the service, even though they were probationers, certainly they are entitled to increments also applying the Rules under Punjab Trust Services (Recruitment and Conditions of Service) Rules, 1978. In this Original Petition, to my mind, there is no difficulty to uphold the provisions contained in the second proviso to Rule 9(a) (v) of the Rules. It is a valid proviso and so the Petitioners are not entitled to increment.

8. Counsel submitted that though the Petitioners were not entitled to increments, they were paid increments and that amount has been utilised by them without the least expectation that one day the amount has to be returned. In such circumstance, this Court has observed that it is harsh and inequitable to recover the amounts from the employees-see 1982 KLT SN 45 (Aleyamma v. Deputy Director, Education). In 1989 (2) KLT 155, a similar situation has arisen wherein this Court has said that even though the Petitioners are not entitled to the reliefs, viz., the right to get increments, "in view of the fact that a long time has passed, the State will not recover the excess amounts drawn by the Petitioners". I think that in this case also, a similar order has to be passed. I direct that the Government should not recover the excess amounts already drawn by the Petitioners in these Original Petitions.

9. Counsel submitted that the second proviso came into force only on 30th September, 1986 and before that date, Petitioners are entitled to gain increments by virtue of Ext. P-3 order in O.P. No. 2836/87-G.O. (P) No. 479/86/Fin, dated 11th July, 1986. Any how, I have now ordered that no recovery should be made in regard to the increments already drawn by the Petitioners in these Original Petitions. So I need not go into the question whether the proviso is retrospective in nature or not. I leave the matter there. Original Petitions are disposed of as above.