

(1977) 05 KL CK 0001
In the High Court Of Kerala

Shareef Rawther and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 23-05-1977

Acts Referred:

Citation : (1978) 1 LLJ 114

Hon'ble Judges : P. Subramonian Poti, J;K.K. Narendran, J

Bench : Division Bench

Judgement

P. Subramonian Poti, J.—Our learned brother Gopalan Nambiyar, J. (as he then was) referred this case to a Division Bench since an interesting question was raised before the learned Judge. Whether the period of leave taken by a Government servant for the pursuit of his studies should count as period during which such Government servant could be treated as on probation is the question that has arisen in this petition. Aspiring to get further promotions to posts which called for higher qualifications the petitioners in this case applied for leave even before they completed their periods of probation, obtained such leave and were pursuing their studies in the M.Sc. course in Analytical Chemistry. They were Technical Assistants Grade II at the time they went on leave. When vacancies arose in the posts of Technical Assistants Grade I they could not be regularly promoted as" they were not approved probationers. Rule 28 of the Kerala State and Subordinate Service Rules requires that no member of a service shall be eligible for promotion from the category in which he was appointed to the service unless he has satisfactorily completed his probation in that category. A junior of the petitioners, the 4th respondent, was promoted in the vacancy which arose during the period the petitioners were on leave. The 4th respondent too was not qualified for that promotion at that time since she also had not completed her period of probation. She was promoted only provisionally. But in due course she became qualified for that promotion by completing the period of her probation. That was so even before the petitioners had completed their probation, for, while they were on leave the 4th respondent, though junior, satisfactorily completed the period on duty to qualify her to be an approved probationer. Later the

petitioners came back after completing their studies and though first petitioner was then promoted reverting the 4th respondent, on a representation by the 4th respondent this was reversed by Ext. P5 order by the Government which is under challenge in this petition. Evidently the stand taken by the Government was that by completing the probation earlier the 4th respondent has become qualified earlier than the petitioner and since she had been appointed to the promoted post provisionally, on getting qualified she was entitled to regular promotion to that post and that being earlier than the date when the petitioners were entitled to such regular promotion by completing their probation the 4th respondent was entitled to hold that post without yielding it to the first petitioner.

2. The petitioners challenge Ext. P5. order on the ground that they are entitled to claim that the period of their leave for purpose of studies must also be taken into account for the purpose of completing their period of probation and if so they should be found to have completed their probation much earlier than the 4th respondent. The short question, therefore, is whether this plea has any substance. Before the learned single judge the decision of our learned brother Eradi, J., was cited as if it would support the case of the petitioners. Evidently we see no support for such a stand in the decision in *Mukundan, M.P. v. State of Kerala and Ors.* (1975) KLT 682.

3. Rule 12(7) of the Kerala Service Rules defines duty as including (1) service as a probationer or apprentice, provided that such service is followed by confirmation, (ii) joining time and (iii) a course of instruction or training which an officer undergoes specially ordered by Government to be treated as duty. During the period a person is serving as probationer he is no doubt on duty. If he is undertaking a course of instruction or training it will also be treated as duty if it is by orders of Government. That the resort to the M.Sc. course by the petitioners was at their own instance and that to better their professional career cannot be disputed. What was done by the Government was to see that seats were reserved by the Registrar of University of Kerala for the M.Sc. degree course in Analytical Chemistry for enabling two candidates from the Government Analyst's Laboratory, Trivandrum to undergo the course. The petitioners took leave and underwent that course. But there was no rule which would enable them to claim that such period should be treated as period of duty. Probation, of course, it would not be, for, they would not be on duty during this period. The decision in *Mukundant M.P. v. State of Kerala and Ors.* (1975) KLT 682, dealt with a different situation. When a person is on leave he is entitled to promotion that may fall due if he is otherwise qualified for such promotion. This provision is made in Rule 8 of the Kerala State and Subordinate Service Rules. Once he is promoted while on leave his seniority in the promoted post is counted with reference to his date of appointment. That is because in determining the length of service for reckoning seniority the period which would count for probation is also taken into account. There are periods which do not count for probation under the Kerala State and Subordinate Service Rules such as a period of service under Rule 9(a)(iv) and Rule 31(d) of the Kerala State and Subordinate Service

Rules. The period during which a person is on leave is a period which will count for probation in the sense that it is a period the nature of which is such that it could be a period of probation. It is one thing to say that the period counts for probation and another to say that it is a period of probation. Within a period counting for probation a person may be on duty for a lesser period and that latter period alone will be the period of probation. That was what was pointed out by the learned Judge in the decision adverted to. The decision, we are afraid, is clearly against the stand taken by the petitioners in this case. The question here is not whether the period during which the petitioners were on leave would count for their promotion. If that were the question possibly the answer would have been different. Here even before the petitioners returned after finishing their studies and underwent the rest of the period of the probation vacancy had arisen in the higher post and at that time the junior being qualified and the petitioners being not so qualified the junior got earlier promotion. That is as it should be. We see no warrant to hold that when a person is on leave that period should be counted for probation in order to enable such person to claim that the total service in that post including that period during which he was on leave should be reckoned as period during which he had undergone probation in that post. If this is the position the petitioners must fail. Hence we dismiss the original petition. Parties are directed to suffer costs.