
(2013) 02 KL CK 0026

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 8476 of 2012

Sree Sabu

APPELLANT

Vs

Kerala State Housing Board

RESPONDENT

Date of Decision : 01-02-2013

Acts Referred:

Kerala State and Subordinate Services Rules, 1958 — Rule 19

Citation : (2013) 2 KHC 703 : (2013) 2 KLT 873

Hon'ble Judges : P.N. Ravindran, J

Bench : Single Bench

Advocate : Kaleeswaram Raj, for the Appellant; George Boban, Sr. Government Pleader (V. Vijulal) and Government Pleader (T.R. Rajesh), for the Respondent

Judgement

P.N. Ravindran, J.—The petitioner, an employee of the Kerala State Housing Board (hereinafter referred to as the "Board" for short) has filed this Writ Petition challenging Ext. P2 letter dated 16.12.2011 sent by the Secretary to Government, Housing Department, to the Secretary of the Board, Ext. P3 order dated 22.3.2012 issued by the Board pursuant to Ext. P2 letter and Ext. P4 memo dated 2.4.2012 issued by the Board calling upon him to show cause why his probation in the category of Accounts Officer should not be terminated and he should not be discharged from service. The brief facts of the case are as follows: The petitioner was advised for appointment as Accounts Officer/Section Officer in the Board by the Kerala Public Service Commission as per advice memo dated 14.9.1995. He was appointed as Accounts Officer/Section Officer in the Board by order dated 20.10.1995 and he joined duty on 17.11.1995. The petitioner's appointment was subject to the condition that he should undergo training for a period of one year from the date of joining duty in the Board and the further condition that after successful completion of training, he will be on probation for a period of two years on duty within a continuous period of three years. He completed his training and commenced his probation on 17.11.1996. Though his appointment in the post of Accounts Officer with effect from 20.10.1995 (the date of the appointment order) was regularized by order dated 26.8.2000, his

probation in the category of Accounts Officer was not declared for the reason that he had not passed the prescribed departmental tests. The Board did not however, terminate his probation or extend the probation as stipulated in Rules 19, 20 and 21 of Part II of the Kerala State and Subordinate Services Rules, 1958, which applies to employees of the Board.

2. As per R.5 of the Kerala State Housing Board Regulations for Special Recruitment from among members of the Scheduled Castes and Scheduled Tribes to the posts of Executive Engineer, Assistant Executive Engineer and Accounts Officer/Senior Superintendent in the establishment of the Kerala State Housing Board, 1991, (hereinafter referred to as the "rules" for short) every person appointed as Accounts Officer in the establishment of the Board has to pass the Account Test (Higher), Kerala P.W.D. Test and the Test on Kerala State Housing Board Act and Rules conducted by the Kerala Public Service Commission, during the period of probation. The petitioner appeared for and passed these tests only by 14.7.2009. The Board that met on 16.2.2011 and 15.3.2011 decided to extend the probation of the petitioner from 17.11.1996 to 14.7.2009 and to declare his probation with effect from 14.7.2009, subject to the approval of the Government. The Secretary of the Board thereupon issued Ext. P1 proceedings dated 23.3.2011 declaring the probation of the petitioner with effect from 14.7.2009 subject to the approval of the Government. The Secretary of the Board thereafter moved the Government for such approval. The Government in turn sent Ext. P2 letter dated 16.12.2011 stating that the order passed by the Board extending and declaring the probation of the petitioner with effect from 14.7.2009 is irregular and without authority.

The Government directed the Secretary of the Board to cancel Ext. P1 order, take steps to issue revised orders extending the probation of the petitioner for one year from the date of completion of two years on duty within a continuous period of three years as stipulated in R.21 of Part II of the Kerala State and Subordinate Services Rules and thereafter move the Government for extension of probation as provided therein. The Government also directed the Secretary of the Board to issue notice to the petitioner as envisaged in Government circular dated 8.5.1985. The Government also directed that immediate steps be taken to rectify the irregularities. Pursuant thereto, the Secretary of the Board issued Ext. P3 order dated 22.3.2012 canceling Ext. P1. Thereafter, the Secretary of the Board issued Ext. P4 memo dated 2.4.2012, calling upon the petitioner to show cause why his probation should not be terminated and he should not be discharged from service.

3. Upon receipt of Ext. P4 memo, the petitioner submitted Ext. P5 reply dated 18.4.2012 raising various contentions including the contention that he was never found unsuitable for full membership, that he was not discharged from service during the original period of probation or during the extended period and therefore, merely for the reason that there was a technical fault on the part of the Board in not extending his probation for a period of one year from the date of

completion of two years on duty and in moving the Government for further extension of probation after the said period, he cannot be visited with the consequences thereof. He requested the Secretary of the Board to recall Ext. P4 memo. He had in the meanwhile filed the instant Writ Petition challenging Exts. P2, P3 and P4.

4. After Ext. P5 representation was submitted, the Writ Petition was amended by incorporating additional facts and additional grounds. The principal contention raised in the instant Writ Petition is that the petitioner was never found to be unsuitable and he was not discharged from service during the period of probation, namely, a period of two years on duty within a continuous period of three years, that his probation was also not extended and in such circumstances merely for an irregularity committed by the employer Board, the petitioner cannot be visited with adverse consequences including discharge from service. It is contended that the Government have not in Ext. P2 letter directed discharge of the petitioner, but had only directed the Board to extend the period of probation for a period of one year from the date of completion of two years on duty within a continuous period of three years and thereafter to move the Government for necessary extension of probation as provided in R.21 of Part II of the Kerala State and Subordinate Services Rules and therefore, for that reason also, the impugned letter/order/memo are liable to be set aside.

5. Respondents 1 and 2 have filed a counter affidavit dated 22.6.2012. In paragraph 4 it is stated that though the petitioner completed his training on 16.11.1996 and his probation started on 17.11.1996, satisfactory completion of probation in the post of Accounts Officer was not declared as he did not pass the prescribed departmental tests. In paragraph 5 it is stated that as the appointing authority is not competent to extend the period of probation beyond a period of one year, the matter was placed before the Board and the Board decided to extend the probation from 17.11.1996 to 14.7.2009 and to declare his probation with effect from 14.7.2009, subject to the approval of the Government. In paragraph 8 it is stated that it was pursuant to the instructions issued by the Government in Ext. P2 letter that Ext. P1 order declaring the probation of the petitioner was cancelled by Ext. P3 order and thereupon Ext. P4 memo was issued to him. In paragraph 11 it is contended that as the petitioner did not pass the Account Test (Higher), Kerala P.W.D. Test and the Test on Kerala State Housing Board Act and Rules during the period of probation, the direction issued by the Government cannot be said to be illegal and unauthorised. It is stated that the Board has only complied with the directions issued by the Government and therefore, Ext. P3 order cannot be assailed.

6. After the Writ Petition was amended, respondents 1 and 2 filed an additional counter affidavit dated 17.1.2013 reiterating the contentions raised in the first counter affidavit. In addition it is stated that pursuant to Ext. P2 letter, the Board decided at its meeting held on 16.2.2011 to act in accordance with the directions issued by the Government and cancelled Ext. P1 order declaring the probation of

the petitioner. The third respondent has filed a counter affidavit dated 29.11.2012 justifying the action taken by the Government. It is contended that the procedure adopted by the Board in declaring the probation of the petitioner is not in order and therefore, the Government issued directions in the matter of declaring the petitioner's probation.

7. I heard Sri. Kaleeswaram Raj, learned counsel appearing for the petitioner, Sri. George Boban, learned standing counsel appearing for respondents 1 and 2 and Sri. V. Vijulal, learned Senior Government Pleader appearing for the third respondent. Sri. Kaleeswaram Raj, learned counsel appearing for the petitioner contended that the Government did not in Ext. P2 direct termination of the probation of the petitioner, but had only directed the employer to extend the probation for the maximum permissible period of one year and thereafter to move the Government to extend the probation and therefore, the Board erred in issuing Ext. P4 show cause notice calling upon the petitioner to show cause why his probation should not be terminated and he should not be discharged from service. The learned counsel for the petitioner contended that the petitioner was recruited under a Special Recruitment Scheme for members belonging to the Scheduled Castes, that it was taking into account the said fact and also the unblemished service rendered by him that the Board in the first instance issued Ext. P1 order extending his probation till 14.7.2009 and declaring his probation with effect from 14.7.2009 and in the absence of any allegation that he is unsuitable to hold the post in any of the proceedings issued or in the counter affidavits, the proposal to terminate his probation cannot but be termed as arbitrary and illegal.

8. Per contra, Sri. George Boban, learned standing counsel appearing for respondents 1 and 2, submitted that as the petitioner did not pass the prescribed departmental tests during the period of probation or within one year from the date of completion of two years on duty within a continuous period of three years, it was open to the Board to terminate his probation and to discharge him from service and that the delay in issuing the order discharging him from service will not entitle him to contend that it should be deemed that he has satisfactorily completed his probation. The learned Government Pleader submitted that the Board as well as the petitioner were at fault, that the petitioner was at fault for not acquiring the prescribed test qualifications during the period of probation and the Board was at fault for not extending the probation for one year in time and thereafter moving the Government for extension of the probation. The learned Government Pleader also submitted that having regard to the fact that the petitioner had continued for more than 17 years in the service of the Board, the Government had only directed the Board to issue an order extending his probation for a period of one year from the date of completion of two years on duty within a continuous period of three years and to thereafter move the Government for extending the probation and that it was not the intention of the Government when it sent Ext. P2 letter that the petitioner's probation should be terminated and he should be discharged from service.

9. I have considered the submissions made at the Bar by the learned counsel appearing on either side. I have also gone through the pleadings and the materials on record. The fact that the petitioner was appointed under a Special Recruitment Scheme for members belonging to the Scheduled Castes is not in dispute. The fact that he was appointed by direct recruitment as Accounts Officer by order dated 20.10.1995 and thereupon he joined duty on 17.11.1995 is not in dispute. In the appointment order it was stipulated that the petitioner's appointment is subject to the condition that he should undergo training for a period of one year from the date of joining duty in the Board and that after successful completion of the training, he will be on probation for a period of two years on duty within a continuous period of three years. He completed his training on 16.11.1996 and his probation commenced on 17.11.1996. The period of probation as per the rules is two years on duty within a continuous period of three years. Under the regulations he was bound to pass the Account Test (Higher), Kerala P.W.D. Test and the Test on Kerala State Housing Board Act and Rules during the period of probation. He did not however, pass the departmental tests during the period of two years on duty within a continuous period of three years commencing from 17.11.1996. It was therefore, open to the Board to either terminate his probation and discharge him from service under R.19 of the Kerala State and Subordinate Service Rules or to extend the period of probation applying R.21 thereof.

10. The Board did not, for reasons best known to it, terminate the petitioner's probation and discharge him from service or extend the probation for the maximum permissible period of one year as provided under R.21 or thereafter move the Government for further extension of probation. The petitioner continued to be a probationer till the Board passed Ext. P1 order dated 23.3.2011 extending his probation from 17.11.1996 to 14.7.2009 and declaring his probation with effect from that date. The declaration of probation was subject to the approval of the Government, which in the ordinary course was not required and was required only on account of the fact that extension of probation for more than one year was required. The Government, on noticing the fact that the authority competent to extend the probation of an employee beyond the period of one year is the Government and not the Board, directed the Board to rectify the irregularity and to issue a revised order extending the probation of the petitioner for a period of one year from the date of completion of two years on duty within a continuous period of three years, as stipulated in R.21 of Part II of the Kerala State and Subordinate Services Rules and thereafter to move the Government for extension of probation as provided therein. The Government did not, when it issued Ext. P2 direct the Board to terminate the probation of the petitioner and to discharge him from service. The Board as well as the Government were aware that the petitioner had by 14.7.2009 passed all the departmental tests which he was required to pass during the period of probation. The Board also rightly understood the direction issued by the Government in Ext. P2 letter while issuing Ext. P3 order dated 23.2.2012 which reflects that it was

issued pursuant to the decision taken by the Board on 22.2.2012 to take action as directed in Ext. P2 letter dated 16.12.2011. The Board thereafter issued Ext. P4 memo dated 2.4.2012 calling upon the petitioner to show cause why he should not be discharged from service with effect from the forenoon of 17.11.2000, when the period of one year computed from the date on which he completed three years on duty as a probationer expired.

11. Rule 19(b)(i) of the Kerala State and Subordinate Services Rules stipulates that if within the period of probation a probationer fails to acquire the special qualifications or to pass the special tests, if any, prescribed in the Special Rules, or to acquire such other qualifications as may be declared by the State Government or by the appointing authority with the approval of the State Government to be equivalent to the said special qualifications or special tests, the appointing authority shall, by order, discharge him unless the period of probation is extended under R.21. In the instant case, the Board did not take steps to discharge the petitioner upon expiry of the period of two years on duty within a continuous period of three years notwithstanding the fact that he had not during the said period passed the prescribed departmental tests. R.20(c) of Part II of the Kerala State and Subordinate Services Rules stipulates that if the appointing authority decides that the probationer is not suitable for such membership, it shall unless the period of probation is extended, under R.21 by order discharge him after giving him a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The Board did not take such a decision and discharge the petitioner from service after following the procedure prescribed in R.20(c). Under R.21 of Part II of the Kerala State and Subordinate Services Rules, in the case of a probationer falling under sub-r. (b) of R. 19 or sub-r. (c) of R.20, the appointing authority can extend his probation for a maximum period of one year to enable him to acquire the special qualifications or pass the prescribed tests as the case may be, or to enable the appointing authority to decide whether the probationer is suitable for full membership or not. The Board did not also take action under R.21 for quite some time. In the instant case, the respondents have no case that the petitioner is not suitable for full membership. It is also evident from the materials on record that the Government interfered with Ext. P1 order only for the reason that the extension of probation was beyond the period of one year. In other words, the Government did not interfere with Ext. p1 for the reason that the petitioner was not suitable for full membership. The Board also has no case either in the counter affidavit or in Ext. P4 memo that it has decided to take action under sub-r. (c) of R.20 of the Kerala State and Subordinate Services Rules for the reason that the petitioner was found to be not suitable for full membership. From the materials on record it is evident that all that the Government intended when it sent Ext. P2 letter was to direct the Board to rectify the irregularity committed by it when it extended the probation of the petitioner beyond the period of one year.

12. The Government had after taking note of situations similar to the case on hand issued circular No. 55792/Rules-1/709/GAD dated 29.8.1979. The said

circular notices that in cases where the maximum period upto which the period of probation can be extended under R.21 expires by the time the probationer passes the prescribed departmental tests, the probation can be extended only after extending the period of probation to the extent required, in relaxation of the rules, that as the Government alone are competent to relax the rules, such cases are being referred to Government for orders and it would be hard to discharge a probationer from service after having known that he has passed the tests. The Government accordingly directed that the appointing authorities should strictly enforce the rules regarding probation (declaration/extension/termination of probation) contemplated under the General Rules. The relevant portion of the circular dated 29.8.1979 is extracted below:-

As per R.21 of the General Rules the Appointing Authority may extend the probation of a probationer to enable him to acquire special qualification or pass the prescribed test, or as the case may be, to enable the Appointing Authority to decide whether the probationer is suitable for full membership or not. Such extended period of probation shall terminate at the latest when the probationer has after the date of expiry of the period of probation prescribed for the service, class or category in which he is on probation, completed one year of duty in such service, class or category. However, instances have come to the notice of Government, where no action has been taken by the appointing authorities concerned for extension/termination of probation under General Rule 19 when probationers fail to pass the prescribed tests, within the normal period of probation. Probationers are being allowed to continue in service without extending their probation until they pass the test. By the time they pass the tests, the maximum period upto which the period of probation can be extended under General Rule 21 might be over, with the result that satisfactory completion of probation can be declared in such cases only after extending the period of probation to the extent required in relaxation of the rules. As Government alone are competent to relax the rules, such cases are being referred to Government for orders. It would be hard to discharge a probationer from service after having known that he has passed the tests. Therefore rules are invariably being relaxed in their favour in a routine manner. This actually creates an impression among the probationers that they will never be discharged from service or reverted for failure to pass the test within the prescribed period. They do not attach any importance to the matter and take their own time to acquire the test qualifications. The Government, therefore, direct that the Appointing Authorities should strictly enforce the rules regarding probation (declaration/extension/termination of probation) contemplated under the General Rules.

(emphasis supplied)

The Government again reiterated the said direction when it issued Circular No. 50403/Rules-1/82/GAD dated 8.5.1985 wherein also the Government noticed that it would be hard to discharge a probationer from service after the probationer becomes fully qualified and long number of years have passed.

13. In the instant case it is evident from the materials on record that for no fault of the petitioner, the Board did not extend his probation for a period of one year and thereafter move the Government for extension of probation for the period in excess of one year. It did not also take steps to discharge him from service under R.20(c) of the Kerala State and Subordinate Services Rules. Instead, the Board allowed the petitioner to continue in service and in the meanwhile he acquired the prescribed test qualifications. After the test qualifications were acquired, the Board extended his probation till the date of the last departmental test. It was this procedure which the Government took exception to in Ext. P2 letter. Having regard to the totality of the facts and circumstances, I am of the opinion that it would not be just, fair or proper to terminate the probation of the petitioner and to discharge him from service at this distance of time, that too, after he had acquired the prescribed test qualifications, when the Board has no case that his service was not satisfactory or he is not suitable for the post. The proper course would in my opinion be to direct the Board to extend the probation for a period of one year from the date on which he completed two years on duty within a continuous period of three years and thereafter move the Government for further extension of probation and to direct the Government to extend the probation of the petitioner till the date of the last departmental test.

A learned single Judge of this Court has in *Ramachandran Nair v. State of Kerala* (1980 KLT 804), held interpreting R.21 of the Kerala State and Subordinate Services Rules, 1958, that the Government have the power to extend the probation retrospectively even if it be after the expiry of the period of probation. Overruling the contention that the Government are not competent to extend the period of probation with retrospective effect it was held that if the Government are competent to pass an order extending the period of probation, there is no reason why it cannot retrospectively extend the period of probation even if it be after the expiry of the period of probation. I am therefore of the considered opinion that Ext. P4 notice and further proceedings pursuant thereto to terminate the probation of the petitioner cannot be sustained. I accordingly allow the Writ Petition, set aside Ext. P4 memo dated 2.4.2012 and direct as follows:-

(a) The competent authority in the Board shall, within two weeks from the date on which the petitioner produces a certified copy of this judgment before the Secretary of the Board, issue orders as directed in Ext. P2 letter extending his probation for a period of one year from the date on which he completed two years on duty within a continuous period of three years. The competent authority in the Board shall thereafter move the Government for extension of probation beyond the said period of one year and till the date of the last departmental test. A request in that regard shall be made to the Government within one week from the date on which orders are issued extending the probation of the petitioner by a period of one year.

(b) The Government shall within one month from the date of receipt of the request in that regard from the Board, issue orders extending the probation of

the petitioner till 14.7.2009, the date of the last departmental test. The Government shall thereafter communicate the order passed by it to the Secretary of the Board.

(c) The competent authority in the Board shall thereupon declare the probation of the petitioner in the category of Accounts Officer/Section Officer with effect from 14.7.2009, the date of the last qualifying departmental test. Needless to say, if after 14.7.2009, any person junior to the petitioner in service has been considered for promotion or promoted to higher posts, the entitlement of the petitioner for such promotion shall be considered and a decision taken expeditiously.