

(2009) 02 KL CK 0018
In the High Court Of Kerala
Case No : W.A. No. 1432 of 2005 (D)

State of Kerala and Others

APPELLANT

Vs

Prof. D. Gopalakrishna Pillai and Others

RESPONDENT

Date of Decision : 16-02-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Kerala Education Rules, 1959 — Rule 60, 62
Kerala Service Rules, 1958 — Rule 60, 63

Citation : (2009) 2 ILR (Ker) 98 : (2009) 1 KLJ 854

Hon'ble Judges : M.L. Joseph Francis, J; K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : Renjith Thampan, Adl. A.G. and K. Sandesh Raja, GP, for the Appellant; R. Rajendran Nair R. Sreeraj, Hariraj, Anil R. Nair, T.M. Reshmy and Vineetha B., for the Respondent

Final Decision : Dismissed

Judgement

K. Balakrishnan Nair, J.

W.P.(C) No. 16111/2006:

1. The petitioners are retired High School Assistant (in short "HSA"), who were working in aided schools. They completed the age of superannuation (55 years) in 10-2-1997 and 31-12-1996 respectively. But, on the strength of Rule 60(c) of Part I of the Kerala Service Rules (in short "the KSR") read with Rule 62 of Chapter XIV A of the Kerala Education Rules (in short "the KER"), they continued in service and retired only on 31-3-1997. All Government servants including aided school teachers retire on the last day of the month in which they attain the age of 55 years. But, in view of the said Rules, the teachers, who attain the age of 55 years. But, in view of the said Rules, the teachers, who attain the age of 55 years in the month of July or diereafter during an academic year, need retire from service only on the last day of the month in which die academic year ends. While the petitioners were continuing in service on the strength of the above

Rules, pay revision for the State Government employees, which was applicable to aided teachers also, was introduced with effect from 1-3-1997. But, the petitioners were not granted the benefits of the pay revision and also the consequential change in the terminal benefits payable to them. While so, based on the Full Bench decision of this Court in Accountant General Vs. Kunjamma, the Government issued Ext.P6 order, stating that all teachers who retired on 31-3-1997 are eligible to get the benefits of the pay revision with effect from 1-3-1997. But, simultaneously, the said order provided that the extended period of service or the emoluments drawn during that period will not be taken into account, while computing the pensionary benefits. In the meantime, the petitioners have already moved the Government seeking revision of their pensionary benefits. Those representations were rejected by the Government by Ext.P7 and P8 orders respectively, relying on Ext.P6 order. So, this Writ Petition was filed, challenging Exts. P6 to P8 and seeking consequential reliefs. While so, the government issued Ext.P11 notification dated 5-1-2007, amending the provisions of Rule 62 of Chapter XIV A of the KER with retrospective effect from 15-5-1986, which provided that the extended period of service beyond the actual date of superannuation, on the strength of Sub-rule (c) of Rule 60 of Part I of the KSR shall not be reckoned as qualifying service for promotion, increment and pension. The petitioners amended the Writ Petition, incorporating the challenge against Ext.P11 also. They submit, they have a vested right to have their pensionary benefits revised, taking into account the pay revision granted to them with effect from 1-3-1997. The said vested right cannot be taken away by an amendment to the Rule, as was done under Ext.P11. The petitioners also relied on the decisions of the Apex Court, to contend that vested rights cannot be taken away by a subordinate legislation. They also submitted that the Full Bench decision in Kunjamma's case (supra) has been affirmed by the Apex Court also. In view of the said decision, since their retirement takes effect only from 31-3-1997, they are entitled to count the last month's revised emoluments also, to compute the last ten months' emoluments. If that be so, that will have some impact on the monthly pension and D.C.R.G payable to them. So, the amendment to Rule 62 of the KER, introduced as per Ext.P11, is highly arbitrary and unjust and is liable to be declared so, it is submitted.

2. The State has filed a counter affidavit, supporting the impugned orders and also the impugned amendment. According to it, the Full Bench dealt with only the pay revision. The benefit of pay revision has been granted to all teachers, pursuant to that judgment and the amendment to Rule 60 of part 1 of the KSR was introduced, denying the pay revision benefits, only with effect from 15-12-2000, But, regarding the grant of pensionary benefits for the extended service, any ambiguity that lingered was removed by the amendment introduced as per S.R.O No. 591/2006 under the Kerala Public Services Act, 1968, to Rule 60(c) of Part I of the KSR. The State also pointed out that the decision in Kunjamma's case (supra) dealt with only the pay revision. Therefore, the State was fully competent to bring amendment to the Rules in relation to other

matters, like pension etc., with retrospective effect.

3. We heard the learned Counsel for the writ petitioners and also the learned Government Pleader for the official respondents. We also had the benefit of hearing the learned Counsel appearing in the connected writ petitions, wherein similar points arose for decision.

4. Rule 60(c) of part I of the KSR, as it stood in 1997, reads as follows:

60. (a)....

(c) The teaching staff of all educational institutions including Principals of Colleges who complete the age of 55 years during the course of an academic year shall continue in service till the last day of the month in which the academic year ends. They shall be entitled to the benefits of increments and promotion which fall due, before the last day of the month in which they attain the age of 55 years, but, they shall not be eligible for increment or promotion during the period of their service beyond such date. If they are on leave on the day they attain the age of 55 years and if there is no prospect of their returning to duty before the closing day of the academic year for vacation they shall be retired with effect from the last day of the month in which they attain the age of 55 years. But in cases where officers coming under this Rule are under suspension on the date of superannuation or thereafter but before the closing day of the academic year, they shall be retired from service on the date of superannuation or on the date of suspension whichever is later.

If, however, the day on which the teaching staff including Principals of Colleges attain the age of 55 years falls within the period of one month beginning with the day of re-opening of the institutions they shall cease to be on duty with effect from the date of such re-opening and they shall be granted additional in which they attain the age of 55 years. They shall be entitled to the benefit of increment if it falls due before the actual date on which they attain the age of 55 years.

If they are eligible to continue in service till the close of the academic year under the 1st paragraph of this sub-rule they shall be granted additional leave from the date of closing for vacation till the last day of the month when the date of closing is earlier than the last day of the month.

The additional leave granted under this sub-rule will not be counted against the eligible leave and will not be counted against the eligible leave and will count for pension. During the period of leave they will draw leave allowance at the same rate as the pay and allowances they would have drawn if they were on duty.

(Emphasis supplied)

Rule 62 of Chapter XIV A of the KER, as it stood in 1997, reads as follows:

62. Retirement: A teacher who completes the age of retirement during the course of an academic year but not within one month from the date of reopening shall continue in service till the close of the school for the mid-summer vacation.

But if he is on leave on such date with no prospect of returning to duty or on leave from the commencement of the academic year to the date of superannuation he may be retired on the due date. If the teacher applies for any leave other than casual leave during the period of his continuance under this Rule beyond the age of retirement he shall be retired forthwith.

Provided that in cases where the academic year is extended beyond the 31st day of March in any year a teacher to whom this Rule is applicable, shall retire on the last day of March itself.

Earlier, a confusion was prevailing whether the extended service given to the teachers could be counted for pensionary benefits. The Government clarified the matter by issuing G.O(P) 360/86/Fin. dated 15-5-1986. The said order reads as follows:

As per Rule 60(c) Part I, K.S.R., teaching staff of all Educational Institutions including Principals of Colleges who complete the age of 55 years during the course of an academic year shall continue in service till the last day of the month in which the academic year ends. The intention of the Government was that such continuance beyond the date of superannuation should not confer on them any benefit which is not available to any other Government Servants except the salary for the extended period of service. In the G.O read above it was ordered that the aided school teachers coming under Chapter XIV B and C of Kerala Education Rules who continue in service till the last day of the month in which the academic year ends, are allowed to count this period for increments and pension. This was under a wrong notion that as per Kerala Service Rules such extended period will count for increment and pension. But the actual position is that such teaching staff were allowed the benefit of increment during the extended period of service and that too only if the increment falls due before they attain the age of 55. By allowing the extended period for pension, a portion of the Government employees will get the benefit of extension of the age of superannuation beyond 55 years of age, which is not available to other Government employees. Government have no intention to confer this advantage to any category of its employees.

2. In the circumstances Government hereby order that in the case of teaching staff of the Educational Institutions including Principles of Colleges who are allowed to continue beyond the age of 55 years till the end of the academic year, their extended service will not count for pension. Past cases will not be re-opened.

(Emphasis supplied)

By the above order, it was provided that the extended period of service will not be reckoned for the purpose of pension. But, it was also ordered that past cases need not be re-opened. In view of the said order and the provisions contained in Rule 60(c), the various service benefits such as promotion, increment, pension etc., were not granted, reckoning the extended period of service, enjoyed by the

teachers in Government and aided Schools, by virtue of Rule 60(c). While so, a dispute arose whether the pay revision introduced with effect from 1-3-1997 could be extended to such teachers on extended service. The Rule was silent on that aspect. A Full Bench of this Court in Accountant General Vs. Kunjamma, held that whatever the rule-making authority wanted to exclude was expressly excluded and pay revision not being one of the items mentioned, the employees are entitled to get the benefit of the same. The teachers were held to be entitled to get the benefit of the pay revision introduced with effect from 1-3-1997. It was declared that though the teachers reached the age of superannuation earlier, as they actually retired only on 31-3-1997, they are eligible to get the benefit of the pay revision introduced with effect from 1-3-1997. In view of the observation of the Full Bench that whatever the rule-making authority wanted to exclude was specifically mentioned, it was contended that the said service could be counted for pension also, as Rule 60(c), as it stood then, did not mention about Pension. If that be so, the pensionary benefits will be increased by virtue of the pay revision which took effect from 1-3-1997. Apparently, to get over the above claims, the Government amended the Kerala Service Rules, as per S.R.O. No. 591/2006 dated 10-8-2006 and S.R.O. No. 241/2007 dated 2-3-2007. As per S.R.O. No. 7/2007 dated 5-1-2007, Rule 62 of Chapter XIV of the KER was also amended.

5. Now we will refer to the amendments, which are relevant for the decision of this case. As per S.R.O. No. 591/2006 dated 10-8-2006, in. Rule 60(c) of Part I of the KER, the following sentence was added as the second sentence of it:

But the extended period of service will not count as qualifying service for pension and the pay received during the period will not be reckoned for computing average emoluments or pensionary benefits, or commuted value of pension.

This amendment was given effect from 15-5-1986, which is the date of G.O(P) 360/86/Fin. As per S.R.O. No. 7/2007 dated 5-1-2007, Rule 62 of Chapter XIV A of the KER was amended, adding the following proviso:

Provided further that the extended period of service beyond the actual date of superannuation of the teacher shall not be reckoned as qualifying service for promotion, increment and pension, and the provisions of Sub-rule (c) of Rule 60 of Part I of the Kerala Service Rules shall apply to the teacher.

6. This amendment was brought into force from 15-5-1986 By S.R.O. No. 241/2007 dated 2-3-2007, four Notes as Notes 6 to 9 were added number Note 5 to Rule 63 of part III of the KSR. Note 9, which is relevant in this case, reads as follows:

In respect of teaching staff of educational institutions who continue in service till the last day of the month in which the academic year ends by virtue of Rule 60(c) of the Kerala Service Rules, Part I, the term "retirement" means superannuation, i.e., the last day of the month in which one completes the age of 55 years/60 years as the case may be.

The above amendment was also given effect from 15-5-1986.

6. If the amendments are valid, the petitioners are not entitled to count the service rendered by them between the date they reached the age of superannuation and 31-3-1997. They are also not eligible to reckon the revised salary they received for the month of March, 1997, for the purpose of computing the terminal benefits. A subordinate legislation can be impugned on various grounds. Those grounds have been succinctly stated by a Division Bench of this Court in *Pankajaksy v. George Mathew* 1987 (2) KLT 723. The relevant portion of the said judgment reads as follows:

12. Thus, the Rule made under a statute by an authority delegated for the purpose can be challenged on the ground (1) that it is ultra vires of the Act; (2) it is opposed to the Fundamental rights; (3) it is opposed to other plenary laws. To ascertain whether a Rule is ultra vires of the Act, the Court can go into the question (a) whether it contravenes expressly or impliedly any of the provisions of the statute; (b) whether it achieves the intent and object of the Act; and (c) whether it is "unreasonable" to be manifestly arbitrary, unjust or partial implying thereby want of authority to make such rules.

7. Going by the pleadings in this writ petition, it could be seen that the main ground attack is that the retrospectivity given to the Rule affects their vested right and therefore, the same offends Article 14 of the Constitution of India. So, the point to be considered is whether the petitioners had a vested right to count the extended period of service for the purpose of pensionary benefits and to take into account the revision of salary they got during the extended period of service for the purpose of computing the terminal benefits. The Rule, as it stood before the amendment, expressly provided that increments and promotions which fell due during the extended period of service should not be granted. The executive order G.O(P) 360/86/Fin. Dated 1-5-1986 also provided that the extended period cannot be counted for pension. That means, the teachers were treated as retired on the date of superannuation and the terminal benefits were being granted to them accordingly. So, the claim that they were enjoying a vested right regarding these matters, is plainly untenable. At any rate, the service was never counted for pensionary benefits after 15-5-1986. Now, because of the observations of the Full Bench, since certain disputes arose, the Rule has been amended with retrospective effect from 15-5-1986. Therefore, the claim of the petitioners that it was a vested right and the right in this regard accrued to them long ago, cannot be accepted. So, the decisions cited concerning divesting of vested rights, by retrospective amendment to the Rules, can have no application to the facts of this case. Accordingly, the challenge raised against the amendments, mainly, based on the existence of a vested right in this regard, cannot be accepted.

8. The learned Counsel for the petitioners pointed out that the decision of this Court in *Accountant General v. Kunjamma* (supra) was affirmed by the Apex Court also and therefore, the observations therein regarding the date of retirement of teachers will bind the State. The said contention cannot be

accepted, in view of the amendment to Rule 63 of Part III of the KSR. It has been specifically provided that the date of retirement of teachers will be the date of superannuation. So, any lack of clarification or any ambiguity regarding the legal position has been clarified by the amendment with retrospective effect. Further, when the Government, acting as the delegate of the legislature, are amending the Rule; they are not bound by any observations in a judgment.

9. In view of the above discussion, it follows that the amendments introduced by the Government are efficacious to block the claims raised by the writ petitioners. Further, we find no infirmity in the amendments introduced by the Government, warranting interference with them by this Court under Article 226 of the Constitution of India. In the result, the Writ Petition fails and it is dismissed.

W.A.NO. 1432/2005:

10. The respondents in the original Petition are the appellants. The petitioners therein are the respondents. The Original Petition was filed, seeking the following reliefs:

(i) To declare that the petitioners having retired from service on 31-3-1997, and the monthly pension and other pensionary benefits became due to them on 1-4-1997 are entitled to the maximum ceiling of Rs. 2,80,000 on DCRG as also the benefit of commutation of a portion of their revised pension on account of the Exhibit P4 order.

(ii) To declare that the insistence of the Government that those who retired from the AICTE/UGC/Medical Education category between 01-01-1996 and 28-02-1997 (including 28-02-1997) shall not be entitled to commute a portion of their revised pension on account of the concession granted by Exhibit P4, is illegal and unconstitutional.

(iv) To issue a writ of mandamus or any other appropriate writ, order or direction commanding the respondents to grant the petitioners DCRG to the tune of Rs. 2.80 lakhs irrespective of their dates of retirement.

(v) To issue a writ of mandamus or any other appropriate writ, order or direction commanding the respondents to allow the petitioners to commute a portion of their revised pension on account of the concession granted by Exhibit 4.

11. The brief facts of the case are the following: The respondents/writ petitioners are college teachers, who retired from service on 31-3-1997. Their dates of superannuation were between July 1996 and February, 1997. The monthly pension and pensionary benefits payable to them, who retired period to 1-3-1997 were governed by Ext.P1 Government order dated 1-6-1994. The Government issued pay revision order, revising the pay scales applicable to State Government employees and teachers with effect from 1-3-1997. The government also issued G.O (P) No. 3001/98/Fin. dated 25-11-1998, revising the pensionary benefits payable to the State Service pensioners. A copy of that order is produced as Ext.P2 in the Original petition." While so, the Government issued Ext.P3 order,

extending the benefit of U.G.C pay scales to the teaching staff of universities, various affiliated Colleges, etc., by which the respondents were also benefitted. This pay revision was given effect from 1-1-1996. But, it was provided that the retirement benefit will be granted to College/University Teachers, including Physical Education Teachers, as per the existing pension Rules under the State Government. The result was that the respondents were eligible to get DCRG only up to a maximum of Rs. 80,000/- where as those who retired after 1-3-1997 were eligible to get DCRG of Rs. 2.80 lakhs. Though some of the shortcomings in Ext.P3 order were rectified by Ext.P4 order dated 17-1-2001, the anomaly regarding the quantum of DCRG remained unaltered. Therefore, the respondents represented by filing Ext.P5 and similar other representations, seeking redressal of their grievance regarding the quantum of DCRG. Since the said representations did not evoke any response, the Original Petition was filed, seeking the reliefs quoted above.

12. The learned Single Judge, who heard the Original Petition, allowed it, holding that the decision of the Full Bench in Accountant General v. Kunjamma (supra) applies in all fours to the facts of this case. So, the O.P was allowed in terms of the said Full Bench judgment. The Government appealed. In the Writ Appeal the main point that was canvassed was that the decision in Kunjamma's case is pending before the Supreme Court in appeal. But, the Division Bench did not accept the said contention and dismissed the Writ Appeal, following the decision in Kunjamma's case, a Review Petition was attempted by filing R.P. No. 969/2005, in which the amendment introduced to Rule 60(c) of Part I of the KSR was produced. The said R.P was dismissed, holding that the amendment cannot be pressed into service to review the judgment or to take away the benefits available to the teachers under the judgment. The matter was carried in appeal before the Apex Court. The judgment dismissing the Writ Appeal was challenged in Civil Appeal No. 5907/2908 and the order in the R.P was challenged in Civil Appeal No. 5908/2008. Both the Civil Appeals were disposed of by the Apex Court, by the common judgment dated 30-9-2008. The said judgment reads as follows:

1. Leave granted.

2. Challenge in these appeals is to the judgment of a Division Bench of the Kerala High Court dismissing the appeal filed by the State, before the High Court it was contended that the decision of the Full Bench of the High Court in Accountant General Vs. Kunjamma, relied on by learned Single Judge was in appeal before this Court and an order of stay of the said Court had been passed, but, the High Court was of the view that in view of the decision of the Full Bench the writ appeal was without merit.

3. It is submitted that the high Court's judgment is dated 19-7-2005, while the identical issue came up for consideration in State of Kerala and Another Vs. P.V. Neelakandan Nair and Others, , which was decided on 11-7-2005.

4. Learned Counsel for the appellant submitted that the view expressed in C.A. No. 2907 of 2005 decided on 22-2-2001 has also relevance.

5. We are of the view that the case at hand needs to be decided in line with what has been stated in P.V. Neelakandan's case (supra) and in CA. 2907 of 2005. we, therefore, remit the matter to the High Court to hear the matter afresh and decide the writ appeal in the light of what has been stated by this Court in the aforesaid two decisions.

6. The appeals are disposed of accordingly.

In view of the above direction, the Writ Appeal is again posted for hearing. The High Court is directed to re-hear the appeal, taking into account the decisions of the Apex Court in State of Kerala and Another Vs. P.V. Neelakandan Nair and Others, and the decision in C.A. No. 2907/2005.

13. We have gone through the above two judgments. The decision in P.V. Neelakandan Nair's case (supra) affirms the decision in Kunjamma's case (supra). The decision in C.A. No. 2907/2005 deals with what is the date of retirement of an employee of the BSNL, in the light FR 56. It was held that the date of retirement is the date on which the employee attains the age of 58 years and not the last day of the month on which he goes out of service by operation of FR 56.

14. In view of the amendments introduced to Rule 60 of part I of the KSR and Rule 63 of Part III of the KSR with retrospective effect from 15-5-1986, we feel that it is not necessary to venture to interpret the Rules concerned. Any ambiguity in those Rules concerning the effect of terminal benefits, by reason of the extension of service beyond the normal date of retirement, has been cleared now. In the connected Writ Petition, we have already upheld the validity and also the re receptivity given to the amended Rules. Since the said amendments now hold the field with retrospective effect, we are of the view that the reliefs sought by the respondents/petitioners cannot be granted. In the result, the Writ Appeal is allowed and the Original Petition is dismissed.

O.P. Nos. 9881/1999, 1228, 3417 & 23200/2002, 3311 & 30169/2003. W.P.(C) Nos. 25413/2006, 1905, 1909 & 2090/2007:

In view of the judgment of this Court in W.P.(C) No. 16111/2006 W.A. No. 1432/2005, these writ petitions are dismissed.