
(2014) 10 KL CK 0226
In the High Court Of Kerala
Case No : Writ Appeal No. 1406 of 2012

State of Kerala

APPELLANT

Vs

M.T. Philip

RESPONDENT

Date of Decision : 10-10-2014

Acts Referred:

Citation : (2014) 10 KL CK 0226

Hon'ble Judges : Ashok Bhushan, C.J;A.M. Shaffique, J

Bench : Division Bench

Advocate : Girija Gopal, Spl. Government Pleader, Advocate for the Appellant; V. Philip Mathew, Advocate for the Respondent

Judgement

A.M. Shaffique, J.—This appeal is filed by the respondents in the original petition. The original petition is filed by the first respondent herein challenging Ext. P18 communication dated 25/06/2002 issued by the Senior Accounts Officer from the Accountant General's Office intimating the Government that no monetary benefit would be granted to the petitioner from the date of regularization of his promotion as Assistant Commandant and Deputy Commandant from 06/10/1976 and 13/11/1981 respectively unless specific orders are passed by the Government. Petitioner also prayed for directing the respondents to disburse the full pay and allowances and other service benefits for the regularised period of service.

2. The petitioner died during the pendency of the original petition and his legal heirs have been impleaded as respondents 2 to 4.

3. The facts involved in the above case in brief are as under:

Sri M.T. Philip was appointed as the Armed Police Inspector by direct recruitment in Malabar Special Police (MSP), III Battalion on 10/09/1962. MSP III Battalion was disbanded on 01/05/1967 and therefore he was relieved from service. He filed O.P. No. 2400 of 1967 before this court challenging discharge from service. The same was disposed of directing the Government to consider his

representation. Later, by another selection process, he was appointed as Reserve Sub Inspector in 1977 when a special recruitment was made from persons discharged from MSP III Battalion. In the meantime, in another Original Petition, directions were issued by this High Court stating that similarly placed persons would be entitled to all benefits of service in MSP as if they were recruited under MSP Subordinate Service. Such persons were reinstated in service as Supernumerary Armed Police Sub Inspectors in MSP. The said persons were later absorbed in newly formed Kerala Armed Police Battalion during November 1972. Sri M.T. Philip therefore filed O.P. No. 2178 of 1986 seeking for a direction to restore his seniority with effect from 1964 on the basis of his original appointment in M.S.P. III Battalion. He relied upon the decision taken by the Government with reference to similarly placed persons who had obtained orders as directed by the High Court. By judgment dated 30/05/1986 in O.P. No. 2178 of 1986 this Court directed the Government to dispose his representation dated 17/03/1986 in accordance with law. In the meantime, he had also filed another representation dated 28/07/1986 claiming all service benefits from 10/09/1964. The Government, as per Ext. P1 dated 15/06/1987 formed an opinion that his case has to be considered sympathetically as similarly placed persons were given all benefits as if they were recruited under M.S.P. Subordinate Services. Accordingly, it was ordered to allow all benefits allowed to Sri S. Sadanandan and others as per Government Order dated 08/04/1981 reckoning his initial appointment as Armed Police Inspector, MSP III Battalion from the date of effective advice by the Kerala Public Service Commission (KPSC). It was also mentioned that the same will be subject to review based on the combined seniority list to be prepared based on Government order dated 18/01/1984. It was therefore ordered that the Director General of Police will refix the rank and seniority of the petitioner in the cadre of Armed Police Inspector observing all required formalities and forward proposals to Government for fixation of his seniority in higher grades. It was further mentioned that "Sri Philip will not, however, be entitled to arrears of pay for the above periods."

4. Ext. P1 came to be challenged in a writ petition filed by certain others and by judgment dated 01/04/1991 in O.P. No. 10376 of 1998, this Court upheld Ext. P1 order. Pursuant to Ext. P1, petitioner was promoted to the post of Assistant Commandant and Deputy Commandant respectively by Government order dated 18/06/1992 and 05/5/1993 temporarily. Subsequently, by Ext. P3 Government order dated 30/01/1996, promotions of the petitioner to the cadre of Assistant Commandant and Deputy Commandant was regularised with effect from 06/10/1976 and 13/11/1981 respectively. In the meantime, when an opportunity came, based on his promotions, petitioner claimed that he should be considered for selection to Indian Police Service. He filed O.P. No. 14317 of 1996 seeking for a direction that his promotion should not be treated as notional. This Court, by judgment dated 30/10/1996 observed that the petitioner is entitled to get the benefits of his promotions as Assistant Commandant with effect from 06/10/1976 and Deputy Commandant with effect from 13/10/1981 for the

purpose of consideration for appointment by promotion to the Indian Police Service. By Government order dated 24/12/1996 produced as Ext. P6, he was confirmed in the post of Assistant Commandant with effect from 06/10/1977. By Ext. P7 dated 10/11/1997, Government informed the Superintendent of Police indicating that the notional service of the petitioner will have to be treated as continuous service for the purpose of seniority, fixation of pay and promotion. Petitioner retired from service on superannuation with effect from 30/04/1997. His complaint is regarding non-payment of pay and allowances for the regularised period of service. He claimed full pay and allowances for the period as Armed Police Inspector from 01/05/1967 to 05/10/1976, as Assistant Commandant from 06/10/1976 to 30/06/1977 and from 01/07/1977 to 12/11/1981 after deducting the salary already drawn, and as Deputy Commandant from 13/11/1981 to 01/07/1992 after deducting the salary already drawn. He submitted Ext. P11 representation on 10/07/1995 which was repeated by Ext. P12 dated 01/08/1998. Several reminders were also sent and ultimately petitioner was informed by Ext. P17 dated 17/05/2002 that the matter was referred to the Accountant General's office. Ext. P18 is the reply from the Accountant General's office. Petitioner also relies upon Ext. P19 an order passed by the Government in respect of one Shambudevan, Driver who was given the benefits taking into account his initial appointment in MSP III Battalion from 06/04/1965.

5. Counter affidavit was filed by the 1st respondent inter alia stating that the petitioner is not a person similarly placed as that of Sri S. Sadanandan and others. Petitioner was not in service for more than 10 years. It was submitted that he was appointed as Armed Police Inspector as per Ext. P1 order dated 15/06/1987 clearly indicating that he will not be entitled to arrears of pay for the regularised period. Therefore the question of monetary benefit cannot be considered. It is therefore contended that in so far as the petitioner is not a person similarly placed as that of others who were given the monetary benefits, petitioner cannot demand the same.

6. The learned Single Judge, after an elaborate consideration of the matter, formed an opinion that when the Government issued order dated 13/01/1996 by way of Ext. P3 promoting the petitioner to the cadre of Assistant Commandant with effect from 06/10/1976 and Deputy Commandant with effect from 13/11/1981 refixation of benefits has to relate to the said posts. Since the word mentioned in Ext. P17 is "refixation" the same has to be done based on the dates on which promotions were ordered as per Ext. P3. It is also observed that from Ext. P17 it was clear that the intention of the Government was to grant monetary benefits to the petitioner from the date of regularization as Assistant Commandant and Deputy Commandant from the respective dates of 06/10/1976 and 13/11/1981. Therefore it was ordered that the respondents have to refix the pay and allowances of the petitioner as in the post of Assistant Commandant with effect from 06/10/1976 and Deputy Commandant with effect from 13/11/1981 and all consequential benefits were to be granted including revision

of pensionary benefits.

7. The aforesaid judgment is impugned by the State inter alia contending that when it was specifically mentioned in Ext. P1 that the petitioner will not be entitled to arrears of pay for the period from 1967 to 1977, the petitioner was estopped from claiming the same. Further, it is contended that any monetary benefits consequent to regularisation of promotion could be given effect only from the date of actual assumption of charge in terms of Rule 23(a) of Part I KSR. That apart, it is contended that Ext. P17 has been issued only for the limited purpose of ascertaining whether any monetary benefits could be granted to the petitioner and it is not an incident where a direction can be issued refixing the pay and allowances.

8. Heard the learned Government Pleader Smt. Girija Gopal on behalf of the appellants and the learned counsel Sri Philip Mathew appearing on behalf of the respondents.

9. It is not in dispute that as per Ext. P1, while considering the representation of the petitioner, Government directed the Director General of Police to refix the rank and seniority of the petitioner in the cadre of Armed Police Inspector reckoning his initial appointment in the MSP III Battalion. However, it was made clear that he will not be entitled to arrears of pay for the aforesaid period. It is also not in dispute that the petitioner was discharged from service of MSP on 01/05/1967. He was thereafter recruited through KPSC by a selection process and joined Kerala Armed Police Battalion in 1977. Therefore, from 1/05/1967 till 1977 when he was appointed as a fresh recruit as a Reserve Sub Inspector, he was not in employment. As far as others were concerned especially Sri S. Sadanandan and similarly placed persons, they challenged their order of discharge from service which was upheld by this Court and they were reinstated in service as Supernumerary Armed Police Sub Inspector in MSP. They were later absorbed in regular post available in KAP Battalion from November 1972. Apparently, that might be the reason for the Government to have formed an opinion that the petitioner will not be entitled for arrears of pay for the said period. Ext. P17 would indicate that the request of the petitioner was to refix his pay and allowances with effect from 06/10/1976 as Assistant Commandant and from 13/11/1981 as Deputy Commandant. It is not in dispute that he has not worked in the said posts at the relevant time. Orders were passed only as per Ext. P1 dated 15/06/1987. Until such time, he was not working in the said post. Ext. P17 was relied upon by the learned Single Judge to indicate that the Government intended refixation of benefits from the said dates, which apparently indicates refixation of salary and allowances. Perusal of Ext. P17 would indicate that the Government was referring to the claim made by the petitioner. Ext. P17, by itself will not give any right to the petitioner. It is only an intimation sent to the petitioner taking into consideration his arguments and informing him that the matter was referred to the Accountant General for necessary action, for refixation etc. The argument of the Learned Government Pleader is that Ext. P17

was only an intimation with reference to the claim made by the petitioner for refixation of pay and allowances and it is not an opinion expressed by the Government that the pay and allowances of the petitioner will be refixed from the dates aforementioned. We are also of the view that in Ext. P17 Government was only referring to the claim made by the petitioner and to that extent, the learned Single Judge was not justified in placing reliance upon Ext. P17 to direct refixation of pay and allowances from the date of his actual joining in the new service.

10. The Learned Government Pleader also relied upon the following judgments to support her argument that the person who has not worked in the said posts cannot be granted monetary benefits unless it is specifically ordered.

i) Paluru Ramkrishnaiah and Others Vs. Union of India (UOI) and Another, is relied upon wherein a three Judge Bench of the Supreme Court, confirmed the judgment of the Madhya Pradesh High Court, wherein it is held that on the principle of "no pay for no work", a person will not be entitled to any pay and allowance during the period for which he did not perform the duties of a higher post although after due consideration he was given a proper place in the gradation list having deemed to be promoted to the higher post with effect from the date his junior was promoted. In such event, such person is not entitled to claim any financial benefit retrospectively. At the most, the entitlement is only for refixation of their present salary on the basis of the notional seniority granted to them in different grades so that their present salary is not less than those who are immediately below them.

ii) Virender Kumar, General Manager, Northern Railways, New Delhi Vs. Avinash Chandra Chadha and others, is relied upon to contend that there is neither equity nor justice for award of emoluments of the higher posts with retrospective effect. It is further observed that when the respondents have not actually worked in the said posts, on the principle of "no work no pay" they will not be entitled to the higher salary.

iii) In State of Haryana and Others Vs. O.P. Gupta, etc., while considering the obligation to pay the salary and allowances on account of notional promotion, it is held that the entitlement to work arises only when they are promoted in accordance with the Rules. Preparation of the seniority list is a condition precedent for consideration and then to pass an order of promotion and posting to follow. Until such exercise is done, the respondents cannot be posted in the promotional posts. It is therefore found that there is no legal foundation in the argument that the employees were willing to work and they were not given the work after posting them in the promotional post. Reference is also made in the said judgment to the view taken by the Supreme Court in Paluru Rama Krishna (supra) and Virender Kumar (Supra).

iv) Another judgment relied upon is State of Kerala v. Jacob (2000 (3) KLT 556). This is a Division Bench judgment of this Court wherein it is held that when the

respondent had not worked in the various posts in the Medical Records Library and after his transfer to the Medical College Men's Hostel, he got his due promotions. He was not entitled for the monetary benefits as he had not worked in the said post in the Medical Records Library.

v) Another three Judge Bench judgment relied upon is A.K. Soumini Vs. State Bank of Travancore and Another, wherein the Supreme Court held in paragraph 8 as under:

"8. In State of Haryana v. O.P. Gupta this Court had occasion to deal with a claim for arrears in a case where in adjudicating a dispute relating to seniority. This Court directed the department concerned to prepare a fresh seniority list strictly in accordance with the rules ignoring inconsistent administrative instructions and in compliance thereof a fresh seniority list came to be prepared and eligible persons were even given notional promotion by the department from a deemed date. When such promotees claimed for payment of arrears of salary as well, this Court rejected the claim applying the principle of "no work, no pay" and set aside the orders of the High Court, countenancing such claims to be illegal for the reason that the promotees did not work for the period in the promoted capacities. In coming to such conclusions this Court followed the earlier decisions reported in Paluru Ramkrishnaiah v. Union of India and Virender Kumar, G.M., N. Rlys. v. Avinash Chandra Chadha."

vi) In Sucheendran Vs. State of Kerala, Division Bench of this Court held that if there is no difference in the work of Assistant Public Prosecutor Gr. II and Assistant Public Prosecutor Gr. I and the petitioner was doing the same work, the principle of "no work no pay" will not apply and in such circumstances, difference in salary for the retrospectively promoted post cannot be denied on the said principle.

vii) In Union of India (UOI) Vs. B.M. Jha, the proposition of "no work, no pay" was again upheld by the Supreme Court.

viii) Yet another judgment relied upon is State of Haryana v. S.K. Khosla ((2007) 15 SCC 777) wherein it is held that when the respondents had never worked during the period in the promotional posts the principle of "no work, no pay" applies and the question of payment of arrears of salary with retrospective effect from the notional dates does not arise.

ix) In State of Punjab and Another Vs. Surinder Pal Singh and Another, it is again reiterated that there is no justifiable reason to give salary to the respondents for the period for which they had not worked. They were only entitled to get their notional increments as they ought to have been appointed from the year 1998 onwards.

11. On the other hand, the Learned counsel for the respondents, while supporting the judgment of the learned Single Judge, relied upon the following judgments:

i) In *State of Kerala and Others Vs. E.K. Bhaskaran Pillai*, , the Supreme Court, while relying upon various judgments relating to grant of monetary benefits when retrospective promotion is given, observed that the same depends upon case to case. When the administration has wrongly denied a person's due promotion, he should be given full benefits including monetary benefits subject to there being any change in law or some other supervening factors. It is held that, to set down any hard and fast rule is difficult and the principle "no work, no pay" cannot be accepted as a rule of thumb. It is observed that there are exceptions where Courts have granted monetary benefits also. In the said case, it is observed that persons junior to the petitioner were appointed and he was wrongly denied the due promotion. In such an event, when he was given the monetary benefit from the date of filing the original petition, the Supreme Court held that the same was reasonable.

ii) Reference is placed on a judgment of the Punjab and Haryana High Court (DB) in *State of Haryana Vs. Bani Singh Yadav*, . In the said judgment while evaluating various other judgments, it is observed that the principle "no work, no pay" can be invoked by the employer to deny wages to the employee only in those cases in which the employee voluntarily abstains from discharging the duties assigned to him/her. It cannot be applied in the cases in which the employee is kept away from duty or is prevented or rendered ineligible to discharge duties of a particular post due to an act or omission of the employer. The said judgment also refers to the judgment in *Union of India Vs. K.V. Jankiraman, etc. etc.*, wherein the Supreme court observed that the principle of "no work, no pay" cannot be applied to all cases of retrospective promotion. In a case where the employer is willing to work and is kept away from the work by the authority for no fault of his, the said principle cannot be applied.

(iii) Reference is also made to *Sucheendran's case (supra)* to contend that the principle of "no work, no pay" is not an absolute rule.

(iv) The learned counsel also placed reliance on the judgment in *Maya Mathew (Dr.) v. Secretary and Another* 2010 (3) KHC 934) wherein this Court, relying upon *Sucheendran's case (supra)* held that when the promotion do not involve change of duty, the same should be given effect from the date on which the vacancy arose and in such circumstances, the concerned person is entitled to salary and allowances in the category effective from that particular date.

12. Having regard to the legal proposition aforementioned, there cannot be any dispute that the principle of "no work, no pay" may not apply to instances where there was deliberate inaction on the part of the employer in giving promotion though a vacancy had arisen to the said promotion post. In instances where there is no change of work with reference to the promotion post, and retrospective promotion is granted, the employee is entitled for monetary benefits from the effective date of promotion.

13. Coming to the factual background involved in this petition, in Ext. P1 the

Government had taken a lenient view in respect of the petitioner and similarly placed persons who were thrown out of employment. However, in the case of the petitioner, when it is noticed that he was selected and appointed to the post of Reserve Sub Inspector in 1977 and he was not working from 10/09/1964 to the said date, by an order dated 15/06/1987 it was ordered that he should be given all the benefits reckoning his initial appointment in the post of Armed Police Inspector in MSP III Battalion on 10/09/1964. However, it is made clear that he will not be entitled to arrears of pay for the said period. What is claimed by the petitioner is that subsequently by Ext. P3 dated 30/01/1996, his promotion to the cadre of Assistant Commandant was regularized with effect from 06/10/1976 and Deputy Commandant from 13/11/1981. It is also not in dispute that until the date when orders were passed in terms of Exts. P1, he was not working in the promotion post. Even according to him, he was not paid salary in the post of Assistant Commandant until his probation was declared. Therefore, this is not an instance where there was any deliberate inaction on the part of the Government in giving retrospective promotion to the petitioner. This is a special circumstance which occurred due to disbanding of MSP III Battalion. Petitioner though challenged the said discharge, did not proceed further and later he got recruited as Reserve Sub Inspector. When a benefit has been given in the form of Ext. P1 making it clear that he was not to be paid monetary benefits during the said period, we do not think that the petitioner was entitled for any monetary benefits from the date of notional promotion. The learned Single Judge has placed much reliance on Ext. P17 to grant the benefit, which we had already held is not justified. Reference is also made to the Judgment of the Division Bench of this Court in E.K. Bhaskaran Pillai's case (supra), wherein it is observed that refixation automatically results in grant of monetary benefit. We do not think that the facts and circumstances of this case has any bearing on E.K. Bhaskaran Pillai's case (supra). Government never indicated that the pay and allowances will be refixed from the date of notional promotion. They have only given notional promotion for the purpose of fixing the seniority to permit the petitioner to have continuity in service from the date on which he had joined MSP III Battalion. Therefore, we do not think that the petitioner is entitled for any relief sought for in the original petition.

In the result,

- i) This writ appeal is allowed.
- ii) The judgment of the learned Single Judge dated 18/05/2010 in O.P. No. 32502/2012 is set aside.