

(1996) 02 KL CK 0024
In the High Court Of Kerala
Case No : O.P. No. 16392 of 1994

Sunny

APPELLANT

Vs

Kerala Water Authority

RESPONDENT

Date of Decision : 28-02-1996

Acts Referred:

Citation : (1996) 1 LLJ 636

Hon'ble Judges : K. Narayana Kurup, J

Bench : Single Bench

Advocate : C.P. Sudhakara Prasad, for the Appellant; Babu Varghese and K. Thankappan, Govt. Pleader, for the Respondent

Judgement

K. Narayana Kurup, J.—As per Ext.PI Government Order dt. September 9, 1986, it was ordered inter alia that the N.M.R, workers of the Public Works Department appointed prior to April 7, 1970 on regularisation would be allowed to continue in service till 58 years of age. As per Ext.P2 proceeds of the first respondent, Kerala Water Authority (for short "the Authority") the benefit conferred by Ext. PI G.O. was extended to the N.M.R. workers of the Authority also. The first respondent-Authority thereafter issued Ext.P3 proceedings dated February 23, 1987 to reinstate those N.M.R. personnel appointed prior to April 7, 1970 and absorbed into regular establishment in the Authority, but who have retired from service on attaining the age of 55, and allow them to continue in service till the age of 58, based on Ext.P 1 G.O.As per Ext. P3 it was also decided that such reinstatement may be restricted to incumbents having atleast 3 months for attaining the age of 58. Ext.P3 was passed based on the resolution passed by the Authority in its 43rd meeting held on January 30, 1987. Since the petitioner was entitled to be reinstated in service on the basis of Exts. PI to P3 orders - proceedings - he submitted representations dt. March 7, 1987 and December 18, 1987 to the Executive Engineer of the First Respondent - Authority who instead of reinstating the petitioner sought clarification from the authority. Since the Executive Engineer did not take any steps to reinstate the petitioner, the

petitioner filed Ext.P4 representation dt. March 7, 1988 to the first respondent, but of no avail. The petitioner completed 58 years of age on April 13, 1988 without being reinstated in service. Thereafter, he preferred Ext.P5 representation dt. December 7, 1988 requesting to give arrears of salary from May 1, 1985 to April 30, 1988 and to refix the pensionary benefits accordingly. But nothing was done to redress the grievances of the petitioner. Thereafter, Government issued Ext.P6 letter to the Managing Director of the first respondent-Authority stating that the N.M.R. Workers whose services were terminated on completion of 55 years of age and who were subsequently reinstated in service and allowed to continue till the age of 58 years, may be given arrears of salary for the period out of employment, after adjusting the pension already drawn for the period out of employment. According to the petitioner, the first respondent without considering the implication of Ext.P6 issued Ext.P7 order dt. March 9, 1990 stating that the petitioner will be allowed only notional fixation of pay and pension as if he had retired from service at the age of 58 without the benefit of back arrears. Aggrieved by Ext.P7, the petitioner submitted Ext.P8 representation to the Minister of Irrigation. Thereafter, the first respondent-Authority by Ext.P9 letter dt. May 20, 1992 addressed to the second respondent informed the latter that the question of granting the benefit of Ext.P6 is to be considered by the Government. Again, the first respondent had by Ext.P10 communication requested the Government to consider the petitioner's request for arrears of salary for the period he was kept out of service on sympathetic grounds. On receipt of Ext.P10 communication, the Government sought opinion of the Chief Engineer in this matter and Ext.P11 is the communication from the Chief Engineer addressed to the Government informing that the petitioner is eligible for getting pensionary benefits had he been allowed to continue in service till attaining the age of 58 years as per Ext. P1 G.O. Thereafter, the Government issued Ext.P12 G.O. dt. August 19, 1995 ordering that the period upto 58 years of age of the petitioner will be allowed to count for purposes of pensionary benefits only.

2. The prayer in this Original Petition is for the issuance of a writ of mandamus directing the respondents to give arrears of salary to the petitioner from May 1, 1985 to April 30, 1988 as if the petitioner had continued in service with interest at 18% per annum to issue a writ of mandamus directing the respondents to give revised pension, gratuity and commuted value of pension to the petitioner as if he had retired from service on April 30, 1988 with interest at 18% per annum.

3. The first respondent has filed a counter affidavit contending that the petitioner could not be reinstated in service after his retirement pursuant to Ext.P3 as the authority had to seek clarification from the Government on the question as to whether the persons absorbed from work establishment will come under the purview of Ext.P1 order.

4. Heard learned counsel on both sides.

5. The petitioner was in N.M.R. service from April 14, 1946 to December 18,

1953. He came into the regular establishment as Blacksmith with effect from April 1, 1984. The petitioner retired from service as Head Blacksmith on April 30, 1985 on completing 55 years of age. On the basis of Exts.P1 to P3 there can be no doubt regarding the entitlement of the petitioner to be reinstated in service after his retirement on April 30, 1985. The petitioner made a request to the Executive Engineer for reinstatement as early as March 9, 1987 which resulted in Ext. R1 (a) letter dt. October 10, 1988, i.e., 17 months after the date of the petitioner's request and 6 months after his retirement going by the extended retirement age at 58 stating that Ext. P1 order issued by the Government is applicable to N.M.R. workers ordered to be absorbed into the work establishment category and subsequently absorbed into regular establishment. The stand taken in Ext.RI (a) ? pales into insignificance having regard to the categoric admission made by the first respondent in their counter affidavit in the following terms:

"... The practice of absorption of NMR hands into work establishment service and then to regular establishment was stopped due to the abolition of the work establishment system. NMR service followed by the work establishment service and then to regular establishment service will count for pension. As such the above two services as work establishment and regular establishment are one and the same for the purpose of retirement benefits including age."

Therefore, the first respondent is not justified in taking the stand in Ext.RI (a) that Ext.P 1 is not applicable to the petitioner. I therefore, hold that the petitioner is entitled to get the benefit of Ext.P1 G.O. and Exts. P2 and P3 which are passed as a sequel thereto.

6. The next question to be considered is that once it is found that the petitioner is entitled to the benefits conferred under Exts.P1 to P3 whether at a later stage the second respondent will be justified in ordering that the period upto 58 years of age of the petitioner will count only for purpose of pensionary benefits and not for purpose of payment of arrears of wages for the period during which the petitioner was kept out of service. The second respondent has not filed a counter-affidavit justifying their stand in Ext.P 12 as to why the petitioner is liable to count the period upto 58 years of age only for purposes of pensionary benefits. However reasons stated by the first respondent in their counter affidavit are as follows:

"... As the clarification was not received from Government, the request of the petitioner for reinstatement and service benefits as per Exts. P4 and P5 were not considered by the Authority."

I do not think that the reasons stated by the first respondent- Authority is a valid reason. In this connection, it is pertinent to note that the petitioner approached the first respondent-Authority requesting to reinstate him as early as March 9, 1987 by filing a representation. Since, that representation was not considered the petitioner had to file another representation on December 18, 1987. Since that was also not considered the petitioner had to file Ext. P4 representation

before he completed 58 years of age Ext P4 representation was also not acted upon. It was in the above circumstances the petitioner completed 58 years of age on April 13, 1988 without being reinstated. The petitioner has a definite case that at the same time persons similarly placed like the petitioner were reinstated in service as admitted by the first respondent in Exts. P7 and P9, In Ext.P7 order it is stated as follows:

"...Certain employees under Kerala Water Authority like him got the opportunity to be in service till the age of 58 years as per provisions contained in the G.O. (P) 110/86/PW & T dt. September 9, 1986 (Ext.P1)".

In Ext.P9, it is stated as follows:

"...Many employees similarly placed were reinstated in the Drainage Division, Trivandrum and P.H.Division, Ernakulam. Sunny belonged to P.H.Division, Trivandrum. So he is the only one who has been denied the benefit".

From the aforesaid facts and circumstances it is clear that the petitioner cannot be faulted in anyway for the denial of reinstatement which is otherwise legitimately due to him. It is clear and leaves no room for any doubt that it was on account of the lapses and inaction on the part of the respondents that the petitioner could not be reinstated in service. Ultimately, the respondents found that the petitioner was entitled to be reinstated but by that time the petitioner crossed the age of 58 years. That being the position the petitioner cannot be made to suffer due to the lethargy and inaction on the part of the respondents.

7. In *Narayana Menon v. State of Kerala* 1978 KLT 29 this Court speaking through Khalid, J. held as follows: "The Government cannot take advantage of a mistake committed by them or an order passed by them in illegal exercise of their power". Following *Narayana Menon's* case, (supra) this Court in *State of Kerala v. Narayanan* 1985 KLT 695 held that it should not be the aim of the Government to enrich itself by denying the legitimate amount due to its employees where the delay in recognising the right of the concerned employee was not due to any fault of that employee. In *Sasidharan v. Senior Superintendent* 1985 KLT27 it was held that a person who was wrongly prevented from continuing in service is entitled on the wrong being rectified by virtue of orders of Court, for restitution of the benefits which he would have enjoyed had he been continued in service as he should have been. Learned counsel for the petitioner also brought to my notice a Division Bench decision of this Court in *P.N. Sivarajan Vs. State*, in which this Court held that where a Government servant being denied his due promotion for no fault of his and subsequently it is held that he is entitled to such promotion, arrears of salary can not be denied to him on the ground that promotion due to him will only be notional without any monetary benefits. In the light of the aforesaid discussion, it cannot be gainsaid that the petitioner is entitled to the arrears of wages for the period he was kept out of service.

8. But then, the question to be considered is whether a direction can be issued to

give the petitioner the entire arrears of wages with effect from May 1, 1985 onwards. Admittedly, as on the date 2 of the petitioner's retirement on April 30, 1985 Ext.P1 G.O. which forms the substratum of the petitioner's case was not in existence. Ext.P1 came into force much later on September 9, 1986. Ext.P2 proceedings of the first respondent-Authority adopting Ext.P1 G.O. was passed on December 22, 1986 and Ext.P3 proceedings of the first respondent-Authority resolving to adopt the resolution of the Authority at its 43rd meeting to reinstate persons like the petitioner appointed; prior to April 7, 1970 and absorbed into regular establishment in the Authority, but who have retired from service on attaining the age of 55 and allowing to continue in service till the age of 58, based on Ext.P1 G.O. was passed only on February 23 1987. The result therefore, is that though Ext.P1 ordered that N.M.R. Workers appointed prior to April 7, 1970 on regularisation will be allowed to continue in service till the age of 58 and the said Ext.P1 G.O. was adopted by the first respondent as per Ext.P2, direction for reinstatement in service of persons like the petitioner who by that time had retired from service took place by Ext.P3 order dated February 23, 1987. In this view. 1 hold that the petitioner is eligible to the backwages only with effect from the date of Ext.P3, i.e., February 23, 1987. No doubt, learned counsel for the petitioner would contend based on Ext.P6 that had the petitioner been reinstated in service and allowed to continue till the age of 58 years, he would have been eligible for arrears of salary for the period of out of employment, i.e., with effect from May 1, 1985. I am unable to accede to this contention, as according to me, the petitioner's eligibility for arrears of salary can at best be confined only to the period commencing from the date of Ext.P3, i.e., February 20/23 1987. This is despite the Government directive contained in Ext.P6 to the effect that the NMR workers whose services were terminated on completion of 55 years of age and who were subsequently reinstated in service and allowed to continue till the age of 58 years may be given arrears of salary for the period out of employment after retirement after adjusting the pension already drawn for the period out of employment. I doubt very much whether the Government who is expected to maintain fiscal discipline can issue such a directive ordering payment of salary to employees who retired at the age of 55 and who were later ordered to be reinstated in service as a policy decision, on the extension of the age of retirement to 58 in breach of the fiduciary duty owned by it to use public revenue with utmost restraint and to expend the same with a sense of accountability bereft of extravagance. Government cannot dole out public money on extraneous considerations and illegal concessions. All the decisions cited supra are clearly distinguishable from the facts of the present case where we are concerned with the extension of the age of retirement from 55 to 58 years as a policy decision and further that the petitioner did not in fact work in any capacity after his retirement on attaining the age of 55 years. The only redeeming feature is that many employees similarly placed like the petitioner were reinstated in service after they attained the age of superannuation at 55 and the petitioner is the only one who has been denied the benefit.

9. In the result, I partly allow this original petition and direct the respondents to give arrears of salary to the petitioner from February 23, 1987 to April 30, 1988 with interest at the rate of 10% per annum. There will be a further direction to the respondents to give to the petitioner the revised pension, gratuity and other terminal benefits as if he retired from service only on April 30, 1988 with interest at 10% per annum. The directions shall be complied with as expeditiously as possible, at any rate, not later than two months from the date of receipt of a copy of this judgment.

Original petition is allowed as above.