

(2007) 03 KL CK 0027
In the High Court Of Kerala
Case No : W.P (C) No. 23778 of 2005-E

T. Thankachan	Vs	APPELLANT
The State of Kerala and Another		RESPONDENT

Date of Decision : 01-03-2007

Acts Referred:

Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 — Rule 15, 18, 19, 20, 21

Citation : (2007) 1 ILR (Ker) 840 : (2008) 1 KLJ 665

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : P.C. Sasidharan, for the Appellant; P.A. Salim, GP, for the Respondent

Final Decision : Dismissed

Judgement

T.R. Ramachandran Nair, J.—The petitioner has filed this writ petition seeking to quash Exts.P5, P6 and P8 and for a declaration that the disciplinary proceedings taken against him is violative of Rule 15 of the Kerala Civil Services (Classification, Control and Appeal) Rules (for short "the Rules") and that his probation is liable to be declared with effect from 30-1-1999. The short facts as evident from the pleadings are the following:

2. The petitioner was appointed by direct recruitment in the Department of Tourism as Manager Grade III and he joined service on 31-1-1997. While he was continuing in the post of Manager, Government Guest House, Attingal, he was issued with Ext. P1 memo of charges alleging certain misconduct on his part. It was duly replied by him by Ext.P2. After culmination of the enquiry, the Director, Department of Tourism issued a notice, Ext.P3, proposing a punishment of removal from service. Finally, by Ext.P4 proceedings, the Director passed an order terminating him from service. The petitioner challenged the same before the Government which resulted in Ext.P5 order, wherein the Government directed the second respondent to reinstate the petitioner in service after cancelling Ext.P3. There was a further direction to extend the period of probation of the

petitioner for two years and not to give any independent charge of any Guest House to him. After getting reinstated in service pursuant to the above order by Ext.P6, the petitioner submitted a review petition Ext.P7 before the Government. In the above review petition, the petitioner challenged that portion of the order of Ext.P5 whereby his probation was extended for another two years. The Government rejected Ext.P7 by Ext.P8 which resulted in the petitioner filing the writ petition challenging the proceedings issued against him.

4. Learned Counsel for the petitioner submitted that the disciplinary proceedings culminating in the termination of the service of the petitioner, is vitiated by violation of the mandatory procedures contained in Rule 15 of the Rules. It is submitted that none of the procedures for imposing a major punishment of termination from service have been complied with and hence the entire proceedings fall to the ground. It is also pointed out that the enquiry conducted was also not in terms of any of the established rules and evidence was collected without giving opportunity to the petitioner to contradict it.

5. The petitioner has got a further argument that the order passed by the Government directing the second respondent to extend the period of probation by another two years amounts to a punishment. Instead of that, the entire service benefits should have been granted to him.

6. It is further pointed out that during or after the initial period of probation, no order extending the period of probation was issued to the petitioner by the appointing authority and at any rate, as the appointing authority has not chosen to issue any such order, the order passed by the Government is illegal.

7. On behalf of the respondents, a detailed counter affidavit has been filed. It is explained in the counter affidavit that while the petitioner was holding the office of the Manager, Government Guest House, Attingal, a surprise inspection was conducted by the Joint Director of Department of Tourism based on a telephonic message that immoral trafficking was going on there with the knowledge of the staff of the Guest House. It is averred that from the staff of the Guest House, the Joint Director came to understand that the Circle Inspector of Police, Attingal had taken a man and woman under custody from room No. 8 of the Guest House for immoral trafficking and after the arrest, another party who were staying in room No. 2 had vacated the room. It is averred that a prima facie case of dereliction of duty and abuse of official position for promoting immoral activities was established from the part of the petitioner and hence he was suspended from service. It is also stated that the Vigilance Officer of the Department who was additional Director (H) was appointed as Enquiry Officer who heard all the staff members of the Guest House, Attingal, Circle Inspector of Police and the first informant. The petitioner was also heard by the Enquiry Officer. It is stated that the Enquiry Officer was satisfied that the petitioner has willfully supported immoral activities happening in the Guest House and his conclusion was arrived at after hearing the petitioner also in person. The petitioner did not adduce any other evidence or produced any records to support his arguments. As regards the

order Ext.P5 passed by the Government, the stand taken is that the Government has only taken a lenient attitude and as it was found that his conduct and character before the termination was not satisfactory, the period of probation was extended for another two years. The rejection of the review petition is also justified in that the Government felt that the work and conduct of the petitioner was not satisfactory during the probation period and that the department was in receipt of various complaints against the petitioner even from the date of his appointment to 30-1-1990. It is also averred that the disciplinary action was taken and was continued in accordance with the principles of natural justice. As regards the power of the Government to direct extension of the period of probation, it is stated that the Government could extend the probation of an employee further and that the Government was competent to take such a decision. It is the further case of the respondents that mere completion of required duty is not sufficient for the declaration of probation and that the work and conduct of the petitioner was not satisfactory during the period prior to his termination. In paragraph 10 of the counter affidavit, some other complaints against the petitioner while he was working as the Manager in Kerala House, Kanyakumari is also mentioned.

9. In the light of the above contentions, the question whether the orders Exts.P5 and P8 are violative of the rules, has to be examined in the light of the relevant statutory rules and the principles governing declaration of probation of an employee. The relevant rules are contained in Rules 18 to 21 of Part II of Kerala State and Subordinate Service Rules. Rule 19 speaks about suspension, termination and extension of probation. A reading of the rule will show that a probationer can be discharged for want of vacancy and the declaration of probation depends upon satisfactory completion of the period of probation. Rule 20 covers probationer's suitability for full membership. Rule 20(a) and (b) are extracted below:

(a) At the end of the prescribed or extended period of probation as the case may be, the appointing authority shall consider the probationer's suitability for full membership of the service, class or category for which he was selected:

Provided that in case the probation was extended under Rule 21 solely to enable the probationer to acquire the special qualifications or to pass the prescribed tests, the appointing authority shall consider the probationer's suitability for full membership of the service, class or category as soon as the probationer has acquired the special qualifications or has passed the prescribed tests.

(b) If the appointing authority decides that a probationer is suitable for such membership, it shall as soon as possible issue an order declaring the probationer to have satisfactorily completed his probation. On the issue of such order, the probationer shall be deemed to have satisfactorily completed his probation on the date of the expiry of the prescribed or extended period of probation;

Provided that in cases to which the proviso to Sub-rule (a) applies the

probationer shall be deemed to have satisfactorily completed his probation on the day following the last date of the whole examination or test in which the probationer has acquired the special qualification or has passed the prescribed tests by passing one or more subjects, if such date is earlier than the date of expiry of the extended period of probation.

10. Going by Rule 20(b), the declaration by the appointing authority depends upon satisfactory completion of the probation by the probationer concerned. Sub-rule (c) enables the appointing authority to discharge a probationer if it decides that the probationer is not suitable for such membership unless the period of probation is extended under Rule 21. But he has to be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. Rule 20(A) is significant. The said rule reads as follows:

20A. Delay in the order of probation. Any delay in the issue of an order discharging a probationer under Clause (ii) of Sub-rule (a) of Rule 19, or Clause (i) or (ii) of Sub-rule (b) of that rule or Sub-rule (c) of Rule 20, shall not entitle him to be deemed to have satisfactorily completed his probation.

Going by the above rule, any delay in the issue of an order discharging the probationer shall not entitle him to be deemed to have satisfactorily completed his probation. Rule 21 covers extension of probation in the case of any probationer falling under Sub-rule (b) of Rule 19 or Sub-rule (c) of Rule 20. Going by Rule 21, the extended period of probation shall terminate at the latest when the probationer has, after the date of expiry of 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. But this rule only applied in respect of cases covered by Rule 19(b) and Rule 20(c).

11. The question herein is whether, on completion of the initial two year period, he should be deemed to have been confirmed and whether his probation is liable to be declared with effect from that date and other service benefits should automatically follow. As far as the right of an employee to get the probation declared and the power of the employer to put the employee on probation for further periods, the position is well settled by the decisions of the Honourable Supreme Court and of this Court. In the decision reported in *Ajit Singh and Others Vs. State of Punjab and Another*, the concept of having a period of probation has been examined and it is held in paragraph 7 that:

7. When the master servant relation was governed by the archaic law of hire and fire, the concept of probation in service jurisprudence was practically absent. With the advent of security in public service when termination or removal became more and more difficult and order of termination or removal from service became a subject matter of judicial review, the concept of probation came to acquire a certain connotation. If a servant could not be removed by way of punishment from service unless he is given an opportunity to meet the allegations if any against him which necessitates his removal from service, rules

of natural justice postulate an enquiry into the allegations and proof thereof. This developing master servant relationship put the master on guard. In order that an incompetent or inefficient servant is not foisted upon him because the charge of incompetence or inefficiency is easy to make but difficult to prove, concept of probation was devised. To guard against errors of human judgment in selecting suitable personnel for service, the new recruit was put on test for a period before he is absorbed in service or gets a right to take post. Period of probation gave a sort of *locus poenitentiae* to the employer to observe the work, ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserved a right to dispense with his service without anything more during or at the end of the prescribed period which is styled as period of probation. Viewed from this aspect, the Courts held that termination of service of a probationer during or at the end of a period of probation will not ordinarily and by itself be a punishment because the servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to. (See *Parshotam Lal Dhingra Vs. Union of India (UOI)*, . The period of probation therefore furnishes a valuable opportunity to the master to closely observe the work of the probationer and by the time the period Of probation expires to make up his mind whether to retain the servant by absorbing him in regular service or dispense with his service. Period of probation may vary from post to post or master to master. And it is not obligatory on the master to prescribe a period of probation. It is always open to the employer to employ a person without putting him on probation. Power to put the employee on probation for watching his performance and the period during which the performance is to be observed is the prerogative of the employer

(emphasis supplied)

Therefore, it is evident that the master is having every right to terminate a probationer and it is not obligatory on the master to prescribe a period of probation also. The same principle will apply as regards the power to extend the period of probation if the appointing authority feels that going by the performance of the employe, his period of probation has to be extended further, before confirming him in service. The question whether an employee is entitled for automatic confirmation after the prescribed period of probation, has also come up before the Honourable Supreme Court in *Registrar, High Court of Gujarat and Another Vs. C.G. Sharma*, and the following observations in paragraph 26 are apposite to the context here:

Even if the period of two years expires and the probationer is allowed to continue after the period of two years, automatic confirmation cannot be claimed as a matter of right because in terms of the rules, work has to be satisfactory which is a prerequisite or pre-condition for confirmation and therefore even if the probationer is allowed to continue beyond the period of two years as mentioned in the rule, there is no question of deemed confirmation. Confirmation is to be ordered if there is a vacancy and if the work is found to be satisfactory.

(emphasis supplied).

A reading of Rules 19 and 20 will show that confirmation of the probationer depends upon the question whether there is a vacancy and about the satisfactory performance of the work. Hence, the petitioner cannot contend for the position that on the expiry of the two year period, the petitioner is entitled to be confirmed in service with effect from 30-1-1999 and consequent declaration of his probation. The whole effect of the rules governing declaration of probation under the K.S. & S.S.R. was considered by this Court in the decision reported in RN. Namboodiri v. State of Kerala and Ors. ILR 1982 Ker. 550 by M.P. Menon, J. It was held as follows:

Now there is no prohibition in Rules 19 to 21 of our rules against continuing a person as probationer beyond any particular period. The power conferred upon the appointing authority either to terminate probation or to extend it after the specified period cannot be equated⁴ to a statutory prohibition against retaining the employee as a probationer after that period.

His Lordship was pleased to hold that the above position is made clear by Rule 20-A introduced in 1980 apparently by way of clarification. Therefore, Rule 19 to 21 cannot be construed as having any prohibition against continuance of a person as probationer beyond the initial period of two years. It is evident and clear that even after the initial period of two years, the employee can be retained as a probationer and the respondents do not lack power to do so. It is therefore clear that merely because of the completion of two years the petitioner is not entitled for a declaration of his probation and the said event depends upon satisfactory completion of the probation. Rule 21 cannot be understood as a prohibition against extending the period of probation to a maximum one year after the initial period of probation. Rule 21 does not apply to the circumstances of this case at all.

12. The question whether the Government has power to extend the period of probation retrospectively after the expiry of the period of probation was considered by this Court in the decision reported in Ramachandran Nair v. State of Kerala 1980 KLT 804 and the learned Judge was pleased to hold that "the Government; have power to extend the period of probation. If the Government is 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 in full agreement with the dictum laid down by the learned Judge in regard to the power of the Government to extend the period of probation even retrospectively. Hence, for this reason also, the petitioner's contention about lack of power for the Government in passing Ext.P5, is only to be rejected.

13. Mr. Sasidharan contended that the entire disciplinary action was taken in violation of Rule 15 of the Rules and therefore the entire thing has to be eschewed and if so, the petitioner is entitled for a declaration of his probation

with effect from 30-1-1999. The question whether the disciplinary action was taken in violation of Rule 15, need not be gone into in this case in view of the findings rendered in Ext.P5 by the Government itself and as the termination of the petitioner was set aside and he was ordered to be reinstated in service. The question mooted by the petitioner regarding violation of Rule 15, is only academic then and we are mainly concerned with the power of the Government to order extension of probation and hence, I find that the said contention need not be gone into.

14. It was next argued that while disposing of the review petition, the Government has not applied its mind to the relevant rules and circumstances governing the issue. In Ext.P8 it was found that mere completion of the required duty is not sufficient for declaration of probation and that the probationer has to prove his eligibility and suitability for full membership in the service. It is further stated that the work and conduct of the petitioner was not satisfactory during the probation period and the direction to reinstate him was as a result of leniency shown to him. Going by the well settled principles, it cannot be said that the reason stated by the Government; to reject the review petition are not convincing. Merely because the petitioner has completed the initial period of duty, it cannot be stated that he was entitled for an automatic declaration of his probation. There were several complaints against him, as stated in the counter affidavit even during that period and during the subsequent period he was subjected to disciplinary action also. It is seen that pending the writ petition, as per Ext.P9, orders have been issued declaring the probation of the petitioner.

15. The contention that the Government lacks power to pass Exts.P5 and P8 orders therefore falls to ground. The Government was exercising the powers of the appellate authority while passing Ext.P5. The petitioner is a beneficiary of Ext.P5 in that his termination was set aside and he was ordered to be reinstated. Consequent direction to extend the period of probation does not suffer from any lack of power going by the principles governing the issue and the power available to the appointing authority and the Government in the matter. Further, the Government was concerned with a case where even during the initial period of probation, there were complaints against him and the decision by the Government to extend the period of probation for two more years is only justified by the above facts concerning the petitioner's conduct. For this reason also I find that there is no lack of power for the Government to pass an order like Ext.P8. Therefore, the writ petition fails and it is accordingly dismissed without any order as to costs.