

(1992) 01 KL CK 0013
In the High Court Of Kerala
Case No : W.A. No. 1007/89

The Director of Health Services

APPELLANT

Vs

P.P. Paul

RESPONDENT

Date of Decision : 15-01-1992

Acts Referred:

Citation : (1992) KLJ 289

Hon'ble Judges : M. Jagannadha Rao, C.J;T.S. Krishnamoorthy Iyer, J

Bench : Division Bench

Advocate : V. Bhaskara Menon, Government Pleader, for the Appellant; K.P. Dandapani, Sumathi Dandapani and K. Jaju Babu, for the Respondent

Final Decision : Dismissed

Judgement

M. Jagannadha Rao, C.J.—The point that arises in this appeal relates to construction of note 2 to Rule 3 of Part III of the Kerala Service Rules, in so far as they relate to recovery of amounts from Death-cum-retirement gratuity (hereinafter called the "D.C.R.G.") payable to a Government servant.

2. The facts of the case are as follows: The writ Petitioner was a store keeper in the Health Services Department. For certain irregularities, he was kept under suspension by Ext. P-1 order dated 1st September 1981. Subsequently by order dated 21st January 1982 he was reinstated in service without prejudice to the disciplinary action. Still later on 26th May 1982 he was promoted to the next higher post on a provisional basis. It is thereafter on 30th June 1982 that he retired from service. The Petitioner made a representation on 28th March 1983 and on 23rd November 1983 for disbursement of his pension and gratuity. The Accountant General by order dated 2nd February 1984 fixed his pension at Rs. 363 per month with effect from 1st July 1982, and also D.C.R.G. of Rs. 11,100. But the first Respondent, namely, the Director of Health Services, sanctioned by order dated 26th March 1984 only a pension of Rs. 235 to the Petitioner, against which the Petitioner made a further representation on 5th July 1984. Ultimately by Ext. P-7 memo dated 21st June 1985 the Director of Health Services held that

the enquiry conducted by the Additional Director of Health Services (Vigilance) had revealed that certain drugs costing Rs. 24,869.59 were manipulated and misappropriated and that out of this an amount of Rs. 10,052.14 had been fixed as liability in so far as the Petitioner was concerned, in as much as he did not exercise adequate supervisory check of the medicines against his subordinates. Therefore the Director asked the Petitioner to file objections, if any, against the proposed punishment. The Petitioner submitted an explanation stating that the storekeeper had no control of supervision over pharmacists and therefore no liability could be fastened on him. Thereafter Ext. P-9 order dated 29th October 1985 was passed finally deciding to recover the above said amount of Rs. 10,052.14 from the D.C.R.G. of the Petitioner.

3. The learned Single Judge after referring to the relevant rules and relying on the decision of this Court in *George v. State of Kerala* 1983 KLT 222, held that in so far as D.C.R.G. was concerned, the liability to recover the same must be fixed before retirement of an employee, and he should be given an opportunity to explain as to why the same should not be recovered. Unless this was done before retirement, no amount could be recovered from D.C.R.G. On the above said basis, the learned Single Judge quashed Ext. P-9 order and directed that pension and D.C.R.G. of the Petitioner should be disbursed to him as early as possible. This order was passed on 25th October 1989. This appeal has been preferred by the Director of Health Services and the State against the said judgment.

4. In this appeal; we have heard learned Counsel for the Appellant, and the Respondent, and we do not find any reason to differ from the view expressed by the learned Single Judge.

5. Part III of the Rules relates to pension. Chapter I deals with general rules. Rule 1 deals with pension. Rule 2 states that future good conduct shall be an implied condition of every grant of a pension. Rule 3 states that the Government reserves to themselves the right of withholding or withdrawing a "pension" or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service; including service rendered upon re-employment after retirement. There is a proviso to Rule 3. It says;

(a) such departmental proceeding, if instituted while the employee was in service, whether before his retirement or during his re-employment, shall after the final retirement of the employee, be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service;

(b) such departmental proceeding, if not instituted while the employee was in service, whether before his retirement or during his re-employment--

(i) shall not be instituted save with the sanction of the Government;

(ii) shall not be in respect of any event which took place more than four years before such institution; and,

(iii) shall be conducted by such authority and in such place as the Government may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the employee during his service;

(c), no such judicial proceeding, if not instituted while the employee was in service whether before his retirement or during his re-employment shall be instituted in respect of a cause of action which arose or an event which took place more than four years before such institution; and

(d) the Public Service Commission shall be consulted before final orders are passed.

Rule 3 contains an explanation, which reads as follows:

Explanation.--For the purpose of this rule--

(a) a departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the employee or pensioner or if the employee has been placed under suspension from an earlier date, on such employee; and

(b) a judicial proceeding shall be deemed to be instituted--

(i) in the case of a criminal proceeding on the date on which the complaint or report of police officer on which the Magistrate takes cognizance is made; and

(ii) in the case of a civil proceeding, on the date of presentation of the plaint in the Court.

(emphasis supplied)

6. A reading of the Explanation would therefore show that the rule-making authority was making a distinction between "an employee" and "a pensioner" for the purpose of Rule 3. Then we come to note 1. As this note is not relevant, we shall not refer to it. Then comes note 2, which is important, and reads as follows:

Note 2.--The word "pension" used in this rule does not include death-cum-retirement gratuity. Liabilities fixed against an employee can be recovered from the death-cum-retirement gratuity payable to him without the departmental/judicial proceedings referred to in this rule, but after giving the employee concerned a reasonable opportunity to explain.

It has to be pointed out that there has been an amendment to the rules by G.O., dated 31st March 1986 published in the Kerala Gazette on 15th April 1986. This amendment to note 2 reads as follows:

In note 2, after the word "employee" occurring in two places, the words "or

pensioner" shall be inserted.

The amendment also incorporates note 3 which reads as follows:

Note 3.--The liability of an employee should be quantified either before or after retirement and intimated to him before retirement if possible or after retirement within a period of three years on becoming pensioner. The liabilities of a pensioner should be quantified and intimated to him.

Ruling No. 3 is annexed to note No. 2 which after the amendment of G.O., dated 31st March 1986, reads as follows:

The note 2 above does not mean that the employee's (or pensioner's) consent should be obtained for recovering the liability from the death-cum-retirement gratuity payable to him. What is contemplated is only a communication of such liabilities to him so as to enable him to submit his explanation before the recovery is effected. It should be specifically stated in the communication that if no reply is received within 30 days of its issue, it will be presumed that the employee (or pensioner) has no explanation to offer and that further action will be taken on that basis. [G.O. (P) 45/68/Fin., dated 27th January 1968].

7. From the above said rules, it is clear that the Rules make a distinction between recovery of amounts from pension on the one hand, and D.C.R.G. on the other. Inasmuch as Rule 3 mainly concerns itself about conversion of disciplinary inquiries against employees as inquiries for purposes of imposing cuts in the pension, the Explanation to Rule 3 must necessarily be confined to such a situation and not for recovering amounts from D.C.R.G. When the explanation to Rule 3 states that a departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the employee or pensioner, or if the employee has been placed under suspension, from an earlier date, the said Explanation cannot apply to a case of recovery of amounts from the D.C.R.G. In other words, even if the suspension had been made before retirement, it cannot (before 31st March 1986) help the recovery of amounts from the D.C.R.G. The only provision which deals with recovery from D.C.R.G. is note 2 set out above. The note clearly states that the word "pensioner" used in Rule 3 does not include D.C.R.G. The note then states when any amount could be recovered from the D.C.R.G. It states that liabilities fixed against an "employee" can be recovered from the D.C.R.G. payable to him without the departmental/judicial proceedings referred to in Rule 3, but after giving the "employee" a reasonable opportunity to explain. The use of the word "employee" alone in note 2 (before its amendment on 31st March 1986) makes it clear that in principle, the liability must be fastened on the person while he continues as "employee" and not after that, though if the liability is created, it could be quantified after retirement. That is why, in *George v. State of Kerala* 1983 KLT 222, it was held so. In fact, it was to get over the said judgment that the words "or pensioner" have been introduced in the note 2 with effect from 31st March 1986. The present case before us relates to a retirement on 30th

June 1982. No liability was at least fastened on the Petitioner before 30th June 1982. It may be that the Petitioner was suspended on 1st September 1981 and the suspension was revoked on 21st January 1982 without prejudice to the departmental inquiry to be initiated but that will not be sufficient for purposes of recovery from D.C.R.G. This is because note 2, before its amendment on 31st March 1986, required that the liability must be fastened, in principle, on the person while he was an employee and not thereafter. The note makes it clear that the liability mentioned in it must have been fixed against a person while he was in employment, and the show cause notice also must have been issued to him while he was in employment. Unless these two conditions are satisfied, there cannot be any question of recovery of any liability from the D.C.R.G. before 31st March 1986. It will be noticed that the amendment by G.O. dated 31st March 1986 now permits liability to be fastened even after retirement, on a pensioner. In the present case, we are not concerned with a situation arising after the amendment by G.O. dated 31st March 1986, inasmuch as the Petitioner retired from service on 30th June 1982. In the present case, we are concerned with a situation arising prior to the amendment by G.O. dated 31st March 1986.

8. The view which we have taken is inconformity with the view taken by a Division Bench of this Court in *George v. State of Kerala* 1983 KLT 222. In that decision at page 226 their Lordships observed as follows:

We hold that the liability of an officer should be fixed before his retirement and the quantification of the liability should be after giving an opportunity to the officer to explain....

9. The learned Government Pleader has, however, referred to an unreported decision of a Division Bench of this Court in *P.A. Narayanan v. State of Kerala* W.A. No. 836 of 1988, delivered by Malimath, C.J. and Bhaskaran Nambiar, J. That case related to the recovery of certain amounts from the pension and not from the D.C.R.G. Therefore that decision is clearly distinguishable and does not deal with the question of recovery of any amount from the D.C.R.G.

For the aforesaid reasons, we are in entire agreement with the learned Single Judge. The Writ Appeal therefore fails and is dismissed. No costs.