
(2010) 12 KL CK 0126

In the High Court Of Kerala

Case No : Writ Petition (C) No. 15996 of 2010

Union of India and Others

APPELLANT

Vs

P.J. Mary

RESPONDENT

Date of Decision : 10-12-2010

Acts Referred:

Citation : (2011) 2 KLJ 212

Hon'ble Judges : C.N. Ramachandran Nair, J;B.P. Ray, J

Bench : Division Bench

Advocate : T.P.M. Ibrahim Khan, Asst. S.G. of India, for the Appellant; T.C. Govinda Swamy, for the Respondent

Final Decision : Allowed

Judgement

C.N. Ramachandran Nair, J.

Writ petition is filed by the Central Institute of Fisheries challenging the order of the Central Administrative Tribunal, Ernakulam directing the petitioners to give ACP benefit (Assured Career Progression) to the respondent reckoning her ad-hoc service as a Junior Clerk. We have heard Assistant Solicitor General appearing for the petitioners and Sri. Govindaswamy, advocate, appearing for the respondent.

1. The facts leading to the controversy are the following: The respondent joined the services of the petitioners as a Junior Clerk on ad-hoc basis on 9.11.1978. She was regularized in service on 30.5.1984. After completion of fourteen years as a Junior Clerk on regular basis, she was given the promotion as Store Keeper on 27.3.1998. Admittedly, the respondent is entitled to ACP benefit, which is the benefit conferred by the Government on Government employees facing stagnation in service. First ACP benefit will be granted on completion of 12 years service and next on completion of a further period of 12 years, that is, on completion of a total service of 24 years. Petitioners have given 2nd ACP benefit to the respondent on completion of 24 years of service, that is, in 2008. The

respondent's case is that her service on ad-hoc basis rendered as a Junior Clerk from 9.11.1978 should be reckoned for the purpose of ACP benefit and so much so, she should have been given the 2nd ACP benefit in the year 2002. On being declined the relief sought by the respondent, that is, reckoning of ad-hoc service as Junior Clerk for the purpose of granting ACP benefit, she approached the CAT, which granted relief, against which this writ petition is filed by the Department.

2. Assistant Solicitor General appearing for the petitioners referred to the relevant portions of the service rules under which respondent's claim is to be considered. For easy reference, we extract hereunder Clauses 3.2, 4 and 5.1 of the relevant service rules.

2.2. Regular service for the purpose of the ACP Scheme shall be interpreted to mean the eligibility service counted for regular promotion in terms of relevant Recruitment/Service Rules.

4. The first financial upgradation under the ACP Scheme shall be allowed after 12 years of regular service and the second upgradation after 12 years of regular service from the date of the first financial upgradation subject to fulfillment of prescribed conditions. In other words, if the first upgradation gets postponed on account of the employee not found fit or due to departmental proceedings etc., this would have consequential effect on the second upgradation which would also get deferred accordingly.

2.1. Two financial upgradations under the ACP Scheme in the entire Government service career of an employee shall be counted against regular promotions (including in situ promotion and fast-track promotion availed through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit. This shall mean that two financial upgradations under the ACP Scheme shall be available only if no regular promotions during the prescribed periods (12 and 24 years) have been availed by an employee. If an employee has already got one regular promotion, he shall qualify for the second financial upgradation only on completion of 24 years of regular service under the ACP Scheme. In case two prior promotions on regular basis have already been received by an employee no benefit under the ACP Scheme shall accrue to him.

3. Admittedly, the respondent is entitled to 2nd ACP benefit under Clause 5.1 above on completion of 24 years of regular service. The short question to be considered is whether the ad-hoc service rendered by the respondent is a Junior Clerk from 9.11.1978 to 30.5.1984 should be reckoned as regular service for granting ACP benefit. We notice that Clause 3.2 defining regular service for the purpose of counting ACP benefit is interpreted to mean the eligibility service counted for regular promotion in terms of relevant recruitment/service rules. Therefore, the service to be counted as regular service for the purpose of ACP benefit is the same as the regular service which could be counted under the relevant service rules for the purpose of promotion. In this context, we refer to

the rules on promotion from the post of Junior Clerk to Storekeeper wherein experience prescribed for the purpose of promotion from Junior Clerk to Storekeeper is three years service as Junior Clerk. The contention raised by the respondent's counsel is that there is no mention of regular service in the relevant rules for the purpose of promotion from the cadre of Junior Clerk to Storekeeper and according to him, since regular service is not the experience required for the post, even ad-hoc service is sufficient. He has also relied on two decisions of the Supreme Court, one in *Union of India v. M. Mathivanan* (2006 S.C.C. (L & S) 1271) and another Constitution Bench of the Supreme Court in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and others* (1990 S.C.C. (L & S) 339) and also an unreported decision of this Court in *Sajad A. v. The Assistant Superintendent of Post Offices and others* (W.P.C. 10694/2004). However, after going through these judgments, we do not find that the issue decided pertaining to ACP benefit or the interpretation of "regular service" is for the purpose of granting ACP benefit. Respondent's counsel has specifically referred to the conclusions arrived at by the Constitution Bench in the second decision of the Supreme Court at Paragraph 47 wherein the Court held as follows:

To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and to according to rules and made as a stop-gap arrangement, the affiliation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted.

4. Relying on the above, the counsel for the respondent submitted that the respondent was appointed by following the procedure inasmuch as her name was forwarded by the Employment Exchange and she continued as an ad-hoc Junior Clerk until regularization and so much so ad-hoc service has to be counted for the purpose of granting ACP benefit in terms of Clause B of the judgment of the Supreme Court. On the other hand, the Assistant Solicitor General of India appearing for the petitioners contended that respondent's case falls under the corollary mentioned in Clause A of the judgment above because, she is appointed on ad-hoc service as Junior Clerk and appointment was not according to Rules and so much so that service cannot be counted for the purpose of granting ACP benefit. As already stated, we notice that the decision of the Supreme Court was not rendered in the context of claim for ACP benefit which has to be considered with reference to "regular service" as appearing in the rule stated above. In the

first phase, what is stated in Clause 3.2 is that for the purpose of granting ACP benefit, period of service to be counted is the regular service. Regular service to be counted for promotion is the service which qualifies the employee for promotion. As already noticed, for promotion to the higher post, which is that of storekeeper, service required is only three years and we asked a specific question to the counsel for the respondent as to whether respondent has been considered for promotion after three years of completion of ad-hoc service as Junior Clerk had there been a vacancy in the post of Store-keeper. Similarly, we queried with the respondent's counsel as to whether ad-hoc service could be clubbed with regular service for the purpose of considering the minimum period of service for promotion to the post of Store-keeper. In other words, it is not disputed that the respondent would not have been considered for promotion to the post of Store-keeper until she completed three years regular service as a Junior Clerk which happened only in May, 1987 and not at any time before that. Petitioner's counsel referred to us the finding of the Tribunal wherein Tribunal held that respondent's ad-hoc service was counted for the purpose of promotion to the post of Store-keeper and so much so, she is entitled to have the ad-hoc service as Junior Clerk counted for the purpose of ACP benefit. We agree with the contention of the counsel for the petitioners that Tribunal committed a mistake in this regard because, respondent got promotion only on 27.3.1998, that is after 14 years of regular service as a Junior Clerk which is on the basis of regularization on 30.5.1984. The Tribunal, in our view, wrongly assumed that ad-hoc service of the respondent has to be considered for the purpose of promotion. The Tribunal itself has extracted the query raised by employees before the department on the applicability of granting ACP benefit wherein the department has specifically answered to the specific query that ad-hoc service will not be reckoned for the purpose of granting ACP benefit and what is required is regular service which alone will be counted for the purpose of granting ACP benefit. In our view, so long as ad-hoc employee is not entitled to seek a higher post before regularization, the service in the cadre as an ad-hoc employee cannot be reckoned for the purpose of promotion to the next higher post unless it is specifically provided under the rules. In this case, even though rule on promotion does not specifically mention the qualifying service for promotion as regular service, we feel the service required for promotion is the regular service of the employee in the lower post. If the respondent's claim is accepted, then she would have been eligible for promotion as store-keeper on completion of three years ad-hoc service as junior clerk, had there been a store-keeper's post at that time. However, respondent does not have such a claim. So much so, in our view, under Clause 3.2, the period of service acquired by the employee after regularization as an employee which in the case of the respondent happened only on 30.5.1984 could be considered as qualifying service for promotion. Therefore, respondent's eligibility for 2nd ACP benefit in terms of Clause 5.1 read with Clause 3.2 is only on completion of 24 years of service in May, 2008. We therefore, allow this writ petition by reversing the impugned order of the CAT and by upholding the decision of the petitioners to grant 2nd ACP benefit to the

respondent only in 2008.