



2024:KER:1745

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE AMIT RAWAL

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

THURSDAY, THE 11TH DAY OF JANUARY 2024 / 21ST POUSHA, 1945

WA NO. 1929 OF 2023

AGAINST THE ORDER/JUDGMENT IN WP(C) 35727/2019 OF HIGH COURT OF
KERALA

APPELLANT/RESPONDENT:

SABU VARGHESE
AGED 51 YEARS
SENIOR OPERATOR CUM INPUT/OUTPUT ASSISTANT,
EDP DIVISION, FINANCE DEPARTMENT, COCHIN PORT TRUST,
WILLINGTON ISLAND, ERNAKULAM., PIN - 682009

BY ADVS.
VINAY KUMAR VARMA
S.SHYAM
N.K.KARNIS
V.K.BALACHANDRAN

RESPONDENT(S)/PETITIONER:

- 1 VIJU P VARGHESE
AGED 53 YEARS
OCIO ASSISTANT, EDP DIVISION, FINANCE DEPARTMENT,
COCHIN PORT TRUST, WILLINGTON ISLAND, ERNAKULAM.,
- 2 THE COCHIN PORT TRUST
REPRESENTED BY ITS CHAIRMAN,
COCHIN PORT TRUST, WILLINGTON ISLAND,
ERNAKULAM., PIN - 682009
- 3 THE CHAIRMAN
COCHIN PORT TRUST, WILLINGTON ISLAND,
ERNAKULAM., PIN - 682009



- 4 THE SECRETARY
COCHIN PORT TRUST, WILLINGTON ISLAND,
ERNAKULAM., PIN - 682009
- 5 FINANCIAL ADVISOR AND CHIEF ACCOUNTS OFFICER
COCHIN PORT TRUST, WILLINGTON ISLAND,
ERNAKULAM., PIN - 682009

BY ADVS.
KALEESWARAM RAJ
LATHA ANAND
THULASI K. RAJ(K/000814/2015)
APARNA NARAYAN MENON(K/385/2021)
CHINNU MARIA ANTONY(K/3363/2022)
S.VISHNU (ARIKKATTIL)(K/986/2012)

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON
13.12.2023, THE COURT ON 11.01.2024 DAY DELIVERED THE
FOLLOWING:

**JUDGMENT****Amit Rawal, J.**

1. Intra Court appeal at the instance of respondent No.5 in W.P(C).No.35727/2019 preferred by Sri.Viju.P.Varghese-respondent No.1 in the present appeal, is against the judgment of Single bench dated 19.10.2023 whereby following claim of respondent No.1 has been accepted, by issuing the following directions:

- i. To issue a writ of certiorari quashing Exhibit P8 as unjust, arbitrary and unsustainable.
- ii. To issue a writ of certiorari quashing Exhibit P7 to the extent to which it denies promotion to the petitioner as Senior OCIOA w.e.f 01.12.2016 and promotes the 5th respondent as Senior OCIOA w.e.f 01.12.2016.
- iii. To declare that petitioner is entitled to be promoted to the post of Senior OCIOA w.e.f. 01.12.2016 in the retirement vacancy of Shri.P.A.Sasidharan and that he is entitled to be promoted to the post of programmer ahead of the 5th respondent.
- iv. To Issue a writ of mandamus directing the respondents 1, 2 and 3 to pass orders, promoting the petitioner to the post of Senior OCIOA w.e.f 01.12.2016 and to



promote him to the post of programmer reckoning his seniority in the post of Senior OCIOA.

- v. To issue such other orders, directions or writs as may be prayed for and that this Hon'ble Court may deem fit under the facts and circumstances of the case."

"In the result, Ext.P8 is set aside. There will be a direction to the respondents to consider the claim of the petitioner for promotion to the post of Senior OCIOA in preference to the 5th respondent, treating the period of service of the 5th respondent from 01.05.2015 to 18.05.2015 as non-duty for the purpose of reckoning seniority. Appropriate orders shall be passed, revising the dates of promotion of the petitioner and 5th respondent as Senior OCIOA and refixing their seniority in the said post accordingly, within a period of two months from the date of receipt of a copy of this judgment

This writ petition is ordered accordingly."

2. Succinctly, the facts for adjudication of the lis in brief are as under:

Respondent No.1/petitioner in the writ petition alleged that he was appointed as Lower Division Clerk (hereinafter called 'LDC' for short) in Cochin Port Trust on 19.02.1996 and was promoted as Upper Division Clerk (UDC) and thereafter as



Operator Cum Input / Output Assistant (for short OCIOA). His appointment as OCIOA was with effect from 30.12.1999 and was included as Rank No.4 out of 13 candidates for promotion to the post of Senior OCIOA/Programmer. Appellant/respondent No.5 was included at Rank No.12.

3. As per 2016 Recruitment Rules, post of senior OCIOA is to be filled up by promotion from the post of OCIOA having two years of regular service or from Accountant with three years of regular service.

4. Appellant/5th respondent, concededly is senior to the petitioner in the list of OCIOA, but by virtue of an order dated 08.02.2016, which remain unassailed, was punished for unauthorized absence from 01.05.2015 to 18.05.2015 and the said period was considered as non-duty for all purposes except for pension. Realising that the appellant did not fulfill the requirement of Recruitment Rules, representations Ext.P5 and Ext.P6 were submitted by the petitioner, but were rejected vide Ext.P8 and vide order impugned in the writ petition, Ext.P7 dated 01.12.2016 appellant was promoted as Senior OCIOA.



The said order was assailed on the ground that period of unauthorized absence if found after conducting due disciplinary proceedings as non-duty for all purpose except pension, then there was interruption and break in service and in this view of the mater, appellant did not fulfill the criteria. There was no occasion for the Departmental Promotion Committee to promote appellant /5th respondent as senior OCIOA.

5. The aforementioned contention was assailed by the appellant by filing counter affidavit stating that punishment vide Ext.P3 is only censure and there was no occasion for the petitioner to challenge the same. In fact, employees of the Cochin Port Trust are governed by the Fundamental Rules and Central Civil Services (Pension) Rules (hereinafter called 'CCS Pension Rules' for short). Management – employer noticing that it was a penalty of minor nature, would not debar the appellant from consideration of promotion being senior to writ petitioner/respondent No.1. Departmental Promotional Committee examined the matter threadbare and found that the order dated 08.02.2016 and appeal petition preferred did not



contain any element of refusal of promotion, unfit for promotion or other infirmities.

6. Learned Single Bench, as noticed above, allowed the writ petition of respondent No.1 by issuing directions extracted above.

7. Learned counsel appearing on behalf of the appellant/5th respondent in the writ petition submitted that concededly, appellant was senior in the seniority of list of OCIOA and the punishment dated 08.02.2016 vide Ext.P3, even if not assailed, would not debar him from consideration to the promotion in view of the plain and simple interpretation of Rule 27 of CCS Pension Rules. The Fundamental Rule 17A deals with a stand-alone absence and the said interruption of break in service, except it is otherwise decided by the competent authority, would mean an interruption and break of service whereas in respect of employees who had been on leave as in the case of the appellant who had a sanctioned leave from 23.02.2015 to 30.04.2015 remained absent for a period of 19 days ie, from 01.05.2015 to 18.05.2015 thus, as per Rule 27



ibid it would not amount to forfeiture of past service.

8. Authorised leave has already been described in Rule 23 explaining a situation of present nature regarding entitlement of half salary. Counter affidavit of the management nowhere treated the appellant unauthorisedly absent and had break in service, thus it do not seriously or adversely impact seniority. The case law relied upon by the Single Bench ie., judgment of Supreme Court in **State of Punjab v. Dr.P.L.Songla** [2008(3) KHC 968] is not applicable to the facts and circumstances of the case as the employee in the aforementioned reported case had, without the leave remained absent. It was a stand-alone absence and therefore, the period he remained absent is required to be considered as break or interruption in the service. Therefore, the order of the Single Bench is liable to be set aside and order of the Departmental Promotional Committee to be upheld.

9. On the other hand, learned counsel appearing on behalf of the respondent No.1/petitioner submitted that appellant has no legs to stand in the absence of any challenge



to the order Ext.P3 dated 08.02.2016. On plain and simple reading of the aforementioned order, absence from 01.05.2015 to 18.05.2015 was considered unauthorized and non-duty for all purposes other than pension. In other words, the pension of the appellant is not affected but other avenues like promotion, seniority etc. Since the appellant/respondent No.5 did not conform to the requirement of Rules of having minimum two years of service, the seniority was liable to be ignored and the person immediately below him like the petitioner/respondent No.1 was required to be considered for promotion as senior OCIOA. This precisely has been noticed while relying upon Fundamental Rule 17A and Rule 27 of CCS Pension Rules. Any Administrative Order in the absence of challenge would remain in force. In support of the contention, relied upon the Full Bench judgment of this Court in **Pavithran v. State of Kerala** [2009 (4) KLT 20]. It was further contended that break or interruption in service as clarified in Rule 27 would definitely take away the right for promotion and seniority of the employee. Though the pension of the appellant has been



protected, but that would not allow him continuity of service vis-à-vis the seniority and pay for, Rule 23 relied upon do not make any employee of such category entitlement of full pay.

10. We have heard the learned counsel for the parties and appraised the paper book.

11. It is expedient to extract the contents of the order dated 18.02.2016 Ext.P3 treating the period 01.05.2015 to 18.05.2015 as unauthorized and non-duty except for pension. Relevant portion of the same reads as under:

“NOW , THEREFORE, in exercise of the powers conferred under Regulation 12 of Cochin Port Employees (Classification, Control & Appeal) Regulations, 1964, the penalty of ‘censure’ is imposed on Shri.Sabu Vagehese, O.C.I.O.A., EDP division, Finance Department. Furthermore, his absence from 1-5-2015 to 18-05-2015 is unauthorized and treated as ‘non-duty’ for all purposes other than Pension.”

12. Concededly, the aforementioned order remains unassailed. When the DPC, as per the decision dated 28.11.2016, vide Ext.P7, promoted the appellant/respondent No.5 in the writ petition, cause of action accrued in favour of



respondent No.1/writ petitioner to submit a representation which have been rejected vide Ext.P8. It is in that background, jurisdiction of this Court under Article 226 of the Constitution of India has been invoked. There is no doubt to the proposition as culled out by the Full Bench in the judgment cited *supra* that any Administrative Order if remain unchallenged would have its effect. Though by looking at the provisions of Fundamental Rules 17A and Rule 27, learned counsel representing the appellant *prima facie* could differentiate both the Rules being applicable to two sets of unauthorized absence/interruption of service ie, and stand-alone absence or an absence after the expiry of authorized leave. For the sake of brevity Fundamental Rule 17A and Pension Rule 27 extracted by the Single Bench are again extracted hereinbelow:

"F.R. 17-A. Without prejudice to the provisions of Rule 27 of the Central Civil Services (Pension) Rules, 1972, a period of an unauthorized absence-

(i) in the case of employees working in industrial establishments, during a strike which has been declared illegal under the provisions of the Industrial Disputes Act,



1947, or any other law for the time being in force;

(ii) in the case of other employees as a result of action in combination or in concerted manner, such as during a strike, without any authority from, or valid reason to the satisfaction of the competent authority; and

ii) in the case of an individual employee, remaining absent unauthorizedly or deserting the post,

shall be deemed to cause an interruption or break in the service of the employee, unless otherwise decided by the competent authority for the purpose of leave travel concession, quasi-permanency and eligibility for appearing in departmental examinations, for which a minimum period of continuous service is required.

EXPLANATION 1.- For purposes of this rule, "strike" includes a general, token, sympathetic or any similar strike, and also participation in a bandh or in similar activities.

EXPLANATION 2. In this rule, the term "Competent Authority" means the "Appointing Authority".

Rule 27 of the CCS (Pension) Rules is as follows:

"27. Effect of interruption in service

(1) An interruption in the service of a Government servant entails forfeiture of his past service, except in the following cases:-

(a) authorised leave of absence;

(b) unauthorised absence in continuation of authorized leave of absence so long as the post of absentee is not filled substantively;



(c) suspension, where it is immediately followed by reinstatement, whether in the same or a different post, or where the Government servant dies or is permitted to retire or is retired on attaining the age of compulsory retirement while under suspension;

(d) transfer to non-qualifying service in an establishment under the control of the Government if such transfer has been ordered by a Competent Authority in the public interest;

(e) joining time while on transfer from one post to another.

(2)) Notwithstanding anything contained in sub-rule (1), the Appointing Authority may, by order, commute retrospectively the periods of absence without leave as extraordinary leave."

13. On juxtaposing of the aforementioned Rules, interruption or break in service has been clarified in Rule 27 in respect of employees who had remained absent after the expiry of authorized leave whereas Fundamental Rule 17A deals with absence out of nowhere and that absence has also been considered to be a break and interruption. The period aforementioned thus, for all intends and purposes was required to be, except for the pension purposes, treated as unauthorized and non-duty in view of the order dated 18.02.2016 Ext.P3



which remain unchallenged (emphasis supplied). Thus in our considered view, the finding of the Single Bench setting aside the promotion of the appellant/respondent No.5 do not suffer from any illegality or infirmity to form a different opinion and is based up on the appreciation of Fundamental and CCS Pension Rules.

Appeal sans merit, accordingly dismissed.

Sd/-

AMIT RAWAL
JUDGE

Sd/-

C.S. SUDHA
JUDGE

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