

CASE NO.:
Appeal (civil) 4490 of 2007

PETITIONER:
M. MOHAMMED ABDULLA

RESPONDENT:
STATE OF KERALA AND ORS

DATE OF JUDGMENT: 25/09/2007

BENCH:
S.B. SINHA & H.S. BEDI

JUDGMENT:
J U D G M E N T
(Arising out of SLP(C) No.10844/2006)

S.B.SINHA, J.

Leave granted.

Appellant herein is aggrieved by and dissatisfied with the judgment and order dated 23.11.2005 passed by a Division Bench of the Kerala High Court in Writ Petition (C) No.26149 of 2004.

The factual matrix involving the dispute is on a narrow compass.

There are two services in the State of Kerala; one is governed by the Kerala Service Rules and the other by the Kerala State and Subordinate Service Rules. Within the State service falls Local Fund Audit Service, known as Kerala Local Fund Audit Service.

Appellant was appointed as Grade II Auditor on the recommendation of Public Service Commission on 7.7.1975. He was promoted as Inspector Local Fund Account on 18.11.1995, which post was re-designated as Audit Officer.

In terms of paragraph 4 of Appendix XIIA of the Kerala Service Rules, to which we will advert to a little later, the appellant while holding the post of Audit Officer, applied for and was granted leave without allowance for a period of 5 years from 1.9.1996 vide G.O. dated 18.11.1996 for taking employment abroad. He rejoined his duties as an Audit Officer on 8.11.2001. Respondent No.3 herein, who was junior to the appellant, was promoted as Deputy Director of Local Fund Account on 5.8.2002 and he joined the said post on 24.8.2002. Appellant was declared to have completed his period of probation in the category of Audit Officer in terms of order passed by Respondent No.2 dated 6.11.2003 with effect from 6.3.2003. In the seniority list which was published on 6.11.2003, his seniority was shown at serial No.8A. The original seniority assigned to the appellant in the category of Audit Officer as published on 18.5.1998 was restored in favour of the appellant by an order dated 3.1.2004 stating:

\023Government, in their orders read as 7th paper above, have clarified that the seniority of those who avail of leave without allowances before completion of probation in a grade will be protected though they will lose promotion chances that may arise during the currency of leave and until the date of completion of successful probation above those recruited after him and remaining in that grade.

Accordingly, the original seniority of Sri M. Mohammed Ahdulla, Audit Officer as in the seniority list published as per this office proceedings read as 1st paper above has to be restored.

It is therefore ordered that the original seniority of Sri Mohammed Abdulla is restored as Sl. No.111, below Sri U.P. Ramachandran (Sl. No.109) in the seniority list published as per this office proceedings No. LF/6188/Spl. Cell/98 dated

18.5.1998.

The revision and modification orders issued as per 5th paper read above is hereby replaced by this final order restoring the original seniority of Sri Mohammed Abdulla in the light of Government orders.\024

Questioning the said G.Os. dated 6.11.2003, 19.11.2003 and 3.1.2004, the third respondent filed a writ application before the High Court of Kerala which was marked as Writ Petition No.2075/2004. An interim order of stay was granted therein pursuant where to the G.O. dated 3.1.2004 was cancelled. A Select List was prepared on 7.5.2004 on the recommendation of the Departmental Promotion Committee. Pursuant thereto, the appellant was promoted to the post of Deputy Director of Local Fund Audit Account by order dated 27.5.2004. However, the said order was reviewed by the Government by its order dated 26.8.2004, inter alia on the premise that while passing the same, the order of stay passed in Writ Petition No.2075/2004 had not been taken into account whereby the promotion of the appellant was cancelled.

Aggrieved thereby the appellant filed another writ application being Writ Petition (Civil) No.26149/2004 before the Kerala High Court for a declaration that the inclusion of his name in the Select List and the order dated 27.5.2004 giving promotion to him was legal and valid and the same should not have been reviewed.

The said writ petition although was dismissed but the review application filed by the appellant was allowed. By reason of the impugned judgment, the High Court upon hearing the parties, while dismissing the writ petition filed by the appellant herein, allowed the writ petition filed by the third respondent herein.

In view of the controversy involving the applicability of paragraph 4 or paragraph 5 of Appendix XIIIA to the Kerala Service Rules, we may at the outset notice the same:

\0234 Permanent officers and non-permanent officers who have completed probation in their entry cadre in the regular service of Government may be granted leave without allowances under these rules. In such cases, for, and during the currency of the period of leave, the officers shall lose all service benefits such as the earning of leave including half pay leave, pension, gratuity, increment, etc., and also promotion chances as may arise with reference to their seniority in the posts from which they proceeded on leave. They shall also lose seniority in the higher grade/grades with reference to their juniors who might get promoted to such grade/grades before they rejoin duty.

5. In the case of non-permanent officers in regular service who have not completed probation in the entry grade, leave without allowances may be granted subject to the condition that they will have to start afresh and complete their probation on return from the leave without allowances. In other words, the officers will forfeit the service benefits that had accrued to them prior to their proceeding on leave and they will be deemed as new entrants to Government service on return from leave. What is protected is only their right to rejoin Government service in the same entry grade as if they were new entrants.\024

The High Court relying upon its earlier decisions in Lukose vs. State of Kerala (1995 (2) KLT 285) and Unnikrishna Panicker vs. Bhasi (2000 (1) KLT 449), held that in this case, paragraph 5 of Appendix XIIIA shall apply. Appellant contends that paragraph 4 is applicable in this case.

We may before embarking on the said issue at this juncture, notice the

stand taken by the State of Kerala in its counter affidavit before the High Court:

\023It is submitted that the petitioner is governed by Clause 5 of Appendix XIIIA of KSR since he had not completed probation before proceeding on leave. As per the Clause 4 & 5 of Appendix XIIIA of KSR, entry cadre means the cadre from which the officer proceeds on leave. Officers who avail long leave without allowances for employment abroad before the completion of probation are governed by Clause 5 of the Rule under Appendix XIIIA of KSR. As per this rule, such officers will be treated as new entrants when they rejoin duty and will have to start the probation afresh. Since they have not completed probation before proceeding on leave, they are not eligible for promotion during the currency of leave period.\024

Before us, however, Mr. G. Prakash, learned counsel appearing on behalf of the State would submit that in view of the fact that the appellant joined his services in the Subordinate Service of the State on the post of Inspector of Local Fund Account, now re-designated as Audit Officer, which is in the State service and he having been appointed by transfer from the former to the latter, would be deemed to have entered into the State service on 8.11.2001 and as before completion of his period of probation; the third respondent had already been promoted as Deputy Director of Local Fund Account, the matter would be governed by paragraph 5 and not paragraph 4 of Appendix XIIIA of the said rules.

We may notice Rules 27 & 28 of the Kerala State and Subordinate Service Rules which read as under:

\02327. Seniority.- (a) Seniority of a person in a service, class, category or grade shall, unless he has been reduced to a lower rank as punishment, be determined by the date of the order of his first appointment to such service, class, category or grade.

Explanation:- For the purposes of this sub-rule, 'appointment' shall not include appointment under rule 9 or appointment by promotion under rule 31.

28 (a) Promotion.- (i) Except in the case of appointment to the posts of Heads of Departments no member of a service or class of a service shall be eligible for promotion from the category in which he was appointed to the service unless he has satisfactorily completed his probation in that category:

Kerala Local Fund Audit Service Special Rules, 1960 consists of only four category of officers:

1. Examiner of Local Fund Accounts (re-designated as Director)
2. Deputy Examiner of Local Fund Accounts (re-designated as Assistant Director)
3. Assistant Examiner of Local Fund Accounts (re-designated as Deputy Director)
4. Inspectors of Local Fund Accounts (re-designated as Audit Officers)

Rule 3 of the 1960 Rules provides as under:

\023Promotion to the posts of Deputy Examiner of Local Fund Accounts and Assistant Examiner of Local Fund Accounts and appointment by transfer to the post of Inspector of Local Fund Accounts shall be made from select lists prepared from among eligible officers on the basis of merit and ability, seniority being considered only where merit and ability are approximately equal.\024

Appellant availed leave without allowance in terms of paragraph 4 of the said rules while he was working as Audit Officer of Local Fund Accounts. But prior thereto he had already entered the cadre of Grade II Auditor and completed his period of probation. He was a permanent Government servant. Once he became permanent Government servant, the question of his availing leave while he had not completed the period of probation in the entry grade as envisaged in paragraph 5 of Appendix XIIA of the rules would not arise. Distinction between paragraphs 4 and 5 is apparent. Paragraph 4 deals with the cases of permanent officers who have completed the period of probation in their entry cadre in the regular service, whereas paragraph 5 speaks of non-permanent officers in regular service who have not completed probation in their entry grade. In the latter case, all the service benefits which had accrued to the officer prior to his proceeding on leave, would be forfeited and he has to be treated as new entrant when he rejoins his post. It has categorically been stated in paragraph 5 that only the service of the concerned officer is protected but any benefit thereof is not to be given. Paragraph 4, on the other hand, deals with a situation where a person availing leave thereunder would lose his seniority in the higher grade with reference to his juniors who might get senior grade before he rejoins his duty.

Condition precedent for denying the concerned officer the benefit of his seniority is that his junior in the meantime must obtain a senior grade before he rejoins his duty. Paragraph 4, in our opinion, speaks of the entry in the regular service of the Government, whatever be the cadre held by the employee.

The State, as noticed hereinbefore, proceeded on the basis that the appellant had not completed his period of probation before proceeding on leave. A factual error appears to have been committed by the State as it is evident from the factual matrix, as noticed hereinbefore, that the appellant had entered into Government service in the year 1975 and he had already been promoted several times.

Furthermore, Rule 28 as noticed hereinbefore, provides for promotion, which will be applicable in a case of this nature. In terms of the said rule the question as to whether the employee had completed his period of probation or not may not be a relevant criteria.

We may now notice the decisions of the High Court whereupon reliance has been placed while passing the impugned judgment. In Lukose (supra), the Full Bench had no occasion to consider the applicability of Appendix XIIA which was inserted only in the year 1986, as the cause of action therein had arisen much prior thereto. Unnikrishna Panicker (supra) is a case where admittedly paragraph 5 of the Rules was applicable. In that case, the third respondent therein joined the service on 24.12.1981 and before completion of his probation in the post of Drug Inspector, he had applied for leave for a period of 5 years to take up employment abroad. It was in that view of the matter that on rejoining his duty, he was treated as a new entrant in service. In the fact situation obtaining therein, paragraph 5 indisputably was applicable. It was so noticed by the Bench in the following terms:

\023The Government Order dated 16.12.1983 provided that non-permanent employees in regular service who have not completed probation in the entry grade will have to start afresh and complete their probation on return from leave without allowance. In other words, the officers will forfeit the service benefits that have accrued to them prior to their proceeding on leave and they will be deemed as new entrant to Government service on return from leave. Government Order however protected their right to rejoin Government service on the same grade as if they were new entrants. The aforementioned G.O. was given the status of a rule and inserted as Appendix XIIA vide G.O.(P) No. 953/86/Fin dated

2.12.1986 published in the Keala Gazette dated 3.3.1987 with effect from 16.12.1983.\024

The High Court, therefore, in our opinion committed a serious error in relying upon the decision in Lukose (supra) as also Unnikrishna Panicker (supra). We may furthermore observe that a declaration of probation in a grade would not automatically confer an employee a right of promotion. All eligible permanent employees are required to be considered for promotion inter alia upon taking into consideration their seniority in the service.

The submission of Mr. G. Prakash that the appellant was a fresh entrant in the post of Inspector, Local Fund Account (now Audit Officer) may not be entirely correct. He might have entered into the State service for the purpose of the said rule, the same would not affect his career, if paragraph 5 of the Appendix XIIA of the Kerala Service Rules is found to be inapplicable. At the cost of repetition, we may reiterate that paragraphs 4 & 5, talk of the position of the employees with reference to their permanent or temporary status, meaning thereby the persons who have completed their probation and who are yet to complete their probation. It does not take into consideration the question in regard to entry in any other service to which he might have been promoted or appointed by transfer.

The High Court furthermore wrongly applied clause (c) of Rule 27 of the Kerala State and Subordinate Service Rules, as the question of fixation of the relative seniority and the order in which their names are arranged in the revised list (as recommended by Public Service Commission) would not arise in a case of this nature where the question is as to whether the entry in the State Service is by way of transfer from Subordinate Service or by promotion as such a situation has to be made from amongst the existing Government servants and not outsiders.

Rule 3 of the Kerala Local Fund Audit Service Special Rules in no unmistakable term says that even for the purpose of appointment by transfer to the post of Audit Officer the names of the employees mentioned in the select list prepared from amongst the eligible officers on the basis of their merit and ability are to be taken into consideration as the seniority is to be considered only when merit and ability are approximately equal. Once, therefore, the appellant was found to be eligible for promotion or for that matter, for recruitment by transfer, to the post of Audit Officer on the basis of his merit and ability, although seniority being the relevant criteria provided merit and ability of the respective candidates were approximately equal, in our opinion, his promotion shall not have been cancelled.

For the reasons aforementioned, we are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of this case, there shall be no order as to costs.

We make it clear that this order shall not affect the benefits which might have been given to the third respondent herein pursuant to the order impugned in the writ application.