

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

TUESDAY, THE 8TH DAY OF DECEMBER 2015/17TH AGRAHAYANA, 1937

WP(C).No. 1241 of 2004 (W)

PETITIONERS:

1. P.A. RAJAMMA, W/O. REGHUNATHAN,
JUNIOR TYPIST CLERK, RETD., MEKKANATH HOUSE
THOPPUMPADY, KOCHI-5.
2. P.A. FATHIMABI, W/O. A.H. MEHABOOB,
JUNIOR TYPIST CLERK (RETD.), AMBALATH HOUSE
S.R.M. ROAD, KOCHI-12.
3. M.J. DEVASY, JUNIOR TYPIST CLERK (RETD.)
MENACHERRY HOUSE, S.R.M. ROAD, KOCHI-12.

BY ADV. SRI.GEORGE CHERIAN (THIRUVALLA)

RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY THE
DIRECTOR OF FISHERIES AND REGISTRAR OF
FISHERIES CO-OPERATIVES, VIKAS BHAVAN
THIRUVANANTHAPURAM.
2. THE KERALA STATE CO-OPERATIVE
FEDERATION FOR FISHERIES DEVELOPMENT LTD.
(MATSYAFED) TRIVANDRUM, REPRESENTED BY ITS
MANAGING DIRECTOR.

R,R2 BY ADV. SMT.LALI VINCENT, SC, MATSYAFED
R2 BY ADV. GEORGE POOTHOTTAM(SC)
R2 BY ADV. SRI.GEORGE POONTHOTTAM, SC,MATSYAFED
R BY SRI.MATHEW ZACHARIAH, SC, MATSYAFED

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 08-12-2015,
ALONG WITH WPC. 9316/2004, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

APPENDIX

PETITIONER'S EXHIBITS

- P1: TRUE COPY OF THE ORDER DATED 8.11.95 ISSUED BY THE GOVERNMENT OF KERALA
- P2: TRUE COPY OF THE CIRCULAR DATED 29.4.97 BY THE 2ND RESPONDENT
- P3: TRUE COPY OF THE CIRCULAR DATED 15.4.98 BY THE 2ND RESPONDENT
- P4: TRUE COPY OF THE LETTER DATED 4.9.2001 BY THE ACCOUNTANT GENERAL
- P5: TRUE COPY OF THE ORDER DATED 18.6.2001 ISSUED BY THE GOVERNMENT OF KERALA
- P6: TRUE COPY OF THE JUDGMENT DATED 17.12.2002 IN O.P. NO.34098/2002 BEFORE THIS HON'BLE COURT
- P7: TRUE COPY OF THE ORDER DATED 19.9.2002 ISSUED BY THE SECOND RESPONDENT
- P8: TRUE COPY OF THE ORDER DATED 4.3.2003 BY THE GOVERNMENT OF KERALA
- P9: TRUE COPY OF THE ORDER DATED 11.8.2003 ISSUED BY THE GOVERNMENT
- P10: TRUE COY OF THE ORDER DATED 4.9.2003 ISSUED BY THE 2ND RESPONDENT
- P11: TRUE COPY OF THE ORDER DATED 3.10.2003 BY THE 2ND RESPONDENT
- P11(A) TRUE COPY OF THE PAY FIXATION ORDER OF 1ST PETITOINER
- P11(B) TRUE COPY OF THE PAY FIXATION ORDER OF 2ND PETITIONER
- P11(C) TRUE COPY OF THE PAY FIXATION ORDER OF 3RD PETITONER
- P12: TRUE COPY OF THE ORDER DATED 21.6.90 ISSUED BY THE GOVERNMENT
- P13: TRUE COPY OF THE LETTER DATED 14.6.2001 BY THE 2ND RESPONDENT
- P14: TRUE COPY OF THE LETTER DATED 30.7.2001 BY THE DIRECTOR OF FISHERIES
- P15: TRUE COPY OF THE ORDER DATED 5.12.2003 ISSUED BY THE 2ND RESPONDENT

//TRUE COPY//

P.A. TO JUDGE

JJJ

K. VINOD CHANDRAN, J.

W.P.(C) Nos. 1241 & 9316 of 2004 (H)

Dated this the 8th day of December, 2015

J U D G M E N T

The petitioners in both the writ petitions were employees of the Matsyafed, who retired from service, on various dates. The petitioners contend that they are entitled to higher grade as were entitled to the other employees of the erstwhile Kerala Fisheries Corporation Limited, who were absorbed in the Fisheries Department of the State Government. The documents are referred to from W.P.(C) No.9316/2004, unless otherwise specifically noticed.

2. The petitioners were all working under the Kerala Fisheries Corporation, when the Corporation became defunct, and the employees were absorbed in the Government and the Matsyafed. The petitioners

were absorbed in the Matsyafed and worked in various designations and retired on various dates. The petitioners have filed the above writ petitions on the ground that Ext.P5 dated 4.3.2003, which was issued later to the retirement of the petitioners, was discriminatory insofar as the order while granting a benefit of higher grade, to the employees who were absorbed from the defunct Kerala Fisheries Corporation to the Matsyafed, made it prospective.

3. The Government Order at Ext.P5 indicated that the monetary benefit would be available only prospectively, ie, from 4.3.2003, the date of the order. The petitioners were all retired before that date and hence they would derive no benefit at all, while those similarly placed and continuing in the Matsyafed for reason only of their having not retired would at least be able to receive the monetary benefits prospectively.

One other ground of discrimination raised is that those employees from the defunct Corporation, who had been absorbed to the government were granted such benefits earlier; which benefit was sought to be extended to those absorbed in Matsyafed and the prospective application of such order results in, it being rendered nugatory.

4. The learned Counsel for the petitioners submits that by Exts.P1 and P2, the Matsyafed had, in fact, granted time bound higher grade to the employees of the Matsyafed, which included the employees of the defunct Corporation who were absorbed to the service of the Matsyafed. However, they were discriminated insofar as the benefits granted by the Government, as per Exts: P-3 & P-4, to those persons who were absorbed to the government, from the defunct Corporation, were not granted to them. Ext.P3 is an

order dated 8.11.1995 wherein, the time bound higher grade was granted to the erstwhile employees of the defunct Kerala Fisheries Corporation, who were absorbed to Government service, taking into account their service rendered in the Kerala Fisheries Corporation and the Fisheries Department as a special case.

5. Subsequently, Ext.P4 order was passed by the Government, which, the learned Counsel for the petitioners points out, was on the basis of an objection raised by the Accountant General that the higher grade has been granted even to unqualified persons. By Ext.P4, the Government, having considered the issue and on the basis of the recommendations made by the Director of Fisheries, was pleased to grant higher grade promotion to the employees of the erstwhile Corporation, absorbed to the Government; in the scale

of pay as specified in the list attached to the Pay Revision Orders with effect from 1.7.1988. The petitioners contend that they are similarly placed as those employees who were appointed and absorbed in the Fisheries Department and, hence, they are entitled to similar benefits and also retrospective effect of the same, so as to enable their pay to be fixed accordingly and arrears disbursed with effect from 1.7.1988. However, Ext.P5 was passed on 4.3.2003, granting the benefit only prospectively.

6. The learned Counsel for the petitioners in W.P. (C) No.9316/2004 would specifically point to Ext.P9 order in the contempt case and contend that, the judgment against which contempt was filed was with respect to employees who were similarly placed as the petitioners and therein orders were issued directing the relief to be granted to the employees of the Matsyafed,

as was granted to the Government employees. The petitioners in W.P.(C) No.1241/2004 were the petitioners in O.P. No.34098/2002 which led to the contempt case. The judgment in the said O.P. is produced as Ext.P6 in their writ petition.

7. The learned Counsel for the respondent, at the outset, fairly submits that there is a judgment in O.P. No.2944/2003; where one of the employees, against whom refund was directed for the time bound higher grade granted without proper approval from the Government, had challenged the refund and the prospective application of the Government Order. It is also submitted that the Counsel for the Matsyafed was not present when the matter was heard since the writ petition was once dismissed for default and then restored with notice only to the Counsel who had been earlier representing Matsyafed. Hence, the respondent

has filed a review against the said judgment.

8. However, on facts, it is submitted that there is substantial difference insofar as the petitioners are all retired earlier to the Order, now impugned as discriminatory at Ext.P5. Further, the petitioners were never given that particular benefit and there is no question of any refund arising in the instant case.

9. It is also argued that petitioners cannot be considered to be equally situated as those absorbed in Government Service, since, they were persons who were absorbed and continued in Matsyafed, which is a Co-operative Society. The employees of the Society would be governed by the decisions taken by the Board of the Society, subject to approval from the Government as is stipulated in Section 84 of the Kerala Co-operative Societies Act.

10. Therein, the writ petition was filed by an employee of Matsyafed, who was given a higher grade which was sought to be refunded on the strength of the order dated 04-03-2003 (Ext:P-5). Therein, the recovery was also on the basis of an audit objection, that the fixation of pay of the petitioner therein, at the time when time bound higher grade was fixed in the regular higher scales, was not admissible. It was in such circumstance, deeming the recovery to be a direct consequence of Ext: P-10 order (herein Ext:P-5), it was held that the recovery cannot be effected and Ext.P10 would stand set aside to the extent it imposes the condition that the benefit will be payable to the petitioner with effect from the date of the said order. This Court is of the opinion that the petitioners herein are not similarly placed as the petitioner in O.P. No.2944/03. Herein, the petitioners were not granted

with that particular benefit, at any time during their service, nor did any of them complain of it.

11. The petitioners in W.P.(C) No.1241/2004 had claimed the benefit granted to those employees absorbed in the Government; by O.P. No.34098/2002. The judgment in that case (ExtP6 in W.P.(C) No.1241/2004) does not consider the issue on merits and merely directed consideration of their claim. The claim was that those who were absorbed in Matsyafed are similar to those who were absorbed in Government; from the defunct Corporation. The benefit of the order granting Higher Grade to those in Government, was claimed to be entitled to those in Matsyafed also. The Government rejected the claim and Ext.P9 order in contempt also disclose that the Court had not entered any positive finding in O.P. No.34098/2002.

12. The contention raised by the petitioners in W.P.(C) No.9316/2004 is that they are similarly situated to the petitioner in Ext.P9 and they have been discriminated, violating Article 14 and 16 of the Constitution of India. Ext.P9 is the order in the contempt case, which was filed on the basis of the judgment in O.P. No.34098/2002. The original petition was allowed directing consideration of the claim of the various writ petitioners for time bound higher grade promotion, in accordance with law, taking into account two exhibits produced as Exts.P9 and P14 in that Original Petition. In compliance with the judgment in the O.P., Ext:P-8 was passed restricting the monetary claim, from the date of the order, against which the contempt case was filed. Ext: P-8 also noticed Ext:P-5 and modified Ext:P-5 and the said order was made retrospective, for the purpose of notional fixation

of pay. The Court in the contempt case found that since orders have been passed, it is for the petitioner therein to challenge the said order appropriately, and it was also directed that arrears of gratuity, due to the petitioner therein, shall be released within one month considering the revision of gratuity in the light of the notional pay fixation made.

13. The chronology of events, in a nut shell, would be that on the Corporation becoming defunct, some of its employees were absorbed into government and some to the Matsyafed. The employees so absorbed into Matsyafed, though entitled to higher grade, were not granted the similar benefit that were granted to those absorbed in government. A challenge of such denial by O.P. No: 34098 of 2002, in which by judgment dated 17.12.2002, there was a direction to consider the claim of the petitioners therein.

14. Independent of such direction, the government, by Ext P-5 dated 04.03.2003 granted it but prospectively. Later complying with the directions in the judgment, ext:P-8 dated 03.10.2003 was passed allowing notional retrospective effect to EXT:P-5 order. This Court in the O.P., did not find on the merits of the claim raised by the petitioners which was why the contempt case was closed. As noticed earlier the fact that the petitioners were left the remedy to challenge the order rejecting their claim, itself indicates that there was no positive finding rendered in O.P. No.34098/2002; which alone would invite a contempt proceeding. Hence, it cannot be said that this Court had allowed the claim of the petitioners in the other case also. The grant of notional pay fixation and the arrears made effective from 4.3.2003 was also in the light of Ext.P6 order of the Government itself, produced

in W.P.(C) No. 9316/2004.

15. It has to be reiterated that all the petitioners retired even prior to Ext.P5 order being passed. The petitioners also had the benefit of the higher grade at Exts:P-1 & P-2, which they admit in the Writ Petitions (Para 5 in W.P.(C) No.9316/2004 and para 2 in W.P.(C) No.1241/2004). The orders relied on by the petitioners at Exts:P-3 & P-4 are orders governing the employees absorbed to Government; who have the status of Government employees conferred on them, by the absorption. True, the source was the same as far as both having been employed in a Corporation, which had become defunct. As a measure of amelioration; the Government had decided to absorb the employees of the Corporation; lest they be thrown out, on to the streets. Some were absorbed in government and some in Matsyafed, also not necessarily on option. But having

thus accepted the different employments under the different employers, no equation of posts or employment can be claimed. Otherwise, the employees of the defunct Corporation would at best have been entitled to retrenchment compensation. Their status differ after absorption and so does the nature of work. Discrimination can be successfully urged as a legal ground only when the action complained of, treats equally placed persons differently.

16. Apposite would be reference to the decision of the Hon'ble Supreme Court in **H.P. Gupta v. Union of India - (2002) 10 SCC 658**. In the said case, grant of two advance increments to in-service Telecom Officers, on acquiring Engineering degree, declining it to those who possessed the degree even at the time of joining the service was held to be valid classification in the following manner:

“The object of giving two advance increments to those officials who did not possess degree in Engineering before joining the service, is only to encourage them to get such a degree so that they could improve themselves while in service. When that object is satisfied, the contentions that there should be equality in the matter of payment of salary or other emoluments or that there should be parity in the matter of giving increments, cannot be accepted. It is true that in such a situation, certain anomalies may arise in specific cases when the official who has acquired degree in Engineering subsequent to joining of service may get higher salary though junior to those who possessed the qualification of degree in Engineering even at the time of joining the service. There cannot be perfect equality in any matter on an absolute scientific basis and there may be certain inequities here and there. If the classification is correct and serves a particular purpose, the same is not to be judicially interfered with.”

17. When the petitioners were absorbed in the Matsyafed and when they were continued in service, till their retirement, they did not have a case of discrimination. Only for sanction of higher grade, as was permitted to the employees who were absorbed in the government, a few raised a challenge. It was after their retirement that Ext.P5 order was passed granting certain benefits, prospectively. The petitioners never having claimed equal status on absorption or while continuing in employment and when retired; were given a benefit by Ext:P-5, on which, they claim retrospective operation.

18. There is yet another contention raised by the learned Counsel for the petitioners, pointing to Ext.R2 (a), produced by the respondent. The Government in Ext.R2(a) had noticed that the order in W.P.(C) No. 27156/2004, filed by four other employees, wherein the

direction to grant benefits prospectively from 4.3.2003 was not interfered with, but, however, directed the Government to examine the matter. The Government having examined the case in consultation with the Managing Director, Matsyafed, found that the huge financial liability in disbursing arrears of benefit to 140 employees would stand in the way of consideration of payment of arrears. The contention raised is that mere financial liability cannot deter the Government when the issue is of discrimination. Discrimination has already been found against, and does not survive as a ground, for the petitioners to urge.

19. As is noticed earlier, the petitioners were absorbed in the Matsyafed, on the Kerala Fisheries Corporation, their erstwhile employer, going defunct. The petitioners were continued therein for long when they did not claim similar benefits as are available to

other employees who were absorbed in the Government department. It cannot also be said that the petitioners are equally placed since the petitioners were admittedly working in a Co-operative Society and the other employees were absorbed in the Government. The Government's decision, to decline payment on the ground of financial liability, suffers from no defect on the ground of discrimination, since, it has already been found that the two, those absorbed in the Government and in Matsyafed, are neither similarly placed nor possible of equation. The consideration in that context can only be a sympathetic one, which can be declined on the ground of financial stringency.

20. The Hon'ble Supreme Court, with respect to cut-off dates on the question of pay revision, has held so in **Government of A.P. v. N. Subbarayudu- (2008) 14 SCC 702.**

“5. In a catena of decisions of this Court it has been held that the cut-off date is fixed by the executive authority keeping in view the economic conditions, financial constraints and many other administrative and other attending circumstances. This Court is also of the view that fixing cut-off dates is within the domain of the executive authority and the Court should not normally interfere with the fixation of cut-off date by the executive authority unless such order appears to be on the face of it blatantly discriminatory and arbitrary.”

In such circumstance, it cannot be said that the petitioners who had retired even prior to Ext.P5 order are entitled to any arrears of pay. The petitioners having been found to be dis-entitled to be treated at par with the employees absorbed in the Government, after their absorption can only derive the benefit granted by Ext.P5 order, on its terms.

21. It is pertinent that by Ext.P6, the Government had agreed to give retrospective effect to Ext.P5 with effect from 1.7.1988 subject to the condition that the monetary benefits would be given only from the date of order ie, 4.3.2003. Hence the petitioners or even the similarly placed employees continuing in the Matsyafed, would not have any claim for arrears. The petitioners having retired prior to Ext.P5, cannot have any claim for monetary benefits prospectively. Even if the petitioners are dis-entitled from the arrears, the petitioners definitely have to be fixed their pay notionally from the date of their employment in the Matsyafed and the higher grades also granted notionally in the various periods in which such higher grades were applicable, if no promotions have been granted to the petitioners. On such notional fixation of pay the petitioners have to be granted gratuity and

other retirement benefits taking the last drawn pay, as the notionally fixed last drawn pay. The same shall be done within a period of three months from the date of receipt of the certified copy of this judgment.

22. One other claim of the petitioners is the exclusion of the compensatory allowance, for computation of gratuity. This has been allowed by Ext:R-1(A). If not already granted, the gratuity shall be reworked on that basis and the balance too paid, within the time stipulated herein above.

The writ petitions are disposed of with the above directions. Parties to suffer their respective costs.

Sd/-
K.VINOD CHANDRAN,
JUDGE