

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

WEDNESDAY, THE 12TH DAY OF AUGUST 2015/21ST SRAVANA, 1937

OP(KAT).No. 134 of 2015 (Z)

**AGAINST THE JUDGMENT IN OA EKM 12/2015 of KERALA ADMINISTRATIVETRIBUNAL,
THIRUVANANTHAPURAM DATED 13-01-2015**

PETITIONER(S):

**OMANA AGED 54 YEARS
W/O SUNIL KUMAR,
STAFF NURSE GRADE I,
DISTRICT HOSPITAL, KANNUR
RESIDING AT 'SAPTHAMI', ANDATHODU P.O,
CHOVVA, KANNUR - 6.**

**BY ADVS.SRI.K.C.SANTHOSHKUMAR
SMT.K.K.CHANDRALEKHA**

RESPONDENT(S):

**STATE OF KERALA
REPRESENTED BY SECRETARY TO GOVERNMENT
HEALTH & FAMILY WELFARE DEPARTMENT
GOVERNMENT OF KERALA
THIRUVANANTHAPURAM - 695001**

**THE DIRECTOR OF HEALTH SERVICES
THIRUVANANTHAPURAM - 695001.**

**THE DISTRICT MEDICAL OFFICER
KANNUR - 670001.**

R BY GOVERNMENT PLEADER SRI.JOSEPH GEORGE

**THIS OP KERALA ADMINISTRATIVE TRIBUNAL HAVING COME UP FOR
ADMISSION ON 12-08-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

avk

OP(KAT).No. 134 of 2015 (Z)

APPENDIX

PETITIONER'S EXHIBITS

**EXT. P1 : TRUE COPY OF THE ORIGINAL APPLICATION FILED BY THE
PETITIONER**

**EXT. P2 : TRUE COPY OF THE ORDER DATED 13.01.2015 IN O.A (EKM)
NO.12/2015 OF THE KERALA ADMINISTRATIVE TRIBUNAL,
THIRUVANANTHAPURAM (CAMP SITTING ERNAKULAM).**

RESPONDENT'S EXHIBITS

NIL

//TRUE COPY//

PA TO JUDGE

avk

**P.R.RAMACHANDRA MENON
&
BABU MATHEW P.JOSEPH, JJ.**

O.P.(KAT)No.134 of 2015

Dated this the 12th day of August, 2015

JUDGMENT

P.R.RAMACHANDRA MENON, J

Denial of the claim for second Higher Grade on completion of 15 years of service, also reckoning the provisional service rendered by the petitioner prior to commencement of the regular service, at the same time effecting cancellation of the benefit already given towards the first Higher Grade benefit on completion of 8 years, as ordered by the authorities of the State and upheld by the Kerala Administrative Tribunal, is sought to be challenged by the petitioner by filing this original petition.

2. The factual matrix reveals that the petitioner, on coming out successful in the process of selection conducted by the PSC to the post of Staff Nurse, came to be appointed as Junior Public Health Nurse Grade II on 18.8.1992. It is stated that, prior to her joining regular service as above, she had worked on provisional basis as a Staff Nurse for two different spells between 14.02.1987 to 01.01.1989 and 30.5.1989 to 17.08.1992. After joining the service on regular selection, admittedly the petitioner did not wait for declaration of probation and sought to proceed on 'leave without allowance' (even before six months after joining duty) by submitting an application in this regard, so as to reap the fortunes abroad.

Considering the application preferred by the petitioner, LWA for 5 years was granted initially, which was subsequently extended by another spell of 5 years, thus totaling 10 years, during the period from 3.2.1992 to 19.1.2003. After completion of the leave as above, the petitioner joined back in service on 20.1.2003. It was thereafter, that the probation of the petitioner was declared on 9.2.2005. After declaration of probation as above, the petitioner applied for regularization of the provisional service in terms of the stipulations under Rule 33 of Part I KSR (dealing with the service reckonable for the purpose of granting increments) Since the application preferred by the petitioner was considered on time, stating that there was a difference in the scale of pay and as such the benefit contemplated under Rule 33 could not be extended to petitioner herein, she was constrained to approach this Court by filing W.P.(C).No.9281/2007; which was disposed of, directing the matter to be considered by the concerned authority in the light of the law declared by this Court as per decisions reported in **1996 (2) KLT 555 Hussain v. Kerala Water Authority** and **2005 (4)KLT 987 State of Kerala v. Ponnamma** (which virtually is to the effect that, if at all there was any difference/variation of the pay by virtue of subsequent revision of the pay scales, it was never to be a bar in giving effect to the provision under Rule 33). The matter was accordingly considered by the competent authority, who passed Annexure A1 order on 15.3.2013, whereby, the provisional service

rendered by the petitioner was reckoned for the purpose of granting the first Higher Grade on completion of 8 years and the due amount was disbursed to the petitioner.

3. Later, on completion of 15 years, having already reckoned the provisional service as part of service for granting the 1st Higher Grade benefit, the petitioner filed Annexure 2 application for granting the 2nd Higher Grade. The said application was forwarded by the superintendant to the 3rd respondent along with Annexure A3 dated 10.10.2014. The matter was considered by the 3rd respondent who observed that, reckoning of provisional service of the petitioner was not in conformity with the statutory provisions; particularly the mandate under Para 5 of Appendix XII A and held that, she was not entitled to have any benefit either in respect of the claim for the First Grade promotion or in respect of the Second Grade as well. The 3rd respondent also observed that the position was already conveyed on two occasions earlier and that there was absolutely no basis for having forwarded it again; clarifying that the question of reckoning the provisional service would arise only in cases where regularization was given prior to 1.10.1994. This was sought to be challenged by filing O.A. (EKM).No.12/2015 before the Tribunal. After hearing both the sides, the Tribunal categorically held that there was no dispute with regard to the factual position that the 'leave without allowance' was availed and obtained by the petitioner/applicant before completing the period of probation and

that, by virtue of paragraph 5 of Appendix XII A Part I KSR, the past service of the applicant was liable to be treated as erased out. The Tribunal also arrived at a finding that, since the probation itself was completed, declaring the same only after rejoining duty on 20.1.2003 (with declaration of probation on 9.2.2005); the regular service could be treated as commenced much after 1.10.1994. It was accordingly that the relief sought for by the applicant was declined to be given and the original application was dismissed as per Ext.P2 order dated 13.01.2015.

4. The learned counsel for the petitioner submits that, the case of the petitioner is liable to be viewed in a different perspective, though there is no dispute with regard to the mandate of Paragraph 5 of Appendix XII A of Part I KSR (which came to be deleted only in the year 2010). The claim mooted by the petitioner for granting the benefit was considered by the competent authority and a finding was rendered that the provisional service was liable to be reckoned for the purpose of granting the benefit and the same was granted as well. It was only much later, that Annexure A1 order was passed by the 3rd respondent (in connection with the claim putforth for granting the Second Higher Grade) holding that the same is not liable to be acceded to; simultaneously, holding that, granting of the First Higher Grade benefit earlier as per Annexure A3 was also liable to be intercepted. The learned counsel submits that the eligibility of the petitioner having already been accepted, there

was absolutely no reason to have the same declined as per Annexure A1 order and hence the challenge. It is also stated that, even by the farthest stretch of imagination, recovery is not proper; more so, when the petitioner is a person who is serving the respondents in the entry cadre which is not a post in the officer category.

5. The learned Senior Government Pleader appearing for the respondents submits that the case of the petitioner is governed by the mandate of Para 5 of Appendix XII A; which as existed at the relevant point of time, reads as follows:-

“...the applicant’s past service is erased and she will be deemed as a new entrant. The past provisional service can be counted for the grant of higher grade if only the regular service of the applicant commenced before 1.10.1994. In this case the applicant can be treated as a person who entered service only on 20.01.2003.”

The said paragraph came to be can be deleted only in the year 2010. Scope of the said provision came to be considered by a Division Bench of this Court as per the decision reported in **2009 Vol I KLT Page 655 George v.Law Secretary** (to which I was also a member) declaring it in crystal clear terms, that the benefit contemplated is only to have an opportunity to rejoin the post in the concerned cadre and nothing more. The past service or such other benefits are not liable to be counted for any other purpose by virtue

of the statutory position and the law declared by the Division Bench of this Court as aforesaid. This Court finds that the learned Government Pleader is fully justified in making the submission, with regard to the legal position as above and as such, the observation made by the 3rd respondent in Annexure A1 order that granting of the First Higher Grade itself could not have been given to the petitioner whose regularization of service was never before 1.10.1994 is perfectly in order. In view of the declaration of law as above, this Court finds that the petitioner could not have been given the First Higher Grade benefit as per Annexure A3 order, counting the provisional service rendered prior to 1.10.1994. As a natural consequence, there cannot be any valid claim in respect of the Second Higher Grade benefit as well. This being the position, interference declined by the Tribunal in respect of the challenge raised against Annexure A1 order does not warrant any interference.

6. However, with regard to the submission made by the learned counsel for the petitioner that, the monetary benefit already disbursed to the petitioner is not liable to be recovered at this distance of time, this Court finds that the matter requires consideration. This is more so, in view of the law declared by the Supreme Court as per the recent judgment reported in **(2015) 4 SCC 334 (State of Punjab and others v. Rafiq Masih and others)** holding that no such recovery shall be effected in respect of lower category posts, particularly belonging to Group "C" and

Group "D". The petitioner's post being that of a Staff Nurse Grade II and since there is no case that it is something above Group "C", this Court finds that the petitioner is entitled to have the benefit of the verdict passed by the Supreme Court. In the said circumstance, while sustaining the order passed by 3rd respondent vide Annexure A4, with regard to the claim mooted by the petitioner, for granting the benefit of Higher Grade with liberty to effect necessary corrections, steps for recovery of the amounts already paid to the petitioner will stand intercepted. The verdict passed by the Tribunal stands modified to the said extend. The original petition is disposed of accordingly.

**Sd/-
P.R.RAMACHANDRA MENON
JUDGE**

**Sd/-
BABU MATHEW P.JOSEPH
JUDGE**

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PA TO JUDGE

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