

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K. SURENDRA MOHAN

&

THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

MONDAY, THE 14TH DAY OF SEPTEMBER 2015/23RD BHADRA, 1937

OP(KAT).No. 231 of 2014 (Z)

AGAINST THE ORDER IN T.A. 631/2013 of KERALA ADMINISTRATIVE TRIBUNAL,
THIRUVANANTHAPURAM DATED 28-01-2014.

PETITIONER(S)/APPLICANT IN THE T.A.:

SAJI C.M.,
S/O.C.K. MOHANAN, CHETTIPARAMBIL HOUSE, TAGORE ROAD,
NAYARAMBALAM - 682 500, ERNAKULAM DISTRICT
NOW WORKING AS LAST GRADE SERVANT,
REVENUE DIVISIONAL OFFICE, FORT KOCHI, ERNAKULAM.

BY ADVS. SRI. G. KRISHNAKUMAR
SRI. R. KRISHNAKUMAR (CHERTHALA)

RESPONDENT(S)/RESPONDENTS IN THE T.A.:

1. STATE OF KERALA,
REPRESENTED BY ITS SECRETARY TO GOVERNMENT,
PERSONNEL AND ADMINISTRATIVE REFORMS (RULES) DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM - 695 001.
2. THE ADDITIONAL CHIEF SECRETARY TO THE GOVERNMENT,
REVENUE (T) DEPARTMENT, GOVERNMENT OF KERALA,
THIRUVANANTHAPURAM - 695 001.
3. THE LAND REVENUE COMMISSIONER,
LAND REVENUE COMMISSIONERATE,
THIRUVANANTHAPURAM - 695 001.
4. THE DISTRICT COLLECTOR,
ERNAKULAM DISTRICT, KAKKANAD, ERNAKULAM - 682 011.
5. THE REVENUE DIVISIONAL OFFICER
FORT KOCHI - 682 001.

R1-R5 BY GOVERNMENT PLEADER, SRI. M. MOHAMMED SHAFI

THIS OP (KERALA ADMINISTRATIVE TRIBUNAL) HAVING BEEN FINALLY HEARD
ON 03.09.2015, ALONG WITH OP(KAT)NO. 232/2014, THE COURT ON 14-09-2015
DELIVERED THE FOLLOWING:

P.T.O.

OP(KAT).No. 231 of 2014 (Z)

APPENDIX

PETITIONER(S)' ANNEXURES/EXHIBITS:

ANNEXURE A1: ORDER DATED 28.01.2014 IN T.A.NO.631/2013 ON THE FILE OF THE HON'BLE KERALA ADMINISTRATIVE TRIBUNAL AT THIRUVANANTHAPURAM.

ANNEXURE A2: TRANSFER APPLICATION T.A.NO.631/2013 IN W.P.(C)NO.30494/2011 FILED BEFORE THE HON'BLE KERALA ADMINISTRATIVE TRIBUNAL AT THIRUVANANTHAPURAM.

EXHIBIT-P1- TRUE COPY OF THE NOTIFICATION G.O(P) 1/2002/P&ARD DATED 21/01/2002 OF THIRUVANANTHAPURAM.

EXHIBIT-P2- TRUE COPY OF THE G.O(P) NO. 5/2010/P&ARD THIRUVANANTHAPURAM DATED 04/03/2010.

EXHIBIT-P3- TRUE COPY OF THE LETTER DATED 31/01/2009 ISSUED BY THE 5TH RESPONDENT.

EXHIBIT-P4- TRUE COPY OF THE REPRESENTATION DATED 20/04/2010.

EXHIBIT-P5- TRUE COPY OF THE REMINDER DATED 28/07/2011.

EXHIBIT-P6- TRUE COPY OF THE LETTER FROM THE 5TH RESPONDENT DATED 29/07/2011.

EXHIBIT-P7- TRUE COPY OF THE G.O(P)36/91/P&ARD, THIRUVANANTHAPURAM DATED 02/12/1991.

RESPONDENT(S)' EXHIBITS: NIL

//TRUE COPY//

P.S. TO JUDGE

St/-

**K. SURENDRA MOHAN
&
SHAJI P. CHALY, JJ.**

O.P.(KAT) Nos.231 & 232 of 2014

Dated this the 14th day of September, 2015

JUDGMENT

Shaji P. Chaly, J.

These original petitions were filed by the applicants against the order dated 28.01.2014 of the Kerala Administrative Tribunal (for short, 'the Tribunal') in T.A.No.5964 of 2012 and T.A.No.631 of 2013. Both the Applications were disposed of by the Tribunal by a common order. Since the subject matter of both the original petitions are similar, we also propose to dispose of the same by a common judgment. By the common order, learned Tribunal dismissed the reliefs sought for by the petitioners to quash Exts.P5 and P6 in T.A.No.5964 of 2012 and consider the claim of the petitioner in T.A.No.631 of 2013 and held that they are not entitled to get seniority re-fixed from the date of advice as Last Grade Servants.

2. Brief common facts for disposal of the petitions are as follows:

Petitioners were advised by the District Office of the Kerala Public Service Commission (P.S.C.), Ernakulam as Last Grade Servants and they were ordered to join duty in headquarters vacancies on various dates. Later, the petitioners applied for inter-district transfer and they were allowed and accordingly petitioners joined duty in Ernakulam District on various dates. Thereafter, the petitioners filed representations before the 5th Respondent seeking fixation of seniority with reference to the original date of advice by the Public Service Commission. However, the 5th Respondent declined the same by passing impugned orders holding that since by Ext.P2 order dated 24.07.2010, the 2nd Respondent had issued clarification that same was having retrospective effect from 21.02.2002 only i.e. the date of Ext.P1 notification, petitioners who were transferred prior to 21.02.2002 to district of their choice were not entitled to get seniority with effect from the date of advice by the P.S.C. It is thus challenging the orders passed by the 5th Respondent declining seniority from the date of advice by the P.S.C., petitioners have filed writ

petitions before this Court which were later transferred to the Kerala Administrative Tribunal, on its constitution.

3. After hearing the petitioners and the Respondents and considering the rival pleadings, the learned Tribunal dismissed the petitions holding that since Exts.P1 and P2 Government Orders are given effect from 21.01.2002, the applicants, except the 4th applicant who were transferred after the cut off date fixed thereunder, were not entitled to succeed and therefore held that the persons already transferred before the cut off date are not eligible to get protection of seniority from the date of advice by the P.S.C. It was further held that since Rule 14 is a special provision in the Special Rules for the Last Grade Service, the same will prevail over the provisions of Rule 27(c) of Part-II of the Kerala State and Subordinate Services Rules and therefore the same cannot have any application in the case of Last Grade Servants. It was thereupon held that since the petitioners have not cared to challenge Exts.P1 and P2, the claim for seniority with effect from the date of advice fails. It is thus challenging the said order of the Tribunal, these Original Petitions are filed before this Court.

4. Heard the learned counsel for the petitioners and the learned Government Pleader appearing for the Respondents. Perused the pleadings and the entire materials on record.

5. Learned counsel for the petitioners contended that Rule 14(c) of the Special Rules for the Last Grade Service protects the claim raised by the petitioners before the Administrative Tribunal to the effect that their seniority is to be counted from the date of advice by the P.S.C. He further contended that originally a Note was appended to the said rule which clarified that the effective advice in the aforesaid rules means the date of letter of the Commission on the basis of which the candidate was appointed. Therefore, taking cue from those provisions, learned counsel contended that even though Notes (2) and (3) were added with effect from 21.01.2002, the same will have no bearing on Rule 14(c) and the Note originally provided to the said Rule. He contended that the original Note was re-numbered as Note (1), consequent to the introduction of Notes (2) and (3). Therefore, the learned counsel contended that since the rule as it originally stood is in their favour, merely because

subsequent Notes were added to the main rule, the same will not abridge or take away the rights conferred in favour of the petitioners as per Rule 14(c) of the Special Rules. The learned counsel further contended that a Note introduced to a rule cannot have any overriding effect over the main rule and therefore even if the Notes are taken into account, the same are not in modification of Rule 14(c) of the Special Rules and the same are only clarificatory in nature in order to clarify that the persons who were appointed district-wise and recruited to headquarters against the vacancies existing then were entitled to get seniority from the date of advice by the P.S.C.

6. On the other hand, learned Government Pleader contended that Ext.P1 notification was dated 21.01.2002 and Ext.P2 notification even though dated 04.03.2010 was given retrospective effect with effect from 21.01.2002 alone and the same were not challenged by the petitioners then and there and the belated challenge made by the petitioners cannot be sustained under law. Further, the learned Government Pleader contended that if any orders are passed by this Court in contra-distinction to the cut off date prescribed under Ext.P2 Government Orders, the same will upset the seniority list

prepared for the Last Grade Servants and innumerable difficulties will be caused.

7. Learned counsel for the petitioners had drawn our attention to the judgments in '**Punjab State Electricity Board Ltd. v. Zora Singh and Others**' [(2005) 6 SCC 776], '**Rai Sudhir Prasad v. State of Bihar and Others**' [(2004) 13 SCC 25] and '**V.B.Prasad v. Manager, P.M.D. Upper Primary School and Others**' [(2007) 10 SCC 269] and canvassed the proposition that the Note added to a main rule is only clarificatory in nature and the same will not have any bearing adverse to the main rule and therefore Rule 14(c) along with the original Note appended to the same were not modified in any manner consequent on the introduction of Exts.P1 and P2 by which Notes (2) and (3) were added to Rule 14(c) of the Special Rules.

8. On the other hand, learned Government Pleader has invited our attention to the judgment in '**Bhoop Singh v. Union of India and others**' [AIR 1992 SC 1414] and canvassed the proposition that since there was long delay in challenging the impugned orders passed by the 5th Respondent, the challenge made against the same in 2011 by

filing the writ petitions cannot be sustained. We have gone through the judgment in '**Bhoop Singh's** case (supra) and found that, that was a case where a termination of service was challenged after 22 years and no explanation was offered for delay and in that background, Hon'ble Apex Court held that the challenge could not be sustained under law.

9. Having considered the rival submissions made at the Bar, we think it is only appropriate that Rule 14(c) along with the Notes are extracted for evaluating the circumstances in a proper and effective manner:

"14(c) Notwithstanding anything contained in clauses (a) and (b) above, the seniority of a person appointed to a category in the service on the advise of the Commission shall unless he has been reduced to a lower rank as punishment be determined by the date of first effective advise made for his appointment to such category and when two or more persons are included in the same list of candidates advised, their relative seniority shall be fixed according to the order in which their names are arranged in the advise list.

Note(1). The date of effective advise in this rule means the date of the letter of the Commission on the basis of which the candidate is appointed.

Note(2). Seniority of a person advised by the District Office of the Kerala Public Service Commission for appointment against a vacancy in Headquarters and transferred after such appointment to the District of his choice shall be determined with reference to the original advice by the District Office of the Public Service Commission.

Note(3). The seniority of a person advised by the District Office of the Kerala Public Service Commission and appointed against a Headquarters vacancy in the Government Secretariat, Advocate General's Office and similar departments having no extension in Districts and transferred after such appointment to any Department in the opted District of his choice, shall be determined on the basis of his date of first effective advice for appointment to such category."

10. According to us, Rule 14(c) was introduced to the Special Rules with the avowed object and intention of protecting the interests of the Last Grade Servants by making it explicit and clear that the seniority of a person appointed to the Last Grade Service shall be the date of advice by the Commission unless he has been reduced to a lower rank as punishment. Rule 14(c) further takes care of adjudicating seniority of candidates advised on the same list and provides that, in that situation seniority shall be fixed according to the

order in which their names are arranged in the advice list. By the original Note now numbered as Note (1), the effective advice contained under Rule 14(c) was clarified and stated that the date of the effective advice in this Rule means the date of the letter of the Commission on the basis of which the candidate was appointed. Therefore, going by Rule 14(c) along with Note (1), it is categoric and clear that the seniority of a candidate is to be counted from the date of his advice by the P.S.C., whether he was appointed on district-wise basis or to the State Headquarters. Viewed in that circumstances, it is broad and clear that once an advice is made, irrespective of the appointment made as per the said advice, the candidate is entitled to get seniority from the date of advice. There is no change to Rule 14(c) and the original Note in spite of Exts.P1 and P2 notifications. In other words, Rule 14(c) along with original Note stood intact in spite of the addition of Notes (2) and (3).

11. It is a well settled proposition of law that a Note appended to a Rule cannot alter the Rule position provided as per the Rule but a Note is added as clarificatory which will not disturb the rule and it must be read in context of the

substantive provision and not in any way derogative to the same. Further, by introducing a Note to a rule, the purport/purpose and objective of the rule cannot be defaced. So also, we found that the petitioners have a vested right under Rule 14(c) to get seniority as per the advice of the P.S.C. which cannot be taken away by adding Notes to the rules. On the contrary, if the arguments advanced by the learned Government Pleader is accepted, there will be two sets of Last Grade Servants from the same advise that is: (1) the candidates who were transferred to the districts opted by them prior to the date of Exts.P1 and P2 notifications and (2) candidates who were transferred subsequent to Exts.P1 and P2 notifications and who will be ranked seniors to the first set of candidates in view of Ext.P2 notification. Therefore, according to us, such an anomaly cannot be allowed to remain causing gross injustice to the candidates ranked senior as per the advice of the P.S.C.

12. In our view, the principles of 'doctrine of reading down' will have to be applied in order to rectify the anomaly and remove the gross injustice caused by fixing such a cut off date. Therefore, so as to give Rule 14(c) a reasonable

meaning and to make it Constitutionally valid, the said principle will have to be applied and the cut off date fixed under Ext.P2 notification i.e. 21.01.2002 will have to be construed properly in the matter of fixing the seniority as per the advice of the P.S.C. and as provided under Rule 14(c) of the Special Rules for the Last Grade Service. In that context, we have come across the judgment of the Hon'ble Apex Court in '**The All Saints High School etc. etc. v. The Government of Andhra Pradesh and others etc. etc.**' [AIR 1980 SC 1042] and in paragraph 111 it was held thus:

"111. x x x x x x x
x x x x x x x

It is well settled that in interpreting an enactment, the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress. (The Bengal Immunity Co. Ltd. v. The State of Bihar (1955) 2 SCR 603 and R.M.D. Chamarbaugwalla v. The Union of India (1957) SCR 930 cited with approval)."

This Court has in several cases adopted the principle of reading down the provisions of the Statute. The reading down of a provision of a statute puts into operation the principle that so far as it is reasonably possible to do so, the legislation should be construed

as being within its power. It has the principal effect that where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters beyond the relevant legislative power, the Court will construe it in a more limited sense so as to keep it within power."

Therefore, according to us, we will be justified in applying the said principle in order to rectify the anomaly that has occurred consequent to the cut off date fixed as stated supra.

13. If the view adopted by the learned Tribunal is accepted, a candidate advised by the P.S.C., senior in rank under the district-wise recruitment and posted to the Headquarters vacancy and transferred to the district of his choice prior to Ext.P2 notification will be ranked junior to a candidate junior in rank in the same list and directly recruited to a district of his choice. Similarly, a senior candidate recruited at Headquarters and got transferred to the district of his choice, prior to 21.01.2002 and his junior who was transferred after 21.01.2002 will be given the seniority against the said senior as per the original advice. Such an anomaly, according to us, will cause gross injustice to the senior candidates selected district-wise and recruited to the Headquarters.

14. According to us, Notes (2) and (3) were only of clarificatory in nature clarifying that the persons advised district-wise and appointed to headquarters vacancies while transferred to the districts opted by them will have seniority as per the advice. But since a cut off date i.e. 21.01.2002 was made as per Ext.P2 notification, the whole confusion has occurred. The cut off date has no rationale or nexus sought to be achieved and therefore the same cannot be sustained. On the other hand, the cut off date contained in Ext.P2 is totally arbitrary and illegal and the same is violative of Rule 14(c) of the Special Rules for the Last Grade Service. In that context, paragraphs 22 to 24 of the judgment in '**Punjab State Electricity Board Ltd.**' referred supra assume importance and they read thus:

"22. *The administrative circulars as thence existed as also the regulations indisputably require supply of electrical energy to the agriculturists within a period of two months from the date of receipt of the amount asked for in terms of the demand notice. It may be true that the note appended thereto provides that the period specified therein shall be subject to availability of requisite material but the same does not absolve the appellant from performing its statutory duties.*

23. *In A.P. SRTC v. STAT a Full Bench of the Andhra Pradesh High Court has noticed thus: (An LT p.544, para 31)*

"31(24). The meaning of 'note' as per P. Ramanatha Aiyar's Law Lexicon, 1997 Edn. is 'a brief statement of particulars of some fact', a passage or explanation."

24. *The note, therefore, was merely explanatory in nature and thereby the rigour of the main provision was not diluted."*

So also, in the judgment in **'Rai Sudhir Prasad'**s case referred *supra*, it was held in paragraphs 14 to 16 as follows:

"14. The learned counsel for the respondents has submitted before this Court that Rule 103 had no manner of application to the facts of this case because the appellant was not holding the post of a higher rank and, therefore, on the basis of Note (2)(b) to Rule 103 of the Bihar Service Code, his claim for additional pay must be rejected. The submission is misconceived and proceeds on misconstruction of Note (2)(b) which provides:

"When a gazetted government servant holds charge only of the current duties of an officer of higher rank for not less than one month, he may be granted such additional pay for the period as the State Government may in each case direct."

15. *In the first place the rule itself as quoted earlier, explicitly allowed the government servant appointed to officiate in two or more independent posts to be paid reasonable pay in no case exceeding half the presumptive pay of the officiating post. This does not*

mean that he forgoes his own salary and accepts half the pay of the officiating post. It means that the government servant is entitled to additional pay over and above his regular salary which additional pay may, subject to any direction of the State Government, be up to a limit of half the presumptive pay of the officiating post. In this case the State Government has curtailed the limit to 20% under Note 4. Therefore, the appellant, in terms of Rule 103, was entitled to additional pay for the "other post" at the rate of 20% of the pay of such other post during the period he was appointed to officiate in such post.

16. A note to a rule cannot derogate from the explicit words of the substantive provision and must be read as explanatory and in harmony with it. The substantive provision is Rule 103(b) and the relevant note is Note 4, both of which clearly provide for additional pay at 20% of the pay of the officiating post. These provisions entitle the appellant to additional pay of the post of both Medical Superintendent and Principal."

15. In that view of the matter, we found that the judgments relied on by the learned counsel for the petitioners cited *supra* assume importance, and therefore we have no hesitation in holding that the Notes (2) and (3) appended to Rule 14(c) did not disturb at all, Rule 14(c) and Note (1) appended thereto. In that view of the matter, the impugned

orders of the Administrative Tribunal cannot be sustained under law. Therefore, the petitioners are entitled to succeed and they are entitled to get seniority from the date of advice as provided under Rule 14(c), irrespective, of their appointment to the State Headquarters, transfer prior to Exts.P1 and P2 notifications, or the cut off date 21.01.2002 contained under Ext.P2 notification.

Resultantly, Exts.P5 and P6 in O.P. (KAT) No.232 of 2014 are quashed, these original petitions are allowed and the competent among the Respondents is directed to re-fix the seniority of the petitioners in the original petitions in accordance with the date of advice as per the directions contained above, within a period of four months from the date of receipt of a copy of this judgment. Needless to say, the petitioners will be granted all attendant benefits in accordance with the seniority so fixed.

Sd/-
K. SURENDRA MOHAN
JUDGE
Sd/-
SHAJI P. CHALY
JUDGE

//true copy//

P.S. to Judge

St/-