

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC

&

THE HONOURABLE SMT. JUSTICE P.V.ASHA

TUESDAY, THE 1ST DAY OF SEPTEMBER 2015/10TH BHADRA, 1937

WA.No. 416 of 2010 () IN WP(C).34287/2008

AGAINST THE JUDGMENT IN WP(C) 34287/2008 of HIGH COURT OF KERALA
DATED 30-11-2009

APPELLANT(S)/RESPONDENTS 1 & 2:

1. STATE OF KERALA REP.BY THE
SECRETARY TO GOVERNMENT, HEALTH AND FAMILY
WELFARE DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.

2. THE DIRECTOR OF MEDICAL EDUCATION,
MEDICAL COLLEGE P.O., THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SRI T.J.MICHEL

RESPONDENT(S)/PETITIONER & 3RD RESPONDENT:

1. B.M.ALI,
SOCIAL WPRKER,
BLOOD BANK, MEDICAL COLLEGE,
THIRUVANANTHAPURAM.

2. IRISHIKESHAN.P.S, SOCIAL WORKER,
DEPARTMENT OF RESPIRATORY MEDICINE
GOVERNMENT MEDICAL COLLEGE, THIRUVANANTHAPURAM.

R,R1 BY ADV. SRI.PIRAPPANCODE V.S.SUDHIR

R,R1 BY ADV. SRI.SAJU JOHN

R,R1 BY ADV. SRI.V.VARGHESE

R, BY ADV. SRI.JELSON J.EDAMPADAM

R2 BY ADV. SRI.P.S.KRISHNA PILLAI

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON
01-09-2015 ALONG WITH W.A.NO.1053 OF 2010, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V ASHA, JJ.

W.A Nos.416 of 2010 and 1053 of 2010

Dated this the 1st day of September, 2015

JUDGMENT

Asha, J.

W.A No.1053 of 2010 is filed by the petitioner in W.P(c) No.34287 of 2008 and W.A No.416 of 2010 is filed by the Government against the very same judgment.

2. The Writ Petitioner has filed the appeal as against the judgment to the extent the benefit of arrears due to him for the period from 24.04.1998 to the date of his actual promotion is denied by the learned Single Judge. In the appeal filed by the Government, the direction in the judgment to the extent it directed to grant grade promotion reckoning the period of notional promotion is challenged.

3. The appellant commenced his service in the Medical Education Department as a Driver on 22.06.1983, in Government Medical College, Kozhikode. While in service, he acquired B.A Degree in Sociology and thereafter M.A Degree in Sociology.

4. There was a post of Social Worker in the Medical Education Subordinate Service for which the qualification

prescribed was B.A/B.Sc with one year experience as Social Worker among other alternative qualifications. Method of appointment as well as qualification for the post are provided in G.O(Ms)No.424/64/HD dated 20.06.1964. There was no dispute with regard to the qualification acquired by the petitioner and that he was qualified for appointment to the post of Social Worker. The vacancy of Social Worker arose on 28.02.1995. At the relevant time there was nobody qualified in the Department for appointment to the said post. According to the petitioner, he was the person who qualified first and he should have been appointed to the said post. It is pointed out that applications were invited for appointment to the post from among the qualified hands and the petitioner as well as the 3rd respondent submitted applications and the appointment was given to the 3rd respondent w.e.f 24.4.1998. The petitioner challenged the same by filing O.P.No.4748 of 1999 and this Court by judgment dated 21.07.2005, directed the petitioner to file an appeal against the promotion granted to the 3rd respondent. It was made clear that promotion granted to the 3rd respondent would be subject to the decision to be taken by the Government. Thereafter by Ext.P3 order, the Government found that the petitioner was the

qualified hand to be granted promotion to the post of Social Worker. It was also found that the 3rd respondent was not qualified at the relevant time, as he did not have B.A degree in Sociology, though he was having M.A Degree in Sociology. Therefore orders were passed as per Ext.P3 on 11.06.2007 setting aside the promotion granted to the 3rd respondent and directing the Director of Medical Education to promote the petitioner w.e.f 24.04.1998 reverting the 3rd respondent. Thereafter the Government, by Ext.P6 cancelled Ext.P3 order, notionally granting promotion to the petitioner as Social Worker in the Blood Department w.e.f 24.04.1998 without back arrears. The Government found that there was one more post available at the relevant time and the petitioner can be promoted to that post without disturbing the 3rd respondent.

5. The petitioner approached this Court by filing Writ Petition No.34287/2008 aggrieved by the denial of arrears of pay. Simultaneously his request for granting grade promotion on completion of 8 years service in the post of Social Worker was also denied as per Ext.P8 order, on the ground that notional promotion as Social Worker for the period from 24.04.1998 to 01.10.2004 was reckoned as qualified for time bound promotion.

Ext.P8 order was under challenge in the very same Writ Petition.

6. While declaring that the petitioner will be entitled to grant a higher grade reckoning the period from 24.04.1998 to 01.10.2004, the learned Single Judge did not consider the prayer for back arrears, which was denied in Ext.P6.

7. We heard the learned counsel appearing for the appellant as well as the learned Government Pleader.

8. The learned counsel for the appellant relied on the judgments in **Shiv Nandan Mahto v. State of Bihar** [(2013) 11 SCC 626] as well as **State of Kerala v. Bhaskaran Pillai** [2007 (3) KLT 711] in support of his contention that the appellant will be entitled to arrears of pay for the period during which he was barely denied promotion.

9. In this case, it can be seen that the petitioner had submitted his application when there was a vacancy and applications were called for. But the respondents denied him promotion by granting promotion to a person who, according to the respondents themselves, did not have the requisite qualification. If the right thing was done at the right time, the petitioner would have got all his monetary benefits attached to the post of Social Worker from 24.04.1998 itself. The petitioner

cannot be penalised for no fault of his part and he cannot be denied the monetary benefits which would have accrued to him in case the respondents had acted in accordance with rules and granted promotion to the eligible person. Even in Ext.P6 order the Government found that the petitioner was eligible to get promotion w.e.f 24.04.1998 and he was granted notional promotion from 24.04.1998. Therefore there is no reason to deny him the benefit attached to the post for the period from 24.04.1998, especially when he had challenged the promotion of the 3rd respondent at the right time. He was granted actual promotion only w.e.f 17.09.2004. Therefore we find that the denial of monetary benefits in Ext.P6 to the petitioner for the period from 24.04.1998 is illegal. The petitioner will be granted arrears of pay for the period of notional promotion in respect of the post as prescribed by them. The Government filed the appeal as against the direction of the learned Single Judge to grant 8 years higher grade on the ground that the period of notional promotion cannot be reckoned for the purpose of grade promotion. The learned Single Judge has directed the grant of higher grade relying on the judgment of this Court in **Ibrahim v. Commissioner & Secretary to Government** [2003 (1) KLT

534]. Here it is a case where the petitioner was wrongfully denied promotion and ultimately it has been found that he was eligible for promotion w.e.f 24.04.1998. The Government relying on Rule 23 of KS&SSR is challenging the direction to grant notional promotion. Subsequent amendment made to the rules cannot be invoked in the case of the petitioner, who would have been eligible for grant of higher grade in case he was granted promotion at the right time.

10. In **State of Kerala v. Bhaskaran Pillai** [2007(3) KLT 711 (SC)], the writ petitioner herein was granted retrospective promotion w.e.f 15.09.1961, whereas he was actually promoted and joined the promotion post on 11.05.1979. After retirement from service on 31.07.1980, he requested for the monetary benefits of the promotion post w.e.f 15.09.1961. In the original petition filed by him it was held that he was not entitled to monetary benefits, though pensionary benefits were directed to be refixed reckoning his promotion w.e.f 15.09.1961. In the review petition filed by him it was declared that he was entitled to salary for the period from 15.06.1972 to 11.05.1979. In the common judgment in the Writ Appeals filed by the State as well as the pensioner, the Division Bench held that he was entitled to

the monetary benefits w.e.f 15.06.1972, when he filed O.P No.585 of 1975. As against the judgment of the Division Bench, the State of Kerala approached the Apex Court. After referring to various decisions on the issue, the Apex Court found that the judgment of the learned Single Judge granting him monetary benefits of the promotion post with effect from the date he filed O.P No.585 of 1975, ie. 15.06.1972, was proper and the judgment was upheld. In that case the petitioner had claimed back wages from 15.09.1961 by filing a petition dated 15.06.1972 and the Court had granted the benefit from the date of filing the original petition before the High Court. In the judgment in **Shiv Nandan Mahto v. State of Bihar** [(2013) 11 SCC 626], the appellant employee was kept out of service on account of a mistake committed by the State. In that case, the school in which the appellant was working was taken over by the Government of Bihar, while he was working as a Clerk. As the appellant's name was wrongly shown against the post of Librarian, his services were not taken over. He submitted a representation on 17.11.1983 before the Director, Secondary Education, Patna. The respondents were not able to give him a regular post for a long time. Thereafter he filed Writ Petition

No.516 of 1990. The learned Single Judge directed his reinstatement, with benefit of continued service, but ordered that he will not be entitled to monetary benefits for the period he did not work. In paragraph 8 of the judgment, it was held as follows:

“Having heard the learned counsel for the parties, we are constrained to observe that the High Court failed to examine the matter in detail in declining the relief to the appellant. In fact, a perusal of the aforesaid short order passed by the Division Bench would clearly show that the High Court had not even acquainted itself with the fact that the appellant was kept out of service due to a mistake. He was not kept out of service on account of suspension, as wrongly recorded by the High Court. The conclusion is, therefore, obvious that the appellant could not have been denied the benefit of back wages on the ground that he had not worked for the period when he was illegally kept out of service. In our opinion, the appellant was entitled to be paid full back wages for the period he was kept out of service.”

11. In the light of the judgments relied on by the petitioner, there is no reason for disallowing the claim of the appellant for monetary benefits.

12. Under the above circumstances, we do not find any merit in the Writ Appeal filed by the Government.

Accordingly W.A No.416 of 2010 is dismissed. W.A No.1053 of 2010 is allowed directing grant of monetary benefits for the period of notional promotion to the petitioner from 24.04.1998 to 17.09.2004.

Sd/-
ANTONY DOMINIC
Judge

Sd/-
P.VASHA
Judge

rtr/

/true copy/

P.S to Judge