

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

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

WP(C).No. 3085 of 2008 (P)

PETITIONER(S):

C.THANKARAJ,
55 YEARS, S/O.CHELLIAH,
ATTENDER, N.S.S.ENGINEERING COLLEGE, AKATHETHARA,
PALAKKAD, RESI: REENA NIVAS, KONGAPALAM,
AKATHETHARA, PALAKKAD - 678 008.

BY ADV. SRI.U.BALAGANGADHARAN

RESPONDENT(S):

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1. STATE OF KERALA,
REPRESENTED BY SECRETARY,
HIGHER EDUCATION (J) DEPARTMENT,
TRIVANDURM.
 2. THE DIRECTOR OF TECHNICAL EDUCATION,
THIRUVANANTHAPURAM.
 3. THE JOINT DIRECTOR,
REGIONAL DIRECTORATE OF TECHNICAL EDUCATION,
KOZHIKKODE.
 4. THE PRINCIPAL,
N.S.S.ENGINEERING COLLEGE, PALAKKAD.
 5. THE REGISTRAR,
UNIVERSITY OF CALICUT, THENHIPALAM, MALAPPURAM.
 6. THE SECRETARY,
KPSC, TRIVANDRUM.

R6 BY ADV. SRI.P.C.SASIDHARAN, SC, KPSC
R5 BY ADV. SRI.P.C.SASIDHARAN, SC, CALICUT UTY.
BY GOVERNMENT PLEADER SRI.SOJAN JAMES.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 01-09-2015,
ALONG WITH WPC. 3235/2010, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

rvs.

APPENDIX

PETITIONER(S) ' EXHIBITS :

- EXT.P1: APPOINTMENT ORDER NO.GI-56/CT/81 DATED 22/05/1981 OF THE GOVERNING BODY OF R4.
- EXT.P2:- 9TH STANDARD SCHOOL CERTIFICATE DATED 07/12/1978 OF THE PETITIONER.
- EXT.P2 (A) :- EXPERIENCE CERTIFICATE DATED 09/03/1993 ISSUED BY MASTER COLLEGE, TRIVANDRUM
- EXT.P3:- PROMOTION ORDER NO.01/1193/94 DATED 28/06/94 ISSUED BY GOVERNING BODY OF 4TH RESPONDENT.
- EXT.P4: ORDER NO.DP4/13162/91 DATED 27/12/1995 ISSUED BY 2ND RESPONDENT.
- EXT.P5: LETTER NO.IDS1(2)30818/07.G.W. DATED 01/08/2007 ISSUED BY KPSC.
- EXT.P6: REPRESENTATION OF THE PETITIONER DATED 07/03/2003.
- EXT.P7: REPRESENTATION OF THE PETITIONER DATED 23/09/2003.
- EXT.P8: LETTER NO.DP2/14993/03 DATED 04/01/2005 ISSUED BY 2ND RESPONDENT.
- EXT.P9: LETTER NO.DP-4/29165/2006 DATED 11/12/2006 OF THE 2ND RESPONDENT.
- EXT.P10: LETTER NO.A3-2356/2006/RDTE DATED 13/02/2007 OF THE THIRD RESPONDENT.
- EXT.P11: LETTER NO.12730/J3/2007/HED DATED 27/06/2007 OF FIRST RESPONDENT.
- EXT.P12: LETTER NO. INFORMATION/40990/07/DTE DATED 03/01/2008 ISSUED BY 2ND RESPONDENT.

RESPONDENT(S) ' EXHIBITS :

NIL.

/TRUE COPY/

P.A.TO JUDGE

RVS.

A.V. RAMAKRISHNA PILLAI, J.

W.P.(C) Nos. 3085 of 2008 & 3235 of 2010

Dated this the 1st day of September, 2015

J U D G M E N T

The petitioner joined as Peon in NSS Engineering College, Palakkad in 1981, which, according to the petitioner, was a non vacation post, which makes the petitioner eligible for earned leave and consequential surrender of the same. Later, the petitioner was promoted as Attender on 01.07.1994 subject to passing of departmental test conducted by the PSC in five consecutive chances. The petitioner alleges that the PSC conducted only three tests till his retirement, out of which he attended for two and was unsuccessful also. The petitioner further alleges that his probation in the post of Attender was not declared due to above and he was not paid increments, which he is otherwise entitled in the pre-promoted post.

2. WP(C) No.3085/2008 was filed when the

petitioner was about to retire. In that writ petition, he has alleged that the petitioner would not have any opportunity to avail two more chances and he has to leave service without availing remaining two more chances, which would result in loss of increments and consequential benefits, viz., revision of pay, higher grade in the post of Attender. He alleged that unless the KPSC conduct five tests consecutively, the petitioner cannot be found fault with for the non passing of test and he cannot be denied increments in the post of Attender from the date of his promotion.

3. WP(C) No.3235/2010 was filed by the petitioner after he has demitted his office on 30.09.2008 as Attender. His grievance is that he was reverted as Peon as per Ext.P4 with retrospective effect. When terminal benefits were paid, no leave surrender was paid treating him as vacation staff. Though he requested for crediting earned leave and consequential surrender as per Ext.P5, it did not evoke any positive response. In the second writ

petition, he alleged that the post of Attender is not at all a vacation post; and even if it is so, he is stood reverted from 1994 as Peon and he is deemed to have continued in service and retired from service as Peon; and therefore, he becomes eligible for crediting earned leave in his leave account and consequential leave salary for the same on retirement. It is with this background, the petitioner has filed the second writ petition.

4. In the counter affidavit filed by the State, they have admitted that the petitioner was appointed as Peon on 01.06.1981 in the 4th respondent's college and higher grade was granted to the petitioner on completion of 10 years of service on 01.07.1993 in the scale of pay of ₹800-1200. Meanwhile, he had been promoted as Attender in Physics Lab in the scale of pay of ₹800-1200 with effect from 01.07.1994 against the promotion vacancy of Sri.K.P.Sasidharan Nair on condition that he should pass Attender Test conducted by the Kerala Public Service Commission in any of the five consecutive tests.

Consequently, the pay had been fixed at ₹1,010/-. However, the petitioner could not pass the test; and hence, his promotion has not been regularized. The respondents further contended that the Physics Lab Attender of the 4th respondent's college is a vacation staff and the petitioner had enjoyed vacations till the date of his retirement. Therefore, he has not been entitled for earned leave at the rate of 1/11th of duty. It was further contended that the petitioner had been permitted to surrender earned leave at the rate of 1/11th of the pay for the period from 01.06.1981 to 30.06.1994, in which he had worked as Peon.

5. Arguments have been heard.

6. When the petitioner was about to demit his office, he has approached this Court with WP(C) No.3085/2008 seeking regularization of promotion as the Public Service Commission has not conducted five special tests consecutively. During the pendency of the said writ petition, the petitioner moved an interim application

seeking direction to grant increments in the pre-promoted post. However, the said interim application has been rejected and the matter was taken before the Division Bench as WA No.1936/2008. The said intra court appeal was disposed of directing the Government to consider the question whether the petitioner was granted any annual increment after 1993. It was further directed that if no increment was granted, the above benefit should be granted as per the Rules within one month from the date of the judgment. It was observed that if it is not admissible and the petitioner is not eligible for any annual increment for 15 years, reasons should be intimated to him before his retirement. In compliance with the direction of this Court, the Government, as per Letter No.3469/J3/08/H.Edn dated 20.01.2009, directed to revert the petitioner from the post of Attender to the post of Peon so that the annual increments in that post can be sanctioned to him. Vide Order No.F/618/09 dated 31.01.2009, the Chairman, Governing Body, NSS College

of Engineering, Palakkad has reverted the petitioner as Peon with effect from 01.07.1994. The argument advanced by the Government is that in compliance with the judgment of the writ appeal, the petitioner has been reverted to the post of Peon; and accordingly, he was enjoying the benefits of vacation staff.

7. The learned counsel for the petitioner would submit that the ineligibility of the petitioner to pass the test was on account of the long delay of the PSC in conducting the test in time. It was pointed out that during the period of 13 years, the PSC conducted only three tests. According to the learned counsel, the petitioner was unable to acquire test qualification for the reasons attributable to the PSC.

8. It is crucial to note that the petitioner was promoted to the post on condition that he would pass the special test conducted by the PSC in five consecutive chances. Subsequent to the promotion of the petitioner, the PSC conducted only three special tests as could be

discernible from Ext.P5 in WP(C) No.3085/2008. Though he missed one test and failed in two tests, he was disabled to acquire the test qualification due to the non conduct of the remaining tests by the KPSC. As per Ext.P4 order of promotion, the petitioner has every right to appear for five consecutive tests from the date of promotion. Had the PSC conducted the special tests consecutively, the petitioner would have appeared and qualified in one of the tests. In the above circumstances, the petitioner is entitled to get his probation in the post of Attender declared and he is entitled to get the increments from the date of promotion as Attender as the petitioner is unable to acquire the qualification for the reasons not attributable to him.

9. This Court had occasion to consider a similar situation in **Sherafuddin** v. **State of Kerala** [2004 KHC 656], wherein it was observed that the petitioner cannot be put to any prejudice for the only reason of not performing a task, which was impossible to be performed.

10. The petitioner has been reverted as Peon as per Ext.P4 in WP(C) No.3235/2010, i.e., after retirement, with retrospective effect from 01.07.1994. Though it was rightly submitted by the learned counsel for the petitioner that the post of Peon is a non-vacation post and the petitioner is entitled for earned leave for the period subject to limitation under Rule 79, the definite stand taken by the State is that the petitioner has enjoyed all vacation benefits from 01.07.1994 to 30.09.1998 as he was officiating as Attender, which is a vacation post.

11. The learned counsel for the petitioner invited my attention to Ext.P8 in WP(C) No.3085/2008, which was issued in an identical case. Therefore, on a consideration of the entire materials now placed on board, this Court is of the view that the petitioner is entitled to get the relief as prayed for in WP(C) No.3085/2008.

In the result, WP(C) No.3085/2008 is allowed. Exts.P10 & P11 are quashed. It is hereby declared that

the petitioner is entitled to get his probation declared without passing the special test as the PSC has not conducted five special tests consecutively and he is entitled to get annual increments, higher grades and the benefit of revised pay scale, exercising fresh option. Formal orders, to this effect, shall be issued by the respondents within a period of three weeks from the date of receipt of a copy of this judgment.

WP(C) No.3235/2010 is dismissed as the petitioner has enjoyed the benefit of vacation staff while he was officiating as Attender, which is a post having vacation.

Sd/-
A.V. RAMAKRISHNA PILLAI
JUDGE

bka/-