

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

TUESDAY, THE 6TH DAY OF JANUARY 2015/16TH POUSHA, 19361

WP(C).No. 5908 of 2014 (K)

PETITIONER(S):

**K.IBRAHIMKUTTY, AGED 54 YEARS,
S/O.AYAMMED KUTTY, KALPALLY HOUSE, MANIPURAM P.O.,
PIN-673 572, KODUVALLY, KOZHIKODE DISTRICT,
(DRIVER, KERALA STATE ROAD TRANSPORT CORPORATION,
MANANTHAVADY DEPOT)**

BY ADV. SRI.K.P.JUSTINE (KARIPAT)

RESPONDENT(S):

- 1. THE CHAIRMAN & MANAGING DIRECTOR,
KERALA STATE ROAD TRANSPORT CORPORATION,
TRANSPORT BHAVAN, FORT P.O., THIRUVANANTHAPURAM-23.**
- 2. THE EXECUTIVE DIRECTOR (ADMINISTRATOR),
KERALA STATE ROAD TRANSPORT CORPORATION,
TRANSPORT BHAVAN, FORT P.O., THIRUVANANTHAPURAM-23.**
- 3. THE ASSISTANT TRANSPORT OFFICER,
KERALA STATE ROAD TRANSPORT CORPORATION,
MANANTHAVADY DEPOT.**

**BY ADV. SRI.M.G.K.NAMBIAR, SC
SMT.THUSHARA JAMES**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
20-12-2014 ALONG WITH WPC. 6630/2014, AND CONNECTED CASES
THE COURT ON 06-01-2015, DELIVERED THE FOLLOWING:**

msv/

APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1: TRUE COPY OF THE DUTY PASS ISSUED BY THE RESPONDENT CORPORATION TO THE PETITIONER.
- EXT.P2: TRUE COPY OF ORDER NO.D.DIS.PL-13-002875/04 DATED 12.2.2004 ISSUED BY THE RESPONDENT CORPORATION.
- EXT.P3: TRUE COPY OF THE MEMORANDUM NO.E1-1638/03/MNDY DATED 3.4.2004 ISSUED BY THE RESPONDENT CORPORATION.
- EXT.P4: TRUE COPY OF THE ORDER NO.R.DIS.PI.13/041432/08 DATED 2.4.2009 ISSUED BY THE RESPONDENT CORPORATION.
- EXT.P5: TRUE COPY OF THE MEMORANDUM NO.P.L.18/33621/11 DATED 21.5.2012 ISSUED BY RESPONDENT CORPORATION.
- EXT.P6: TRUE COPY OF THE ORDER NO.PLA.10-01575/84/R.DIS. DATED 21.8.1984 ISSUED BY THE RESPONDENT CORPORATION.
- EXT.P7: TRUE COPY OF THE PAGE NOS.7 & 8 OF THE GRADE PROMOTION RULES.
- EXT.P8: TRUE COPY OF THE JUDGMENT DATED 19.9.2012 IN WPC.NO.21748/2012 OF THIS HONOURABLE COURT.
- EXT.P9: TRUE COPY OF THE MEMORANDUM NO.PL9/044016/13 DATED 19.2.2013 ISSUED BY THE RESPONDENT CORPORATION.
- EXT.P10: TRUE COPY OF THE CIRCULAR MEMORANDUM NO.PL.7/000175/2010 DATED 6.7.2010 ISSUED BY THE RESPONDENT CORPORATION.
- EXT.P11: TRUE COPY OF THE JUDGMENT DATED 12.3.2003 IN O.P.NOS.14175/2002 & O.P. NO.32006/2001 OF THIS HONOURABLE COURT.
- EXT.P12: TRUE COPY OF THE COMMON JUDGMENT IN W.A.NOS.1167/2003 & 1179/2005 DATED 13.7.2005 OF THIS HONOURABLE COURT.
- EXT.P13: TRUE COPY OF THE JUDGMENT DATED 20.1.2014 IN W.A.NO.1810/2013 IN WPC.NO.21080/2012 OF THIS HONOURABLE COURT.
- EXT.P14: TRUE COPY OF THE JUDGMENT DATED 14.7.2009 IN WPC.NO.13718/2008 OF THIS HONOURABLE COURT.
- EXT.P15: TRUE COPY OF THE MEMORANDUM NO.PL-10/023637/10 DATED 15.10.2010 ISSUED BY THE RESPONDENT CORPORATION.
- EXT.P16: TRUE COPY OF THE JUDGMENT REPORTED IN 1995 (2) KLT 285; 2001 (1) KLT 449 IN MOHAMMED ABDULL Vs. STATE OF KERALA.

WP(C).No. 5908 of 2014 (K)

RESPONDENT(S)' EXHIBITS

EXT.R1(a): TRUE COPY OF CLAUSE 4 OF APPENDIX XIIA OF PART I OF KSR.

**EXT.R1(b): TRUE COPY OF CLAUSES 1 TO 5 AND 28 OF ORDER
NO.PLA.10-01575/84/R.DIS. DATED 21.8.1984, ISSUED BY THE
CORPORATION.**

**EXT.R1(c): TRUE COPY OF THE RELEVANT PORTION OF THE BIPARTITE AGREEMENT
DATED 2.2.1987 PERTAINING TO THE GRADE PROMOTIONS OF
CONDUCTORS, DRIVERS, L.D.CLERKS AND WORK ASSISTANTS.**

**EXT.R1(d): TRUE COPY OF THE JUDGMENT DATED 1.7.2013 IN WP(C) NO.21080/2012
OF THIS HON'BLE COURT.**

//TRUE COPY//

P.S.TO JUDGE

msv/

Dama Seshadri Naidu, J.

W.P.(C)Nos. 5908, 6630, 6646, 6708,
7813, 7854, 8127, 8356, 8375, 8132, 9490,
9911, 10737, 27746 and 34896 of 2014

Dated this the 6th day of January, 2015

COMMON JUDGMENT

Introduction:

In all the writ petitions similar issues have been raised by identically placed employees against their common employer, the Kerala Road Transport Corporation (KSRTC). As such, it is felt desirable to dispose of all the writ petitions through a common judgement. For ease of reference and convenience, the facts as pleaded in W.P.(C) No.7813/2014 have been taken as the basis, apart from referring to the petitioner therein alone as representing the cause of all the petitioners in other writ petitions as well.

Factual Matrix:

2. To begin with, the factual matrix runs in a narrow

compass. The petitioner, a conductor in the respondent Corporation, initially secured his employment on the advice of the Kerala Public Service Commission (PSC) with a rank of 3002. After completing his probation, the petitioner availed himself of Leave Without Allowance (LWA) with effect from 15.11.2008 to 06.10.2010 for the purpose of securing employment abroad. Later, he rejoined duty on 07.10.2010.

3. After his rejoining, when the petitioner was hopeful that he had been back in the mainstream of the service and that he would be provided timely promotion, much to his dismay, the respondent Corporation altered his seniority from 3002 to 3847-A through Exhibit P4. Further, the petitioner has found that, after his rejoining, many of his juniors have been promoted to the higher cadre. Aggrieved thereby, the petitioner filed the present writ petition.

4. In all other writ petitions as well, the petitioners being the permanent employees of the respondent Corporation availed themselves of LWA and rejoined duty only to find that they had been superseded in promotional avenues by their juniors, consequent to the reduction of their ranks in the seniority.

Rival contentions:

Petitioners:

5. At the outset, Mr. Justine K.P., the learned counsel for the petitioner, has submitted that petitioner has been sanctioned leave and that, so long as it is not unauthorised, absence of the petitioners from service cannot have any adverse impact on their career prospects, especially seniority.

6. The learned counsel for the petitioner has further submitted that Appendix XII-A, Part I of Kerala Service Rules (KSR) has been adopted by the respondent Corporation, as

is evident from Exhibit P5, dated 21.08.1984. The learned counsel, however, fairly concedes that the petitioner is not eligible to be promoted during the period of his absence, and the seniority of all those who got promoted when the petitioner was on leave is not affected. Once the petitioner resumed duty, the embargo placed on the reckoning of his seniority, submits the learned counsel, ceased to operate. As to the applicability of 'dies non', the learned counsel contends that it only disentitles the petitioner to service benefits during his absence, but it does not, by no stretch of imagination, obliterate his seniority. He has, in fact, drawn my attention to Rule 9 of the Grade Promotion Rules of 1987 to stress that the period of dies non will not impair seniority.

7. According to the learned counsel, the petitioners' original rank and seniority are governed by Rule 27(c) Part II of KS & SSR. With reference to the said Rule he contends

that the original seniority and rank of an employee acquired at the time of his entry into service cannot be reduced except by way of punishment. Ipso facto, he contends that, since the petitioner has not faced any disciplinary proceedings, Exhibit P4 order is clearly unsustainable.

8. The learned counsel has further contended that, after the petitioner rejoined the duty, the Corporation has promoted several of his juniors, thereby ignoring the petitioner's claim. The learned counsel contends that grade promotion is entirely different from cadre promotion.

9. The learned counsel for the petitioners has referred to a plethora of precedents, which shall be referred to at an appropriate stage of the discussion.

Respondents:

10. Dr.Thushara James, the learned Standing Counsel for the respondent Corporation, has submitted that as per Exhibit P2 order, dated 19.05.2010, the LWA

obtained by the petitioner would not be reckoned as service; on the contrary, it is to be treated as dies non. According to her, the petitioner is bound by the terms of Exhibit P2 order, which remained unchallenged.

11. Referring to Clause 4 of Appendix XIIA of Part I of KSR, the learned Standing Counsel would contend that it has not been made applicable to the public undertakings. In the alternative, she has also submitted that as per the said clause the seniority in the higher grade with reference to the petitioner's juniors who may get promoted to such grade before the petitioner rejoins remains unaffected. She has referred to Exhibit P5 and has stressed that the employee who avails himself of LWA loses seniority in the grade also.

12. The learned Standing Counsel has drawn my attention to Exhibit R1(d) Grade Promotion Rules to contend that LWA obtained for the purpose of other

employment shall not be counted as qualifying service for grade promotion. She has submitted that for all practical purposes, the leave period has to be excluded, including seniority. According to the learned Standing Counsel, Exhibit R1(c) and R1(d) bind the petitioner, and in the matter of promotion, the relevant factor is the length of service rendered by an employee in a particular grade, such as Grade II, Grade I, Selection Grade or Special Grade.

13. Referring to the case law relied on by the learned counsel for the petitioner, the learned Standing Counsel contends that none of those decisions has any application to the present factual matrix. In elaboration thereof, she has submitted that while rendering Exhibit P10 judgment, the learned Division Bench has not taken into account Exhibit R1(d) Grade Promotion Rules. Consequently, the respondent Corporation has filed a review petition in R.P.No.289/2014, which is pending.

14. Heard the learned counsel for the petitioners and the learned Standing Counsel for the respondent Corporation, apart from perusing the record.

Discussion:

Statutory Scheme & Judicial Interpretation:

15. Paragraphs 4 and 5 of Appendix XIIA to the KSR read thus:

“4. Permanent officers and non-permanent officers who have completed probation in their entry cadre in the regular service of Government may be granted leave without allowances under these rules. In such cases, for, and during the currency of the period of leave, the officers shall lose all service benefits such as the earning of leave including half pay leave, pension, gratuity, increment, etc., and also promotion chances as may arise with reference to their seniority in the posts from which they proceeded on leave. They shall also lose seniority in the higher grade/grades with reference to their juniors who might get promoted to such grade/grades before they rejoin duty.

5. In the case of non-permanent officers in regular service who have not completed probation in the entry grade, leave without

allowances may be granted subject to the condition that they will have to start afresh and complete their probation on return from the leave without allowances. In other words, the officers will forfeit the service benefits that had accrued to them prior to their proceeding on leave and they will be deemed as new entrants to Government service on return from leave. What is protected is only their right to rejoin Government service in the same entry grade as if they were new entrants.

(emphasis added)

16. To appreciate the above statutory position, it is to be seen that in **M. Mohammed Abdulla v. State of Kerala**¹ the appellant was initially appointed as Grade II Auditor, and later got promoted as Inspector, Local Fund Account, which post was re-designated as Audit Officer. He went on leave without allowance for a period of five years and later rejoined service. The issue fell for consideration was, to reckon his seniority after his rejoining the service, whether paragraph 4 or paragraph 5 of Appendix XIIA to the KSR applies. The Government contended that the

1 (2007) 10 SCC 654

appellant had not completed his probation and as such, only para 5 would apply. The Hon'ble Supreme Court repelled the contention of the State by observing that though the appellant was then working as an Audit Officer of local Fund Accounts, prior thereto, he had already entered the cadre of Grade II Auditor and completed his period of probation. Ipso facto, the appellant had already become a permanent Government servant. Accordingly, their Lordships have held that only paragraph 4 applies.

17. In fact, interpreting paragraph 4, the Hon'ble Supreme Court has gone on to observe that it deals with a situation where a person availing himself of leave would lose his seniority in the higher grade with reference to his juniors who might get senior grade before he rejoins his duty. Condition precedent for denying the officer concerned the benefit of his seniority is that his junior in the meantime must have been promoted before he rejoined his duty.

Dies-non:

18. Dies is the Latin word for 'day'. Dies-non (short for dies non juridicus), in Law is the day on which no legal business is transacted, or which is not reckoned in counting days for some particular purpose. Also a day that does not count or on which day there is no activity.

19. Citing Cowell Interpr., (1607–72), the Oxford English Dictionary defines it thus:

“Dies A legal day, and that is of two sorts, 1. Dies Juridicus, and 2. Dies non Juridicus. Dies Juridici are all days given in Term to the Parties in Court. Dies non Juridici are all Sundayes in the year, besides, in the several Terms particular days.” (Oxford English Dictionary, 2009).

20. In service terms, “dies-non” means a day, which cannot be treated as duty for any purpose. It does not constitute break in service, but the period treated as 'dies-non' does not qualify as service for pensionary benefits or increment.

21. A learned Division Bench of the Hon'ble High Court of Madhya Pradesh in **Battilal v. Union of India**² while interpreting FR 54-A (1), has held thus:

“The authority imposing the punishment can direct how the period when the employee was out of service shall be treated. When the authority directs that the period will be treated 'dies non', it means that continuity of service is maintained, but the period treated 'dies non' will not count for leave, salary, increment and pension.”

(emphasis added)

Grade Promotion Rules:

22. When we examine the Grade Promotion Rules, grade promotion is defined as promotions given to the employees belonging to all categories in lower and intermediate divisions (except supervisory posts) from their entry grades to the higher grade/grades in the channel prescribed. For their promotions, till they reach the highest grade allowed/the grades just below the supervisory level,

² ILR [2005] MP 580 (DB),

stipulated for each of such grade/grades.

23. An employee who completes the prescribed length of qualifying service in a grade will be eligible for a tentative promotion to the next higher grade on the day following the date on which he completes such qualifying period. In that regard Rule 28A Part I of KSR regulates the promotions.

24. It is to be further seen that in cases where the senior in the rank qualifies for grade promotion on a date later than that of his junior (owing to the delay on the part of the senior attaining prescribed length of qualifying service), the senior will be given notional promotion to the post in the higher grade on the date on which any of his juniors in the rank who completes the prescribed qualifying service is promoted. It is essentially to avoid disturbance of inter-se rank held by them and to maintain the same sequence of ranking in the promoted post, as in the lower

post. Nevertheless, the monetary benefit of fixation of pay in the promoted post shall not be given to the senior so (notionally) promoted, until he completes the prescribed length of qualifying service in the lower post. Monetary benefit based on grade promotion shall accrue only on completion of prescribed length of qualifying service in the lower post.

25. Regarding the dies-non period, the Rule observes thus:

“(e) Periods of Dies-non other than dies-non due to strike, imposed to regularise periods of unauthorised absence/cover periods of break of service etc., will not be counted as service counting for monetary benefit of grade promotion, even though seniority will not be affected.

(f) Leave without allowance, not supported by Medical Certificate and extending to more than 15 days service counting for monetary benefit of grade promotion. In such cases as well as in cases mentioned (e) above, monetary benefit of grade promotion shall not be given until the employee completes the prescribed length of qualifying service, excluding such non-qualifying periods.”

(emphasis added)

26. In the end, it is specifically stipulated that leave without allowance made use of for the purpose of other employment shall not be counted as qualifying service for grade promotion.

Grade promotion & Cadre promotion:

27. The Corporation seems to have employed the terms 'grade' and 'cadre' synonymously though they are distinct and different. Given the financial betterment, the up-gradation is likened to promotion and is usually, though with an element of distinction, called the 'grade promotion' in contradistinction to 'cadre promotion'. The learned Standing Counsel for the respondent Corporation has made valiant efforts to convince the Court that the employee suffers loss of seniority on all counts owing to his Leave Without Allowance. On that score, she has drawn my attention to the Grade Promotion Rules, which seem to be non-statutory, but having the force of law.

28. To begin with, in **State of Rajasthan v. Fateh Chand Soni**³ the Hon'ble Supreme Court has dealt with the semantic significance of promotion, holding thus:

“8. [I]n the literal sense the word ‘promote’ means “to advance to a higher position, grade, or honour”. So also ‘promotion’ means “advancement or preferment in honour, dignity, rank, or grade”. (See: Webster’s Comprehensive Dictionary, International Edn., p. 1009.) ‘Promotion’ thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also the expression ‘promotion’ has been understood in the wider sense and it has been held that “promotion can be either to a higher pay scale or to a higher post”.

29. As to the nuance of grade in the same rank or cadre, a Constitution Bench of the Hon'ble Supreme Court in **Lalit Mohan Deb v. Union of India**⁴ has held that a promotion post is a higher post with a higher pay. A selection grade has higher pay but in the same post. A

3 (1996) 1 SCC 562

4 (1973) 3 SCC 862

selection grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotions should at least be placed in the selection grade to prevent stagnation on the maximum of the scale. Selection grades are, therefore, created in the interest of greater efficiency.

30. Soon thereafter, a learned Full Bench of this Court in **N.G.Prabhu v. Hon'ble Chief Justice**⁵ has observed thus:

“15.[P]romotion is, of course, appointment to a different post carrying a higher scale of pay in the service. If, to better the conditions of service of the incumbents in posts in the same category, the scale of pay of all the posts in the category is raised, the incumbents would naturally get the higher scale of pay. But in such a case it may not be proper to characterize the event as promotion to higher posts though a benefit of a higher scale of pay is obtained by all concerned. ..That is because there is no question of appointment from one post to another. Parties continue to hold the same post but get a higher scale of pay...”

(emphasis added)

⁵ 1973 KLJ 436

31. In **Union of India v. S. S. Ranade**⁶ the Hon'ble Supreme Court, following the Constitution Bench decision in **Lalit Mohan Deb** (supra), and quoting with approval **N.G.Prabhu** (supra), has held that an employee, who secures a selection grade, given a promotion to a higher pay scale, but it is a higher pay scale in the same post. The use of the word 'promotion' in the governing service rules does not necessarily lead to the conclusion that the promotion which is contemplated there is a promotion to a higher post. Thus concluded their Lordships that promotion can be either to a higher pay scale or to a higher post.

32. Interpreting the Judicial Service Recruitment Rules of the State of Maharashtra, in **Dayaram.A. Gursahani v. State of Maharashtra**⁷, the Supreme Court has observed that the selection grade post is not a post to which promotion has to be made, nor is there any efficiency

6 (1995) 4 SCC 462

7 (1984) 3 SCC 36

bar rule attached to it.

33. In **Union of India v. Pushpa Rani**⁸, the Hon'ble Supreme Court has, with reference to its earlier pronouncements, drawn the distinction between upgradation and promotion as follows:

“In legal parlance, upgradation of a post involves transfer of a post from lower to higher grade and placement of the incumbent of that post in the higher grade. Ordinarily, such placement does not involve selection but in some of the service rules and/or policy framed by the employer for upgradation of posts, provision has been made for denial of higher grade to an employee whose service record may contain adverse entries or who may have suffered punishment. The word ‘promotion’ means advancement or preferment in honour, dignity, rank, grade. Promotion thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law, the word ‘promotion’ has been understood in wider sense and it has been held that promotion can be either to a higher pay scale or to a higher post.”

(emphasis original as quoted in *BSNL v. R. S. Veluswamy*)

8 (2008) 9 SCC 242

34. Having surveyed the case law obtaining on that point, in **BSNL v. R.Santhakumari Velusamy**⁹ the Hon'ble Supreme Court has summarised the legal position on the dichotomy of 'up-gradation' and 'promotion' thus:

“29. (i) Promotion is an advancement in rank or grade or both and is a step towards advancement to a higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both—that is, advancement to a higher position and advancement to a higher pay scale—are described by the common term “promotion”, does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

9 (2011) 9 SCC 510

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simpliciter can be said to be a promotion in its wider sense, that is, advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simpliciter. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not

amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simpliciter. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.
..."

35. Coming back to the facts of the matter, it can be seen that in terms of Exhibit R1(c), Memorandum of Settlement entered into between the management and workmen, grade promotion is linked with the years of qualifying service put in by each employee in different grades. Illustratively, as far as Conductor is concerned, the grade promotion is as follows:

- (i) From Grade II to Grade I: 9 years in Grade II.
- (ii) From Grade I to Selection Grade: 15 years in Grades I & II.
- (iii) From Selection Grade to Spl. Grade: 18 years in Grades I & II and Selection Grade.

Similar time frames, with minor variations, have been fixed for the Drivers, L.D. Clerks and Work Assistants.

Seniority & Promotion:

36. Rule 27 of the Kerala State and Subordinate Service Rules (KS & SSR) reads as under:

“27. Seniority.- (a) Seniority of a person in a service, class, category or grade shall, unless he has been reduced to a lower rank as punishment, be determined by the date of the order of his first appointment to such service, class, category or grade.

Explanation:- For the purposes of this sub-rule, 'appointment' shall not include appointment under R.9 or appointment by promotion under Rule 31.”

(emphasis added)

37. It is the persistent plea of the learned Standing Counsel for the Corporation that the service conditions of the employees of the respondent Corporation are solely governed by the periodic agreements entered into between the management and the workmen's union. According to her, Exhibit P2 is an outcome of one such agreement and

that the petitioners cannot wriggle themselves out of the binding covenant, having taken a benefit under it, i.e., availing themselves of LWA.

38. It is thus apposite to examine Exhibit P2 proceedings, under which leave has been granted to the petitioner. Paragraph 2 thereof, being relevant, reads as under:

“Period of this leave will not count for any service/pensionary benefits including full pay leave, half pay leave, increment, pension, et cetera. He will not be eligible for promotion during the period of his leave and as such he will lose his seniority and rank will be re-fixed as of the date of joining after the leave. In other words, the period spent by him on Leave without Allowance to take up/seek employment elsewhere shall be treated as “Dies-non” for all kinds of service benefits and they shall lose seniority also in the grade with reference to those who might have got promoted before he rejoins duty.”

39. The question is whether Exhibit P2 can be considered or interpreted in isolation without reference to the statutory scheme governing the service conditions of

the employees of the respondent Corporation. It is axiomatic that the management and the unions of any establishment are always at liberty to bind themselves with mutually agreed covenants, say service conditions. It is equally indisputable that such contractual freedom shall be within the sphere of the statutory norms operating in the field. Indeed, Appendix XII A of KSR, having statutory force, has been adopted by the respondent Corporation. In fact, Exhibit P5 proceedings provide the revised guidelines governing the cases of Leave Without Allowance. If we examine paragraph 3 thereof, there is a specific reference to the loss of seniority, apart from the application of “dies-non”. Thus, it is profitable to examine the said stipulation, which is as under:

“Permanent employees on the employees who have completed probation in their entry cadre in the regular service of the Corporation will be granted leave without allowances for taking up employment outside the country as well as inside. In such cases, during the currency of the

leave period, the employees shall lose all service benefits including commutation leave benefits, half pay leave benefits, increment, pension, et cetera., and also promotion chances as may arise with reference to their seniority in the posts from which the left such employees on leave without allowances, to take upon employment elsewhere shall be treated as "dies-non" for all kinds of service benefits. They shall lose seniority also in the grade with reference to those who might get promoted before they rejoin duty."

(emphasis added)

40. It needs no reiteration that any statutory provision is required to be read holistically to comprehend its meaning. In the above extract, the respondent Corporation desires to view the expression "shall lose seniority also" in isolation. As has already been discussed, 'seniority' is not the same for the grade promotion as for cadre promotion. Grade promotion provides monetary incentives without enhancing the rank of the employee; whereas the cadre promotion not only provides monetary incentive but also enhances the rank of the employee. It can be stated that grade promotion is horizontal and cadre

promotion, vertical.

41. To be entitled to monetary incentive, regularity counts; concerning the enhancement of rank, the length of service counts, lest for every day's leave, even if sanctioned, the juniors gain a march over the seniors, thus leading to incongruity, inter alia, affecting the morale of the senior employees.

42. Fortification for this view is available from the decision of the Hon'ble Supreme Court in **M. Mohammed Abdulla** (supra), where Paragraph 4 of Appendix XIIA to KSR has come to be interpreted. Even otherwise, the Grade Promotion Rules expressly exclude the period of LWA as qualifying service for grade promotion alone.

43. It is relevant to observe that this issue is a hydra, at least as far as the respondent Corporation is concerned. Every time this Court answers the issue, the respondent Corporation, yet again, confounds it with another veil of

reasoning. Let us examine the decided cases up to this point of time, notwithstanding the valiant efforts of the learned Standing Counsel that they do not have any bearing on the present factual matrix.

44. This Court disposed of K. Selvaraj & others v. KSRTC, arising out of W.P.(C)No.15731/2014, through a judgment dated 13.08.2012, applying the ratio of the judgment of even date in W.P.(C)No.4969/2007. M.G. Chandrasekharan Nair v. KSRTC, arising out of W.P.(C)No. 38683/2003, in turn, was disposed of relying on the judgment dated 12.03.2003 in O.P.No.14175/2002 and the decision of a learned Division Bench of this Court in W.A.Nos.1167/2003 and 1179/2005, apart from other unreported judgments. In all the above cases similar contentions of the Corporation were rejected.

45. In M. R. Mathew & others v. KSRTC, (judgment dated 12.03.2003 in O.P.Nos.14175/2002 and 32006/2001),

the issue that fell for consideration was whether the Driver had lost his seniority by reason of his availing himself of leave without allowance. The Court has observed that the seniority in a cadre is computed in the light of the provisions contained in Rule 27 of KS & SSR., which has been adopted by the respondent Corporation. It is further observed that a direct recruit through Public Service Commission is entitled to count his seniority with effect from the date of first effective advice and a promotee is entitled to count his seniority from the date of appointment. In the end, the Court has concluded that availing oneself of leave without allowance will not in any way affect the seniority. Adverting to Rule 4 of Appendix XII-A, the Court has observed that it only says that during the absence of the employee, his juniors can be promoted to the higher grade and in that event, the juniors will gain seniority in the higher grade even though the employee is subsequently

promoted. It is emphatically observed that the said Rule will have no bearing on the seniority position of the incumbents in the entry cadre.

46. In KSRTC v. M. Rekkubu Kunju, judgment dated 11.03.2010, rendered by a learned Division Bench, it is observed that a person on Leave Without Allowance can be superseded by his juniors while he is on leave, but not thereafter.

47. In Sony Jacob v. KSRTC, arising out of W.P.(C) No.13718/2008, a learned Single Judge of this Court has observed that seniority is a continuous flow from the entry into service and it can be retarded or crippled unless any of the instances provided in Rule 27 of Part II of KS & SSR exists. While referring to Rule 4 of Appendix XII-A under Part I KSR, it is held that it amply shows that there is no deprivation of seniority on account of the grant of leave. The judgment further holds that non-conferment of a higher

grade will in no manner impair the seniority.

48. In KSRTC v. K. Reghu, a learned Division Bench, through its judgment dated 13.07.2005, has held that the seniority in the cadre in which LWA was taken recourse to should be computed under Rule 27 of Part II KS & SSR, which is made applicable to the respondent Corporation. It is further held that Rule 4 in Appendix XII-A of Part I KSR does not in any manner take away the seniority which is gained based on the date of appointment to that cadre.

49. Suffice it to observe that in M. Rajendran v. KSRTC, a judgment rendered on 13.01.2014, arising out of W.P.(C)No.17423/2013, this Court, per C.K. Abudl Rehim J, has addressed all the issues presently raised by the respective parties herein. After a threadbare discussion, with reference to much decided case law, his Lordship has held that the Grade Promotion Rules do not have any manner of application, inasmuch as the grievance of the

petitioners was the denial of cadre promotion. This Court accepted the contention of the respondent Corporation to the extent that a person who availed himself of LWA will lose seniority in the matter of promotion against only those of his juniors who have been promoted during the period of such leave.

50. In that process, it is observed thus:

“6. [B]ut as observed above, seniority of any person who had entered the service on the basis of advice made by PSC is governed based on the date of 'effective advice'. So also seniority in any cadre is not fixed based on the extent of actual period of duty in any particular cadre. In other words, inter-se seniority among persons in the same cadre is not fixed based on the length of effective service or attendance. Even in Ext.R1 (e) Grade Promotion Rules it is only indicated that the periods of dies-non is imposed only to cover up the periods of break for the purpose of monetary benefits. Therefore it is evident that, even in the case where the period of LWA is treated WP(C).17423 /2013 10 as 'dies non' seniority will not be affected.”

51. One cannot help seeing the intrepid mythical King Vikram in the respondent Corporation that has been carrying this corpse of a case resolutely and tirelessly, even after repeated rejections. On more than a dozen occasions this Court has answered the question raised in the present batch of writ petitions against the Corporation; however, for the respondent Corporation, it remains a betal prasna or maru chodyam.

Conclusions:

52. In the light of the above discussion, the whole issue can be summed up thus:

(1) The LWA affects the grade seniority, but does not affect cadre seniority, which is governed by Paragraph 4 of Appendix XII-A to KSR;

(2) The Grade Promotion Rules cannot impact or impair the overall seniority of an employee, seeking cadre or rank promotion;

(3) Dies-non does not result in cessation of service, affecting the length of service.

(4) The seniority, as far as the rank promotion is concerned, is governed by Rule 27 of KS & SSR;

(5) The seniority of the juniors who actually got promoted while a senior employee is on LWA remains unaffected;

(6) Even after rejoining, the employee's grade seniority is to be resumed from where it has been left vis-a-vis his juniors, but the said employee's over-all service seniority continues to run all through, in terms of Rule 27 of KS & SSR, like an undercurrent, without affecting those that have already been promoted in the rank; and

(7) Exhibit P2 conditions are required to be read in conjunction with Paragraph 4 of Appendix XII-A to KSR, as well as Rule 27 of KS & SSR.

Result:

53. As a result, all the orders in the above writ petitions reducing the rank of seniority of the petitioners are set aside, with a consequential direction to the respondent Corporation to restore the petitioners' seniority with reference to Rule 27 of KS & SSR and consider their cases for promotion, as if their seniority for cadre promotion had never been reduced, save as against the juniors already promoted, provided the petitioners are otherwise eligible to be promoted.

With the above observation, the writ petitions are allowed.

Dama Seshadri Naidu, Judge

tkv