

“C. R.”

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

THURSDAY, THE 26TH DAY OF FEBRUARY 2015/7TH PHALGUNA, 1936

WP(C).No.15079 of 2010 (H)

PETITIONER:

SINDHU SUNIL, ASSISTANT,
KERALA STATE WAREHOUSING CORPORATION
EROOR RESIDING AT ELANJIKAMALIL, VENNALA, COCHIN-28.

BY ADV. SRI.S.RAMESH BABU

RESPONDENT:

KERALA STATE WARE HOUSING CORPORATION-
LTD. REPRESENTED BY ITS MANAGING DIRECTOR, ERNAKULAM
KOCHI-16.

R1 BY ADV. SRI.MAJNU KOMATH, SC, K.S.W.C.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
26-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No.15079 of 2010 (H)

APPENDIX

PETITIONER'S EXTS

EXT.P1:- TRUE COPY OF THE APPOINTMENT ORDER OF THE PETITIONER DATED 01/03/2006.

EXT.P2:- TRUE COPY OF THE PROCEEDINGS DT. 03/02/07 ORDERING TERMINATION OF TH EPETITIONER.

EXT.P3:- TRUE COPY OF THE JUDGMENT DT. 24/11/09 IN WPC NO.4258/07.

EXT.P4:- TRUE COPY OF THE OBJECTION DT. 21/12/09 SUBMITTED BY THE PETITIONER.

EXT.P5:- TRUE COPY OF ORDER NO.KSWC/ADMN/CC/189/09-10 DT. 07/5/10.

EXT.P6:- TRUE COPY OF THE NOTIFICATION 17/10/05 PUBLISHED IN THE CHANDRIKA DAILY DT.20/10/05.

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BABU MATHEW P. JOSEPH, J.

W. P. (C) No.15079 of 2010

“C. R.”

Dated this the 26th day of February, 2015

JUDGMENT

The respondent Kerala State Warehousing Corporation was constituted under the Warehousing Corporations Act, 1962. The respondent invited applications, by way of newspaper advertisements, for appointment to the post of Assistant etc. The number of vacancies in the post of Assistant notified was 50. The petitioner has applied for the post of Assistant. She has undergone due selection process and based on that she was selected for appointment to the post of Assistant. She was ranked No.2 in the select list prepared. Accordingly, as per Ext.P1 order dated 01-03-2006 of the first respondent, she was appointed as Assistant and posted her to the State Warehouse at Tripunithura. While the petitioner was so continuing in the service of the first respondent, by Ext.P2 order dated 03-02-2007, she was terminated from service with effect from the A.N. of

05-02-2007. The services of several other persons appointed to the post of Assistant were also terminated along with the petitioner. The petitioner and three others challenged Ext.P2 order by filing W.P.(C) No.4258 of 2007 before this Court. Several other writ petitions were also filed by others challenging their termination from service. All those writ petitions were heard together by this Court and disposed of them by a common judgment dated 23-11-2009. This Court found that the petitioners in those cases were terminated from service without issuing any notice to them. Therefore, the termination orders dated 03-02-2007 were interfered with and directed such orders to be treated as show cause notices. The petitioners were granted opportunity to file their objections to the said show cause notices by way of addressing the Managing director of the first respondent Corporation. A time limit of four weeks was fixed for filing such objections. It was further directed in the judgment that representations if received as directed would be considered

with notice to the persons who had filed such representations and final orders should be passed duly advertng to the contentions raised in them. Such consideration was directed to be done within two months of the receipt of the objections. Ext.P3 is a copy of that judgment passed by this Court.

2. The petitioner, accordingly, filed her Ext.P4 objections dated 15-12-2009 against Ext.P2 show cause notice. The Managing Director of the first respondent conducted a personal hearing on 12-04-2010. Thereafter, he has issued Ext.P5 order dated 07-05-2010 confirming the termination of service of the petitioner. Challenging Exts.P2 and P5, on various grounds, the petitioner has preferred this writ petition.

3. Heard Sri.S.Ramesh Babu, the learned Senior Counsel appearing for the petitioner, and Sri.A.N.Rajan Babu, the learned Standing Counsel appearing for the respondent. The respondent has filed a counter affidavit in

this case.

4. The main reasons shown in Exts.P2 and P5 for terminating the service of the petitioner with the first respondent is that 50 posts of Assistant were notified at a time when only 12 vacancies of Assistant alone were available in the first respondent Corporation and 10 applicants under the dying-in-harness scheme were waiting for appointment. The Executive Committee of the first respondent created 40 and 33 posts of Assistant in their meeting held on 27-01-2006 and 28-02-2006 respectively for which they had no powers. After the selection process, 99 persons were appointed as Assistants. Therefore, the selection and appointment were illegal and hence the services of all the appointees were terminated. Some other reasons were also noted in Exts.P2 and P5 for terminating the service of the petitioner which I shall deal with in due course.

5. It is the case of the respondent that 50 posts of

Assistant were advertised for appointment at a time when there were only 12 regular vacancies and 10 applicants for appointment under the dying-in-harness scheme were waiting for appointment. Therefore, admittedly, 12 posts of Assistant were available in the respondent Corporation for appointment when advertisements were issued inviting applications for the post of Assistant. The petitioner, after undergoing due selection process, was ranked No.2 in the select list. Therefore, even if there were only 12 vacancies, there were sufficient regular vacancies available for appointing the petitioner to the post of Assistant even after giving appointments to 10 applicants under the dying-in-harness scheme. This crucial aspect of the matter has not been considered either in Ext.P2 or in Ext.P5. The petitioner has specifically raised such a contention in her Ext.P4 objections submitted pursuant to Ext.P3 judgment rendered by this Court. But, despite the direction issued by this Court in Ext.P3 judgment that final orders shall be passed 'duly

adverting to the contentions raised', the specific contention so raised by the petitioner was not considered. Therefore, while issuing Ext.P5 order, the respondent not only violated the direction issued by this Court but also not adverted to the contention so raised by the petitioner in Ext.P4.

6. The case of the respondent is that 99 persons were appointed as Assistant from the select list. No validly created vacancies were there for making such large scale appointments. Only 12 regular vacancies were available then. Therefore, all the appointments were liable to be cancelled. This stand of the respondent cannot be countenanced. All the 99 appointees cannot be treated alike. Those who were appointed to the available regular vacancies cannot be equated with those who were appointed to the vacancies not validly created. It is stated in Ext.P2 that the petitioner was not appointed to a validly created vacancy of Assistant in the Corporation. This is incorrect. Since she was ranked No.2 in the select list, there

was a regular vacancy available for her to be appointed. Also stated in Ext.P2 that she was one among the 99 Assistants irregularly appointed in the Corporation. This is also incorrect. Since there was a regular vacancy for her to be appointed, her case cannot be equated with those appointees who were appointed to the vacancies not validly created. Her appointment can be treated as a regular one since there was a vacancy available for her and she was appointed after undergoing due process of selection as prescribed by the Regulations to be followed in the matter of appointment.

7. It is noted in Ext.P5 that the Executive Committee of the Corporation was incompetent to create posts. Therefore, the decision of the Executive Committee to create 40 and 33 posts of Assistant taken on 27-01-2006 and 28-02-2006 respectively was declared null and void by the Board of Directors of the Corporation by adopting resolution No.2538 in the 242nd meeting held on 13-11-2006 and authorised the

Managing Director to terminate the services of the irregular appointees (emphasis supplied). This decision indicates that the irregular appointees were those persons who were appointed to the 73 posts created by the Executive Committee without any authority. This decision does not direct to terminate the services of those persons who were appointed to regular vacancies. The very basis of the large scale termination of the services of the persons appointed was the unauthorized creation of 40 + 33 posts by the Executive Committee. This has again been repeated in Ext.P5 elsewhere. Therefore, in the light of these facts, the petitioner who was appointed to a regular vacancy after due selection and others who were appointed to vacancies unauthorizedly created by the Executive Committee cannot be treated alike for the purpose of termination.

8. The selection of the candidates for appointment to the posts of Assistant was conducted by a Selection Committee duly constituted. The selection was conducted on

the basis of a written test followed by an interview of the shortlisted candidates. The written test was conducted by an independent public sector body, namely, the Productivity Council. There was no allegation against the process of selection in this case. It is nobody's case that the selection process was vitiated. In such a circumstance, the candidates like the petitioner selected for appointment to the regular vacancies available and the candidates selected for appointment to the irregular vacancies (the vacancies unauthorizedly created by the Executive Committee) can be clearly separated and dealt with. Those who had undergone due selection process and got appointment to regular vacancies cannot be equated with those who were appointed to those irregular vacancies. Some persons were appointed to irregular vacancies created by the Executive Committee cannot be a reason for annulling the selection and appointment of persons like the petitioner who were duly selected and appointed to regular vacancies. In view of

these facts, a wholesale termination of all the candidates appointed purely based on the appointment of certain persons to irregular vacancies was only an arbitrary exercise of power violating Article 14 of the Constitution of India.

9. The Honourable Supreme Court in **Union of India v. Rajesh P.U., Puthuvalnikathu [(2003) 7 SCC 285]** has held as follows:

“.....in the absence of any specific or categorical finding supported by any concrete and relevant material that widespread infirmities of an all-pervasive nature, which could be really said to have undermined the very process itself in its entirety or as a whole and it was impossible to weed out the beneficiaries of one or the other irregularities, or illegalities, if any, there was hardly any justification in law to deny appointment to the other selected candidates whose selections were not found to be, in any manner, vitiated for any one or the other reasons. Applying a unilaterally rigid and arbitrary standard to cancel the entirety of the selections despite the firm and positive information that except 31 of such selected candidates, no infirmity could be found with reference to others, is nothing but total disregard of relevancies and allowing to be carried away by irrelevancies, giving a complete go-by to contextual considerations throwing to the winds the principle of proportionality in going farther than what was strictly and reasonably to meet the

situation. In short, the competent authority completely misdirected itself in taking such an extreme and unreasonable decision of cancelling the entire selections, wholly unwarranted and unnecessary even on the factual situation found too, and totally in excess of the nature and gravity of what was at stake, thereby virtually rendering such decision to be irrational.”

It was held by the Honourable Supreme Court in **Girjesh Shrivastava v. State of M.P. [(2010) 10 SCC 707]** as follows:

“26. From these facts it can be concluded that the alleged participation of near relatives in the selection process was not such a factor as to vitiate the entire selection process. Even if there were some illegal beneficiaries from the selection process, they should have been weeded out instead of striking down the entire selection process.

27. In *Charanjit Singh v. Harinder Sharma* [(2002) 9 SCC 732] a similar situation had arisen. In that case, while not approving the interference of the High Court in the selection process, this Court held that merely because some of the candidates in the selection process happened to be relatives of the members of the Selection Committee, it did not mean that all the candidates were relatives of the members of the Selection Committee and had been illegally selected. It was also held that since the petition was not made by any of the candidates who had appeared in the

selection process and was instead filed as a public interest litigation, it was improper for the High Court to interfere in the matter.”

In the case on hand, it cannot be found that the infirmities found by the respondent in the appointment to the posts of Assistant were all-pervasive nature. No defect or fault was found with the selection process in this case. The appointment of persons like the petitioner was to regular vacancies unlike others. Both the groups can be separated. Therefore, the necessity of a wholesale termination of appointments, i.e., both the appointments regularly made to regular vacancies and the appointments made to irregular vacancies, does not arise here. The persons like the petitioner can be separated and their appointment can be protected and continued.

10. The petitioner was a widow aged 37 at the time of filing this writ petition. She has two minor daughters who were aged 12 and 8 at that time. The petitioner is now overaged to aspire for any appointment in the public sector.

Nobody has a case that she has secured the job in the first respondent Corporation by any unlawful means. Her appointment was not a back door one. She only responded to the advertisement issued by the respondent. She was fully qualified for appointing to the post of Assistant. After undergoing due selection process, she secured a very high rank in the select list, namely, rank No.2. Accordingly, she was given appointment to a regular vacancy. If such an appointment is terminated and the job is lost, which would have very serious adverse consequences affecting the financial status and the livelihood of the petitioner and her family. The Honourable Supreme Court in **Girjesh Shrivastava v. State of M.P.** (supra) has observed as follows:

“31. More importantly, in deciding these issues, the High Court should have been mindful of the fact that an order for cancellation of appointment would render most of the appellants unemployed. Most of them were earlier teaching in non-formal education centres, from where they had resigned to apply in response to the advertisement. They had left their previous employment in view of the

fact that for their three-year long teaching experiences, the interview process in the present selection was awarding them grace marks of 25%. It had also given them a relaxation of 8 years with respect to their age. Now, if they lost their jobs as a result of the High Court's order, they would be effectively unemployed as they cannot even revert to their earlier jobs in the non-formal education centres, which have been abolished since then. This would severely affect the economic security of many families. Most of them are between the age group of 35-45 years, and the prospects for them of finding another job are rather dim. Some of them were in fact awaiting their salary raise at the time of quashing of their appointment by the High Court."

In the peculiar facts and circumstances obtained in the case on hand, the petitioner cannot be subjected to such a drastic step of losing job for no fault of her. There is open regular vacancy for her to be appointed as Assistant in the first respondent Corporation. The learned Standing Counsel appearing for the respondent Corporation brought to my notice that the Board of Directors of the Corporation met on 22-03-2013 resolved to consider appointment of Assistants from the appointment list of 2006 as fresh appointees in the existing 15 permanent vacancies according to seniority

subject to the permission of this Court. If such existing 15 permanent vacancies are filled up from the select list according to seniority, definitely, the petitioner will be entitled to appointment. This decision of the Board of Directors indicates that the respondent, in fact, wanted to fill the existing 15 permanent vacancies from the select list in which the petitioner is ranked No.2. This further indicates that the respondent have no objection and they are willing to appoint the petitioner to the post of Assistant based on her selection to that post. Even though this Court does not propose to make any opinion in respect of the decision so taken by the Board of Directors for appointing persons to the existing 15 permanent vacancies, such a decision persuades this Court to accept the case of the petitioner for quashing Exts.P2 and P5 orders and to allow her to continue in the first respondent Corporation as a regularly appointed Assistant.

11. This Court in Ext.P3 judgment directed to pass final

orders on Ext.P4 duly adverted to the contentions raised. But, a mere perusal of Ext.P5 would go to show that the respondent has not adverted to the real contentions raised by the petitioner in her Ext.P4 objections. Ext.P5 appears to be only a copy of the communication issued to other persons without looking into or considering the individual contentions specifically raised by the petitioner in Ext.P4 objections. Ext.P5 says so many matters unconnected with the contentions raised in Ext.P4. Therefore, non-application of mind on the part of the respondent is writ large while issuing Ext.P5 communication to the petitioner.

12. One of the reasons stated in Exts.P2 and P5 for terminating the services of the petitioner and others was that 99 Assistants were appointed on 01-03-2006, the date on which the code of conduct for elections to the Kerala Legislative Assembly came into effect. Nothing was brought to my notice violating the code of conduct by issuing Ext.P1 order appointing the petitioner as Assistant in the

Corporation. A model code of conduct for the guidance of political parties and candidates issued by the Election Commission of India was brought to my notice during the course of argument of the case. Nothing was found in it prohibiting an appointment like Ext.P1 given to the petitioner. The model code of conduct stipulates that from the time elections are announced by the Commission, Ministries and other Authorities shall not make any ad hoc appointments in Government, Public Undertakings etc. which may have the effect of influencing the voters in favour of the party in power (emphasis supplied). The respondent does not have a case either in Ext.P2 or in Ext.P5 or in their counter affidavit that the appointment given to the petitioner had the effect of influencing the voters in favour of the party in power then. In the absence of such an averment and evidence for the same, the ground so noted in Exts.P2 or P5 cannot be accepted as a reason for terminating the service of the petitioner. Moreover, the

appointment of the petitioner was not an ad hoc one, but was made after a due selection process to a regular vacancy.

13. Another reason raised in Ext.P5 is that due publicity to the Notification inviting application for the post of Assistant was not given and the Notification was not published in the leading newspapers as stipulated in the Kerala State Warehousing Corporation Staff Regulations, 1963, for short, the Regulations. The Notification was published in Chandrika Daily and Kerala Kaumudi Daily. This is admitted in the counter affidavit filed by the respondent. Regulation-7 in Chapter-II of the Regulations deals with publicity of posts etc. It is prescribed in Subregulation (i) that an advertisement incorporating the necessary minimum qualifications and experience may be inserted in such of the leading newspapers as the Managing Director may consider necessary. Which are such leading newspapers are not specified in the Regulations. Chandrika Daily and Kerala

Kaumudi Daily are not excluded also in the Regulations. There is nothing on record to show that Chandrika Daily and Kerala Kaumudi Daily cannot be treated as leading newspapers. The respondent does not have a case that somebody from the general public raised complaint that due publicity was not given to the Notification. Ext.P6 is a copy of the Notification issued by the respondent inviting applications appeared in Chandrika Daily. In the light of these facts, this Court is of the considered view that due publicity advertising the Notification in Chandrika Daily and Kerala Kaumudi Daily was given in this case. Moreover, at the time of issuing Ext.P2, the respondent did not have such a case as raised in Ext.P5 in respect of publicity to the Notification. Therefore, it can reasonably be presumed that the respondent purposely incorporated that reason also in Ext.P5 for terminating the service of the petitioner even though they had no such reason in Ext.P2. In view of these facts, such a reason raised by the respondent is only to be

rejected and hence, I do so.

14. Another reason stated in Exts.P2 and P5 for terminating the service of the petitioner is that the proceedings dated 01-03-2006 of the Managing Director, Sri.G.Mohandas, appointing the petitioner as Assistant was signed by Sri.C.Mohanabalan, General Manager (Marketing & Personnel), without any authority. This reason also does not have any substance. The petitioner was appointed as Assistant as per Ext.P1 order dated 01-03-2006. She was terminated by Ext.P2 order dated 03-02-2007 and subsequently by Ext.P5 order dated 07-05-2010. The petitioner, on the strength of Ext.P1, has actually worked for a period nearly one year before issuing Ext.P2 dated 03-02-2007 to her. The petitioner, refuting such reason, contended in the writ petition as follows:

“D. The further statement that the appointment orders were signed by Sri.Mohanabalan without any authority is not correct. Similar appointment orders signed by Sri.Mohanabalan in the case of appointing persons in dying in harness scheme have

been honoured and they continue in service. The appointment orders were signed by Sri.Mohanabalan as authorized by the then Managing Director as per proceedings dated 28-02-2006.”

This contention specifically raised by the petitioner in this writ petition stands not denied or contradicted by the respondent. Moreover, in Ext.P5 itself, the respondent specifically admitted that the appointment orders in dying-in-harness cases were signed by the General Manager. Also stated that as per the decision of the Executive Committee these appointment orders were revised and appropriate orders were issued later on finding irregularity in those orders. The averment of the petitioner in Ext.P4 that the appointment orders were signed by Sri.C.Mohanabalan as authorised by the then Managing Director as per proceedings dated 28-02-2006 stands not disputed in Ext.P5. Moreover, this irregularity in issuing the appointment order cannot be highlighted as an irregularity warranting termination of service of an appointee. Such irregularity can

only be corrected as done earlier. The petitioner was appointed after a due selection process as per Ext.P1 order and she continued as an Assistant in the respondent Corporation for a period of about one year. During that period nobody had a case that her appointment should be terminated for the reason that the appointment order was signed by the General Manager. Ext.P1 order of appointment, if irregular, can be revised by appropriate proceedings issued by the competent authority. This is not at all a ground for terminating the service of the petitioner from the Corporation.

15. For the foregoing reasons, the petitioner is entitled to succeed in this writ petition. Exts.P2 and P5 are liable to be quashed. The petitioner is entitled to be reinstated in the service of the respondent as an Assistant. The petitioner was terminated from service as per Exts.P2 and P5 with effect from 05-02-2007. Since then the petitioner was out of service. Normally, when reinstatement is ordered that will be

done with continuity of service and all monetary benefits including back wages. But, such a standard cannot be adopted in this case in view of the peculiar facts and circumstances. Therefore, on reinstatement in service, the petitioner will be entitled to continuity of service as Assistant from the date of termination of her service and all service benefits except back wages. It is further made clear that she is entitled to count her service, from the date of joining duty in the respondent Corporation on the strength of Ext.P1 order, for all service benefits including seniority and promotion, but not back wages.

In the result,

- (1) Exts.P2 and P5 are quashed.
- (2) The respondent is directed to reinstate the petitioner in service as Assistant with continuity of service and with all service benefits except back wages as indicated earlier.

(3) The petitioner shall be so reinstated in service by the respondent as early as possible and, at any rate, within a period of 30 days from the date of receipt of a copy of this judgment.

The petitioner is directed to produce a copy of this judgment before the respondent for compliance.

This writ petition is allowed as above.

Sd/-
BABU MATHEW P. JOSEPH
JUDGE

kns/-

//TRUE COPY//

P.A. TO JUDGE