

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY, THE 23RD DAY OF FEBRUARY 2015/4TH PHALGUNA, 1936

WP(C).No. 20866 of 2013 (G)

PETITIONER:

SELINA.M.C.
W/O.JOSE, THEKKEKARA OLARI HOUSE, MUKKATTUKARA
NETTISSEY P.O., THRISSUR-680657.

BY ADV. SRI.DILIP J. AKKARA

RESPONDENTS:

1. STATE OF KERALA
REPRESENTED BY COMMISSIONER & SECRETARY TO GOVERNMENT
DEPARTMENT OF HEALTH & FAMILY WELFARE (D)
SECRETARIAT, THIRUVANANTHAPURAM-695001.
2. THE SECRETARY
DEPARTMENT OF BUREAU OF PUBLIC ENTERPRISES
PLANNING & ECONOMIC AFFAIRS, GOVERNMENT OF KERALA
THIRUVANANTHAPURAM-695001.
3. 'OUSHADHI'
THE PHARMACEUTICAL CORPORATION (IM) KERALA LTD.
REPRESENTED BY MANAGING DIRECTOR, 'OUSHADHI'
KUTTANELLUR, THRISSUR-680014.

R1,R2 BY GOVERNMENT PLEADER SRI.P.M.JOSEPH
R3 BY ADV. SRI.E.K.MADHAVAN
R3 BY ADV. SMT.P.VIJAYAMMA
R3 BY ADV. SRI.V.KRISHNA MENON
R3 BY ADV. SMT.UMA GOPINATH
R3 BY ADV. SRI.U.K.DEVIDAS
R3 BY ADV. SMT.J.SURYA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER(S)' EXHIBITS:

EXHIBIT-P1: PHOTOCOPY OF PETITIONER'S B.COM. DEGREE CERTIFICATE
ISSUED BY UNIVERSITY OF CALICUT.

EXHIBIT-P2: PHOTOCOPY OF THE APPOINTMENT ORDER OF THE PETITIONER
DATED 03.08.1983.

EXHIBIT-P3: PHOTOCOPY OF PROCEEDINGS OF THE 3RD RESPONDENT NO.E1-
9/83 DATED 10.01.84.

EXHIBIT-P4: PHOTOCOPY OF LETTER NO.14100/D2/98/H & PWD DATED 8.6.98
WITH RECRUITMENT RULES ISSUED BY 1ST RESPONDENT.

EXHIBIT-P5: PHOTOCOPY OF REPRESENTATION DATED 6.5.04 BY PETITIONER.

EXHIBIT-P6: PHOTOCOPY OF THE REPRESENTATION DATED 29.12.11 MADE BY
PETITIONER BEFORE THE 3RD RESPONDENT.

EXHIBIT-P7: PHOTOCOPY OF LETTER NO.E1-124/10 DATED 12.5.12 BY 3RD
RESPONDENT TO R1.

EXHIBIT-P8: PHOTOCOPY OF THE ORDER NO.19457/D2/2012/HFD DATED
29.12.12 BY 1ST RESPONDENT.

RESPONDENT(S)' EXHIBITS:

EXT.R1(a): GOVERNMENT LETTER NO.20770/D2/2009/H&FWD
DTD.3.10.2011.

// TRUE COPY //

P.A TO JUDGE.

ALEXANDER THOMAS, J.

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Dated this the 23rd day of February, 2015.

J U D G M E N T

The petitioner was appointed as a Lower Division Clerk in the Scale of Pay of Rs.350-10-460-12-580 in the service of the 3rd respondent Pharmaceutical Corporation (Indian Medicines) Kerala Limited (hereinafter referred to as 'the Corporation') w.e.f. 14.7.1983 for a period of six months as per Ext.P2 order dated 3.8.1983. This appointment was stated to be provisional and subject to the concurrence of the Public Service Commission. By Ext.P3 proceedings dated 10.1.1984, the 3rd respondent Corporation informed the petitioner that since the concurrence from the Public Service Commission for her provisional appointment as Lower Division Clerk has not been obtained, she is allowed to continue beyond the expiry of the original period mentioned in Ext.P2 and that this will be subject to concurrence of the Public Service Commission and till the date on which the nominee of the Public Service Commission joins duty. The appointment to the post including the post of L.D.Clerk/Junior Assistant in the 3rd respondent Corporation

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was brought within the ambit of the Public Service Commission's selection process as per the Kerala Public Service Commission (Consultation by Corporations and Companies) Rules 1971. In the above said Rules, the Corporation was notified to form part of Rule 2(d) thereof as item (XLVIII). The above said entry in terms of item (XLVII) under Rule 2(d) relating to Government Companies as per the above said Rules was notified as per G.O(MS.)630/79/GAD. dated 1.12.1979 published as SRO No.1389/79 in Kerala Gazette No.51 dated 25.9.1979. But, it is common ground that Ext.P4 Recruitment Rules was framed by the State Government to regulate the appointment process in the post under the Corporation through the Public Service Commission only on 8.6.1998.

2. There are 17 posts included in Ext.P4 Recruitment Rules and it is stipulated in Rule 2(3) thereof that the said 17 posts named thereunder including the Junior Assistant/LD Clerk will come under the purview of Public Service Commission in the case of direct recruitment. So, the actual selection process could be entrusted with the Public Service

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Commission only after the promulgation of Ext.P4 Rules issued on 8.6.1998. In view of the long delay in the recruitment processes in respect of those posts, it appears that the 3rd respondent-Corporation had ordered that the appointment of the petitioner as Lower Division Clerk/Junior Assistant as per Exts.P2 & P3 will be permanent for all purposes. The fact that the 3rd respondent-Corporation has treated the appointment of the petitioner as Lower Division Clerk as permanent appointment, is discernible from Ext.P7 proceedings dated 12.5.2012. On this basis, the petitioner was promoted as U.D.Clerk/Senior Assistant on 6.7.1993 and later she was promoted to the post of Assistant Manager on 17.7.1996. These promotions of the petitioner to the post of U.D.Clerk and Assistant Manager have been treated by the Corporation as regular promotion. It is to be noted that these promotions of the petitioner to the higher posts of U.D.Clerk and Assistant Manager have been made much prior to the issuance of Ext.P4 Rules on 8.6.1998.

3. It appears that the 3rd respondent-Corporation had taken up the case of the petitioner's appointment as L.D.Clerk

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with the Public Service Commission and the Public Service Commission was of the opinion that the appointment of the petitioner as L.D.Clerk in the year 1983 cannot be regularised. When the petitioner apprehended her termination from service, she had submitted Ext.P5 representation before the State Government on 6.5.2004. It is common ground that the Government had not taken any action on Ext.P5 representation. Neither had the Government granted its sanction for the regularisation of the appointment of the petitioner as L.D.Clerk nor had the Government directed the Corporation to terminate the service of the petitioner. In these circumstances, the petitioner continued in service and she retired from service as Assistant Manager on 30.6.2011. The 3rd respondent Corporation had paid major part of the gratuity amounts due to the petitioner and provident fund amounts due to her. In the meanwhile, the Government issued Ext.R1(a) letter dated 3.10.2011 to the 3rd respondent-Corporation directing that until further orders from the Government, no further service benefits need be disbursed to the petitioner. Later, the Government issued Ext.P8 proceedings dated

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29.12.2012 directing the 3rd respondent-Corporation not to sanction the remaining service benefits due to the petitioner. It is this order as per Ext.P8 that is under challenge in this writ petition. In the light of these aspects, the petitioner has prayed to issue a writ of certiorari to quash Ext.P8 order and to direct the respondents to pay her full service and other pensionary benefits due to her.

4. The 1st respondent-Government filed a counter affidavit dated 14.1.2015. Therein it is admitted that Ext.P4 Recruitment Rules have been approved by the Government only in 1998. It is further stated that the subsidiary laws relating to service conditions of employees of the Corporation was approved only in 1999. It is also admitted in paragraph 4 of the counter affidavit that petitioner's appointment in 1983 was under the then prevailing Rules, but, that in her appointment order it was specifically mentioned that the appointment is provisional and subject to concurrence of the Public Service Commission. It is stated in paragraph 2 of the counter affidavit that her appointment as per the Board resolution No.7(3) dated 14.7.1983 was observing the then

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prevailing Rules and that she was allowed to continue in service till the nominee of the Public Service Commission joins duty and that when the 3rd respondent sought concurrence of the Public Service Commission for the continuance of the petitioner as L.D.Clerk, the commission had not agreed with the said proposal, that the Corporation had allowed the petitioner to continue in the post of L.D.Clerk and she was promoted as U.D.Clerk and thereafter as Assistant Manager. It is stated that the said action of the Corporation is highly irregular and against the provisions of existing service Rules and that the Corporation has not explained how a provisional appointee whose service is not regularised in the entry cadre could be promoted to the higher post. In view of this specific aspect that the Government has issued Ext.P8 order directing the 3rd respondent not to sanction the remaining service benefits as per Ext.P8.

5. It is clear from a reading of Ext.P7 dated 12.5.2012 issued by the 3rd respondent-Corporation to the 1st respondent-Government that the petitioner has been paid the terminal benefits like gratuity before the issuance of Ext.R1(a) dated

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3.10.2011 and that only arrears of gratuity, DA, Wage Revision, etc., are pending payment to the petitioner. The Corporation sought permission of the Government in Ext.P7 to release the service benefits due to the petitioner in view of the fact that the petitioner had retired from service on 30.6.2011.

6. The impugned Ext.P8 is issued by the 1st respondent-Government addressed to the 3rd respondent-Corporation. The Government has no case that the petitioner was given a reasonable opportunity of being heard before the issuance of impugned Ext.P8 order. The inevitable outcome of Ext.P8 is that adverse civil consequences are inflicted on the petitioner without affording reasonable opportunity to present her case. On this ground alone Ext.P8 is liable to be quashed. Accordingly, Ext.P8 is quashed.

7. From a scanning of the relevant provisions in the Payment of Gratuity Act, it can be seen that the denial of service benefits of gratuity to an employee like the petitioner, who has served the Corporation for a long period of 29 years cannot be justifiably denied. So long as the employee satisfies the definition under Sec. 2(e) of the Payment of Gratuity Act

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and so long as the employee has "continuous service" as envisaged under Sec. 2(a) thereof, and so long as the employee has rendered continuous service for not less than five years as envisaged under Sec. 4, he/she is entitled for payment of gratuity as per the mandate of Sec.4 of the Payment of Gratuity Act on his superannuation or on his retirement or resignation, etc. It appears from a reading of Ext.P-7 that major part of gratuity has already been paid to the petitioner and that what remains is only the arrears of gratuity. The 3rd respondent-Corporation is thus liable to disburse the balance gratuity amounts to the petitioner.

8. It is stated in Ext.P6 that the petitioner was not paid the amount due under General State Insurance Scheme (GSIS) even though contributions in that regard has been recovered from her salary by the 3rd respondent-Corporation. Accordingly, it is also directed that in case the GSIS amounts have not been disbursed to the petitioner, the same shall also be disbursed to her without any further delay. The balance gratuity amount and the GSIS amount shall be disbursed to the petitioner within a period of 4 weeks from the date of

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production of a certified the copy of this judgment.

9. What remains is only arrears of DA and Wage Revision due to the petitioner. A decision in respect of those matters shall be taken by the Government after reconsideration of the entire issues. Prima facie, this Court is of the opinion that as Ext.P4 Rules were issued only on 8.6.1998, direct recruitment to the post of Junior Assistant/Lower Division Clerk could have been made through the Public Service Commission selection process only after 1998. Government shall take into consideration that the Corporation had treated the petitioner's appointment as L.D.Clerk as regular appointment for the purpose of her further promotion only because of the fact that actual recruitment through the Public Service Commission could not have taken place within a reasonable time when the petitioner was given provisional appointment. If a mechanical approach is taken, the Corporation would have been constrained not to make any appointment for a period of more than 15 years since 1983 as Ext.P4 issued only on 1998. So, it appears that it is only due to the exigencies of service that the Corporation had promoted

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the petitioner on a regular basis to the higher categories as U.D.Clerk and Assistant Manager. The Government shall take into consideration the fact that these regular promotions have been granted to the petitioner to the post of U.D.Clerk and Assistant Manager, long prior to the coming into force of Ext.P4 dated 8.6.1998. The Government shall take into account the fact that only the direct recruitment to the post of U.D.Clerk/Senior Assistant and Assistant Manager have been entrusted to the Public Service Commission as per Ext.P4 and that matters relating to promotion to the post of U.D.Clerk and Assistant Manager were fully within the domain of the Corporation. The petitioner has a case that several other similarly situated persons have been given a better treatment by disbursing service benefits due to them. It is for the petitioner to file a comprehensive representation before the State Government to pin point the details in that regard and the petitioner may also urge all other submissions in aid of her contentions. These observations are made on a prima facie assessment of the facts and circumstance of this case and this Court is not pronouncing any final opinion on this issue, for

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that is a matter to be considered by the Government. The petitioner was ordered to continue in service as LDC, until a PSC advised candidate joins duty. The PSC could have advised the regular appointment to the post of LDC only long after Ext.P-4 dated 8.6.1998. Much prior to this, the petitioner was already promoted to the next higher posts. So there was no occasion to terminate the service of the petitioner as LDC, even as per the conditions in her appointment order. Moreover, promotions to those posts do not come within the purview of the PSC as per the stipulations in Ext.P-4. These relevant aspects require the pointed consideration of the Government. The Government will take into account the fact that the petitioner was allowed to continue in service uninterruptedly, in the above circumstances, and that she has rendered 29 long years of blemishless service to the 3rd respondent-Corporation after securing regular promotions to two higher posts and that such promotions were effected much prior to coming into force of Ext.P-4 Rules. The Government shall consider all relevant aspects of the matter and grant a reasonable opportunity of being heard to the petitioner and

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then take a just, fair and equitable decision thereof on the question as to the disbursal of arrears of DA and Wage Revision claimed by the petitioner. The Government shall pass final orders on these aspects within a period of three months from the date of submission of the representation by the petitioner along with a certified copy of this judgment.

With these observations and directions, the writ petition stands finally disposed of.

**ALEXANDER THOMAS,
Judge.**

bkn/-