IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN

TUESDAY, THE 27TH DAY OF JANUARY 2015/7TH MAGHA, 1936

WP(C).No. 25840 of 2008 (A)

PETITIONER(S):

P.V.MARKOSE, S/O.OF VARKEY,
PERUMPALLIKUNNEL, PALAKUZHA P.O.

BY ADV. SRI.P.RAMAKRISHNAN

RESPONDENT(S):
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1. **THE PALAKUZHA SERVICE CO-OPERATIVE BANK LIMITED NO.E.81, PALAKUZHA P.O, REPRESENTED BY ITS SECRETARY.**

2. **KERALA STATE CO-OPERATIVE EMPLOYEES PENSION BOARD, THIRUVANANTHAPURAM-695 001, REPRESENTED BY ITS SECRETARY.**

R1 BY ADVS. SRI.V.G.ARUN
SRI.T.R.HARIKUMAR
R2 BY ADV. SRI.K.R.SUNIL, SC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 27-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

msv/

WP(C).No. 25840 of 2008 (A)

APPENDIX

PETITIONER(S)' EXHIBITS:

EXT.P1: TRUE COPY OF MEMORANDUM OF SETTLEMENT DATED 27.7.1988.

EXT.P2: TRUE COPY OF ORDER DTD.3.9.2001 ISSUED BY THE ASSISTANT REGISTRAR (GENERAL) MUVATTUPUZHA.

EXT.P3: TRUE COPY OF ORDER DTD.20.6.2008 ISSUED BY THE 2ND RESPONDENT.

EXT.P4: TRUE COPY OF LETTER DTD.2.4.2008 WRITTEN BY THE 2ND RESPONDENT.

EXT.P5: TRUE COPY OF PENSION CALCULATION SHEET.

RESPONDENT(S)' EXHIBITS:

NIL

//TRUE COPY//

P.S.TO JUDGE

Ms**v/**

K. SURENDRA MOHAN,J.

W.P(C) NO. 25840 OF 2008

Dated this the 27th January, 2015.

JUDGMENT

The complaint of the petitioner herein is regarding the quantum of pension that is being paid to him on the basis of Ext.P5 calculation statement by the second respondent. The petitioner retired from service on 31.5.2007.

2. The petitioner was an employee of the first respondent bank. He had joined service as a salesman on temporary basis on 1.6.1976. On 1.6.1977 he became a permanent salesman. After he became a permanent employee on 4.11.1977 the petitioner joined the contributory provident fund. While so, on 9.6.1981 the petitioner was suspended from service on charges of misconduct. A disciplinary enquiry was conducted and he was dismissed from service on 31.5.1982, with effect from the date of his

suspension viz., 9. 6.1981. Along with the petitioner two other employees had also been dismissed from service. All of them challenged the dismissal orders passed against them before the Appellate Authority, in separate appeals. The Appellate Authority found as per a preliminary order that the enquiry conducted against the petitioner was defective. Therefore, a de novo enquiry was commenced. While so, the matter was settled as per Ext.P1. As per the settlement, the petitioner was reinstated in service from the date of his suspension, with continuity of service, but without back wages. Thus the petitioner continued in service thereafter and worked till the date of his retirement.

3. As per Ext.P2 proceedings of the Assistant Registrar dated 3.9.2003 the petitioner was granted higher grade on completion of 25 years of service. The length of his service was computed taking into account the period that he had been suspended from service also. Thus, according to the petitioner, his period of suspension was counted for all

purposes, after Ext.P1. However, as per Ext.P3 when the petitioner's pension was fixed the period that he was kept under suspension was not taken into account. The counsel for the petitioner places reliance on Ext.P5 calculation statement to point out that, the period that he was under suspension has not been taken into account while computing the pension payable to him. The petitioner has therefore filed this writ petition challenging Exts.P4 and P5.

4. According to the counsel for the petitioner, as per Ext.P1 the petitioner was reinstated in service, with continuity of service, but without back wages. Since the petitioner was reinstated back in service with continuity of service, it is contended that there is no justification for excluding his period of suspension while computing the pension payable to him. It is pointed out that, the first respondent has remitted the contribution payable for the purpose of sanction of pension to him. Therefore, he seeks the issue of appropriate directions for computing his period of suspension also while

fixing his pension amount.

5. Adv.V.G.Arun appears for the first respondent bank. According to the counsel for the bank the petitioner was reinstated in service with continuity of service. It was for the said reason that, the contribution payable by the bank was also paid.

6. Adv.K.R.Sunil appears for the second respondent. A counter affidavit has been filed. The contention of the second respondent is that, the petitioner has not been paid wages for the period that he was kept out of service. Since he was not paid wages for the said period, it is contended that he does not come within the definition of “employee” contained in Clause 2(f) of the Kerala Co-operative Societies Employees Self Financing Pension Scheme, 1994 (the 'Pension Scheme' for short). Since the employee was not paid any wages for the period that he was kept out of service, no contribution also could be paid by the bank in respect of the said period. It is further contended that, the period that the petitioner was kept

out of service could only be treated as leave without allowances. In view of Clause 19(3) of the Pension Scheme, leave without allowances could not be reckoned or taken into account while computing the qualifying service for pension. Clause 19(5) is also relied upon to point out that, the period of suspension could be counted only in accordance with the order of the competent authority regarding the manner in which the said period was to be treated.

7. It is further pointed out by the counsel for the second respondent that, the first respondent bank was enrolled in the Pension Scheme on 2.11.1996. The contribution in respect of the period that the petitioner was kept out of service was made only on 3.12.2003. In view of Section 61 of the Kerala Co-operative Societies Act, 1969 (the 'Act' for short) such payment after the date of enrollment was not permissible. Sub clauses (1) and (2) of Clause 39 of the Pension Scheme, provides that, the liability of the employer to make contributions to the provident fund shall cease from the date

on which the amount standing to the credit of his account is transferred and credited to the pension fund. Therefore, the remittance on 3.12.2003 is of no consequence.

8. Heard. The facts are not in dispute. The only question is whether the period from 9.6.1981 to 1.8.1988 during which the petitioner was kept out of service could be counted for the purpose of computing his total length of service for payment of pension under the Pension Scheme. The first contention of the counsel for the second respondent is that, the petitioner would not come within the definition of an employee under Clause 2(f) of the Pension Scheme. The said clause reads as follows:-

> "2. Definitions.--(f) Employee means a person appointed in the service of a Co-operative society registered under the Kerala Co-operative Societies Act, 1969, against a sanctioned post or in a post approved by the competent authority under the said Act and who is working on a full time, regular and paid basis including part-time contingent

> employees, commission agents, security staff
> and such other categories of employees."

As per the above definition, an employee means:

i) a person appointed in the service of a co-operative society registered under the Act;

ii) against a sanctioned post or in a post approved by the competent authority under the Act and

iii) who is working on a full time, regular and paid basis including contingent employee, commission agents, security staff and other categories of employees.

Therefore, as per the above definition a person has to be appointed to a sanctioned post, he has to be a person working on a full time, regular and paid basis. There is no dispute that, the petitioner was appointed to a sanctioned post and that he was working on a full time, regular and paid basis. The only objection is that, he was not paid his salary during the period that he was kept out of service, in view of the terms of settlement in Ext.P1. The said contention cannot be sustained for the reason that, petitioner was admittedly a person who was working in a sanctioned post on full time, regular and paid basis. Ext.P1 settlement only deals with the terms subject to which he was reinstated in service. It is true that as per Ext.P1, the petitioner had to forgo his claim for back wages as part of the settlement, to which the petitioner had agreed. Such agreement would not render the services of the petitioner deficient in any manner since he was already working on a full time, regular and paid basis. It is also not in dispute that the contribution in respect of the employee has been paid by the society. Therefore, it is held that the petitioner is an employee coming within the definition contained in Clause 2(f) of the Pension Scheme, though he was not actually paid his salary during the period that he was kept out of service.

9. The second contention made on behalf of the second respondent is that, the period that the petitioner was kept out of service could not be considered as qualifying service in

terms of Clause 19 of the Pension Scheme. This is for the reason that, his period of absence could be treated only as leave without allowances according to the counsel, which period is liable to be excluded under Clause 19(3) of the Pension Scheme. The above contention also has to fail for the reason that, the petitioner has been reinstated with continuity of service. The expression "continuity of service" means continuity of service for all purposes. That the expression has been so understood by the departmental authorities also is clear from the fact that the Assistant Registrar of Co-operative Societies has granted higher grade to the petitioner on completion of 25 years, as per Ext.P2. The said period has been computed taking into account the period that the petitioner was kept out of service also. A further contention is put forward on the basis of Clause 19(5) that, the period of suspension could be counted as qualifying services only "as declared by the competent authority." According to the counsel, there is no specific declaration in Ext.P1 regarding the manner in which the period of suspension should be treated. The above contention also cannot be accepted for the reason that as per Ext.P1 the petitioner has been reinstated with continuity of service. As I have already held, continuity of service means continuity for all purposes. Therefore, the period of suspension has also to be treated as part of the petitioner's service.

10. The counsel for the second respondent has raised serious objections regarding the delay in remitting the contribution by the first respondent society in respect of the petitioner's period of suspension. It is pointed out that, the society was enrolled in the Pension Scheme on 2.11.1996. In view of the proviso to Section 61 of the Act no remittance after the said date was permissible. Therefore, the remittance made on 3.12.2003 is of no consequence, it is contended. According to the counsel for the petitioner, the petitioner was reinstated in service in the year 1988. The Pension Scheme was formulated only in the year 1994. The first respondent

bank got enrolled in the Pension Scheme in the year 1996. The contributions in respect of the employees were being remitted by the bank continuously, ever since. Since contributions have been paid in respect of the employees, it is contended that the delay in making payment in respect of the petitioner's period of suspension is of no consequence. The payment was accepted by the Pension Board and is still being retained. My attention is drawn to the 3rd page of Ext.P5 to point out that, the amount so remitted works out to Rs.94,353/-, a substantial amount. Therefore, according to the counsel, there is no justification for the present stand of the second respondent in refusing to pay full pension to the petitioner.

11. It is true that, as per Section 61 no payment to the Employees Provident Fund is permissible after the society enrolls under the Pension Scheme. However, the said prohibition does not place any impediment against making good any short fall that may be detected at a later point of

time. It is not in dispute that, upon the first respondent joining the Pension Scheme the amount standing to the credit of the employees under the said scheme had been transferred to the second respondent. It is also worth noticing that, the amount remitted was received by the second respondent and is still being retained. The above being the position, there is no justification for denying to the petitioner the full pension on the basis of the remittances made. The delay for the remittance can be attributed only to the first respondent society for which there is no justification for penalising the petitioner who is the employee. There has been no lapse or omission on the part of the petitioner. Therefore, it is only appropriate that the petitioner is paid pension computing the period that he was kept out of service also.

In view of the above this writ petition is allowed. The second respondent is directed to compute the pension payable to the petitioner taking into account the entire period that he was kept out of service also. The petitioner shall be entitled to receive pension computed on the above basis. Appropriate orders in accordance with the above direction shall be issued as expeditiously as possible and at any rate within a period of three months of the date of receipt of a copy of this judgment. The petitioner shall also be entitled to be paid arrears on the basis of the fresh computation ordered above. Needless to observe that the second respondent shall be at liberty to insist on any further payment by the first respondent, if necessary to make good any short fall in remittance that may be detected.

Sd/-
K. SURENDRA MOHAN
Judge

jj /True copy/