

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.T.RAVIKUMAR

SATURDAY, THE 30TH JANUARY 2010 / 10TH MAGHA 1931

WP(C).No. 16756 of 2004(T)

PETITIONER(S):

P.PRASAD, FULL-TIME FERRYMAN,
KANJI RAMKADAVU FERRY UNDER P.W.D. ROADS
SECTION, CHATHANNOOR, KOLLAM.

BY ADVS. SRI.N.SUGATHAN,
SRI.A.V.RAMAKRISHNA PANICKER.

RESPONDENT(S):

1. THE STATE OF KERALA REPRESENTED BY
THE SECRETARY TO GOVERNMENT, PUBLIC WORKS
DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.
2. THE CHIEF ENGINEER, PUBLIC WORKS
DEPARTMENT (ADMINISTRATION), THIRUVANANTHAPURAM.
3. THE EXECUTIVE ENGINEER, ROADS DIVISION,
KOLLAM.
4. THE ASSISTANT EXECUTIVE ENGINEER,
ROADS SUB DIVISION, KOLLAM.
5. THE ASSISTANT ENGINEER,
P.W.D.ROADS SECTION, CHATHANNOOR, KOLLAM.

R1 TO R5 BY GOVERNMENT PLEADER SRI. ANTONY MUKKATH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 30/01/2010, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

Kss

WPC.NO.16756/2004 T

APPENDIX

PETITIONER'S EXHIBITS:

- P1: COPY OF ORDER NO.E2-4651/94 DTD. 9/11/1994 OF THE 3RD RESPONDENT.**
- P2: COPY OF ORDER NO.E2-4651/94 DTD. 22/12/1994 OF THE 3RD RESPONDENT.**
- P3: COPY OF ORDER NO.A6(1)4651/94 DTD. 13/11/1996 OF THE 3RD RESPONDENT.**
- P4: COPY OF LETTER NO.38154/A1/97/PWD DTD. 6/04/2000 OF THE 1ST RESPONDENT.**
- P5: COPY OF JUDGMENT DTD. 24/07/2003 IN O.P.NO.15311/2000.**
- P6: COPY OF ORDER NO.A6(1) 546/89 DTD.4/1/1997 OF THE 3RD RESPONDENT.**
- P7: COPY OF LETTER NO.EE3/42658/99 DTD. 13/10/2003 OF THE 2ND RESPONDENT.**
- P8: COPY OF ORDER NO.A5-7412/96 DTD. 22/10/2003 OF THE 3RD RESPONDENT.**
- P9: COPY OF LETTER NO.F1/60 DTD. 27/05/2004 OF THE 5TH RESPONDENT.**
- P10: COPY OF JUDGMENT DTD. 13/10/97 IN O.P.NO.17988/96.**
- P11: COPY OF JUDGMENT DTD. 15/12/99 IN W.A.NO.261/98.**

RESPONDENT'S EXHIBITS:

N I L

/TRUE COPY/

P.A.TO JUDGE

Kss

C.T.RAVIKUMAR, J.

W.P.(C) NO. 16756 OF 2004

Dated this the 30th day of January, 2010

JUDGMENT

The petitioner is a Full-time Ferryman, working under the Public Works Department. This Writ Petition is filed seeking the following reliefs :-

"i) to issue a writ of certiorari or any other appropriate writ or order quashing Ext.P9 order;

ii) to issue an appropriate writ or order declaring that the petitioner is not liable to refund the arrears of salary already disbursed to him pursuant to Ext.P5 judgment and Ext.P7 order."

2. A brief narration of facts is essential to decide the issues involved in this writ petition. The Public Works Department has been conducting two types of ferry services, namely, regular ferry service and seasonal ferry service. In the year 1994, pursuant to the requisition from the 3rd respondent-Executive Engineer the District Employment Officer, Kollam, sponsored 22 candidates, including the petitioner, for the purpose of selection to the post of Seasonal Ferryman. After the due selection process the 3rd

respondent had prepared a select list and thereafter, as per Ext.P1 dated 9.11.94 five candidates were appointed as Seasonal Ferryman. One of the appointees did not join duty pursuant to Ext.P1. As against the resultant vacancy the petitioner was appointed as per Ext.P2 order dated 22.12.1994. After about two years since such appointment Ext.P3 order was issued terminating the service of the petitioner and another appointee, on the ground that at the time of their appointments communal rotation was not correctly observed. The said order of termination was passed without serving notice on them. Therefore, they approached this Court by filing O.P.No.17988/96. The said writ petition was allowed on the short ground that the order of termination was passed beyond the one year period prescribed under Rule 3 of the General Rules in the Kerala State Subordinate Services Rules (for short K.S. & S.S.R.). The matter was taken up in appeal as Writ Appeal.No.261/98. As per Ext.P11 judgment the said writ appeal was disposed of. It was held that Rule 3 of K.S. &

S.S.R is not applicable to part time contingent employees and therefore, order of removal of the petitioner and the other person could not be said to be faulty. However, it was further observed as hereunder:-

"But, at the same time it cannot be lost sight that the respondents were given periodical engagement and by now have acquired some experience. Let, the first appellant consider whether taking into account their experience and the period of engagement they can be given any engagement in future. The objective assessment has to be made in that regard. The exercise shall be taken within two months from today. Till a decision is taken, the first appellant shall consider whether the respondents can be continued as Seasonal Ferryman."

3. In purported compliance with Ext.P11 judgment the claim of the petitioner and the other person were considered and Ext.P4 letter was issued. In fact, the decision thereon was communicated to the learned Advocate General as per Ext.P4. It was informed that future engagement of the petitioners therein viz., the petitioner and the other person would affect the rights of other eligible communities and, therefore, they could not be given any other posting. On obtaining a copy of the said order they challenged the same

by filing O.P.No.15311/00. The said original petition was allowed as per Ext.P5 judgment and Ext.P4 order viz., Ext.P8 therein was quashed. The operative portion of the said judgment reads thus:

"Considering the entire aspects of the case and the facts of this case, this court is of the view that the reasons contained in Ext.P8 though legally correct, that cannot be taken as a ground for the termination of the service of the 2nd petitioner. It is also reported that all the persons appointed along with the 2nd petitioner are now regularised. Hence it only proper to allow the second petitioner to continue in service as regularised with effect from the date of initial appointment. It is accordingly ordered.

The Original Petition is allowed. Ext.P8 is quashed."

4. Evidently, as per Ext.P5 this Court directed the respondents to allow the second petitioner therein viz., the petitioner herein, viz., the petitioner herein, to continue in service as regularised with effect from the date of initial appointment. Accordingly, the petitioner's appointment as Seasonal Ferryman was regularised with effect from 22.12.1994. In the meanwhile, three of the earlier appointees, appointed as Seasonal Ferryman pursuant to the

same selection process, were promoted as Full-time Ferryman as per Ext.P6 order dated 4.1.1997. But for their termination the petitioner and the other person by name Kamarudeen Kunju also would have been promoted along with those promotees as sufficient vacancies were available. Hence, they were constrained to approach the first respondent. The first respondent as per Ext.P7 letter dated 13.10.2003, directed the 3rd respondent to comply with the directions in the judgment immediately. In compliance with Ext.P5 judgment and Ext.P7 letter, the 3rd respondent issued Ext.P8 order dated 22.10.2003 promoting the petitioner as Full Time Ferryman with effect from 4.1.1997 and posting him as such at Kanjiramkadavu Ferry under the 5th respondent. Thus, it is evident that the respondents have preferred to implement directions in Ext.P5 despite the findings in Ext.P11 judgment. In short, evidently, a conscious decision was taken to comply with the directions in Ext.P5 as per Ext.P8 pursuant to Ext.P7. As noticed earlier, Government as per letter No.13194/A2/02/PWD dated

1.10.2002 directed the 2nd respondent to implement directions in Ext.P5 judgment. Therefore it should be taken that Government decided to implement the direction in Ext.P5 to regularise the petitioner with effect from the date of his initial appointment as that was the direction contained in Ext.P5. Thereupon as per Ext.P7 dated 13.10.03 the 2nd respondent issued a direction to the 3rd respondent to implement directions in Ext.P5 judgment. It was consequent to the same that Ext.P8 dated 22.10.03 was passed by the 3rd respondent. It is to be noted that in Ext.P8 also the respondents had reiterated the fact that the said order was issued in compliance with the directions in Ext.P5 judgment. Admittedly, Ext.P5 has become final and the respondents have implemented the directions in Ext.P5 as per Ext.P8. In terms of Ext.P8, the 4th respondent drawn and disbursed the monitory benefits flowing from Ext.P8 to the petitioner. Later as per Ext.P9 dated 29.7.04 the 5th respondent directed the petitioner to refund an amount of Rs.1,12,178/- allegedly drawn in excess as arrears of salary. It is stated

therein that the 3rd respondent has issued a direction in that regard. It is challenging the said direction to refund the amount of Rs.1,12,178/- that the petitioner has filed this writ petition.

5. The crux of the contention of the petitioner is that since Ext.P5 judgment had become final and directions in Ext.P5 judgment was implemented as per Ext.P8 and further that Ext.P8 has not been modified or cancelled hitherto, there is no justification for giving directions in Ext.P9 to refund the aforesaid amount. According to the petitioner he is legally entitled to retain the amount disbursed to him. The contention of the petitioner is that as Ext.P5 judgment has become final, the respondents cannot be heard to contend that the petitioner was not entitled to get regularisation. That apart, it is a fact that he was provisionally promoted as Full-time Ferryman with effect from 4.1.97. As stated earlier, in all the orders issued by the authorities subsequent to Ext.P5 it has been specifically stated that such orders had been issued in compliance with

Ext.P5. In this context, it is to be noted that as per Ext.P5 judgment, the petitioner was allowed to be continued in service as regularised with effect from the date of initial appointment. The learned counsel appearing, for the petitioner placed reliance on the decisions reported in **Sivarajan V.State of Kerala (1993 (2) KLT 287), State of Kerala V. Bhaskaran Pillai (2003 (1) KLT 60), Syed Abdul Qadir and Others V. State of Bihar and Others ((2009) 3 SCC 475)**, to contend that the amount paid the petitioner is not liable to be refunded and that the respondent cannot now effect any recovery of the said amount paid to the petitioner.

6. A counter affidavit has been filed in the writ petition by the 3rd respondent. The contentions of the petitioner have been refuted therein. It is contended that the appointment of the petitioner on 22.11.94 was not legal and that the action in terminating his service was upheld by Division Bench in Ext.P11 judgment. In effect, the attempt on the part of the 3rd respondent is virtually, to challenge

Ext.P5 judgment. It is so evident from the statement in paragraph 5 therein, which reads as hereunder;

"In the course of audit in the office of the Executive Engineer, Kollam it was found out that an amount of Rs.1,12,178/- was paid in excess to the petitioner. The discrepancy noted in the audit was reported to the Chief Engineer after verifying the file issued proceedings No.EE3-42658/99 dated 24.4.2004 directing to recover the amount from the petitioner. It was on the basis of the said letter from the Chief Engineer that Ext.P9 notice is issued to the petitioner directing him to remit the amount which had received in excess of the amounts actually due to him. It is submitted that he has received the amount after giving an undertaking that if any amount is found to be paid in excess, he has received the amount is found to be paid in excess, he has no objection in effecting the same from his salary. A true copy of the consent letter dated 9.1.2004 submitted by the petitioner is produced herewith and marked as Ext.R3(a). It is also to be noted that in Ext.P5 judgment, there is no direction to effect payment of salary to the petitioner in the post of Full Time Ferryman from the date of his regularisation. Therefore on the basis of Ext.P5 judgment he is not entitled to get the salary of Full Time Ferryman from the date of regularisation. All the facts stated in the writ petition contrary to the above are denied."

7. It is obvious from the statements in the counter affidavit as also from Ext.P8 that the petitioner was promoted as Full-time Ferryman with effect from 4.1.97 in the light of Ext.P5 judgment. In Ext.P5 judgment it was observed that as all the persons appointed along with 2nd

petitioner viz., petitioner herein, were regularised in service it would only be appropriate to allow to the petitioner to continue in service as regularised from the date of initial appointment. Subsequent to Ext.P5 judgment the Government have issued letter No.13194/12/02/PWD dated 1.10.2002 directing the 2nd respondent to implement the same. Ext.P7 was issued on the strength of the same and evidently, that was the basis for Ext.P8 order. It was in the said circumstances that the 4th respondent had drawn and disbursed the amounts including Rs.1,12,178/- to the petitioners as arrears of salary. Neither the 3rd respondent nor any superior officer, in that matter the Government as well, found any illegality in the action of regularisation of the petitioner and the consequential disbursement of arrears of salary to him. It is only based on the Audit Report noting that Ext.P9 order was issued.

8. Certain undisputed facts assume relevance in this context of the contentions. As per Ext.P5 taking note of the fact that persons appointed along with the petitioner were

regularised in service, the prayer of the petitioner to allow him to continue in service as regularised with effect from the date of initial appointment was allowed. Though the said prayer of the petitioner was allowed as per Ext.P5 the respondents did not challenge Ext.P5 judgment and thereby, they allowed the same to become final. Above all, they have already implemented the direction in Ext.P5 and even granted promotion to the petitioner based on the same, as per Ext.P8 with effect from 4.1.1997. All the orders passed subsequent to Ext.P5 judgment contained a categorical statement to the effect that such orders had been issued in terms of Ext.P5 judgment. In the totality of the circumstances it can only be presumed that he was so promoted taking into account his service with effect from 22.11.94 as regular service by honouring the direction in Ext.P5 judgment. Therefore, at this distance of time the respondents cannot be heard to contend that the initial appointment was irregular and therefore, he has to refund the amount as demanded. It is a settled position of law that

even if a decision is wrong unless and until it is reversed or corrected in appropriate proceedings it will bind the parties to it. Therefore, at this distance of time the respondents cannot be permitted to contend that the petitioner was not entitled to be permitted to continue in service as regularised with effect from the date of his initial appointment viz., from 22.12.1994. Once his service from 22.12.94 as Seasonal Ferryman is taken as a regular service, his claim for appointment as Full-Time Ferryman could not have been disputed or denied as appointees along with him were given promotion with effect from 4.1.97. It has to be presumed that the said position was taken in to consideration lest there was no other reason to grant promotion to the petitioner with effect from 4.1.97. If that be so, the action on their part has to be taken as an action based on a conscious decision to restore all benefits to the petitioner which were granted to the other three candidates who were appointed pursuant to the same selection process. In other words, the respondent had virtually recognized the position that he was

illegally denied an opportunity to function as Full-time Ferryman at the time when similarly situated persons were granted such promotion. The very fixation of date of promotion in Ext.P8 as 4.1.97 would suggest the same. A crucial aspect has also to be borne in mind in this context. The request of the petitioner was only to grant him the benefit of promotion as Full-time Ferryman as has been done in the case of appointees under Ext.P1. Taking into account the long legal battle the petitioner had fought the respondents had treated him at par that the appointees under Ext.P1 and granted him all consequential benefits taking into account the very spirit of Ext.P5 judgment. Can such benefits given to him be taken away in total disregard to the principles of natural justice that too, without cancellation of any of the orders passed subsequent to Ext.P5 solely based on an audit objection? In fact, based merely on an audit objection the 3rd respondent should not have issued directions to the 5th respondent to recover an amount of Rs.1,12,178/- as Ext.P8 was issued by him in

terms of Ext.P7 which, in turn, was based on the Government letter dated 1.10.2002. There is no case for the 3rd respondent that the respondents 1 and 2 have subsequently withdrawn their letters and directed the 3rd respondents to cancel the regularisation and also the consequential promotion as Full Time Ferryman with effect from 4.1.1997. It is only the audit objection that prompted the 3rd respondent to change the stand.

9. It is brought to the notice of this Court that in connection with the alleged excess payment to the petitioner, the DCRG payable to the then Assistant Engineer who had drawn and disbursed to the petitioner the arrears of salary consequent to his promotion, was withheld. Aggrieved by the said action he had filed W.P.(C) 16569/04 before this Court. Admittedly, that was disposed of on 13.8.04 and pursuant to the same he was given benefits withheld based on the aforesaid reason. Yet another contention that was taken up is that the petitioner is not entitled to retain the amount in terms of Ext.R3(a).

According to the respondents as per Ext.R3(a) the petitioner had given his consent for the recovery of amount of salary arrears paid in excess from his salary. Therefore it is contended that the petitioner is liable to refund the amount,. It is revealed that he has given his consent only for recovery of amount paid to him to which he is not entitled. A perusal of Ext.R3(a), in fact, would reveal that it is a letter prepared by somebody on 19.1.04 and subsequently got it signed by the petitioner on 27.1.04. For all these reasons, I am of the view that Ext.P9 order is not liable to set aside. Accordingly, it is set aside. Consequently, it is declared that the petitioner is not liable to refund the arrears of salary already disbursed to him pursuant to Ext.P5 judgment and Ext.P7 order. In view of my finding with regard to the entitlement of petitioner to retain the amount, there is no need to look into the validity or legality of Ext.R3(a). At any rate, it cannot form the basis for effecting recovery of the amount which the petitioner was found not liable to be refunded. It is made clear that the petitioner is entitled to

get settled all his subsequent grievances relating pay revision benefits and D.A. arrears etc., in case he is otherwise entitled to such benefits. This writ petition is disposed of accordingly.

C.T.RAVIKUMAR, JUDGE

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