

THE KERALA ASSISTANT PUBLIC PROSECUTORS
ASSOCIATION

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v.

THE STATE OF KERALA AND ORS.

(Civil Appeal No. 3792 of 2010)

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MAY 17, 2018

**[DIPAK MISRA, CJI, A. M. KHANWILKAR AND
DR. D. Y. CHANDRACHUD, JJ.]**

Service Law – Appellant-association claimed for grant of parity to Assistant Public Prosecutors, in the matter of retirement age, with Public Prosecutors in the State – Claim rejected by the High Court – Appellant contended that maximum age for appointment of public prosecutors, for term of 3 years, is 60 years; whereas the age of retirement of Assistant Public Prosecutors appointed prior to 31st March, 2013 is 56 years – As both act as officers of the Court, Assistant Public Prosecutors are also entitled to be treated at par with Public Prosecutors and other officers whose age of superannuation is specified at 60 years – On appeal, held: No infirmity in the conclusion arrived at by the High Court – The method of appointment and conditions of service of Assistant Public Prosecutors and Public Prosecutors are qualitatively different – Assistant Public Prosecutors are appointed through a competitive selection process conducted by the Kerala Public Service Commission and entitled to all service benefits as are enjoyed by the other government employees without any exception – Public Prosecutors, however, are appointed from a panel of advocates furnished by the Advocate General for a period of 3 years and they are not considered as government employees and do not derive any service benefits as in the case of government employees – The fact that the nature of duties and functions of Assistant Public Prosecutors and Public Prosecutors are similar, per se, cannot be the basis to claim parity with Public Prosecutors in respect of age of superannuation – Code of Criminal Procedure, 1973 – ss.24 and 25 – Kerala Service Rules – r.60(b) to (d) – Kerala Government Law Officers (Appointment and Conditions of service) and Conduct of Cases Rules, 1978.

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- A *Service Law – Appellant-association contended that there are Assistant Public Prosecutors appointed on or after 1st April, 2013 whose age of superannuation is 60 years; whereas there are Assistant Public Prosecutors appointed prior to 31st March, 2013 whose age of superannuation is 56 years – Appellant sought that the age of superannuation of Assistant Public Prosecutors appointed prior to 31st March, 2013 to be brought at par to 60 years – Further, alternately it was pleaded that Assistant Public Prosecutors were willing to forego the pension for the extra period of service which will accrue from the age of 56 years till 60 years – Held: Conditions of service of Assistant Public Prosecutors who were appointed on or before 31st March, 2013 and who joined on and after 1st April, 2013 are different – In that, those appointed on or before 31st March, 2013 are governed by the statutory pension scheme under the Service Rules as in the case of other government employees; and those appointed on or after 1st April, 2013 are governed by the new Contributory Pension Scheme made applicable to all the government employees and not limited to Assistant Public Prosecutors – If the alternate plea of appellant to forego pension is accepted, it will create anomaly and also discrimination and hardship to the rest of the government employees appointed prior to 31st March, 2013, as they would retire at the age of 56 years – Further, it is a policy matter – It is open to the appellant to make a representation to the concerned State authority who will be free to take an appropriate decision as may be advised and permissible in law.*
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Dismissing the appeal, the Court

- F **HELD: 1. There is no infirmity in the conclusion arrived at by the High Court in rejecting the claim of the appellant to accord parity in respect of age of superannuation at 60 years to the Assistant Public Prosecutors appointed on or before 31st March, 2013. The High Court rightly opined that the method of appointment and conditions of service of Assistant Public Prosecutors and Public Prosecutors are qualitatively different. Assistant Public Prosecutors are appointed through a competitive selection process conducted by the Kerala Public Service Commission as per the rules in vogue. After appointment, Assistant Public Prosecutors are entitled to all service benefits as are enjoyed by the other government employees without any**
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exception. Public Prosecutors, however, are appointed from a panel of advocates furnished by the Advocate General and the term of appointment of Public Prosecutors is for a period of 3 years only. They are not considered as government employees and do not derive any service benefits as in the case of government employees. They can even be terminated by the Government at any time before the expiry of normal term of appointment, without assigning any reason. The Government is also free to re-appoint any person appointed as Public Prosecutor for a further period subject to eligibility. The fact that the nature of duties and functions of Assistant Public Prosecutors and Public Prosecutors are similar, *per se*, cannot be the basis to claim parity with Public Prosecutors in respect of age of superannuation.[Para 6][1144-F-H; 1145-A-C]

2. As regards the disparity in the age of superannuation of the Assistant Public Prosecutors appointed on or before 31st March, 2013 and those who joined on or after 1st April, 2013, the said contention is also devoid of merits inasmuch as the conditions of service of the concerned set of Assistant Public Prosecutors is distinct. In that, those appointed on or before 31st March, 2013 are governed by the statutory pension scheme under the Service Rules as in the case of other government employees; and those appointed on or after 1st April, 2013 are governed by the new Contributory Pension Scheme made applicable to all the government employees and not limited to Assistant Public Prosecutors. Assistant Public Prosecutors are only a small section of the genre of State Government employees – be it appointed prior to 31st March, 2013 or on or after 1st April, 2013, either governed by statutory Pension Scheme or the new Contributory Pension Scheme, as the case may be. [Para 8][1145-E-H]

3. An alternative plea was made by the appellant Association that the members of the appellant Association appointed on or before 31st March, 2013 and who are still serving as Assistant Public Prosecutors, if continued till 60 years, are willing to forego their pension, without any demur, for the extra period of service which will accrue from the age of 56 years till 60 years. Accepting this offer would create anomaly, discrimination and hardship to the rest of the government employees appointed prior to 1st April,

- A **2013 as they all will retire at the age of 56 years. In any case, this is a policy matter. It is best left to the State Government. It will be a different matter if the Government accepts the offer given by the appellant on behalf of its members. It is open to the appellant to make a representation to the concerned State authority who will be free to take an appropriate decision as may be advised and permissible in law. [Para 9][1146-A-D]**
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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3792 of 2010.

- C From the Judgment and Order dated 07.03.2008 of the High Court of Kerala at Ernakulam in W.A. No. 514 of 2008.

R. Basant, Sr. Adv., P. S. Sudheer, Manu Krishnan G., Mrs. Nagenthera Roy, Nishe Rajen Shonker, Anu K. Joy, A. Anvar, E.M.S. Anam, Liz Mathew, G. Prakash, Advs. for the appearing parties.

- D The Judgment of the Court was delivered by

- E **A. M. KHANWILKAR, J.** 1. The appellant Association has assailed the judgment and order dated 7th March, 2008 passed by the Division Bench of the High Court of Kerala at Ernakulam in Writ Appeal No.514 of 2008, whereby the High Court rejected the claim for grant of parity to Assistant Public Prosecutors, in the matter of retirement age, with Public Prosecutors in the State.

- F 2. According to the appellant, Assistant Public Prosecutors are appointed to the Magistrate Court to conduct prosecutions as per Section 25 of the Code of Criminal Procedure (for short “the Code”). The Public Prosecutors are also appointed to conduct prosecutions in the Sessions Court under Section 24 of the Code. The nature of duties, functions and powers of both Assistant Public Prosecutors and Public Prosecutors are similar. The maximum age for appointment of Public Prosecutors, for a term of 3 years, is 60 years; whereas the age of retirement of Assistant Public Prosecutors appointed prior to 31st March, 2013 is 56 years. It is stated that even the age of superannuation of judicial officers in the State of Kerala is 60 years. The Public Prosecutors as well as the Assistant Public Prosecutors act as officers of the Court when appearing in Court and both have an important role in the criminal justice system. On these assertions, the appellant claims that Assistant Public Prosecutors are also entitled to be treated at par with Public

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Prosecutors and other officers whose age of superannuation is specified at 60 years. A

3. It is stated that there are 61 Assistant Public Prosecutors appointed on or after 1st April, 2013 whose age of superannuation is 60 years; whereas there are 90 Assistant Public Prosecutors appointed prior to 31st March, 2013 whose age of superannuation is 56 years. Thus, considering the nature of the duties and responsibilities of Assistant Public Prosecutors and the fact that they discharge similar duties and functions as that of Public Prosecutors and more particularly, the existing cadre strength of 150 Assistant Public Prosecutors and 61 District Public Prosecutors, and also the officers mentioned in Rule 60 (b) to (d) of the Kerala Service Rules, whose age of superannuation has been fixed at 60 years, the age of superannuation of Assistant Public Prosecutors appointed prior to 31st March, 2013 ought to be brought at par to 60 years. It is alternatively contended that as the age of superannuation of Assistant Public Prosecutors who joined service on or after 1st April, 2013 is 60 years, the members of the appellant Association who have been appointed prior to 31st March, 2013 and are still serving as Assistant Public Prosecutors are willing to forego the pension for the extra period of service which will accrue from the age of 56 years till 60 years without any demur. B
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4. Per contra, the respondent State asserts that the mode of appointment and conditions of service of Assistant Public Prosecutors and Public Prosecutors are entirely different. Assistant Public Prosecutors are selected as per the advice given by the Kerala Public Service Commission according to their merit and rules for reservation, after conducting a competitive examination and preparation of rank list in accordance with the rules. The Assistant Public Prosecutors so appointed are entitled to all service benefits which are enjoyed by any other government employee and their service has no distinctive feature from that of other government employees. Public Prosecutors are, however, appointed by the Government under the Kerala Government Law Officers (Appointment and Conditions of Service) and Conduct of Cases Rules, 1978, from a panel of advocates furnished by the Advocate General. The term of appointment of Public Prosecutors is for a period of 3 years and they can be re-appointed by the Government for a further period, subject to eligibility. The Government is free to terminate the service of Public Prosecutor at any time before the expiry of his normal term of appointment without assigning any reason. Notably, Public E
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- A Prosecutors are not entitled to any service benefits since they are not government employees. As regards the Assistant Public Prosecutors appointed on or after 1st April, 2013, the age of superannuation is at par with the other government employees and consequent to the introduction of the new Contributory Pension Scheme, it is made applicable to all appointees after the cut-off date. The Assistant Public Prosecutors appointed on or before 31st March, 2013 are, however, entitled to the benefit of statutory pension as in the case of other government employees, whose age of superannuation has been fixed at 56 years. In the event, the claim of the Assistant Public Prosecutors appointed on or before 31st March, 2013, is to be accepted, it will create an anomaly and also discrimination and hardship to the rest of the government employees appointed prior to 1st April, 2013, as they would retire at the age of 56 years.

5. According to the respondents, Writ Petition (Civil) No.12703 of 2005, filed by the appellant was justly rejected by the learned Single Judge on 8th June, 2006 and the Division Bench vide impugned judgment affirmed that decision in Writ Appeal No.514 of 2008 on 7th March, 2008. The learned Single Judge as well as the Division Bench have noted that Public Prosecutors are not judicial officers and more particularly, the terms and conditions of service of Assistant Public Prosecutors and Public Prosecutors are distinct. Further, Assistant Public Prosecutors are governed by the service conditions as per the Kerala Service Rules in force, which are uniformly applicable to all government employees. The respondent State submits that there is no infirmity in the view taken by the learned Single Judge and the Division Bench of the High Court and for which reason this appeal is devoid of merits.

- F 6. We have cogitated over the rival submissions and after examining the records, we find no infirmity in the conclusion arrived at by the High Court in rejecting the claim of the appellant to accord parity in respect of age of superannuation at 60 years to the Assistant Public Prosecutors appointed on or before 31st March, 2013. The High Court rightly opined that the method of appointment and conditions of service of Assistant Public Prosecutors and Public Prosecutors are qualitatively different. Assistant Public Prosecutors are appointed through a competitive selection process conducted by the Kerala Public Service Commission as per the rules in vogue. After appointment, Assistant Public Prosecutors are entitled to all service benefits as are enjoyed by the
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other government employees without any exception. Public Prosecutors, however, are appointed from a panel of advocates furnished by the Advocate General and the term of appointment of Public Prosecutors is for a period of 3 years only. They are not considered as government employees and do not derive any service benefits as in the case of government employees. They can even be terminated by the Government at any time before the expiry of normal term of appointment, without assigning any reason. The Government is also free to re-appoint any person appointed as Public Prosecutor for a further period subject to eligibility. The fact that the nature of duties and functions of Assistant Public Prosecutors and Public Prosecutors are similar, *per se*, cannot be the basis to claim parity with Public Prosecutors in respect of age of superannuation.

7. Reliance placed by the appellant on the factum of officers in Kerala Judicial Service and other officers referred to in Rule 60 (b) to (d) regarding their age of superannuation at 60 years, is also of no avail to the appellant. The fact that Assistant Public Prosecutors are considered as officers of the Court as in the case of Public Prosecutors, can be no basis to equate them with the judicial officers whose method of appointment and conditions of service are distinct. The issue on hand cannot be decided merely on the basis of comparison of the nature of duties and functions of Public Prosecutors and Assistant Public Prosecutors.

8. As regards the disparity in the age of superannuation of the Assistant Public Prosecutors appointed on or before 31st March, 2013 and those who joined on or after 1st April, 2013, the said contention is also devoid of merits inasmuch as the conditions of service of the concerned set of Assistant Public Prosecutors is distinct. In that, those appointed on or before 31st March, 2013 are governed by the statutory pension scheme under the Service Rules as in the case of other government employees; and those appointed on or after 1st April, 2013 are governed by the new Contributory Pension Scheme made applicable to all the government employees and not limited to Assistant Public Prosecutors. Assistant Public Prosecutors are only a small section of the genre of State Government employees – be it appointed prior to 31st March, 2013 or on or after 1st April, 2013, either governed by statutory Pension Scheme or the new Contributory Pension Scheme, as the case may be. Be it noted, the cut-off date of 1st April, 2013 for introducing the new Contributory Pension Scheme by the State Government is not the

A subject matter of challenge in the present case.

9. Realising this position, an alternative plea has been taken by the appellant Association that the members of the appellant Association appointed on or before 31st March, 2013 and who are still serving as Assistant Public Prosecutors, if continued till 60 years, are willing to forego their pension, without any demur, for the extra period of service which will accrue from the age of 56 years till 60 years. The argument, though attractive, cannot be the basis to issue such direction to the State Government. We agree with the respondent State that accepting this offer would create anomaly, discrimination and hardship to the rest of the government employees appointed prior to 1st April, 2013 as they all will retire at the age of 56 years. In any case, this is a policy matter. It is best left to the State Government. It will be a different matter if the Government accepts the offer given by the appellant on behalf of its members. We express no opinion in that behalf. It is open to the appellant to make a representation to the concerned State authority who will be free to take an appropriate decision as may be advised and permissible in law. We say no more.
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10. This appeal, in our opinion, is devoid of merits and hence the same is dismissed with no order as to costs.