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State of Kerala Vs. M.S.Thomas

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Court : Kerala

Decided On : Dec-20-2012

Judge : Hon'Ble the Chief Justice Mrs. Manjula Chellur

Appellant : State of Kerala

Respondent : M.S.Thomas

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HON'BLE THE CHIEF JUSTICE MRS. MANJULA CHELLUR & THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE THURSDAY, THE 20TH DAY OF DECEMBER 2012 29TH AGRAHAYANA 193 WA.No. 1305 of 2008 ( ) ---------- AGAINST THE ORDER/JUDGMENT IN OP.NO.4034/2003 DATED 08 06-2006 ..... APPELLANT(S)/RESPONDENTS IN THE WRIT PETITION: ---------- 1. STATE OF KERALA REPRESENTED BY THE CHIEF SECRETARY TO GOVERNMENT, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

2. SECRETARY TO GOVERNMENT, DEPARTMENT OF LAND REVENUE, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

3. COMMISSIONER OF LAND REVENUE, OFFICE OF THE COMMISSIONER OF LAND REVENUE, THIRUVANANTHAPURAM. BY SR.GOVERNMENT

PLEADER SRI.P.I.DAVIS RESPONDENT(S)/PETITIONERS IN THE WRIT PETITION: ---------- M.S.THOMAS, S/O.K.J.SAMUEL, MUZHUPPEL PUTHEN VEEDU, EDAPPAVOOR P.O.,AROOR, PATHANAMTHITTA (UPPER DIVISION CLERK, DRDA, PATHANAMTHITTA). Kss ..2/- .....2.... W.A.NO.1305/2008 *ADDL.R2 & R3 IMPLEADED: R2. P.BALACHANDRAN, SENIOR SUPERINTENDENT, OFFICE OF THE REGIONAL DEPUTY DIRECTOR, INSURANCE MEDICAL SERVICES, CHALAPURAM, KOZHIKODE - 2. R3. K.KRISHNA KUMAR, JUNIOR SUPERINTENDENT, E.S.I. HOSPITAL, PEOORKADA, THIRUVANANTHAPURAM. (*ADDL.R2 & R3 ARE IMPLEADED AS PER ORDER DTD. 10/09/2012 IN I.A.NO.734/2011) R1 BY ADV. SRI.S.SUBHASH CHAND ADDL.R2 & R3 BY SRI.C.P.SUDHAKARA PRASAD, SENIOR ADVOCATE BY ADVS. SRI.S.RAMESH SRI.NAVEEN.T SMT.POOJA SURENDRAN THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 09/10/2012 ALONG WITH WA. NO.531/2012, THE COURT ON 20/12/2012 DELIVERED THE FOLLOWING: Kss W.A.NO.1305/2008 APPENDIX APPELLANT'S ANNEXURE: ANNEX.R1(A): COPY OF THE RELEVANT PAGES OF THE SERVICE BOOK OF THE PETITIONER. RESPONDENT'S ANNEXURES: N I L /TRUE COPY/ P.S.TO JUDGE Kss MANJULA CHELLUR, C.J & A.M.SHAFFIQUE, J.

---------- W.A. Nos. 1305 of 2008 and 531 of 2012 ---------- Dated this the 20th day of December, 2012

JUDGMENT

Shaffique, J.

As these appeals arise out of a common judgment, the same are disposed together.

2. Writ Appeal No. 1305 of 2008 is filed by the respondents in the Original Petition and Writ Appeal No. 531 of 2012 is filed by third parties with leave of court.

3. The first respondent in Writ Appeal No.1305/2008 is the petitioner in the original petition and additional respondents 2 and 3 are the appellants in W.A. No.531/2012. The appellants in W.A. No. 531/2012 supports the contentions in

W.A. No. 1305/2008.

4. The original petition is filed by the first respondent seeking a direction to the respondents to gra12nt seniority to the petitioner in the cadre of Lower Division Clerk with effect from his original date of advise in the Directorate of Medical Education Department by the Kerala Public Service Commission as per Ext.P2 and also challenges W.A. Nos. 1305 of 2008 and 531 o

2. the retrospective operation of Ext.P2 amendment.

5. The facts involved in the case disclose that the petitioner was appointed as LD clerk on the basis of Ext. P1 advice in the Medical Education Department. Though his choice of district was Pathanamthitta, since he was advised against headquarters vacancy in the Directorate of Medical Education in Thiruvananthapuram and though he tried for a transfer to Pathanamthitta, as the Directorate of Medical Education did not have any office at Pathanamthitta, he was unable to get a transfer. During the relevant time as per the proviso to Rule 27 (a) of part II KS & SSR, 1958, the seniority of persons advised by KPSC for appointment in a vacancy in the head quarters without obtaining his willingness and transfer after such appointment to the district office of his choice, without insisting on the time limit of five years shall be determined with reference to the date of his original advice by KPSC. Hence the petitioner requested for a transfer to Pathanamthitta district in the Land Revenue Department and he got a transfer to Pathanamthitta on 21.2.1990 and he joined duty on 26.2.1990.

6. Since he was not given seniority with reference to the date of joining as per Ext. P1, on enquiry, later on, he came to know that as per Ext.P2, Government order, a note was W.A. Nos. 1305 of 2008 and 531 o

3. introduced by way of an amendment to Rule 27 (a) of KS & SSR, which inter alia reads as under: "Note - The above proviso shall not apply to inter- unit or inter-departmental transfers" 7. The said note has come into effect from 26.9.1998.

8. Petitioner contended that by virtue of the Rule prevailing as on the date of Ext.P1 he was entitled for inter-departmental transfer without loosing his seniority

and such a vested right cannot be taken away by a subsequent amendment to the Rules. Hence the petitioner challenges the retrospective effect of the amendment to the Rule 27(a) and contends that the implication of the note can have only prospective operation.

9. The appellants however supported the stand taken in Ext. P2. Learned Single Judge however, relying upon the judgment of the Supreme court in Union of India v. Tushar Ranjan Mohanty [(1994) 5 SCC 450.came to the conclusion that since a benefit was available to the petitioner as on the date of his entry into the cadre in the form of 4th proviso to Rule 27 (a) of KS & SSR, the same cannot be taken by Ext. P2 note to reduce 7 years of service W.A. Nos. 1305 of 2008 and 531 o

4. and the same being a vested right, to that extent, the note has only prospective operation and the petitioner shall be entitled to retain seniority based on Ext.P1.

10. Learned Government Pleader impugned the above judgment. It is inter alia contended that the petitioner was given a transfer to a vacancy of L.D. Clerk in the Land Revenue Department in Pathanamthitta on his request and it was specifically indicated in his service book Annexure R1(a). That transfer was as per conditions laid down in G.O.(MS) 4/61/PD dated 2.1.1961 wherein his prior service in the Department will not count for seniority in the Land Revenue Department. It is also contended that the petitioner never had a vested right to have a promotion or a seniority and in that view of the matter the judgment of the learned Single Judge requires to be set aside. It is contended that the petitioner was not assigned seniority in the cadre of L.D clerk with effect from 1986 and no benefit is accrued to the petitioner by virtue of the proviso to Rule 27(a). It is further contended that the Government has power under Article 309 of the Constitution of India to make the laws with retrospective effect and in Prafulla Kumar Das v. State of Orissa (2003 (11) SCC

614) it was held that under Article 309, the Government has discretion to bestow or W.A. Nos. 1305 of 2008 and 531 o

5. divest right of seniority. It being a policy matter it was wrong on the part of the learned Single Judge to have passed the impugned judgment.

11. The appellants in Writ Appeal No. 531/2012 also supported the appellants in Writ Appeal No. 1305/2008. The learned senior counsel Sri Sudhakara Prasad relied upon the judgment of the Supreme Court in T.Narasimhulu and others v. State of Andhra Pradesh and Others [(2010) 6 SCC 545.in which the Supreme Court had occasion to consider the judgment in Union of India v. Tushar Ranjan Mohanty [(1994) 5 SCC 450]. It is observed by the Supreme Court that a three Judge Bench of the Supreme Court in S.S. Bola v. B.D. Sardana (1997 (8) SCC

522) had held that seniority was not a vested or accrued right . In para 24 of the said judgment, the Supreme Court held as under: "It is, thus, clear from the judgment of a larger Bench that in S.S. Bola v. B.D. Sardana that seniority of a government servant is not a vested right and that an Act of the State Legislature or a rule made under Article 309 of the Constitution can retrospectively affect the seniority of a government servant". W.A. Nos. 1305 of 2008 and 531 o

6. 12. In the light of the above law laid down by the Supreme Court explaining the judgment in Union of India v. Tushar Ranjan Mohanty [(1994) 5 SCC 450], and the dictum laid down in T.Narasimhulu and others v. State of Andhra Pradesh and Others (2010) 6 SCC 54.(supra), we are of the view that the writ appeals are only to be allowed.

13. The learned counsel appearing for the 1st respondent however contended that as far as the petitioner is concerned his option was to get an appointment at Pathanamthitta and only on account of the fact that there was no district office of Medical Education Department in Pathanamthitta district and that it was without his consent that he was posted at Thiruvananthapuram Head Office. He had made a request for inter-departmental transfer purely relying upon the 4th proviso to Rule 27(a). According to him, if he would have lost his seniority, he would not have opted for a transfer to Pathanamthitta. Such an argument though can be appreciated on taking a sympathetic approach will not stand in the eye of law and service jurisprudence. In so far as the government has that right to legislate on service conditions and when it is clear that even the retrospective legislation is permissible under Article W.A. Nos. 1305 of 2008 and 531 o

7. 309 of the Constitution of India and when it is held by the Supreme Court that the seniority is not a vested right, we cannot exercise any sympathy in the matter. In the result, the judgment of the learned Single Judge is set aside and these appeals are allowed. (MANJULA CHELLUR, CHIEF JUSTICE) (A.M.SHAFFIQUE, JUDGE) rka

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