

Thomas Vs. State of Kerala

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Court : Kerala

Decided On : Jun-08-2006

Reported in : 2006(3)KLT60

Judge : Kurian Joseph, J.

Acts : Kerala State and Subordinate Service Rules, 1959 - Rules 13 and 27;
[Constitution of India](#) - Articles 14, 16 and 309;

Appeal No. : O.P. No. 4034 of 2003

Appellant : Thomas

Respondent : State of Kerala

Advocate for Def. : P.K. Shakeela, Government Pleader

Advocate for Pet/Ap. : S. Subash Chand, Adv.

Judgement :

Kurian Joseph, J.

1. Whether an inter-departmental transferee, transferred within five years of a districtwise recruitment, would be entitled to retain the seniority based on the date of advice is the question to be considered in this case. The answer depends on the interpretation of the 4th proviso and Note thereunder to Rule 27(a) of the

Kerala State and Subordinate Service Rules.

2. On the basis of the position in the ranked list for appointment to the post of Lower Division Clerks in various Departments in Pathanamthitta district, the petitioner was advised against the Headquarters vacancy in the Directorate of Medical Education, Thiruvananthapuram as per Ext.PI advice dated 8-10-1986 by the Pathanamthitta District Office of the Public Service Commission. According to the petitioner the Directorate of Medical Education did not have a District Unit at Pathanamthitta. Since the posting of the petitioner at Thiruvananthapuram against Headquarters vacancy was without his consent and since the Unit of appointment sought by the petitioner was Pathanamthitta, petitioner on his request was granted an inter-departmental transfer to the Revenue establishment at Pathanamthitta on 21-2-1990 and thereafter he was absorbed in the Rural Development Department. According to the respondents, since the petitioner got an inter-departmental transfer before completion of five years of original advice, he is not entitled to retain his seniority, in view of G.O.(MS)4/61/PD dated 2-1-1961.

3. Rule 27 of the Kerala State and Subordinate Service Rules deals with seniority. Rule 27(a) provides that 'seniority of a person in a service, class, category or grade shall, unless he has been reduced to a lower rank as punishment, be determined by the date of the order of his first appointment to such service, class, category or grade.' The 4th proviso under Rule 27(a) of the Rules reads as follows:

Provided also that the seniority of a person advised by the District Office of the Public Service Commission for appointment in the vacancy in the Headquarters, without obtaining his willingness and transferred after such appointment to the district 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 the District Office of the Public Service Commission.

There was a dispute as to whether the benefit of the proviso would be available to inter-departmental transferees also. That dispute has been resolved by a Bench decision of this Court in Director of Industries v. Sreedharan 1996 (2) KLT 370. To quote:

The effect of this proviso is that when a candidate who is ranked for appointment in a particular district is advised for appointment in a vacancy in the Headquarters, without obtaining his consent and that person is subsequently posted in the district of his choice, his seniority will have to be decided with reference to the date of the first effective advice. In the instant case, petitioner was selected for appointment in Cannanore district. There were no vacancies in Cannanore district for absorbing him. Thereupon he was advised to the vacancy in the Headquarters of the Port Department at Trivandrum. Pursuant to that advice, he joined the Headquarters. Thereafter he applied for transfer to Cannanore. He was given the transfer and he got a posting in the Industries Department in Cannanore. As per the proviso quoted above, his rank in the Industries Department must be on the basis of the first effective advice. Proviso does not differentiate between interdepartmental transfers as against inter-district transfers. According to us, both will fall within the mischief of the proviso quoted above.

4. At the time of the inter-departmental transfer of the petitioner in 1990, there cannot be any dispute that the petitioner was entitled to the benefit of the proviso in view of the decision referred to above. However, a Note under the 4th proviso to Rule 27(a) was introduced as per G.O.(P) No. 5/97/P&ARD; dated 22-2-1997 and gazetted on 1-3-1997 which reads as follows:

Note:- The above proviso shall not apply to inter-unit or inter-departmental transfers.

The amendment was given retrospective effect from 26-9-1980. Ext.P2 is the copy of the amendment. The amendment as such is not under challenge in this Writ Petition. The challenge is only with regard to the retrospective operation. Learned Counsel for the petitioner contends that a right having accrued on the petitioner in terms of the 4th proviso under RULE27(a) and the petitioner having acted in terms of the said proviso and opted for an inter-departmental transfer to the home district, the benefit thus accrued to the petitioner cannot be taken away by a subsequent subordinate legislation. Reliance is placed on a decision of the Supreme Court in a service matter in Union of India v. Tushar Ranjan Mohanty : (1994)5SCC450 wherein it has been held as follows:

The legislature and the competent authority under Article 309 of the [Constitution of India](#) have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation.

The retrospective operation of the amended Rule 13 cannot be sustained. The retrospective amendment of Rule 13 takes away the vested right of respondent 1 and other general category candidates senior to respondents 2 to 9. Therefore, Rule 13, to the extent it has been made operative retrospectively, is unreasonable, arbitrary and, as such, violative of Articles 14 and 16 of the [Constitution of India](#). The retrospective operation of the rule has to be struck down.

In the instant case, as noted above, the district of choice of the petitioner was Pathanamthitta. His advice to Headquarters vacancy in 1986 was without his consent. At the time of his transfer to the Revenue establishment at Pathanamthitta interdepartmentally, the 4th proviso without the Note thereunder was ruling the field, permitting the retention of the seniority on the basis of the date of advice, in view of the law as settled by this Court in Sreedharan 's case (supra). That benefit has been taken away by Ext.P2 Note introduced after seven years. In view of the legal position as settled by the apex court in Tushar Ranjan Mohanty's case (supra) the amendment introduced by the Note can only be applied prospectively.

In the above circumstances this Writ Petition is disposed of as follows:

(1) The Note under the 4th proviso to Rule 27(a) of the Kerala State and Subordinate Service Rules shall have only prospective operation, ie., from 1-3-1997. Thus the interdepartmental/inter-unit transferees prior to 1-3-1997 and covered by the 4th proviso are entitled to retain their seniority based on the date of advice.

(2) The petitioner shall be entitled to retain his seniority based on Ext.PI advice by the Kerala Public Service Commission.

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