

K.J. Luka Vs. State of Kerala and ors.

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Court : Kerala

Decided On : Mar-25-1993

Reported in : (1994)ILLJ1244Ker

Judge : P.K. Shamsuddin, J.

Acts : Kerala State and Subordinate Service Rules, 1958; [Constitution of India](#) - Article 166

Appeal No. : O.P. No. 6619/1989-K

Appellant : K.J. Luka

Respondent : State of Kerala and ors.

Advocate for Def. : Govt. Pleader

Advocate for Pet/Ap. : O.V. Radha Krishnan, Adv.

Disposition : Petition allowed

Judgement :

ORDER

P.K. Shamsuddin, J.

1. The petitioner in O.P. 6619/89 was a Workshop Foreman and that post comes under Kerala Technical Education Subordinate Service. Thereafter, the petitioner

was appointed by transfer to the category of Workshop Superintendent of the Polytechnic which is the post falling under the Kerala Technical Education Service. By Ext. P-1 proceedings, the provisional appointment of the petitioner was regularised with effect from September 2, 1967. The scale of pay of Workshop Superintendent in Polytechnic is Rs. 750-1450 (pre-revised) and the pay of the petitioner was fixed in the minimum of the scale on Rs. 750-1450. In the final gradation list as on December 31, 1979 published in the Kerala Gazette No. 45 dated November 13, 1984, the petitioner was assigned rank No. 6. Serial numbers 3, 4 and 5 in that list are direct recruits.

2. Govt. issued Ext. P-3 G.O. (MS) No. 439/79/FAD dated August 1, 1979 allowing the benefit of a Higher Grade with effect from April 1, 1979 to all non-gazetted officers who remain in the entry grade, without promotion in the normal course, on completion of 13 years of service in the entry grade. The benefit of Higher Grade allowed to non-gazetted officers was extended to Gazetted Officers also from July 1, 1979 as per G.O. (P)901/79/(116)/Fin dated October 3, 1979. Subsequently, detailed instructions for implementation of the above orders were issued. Ext. P-4 is the detailed instruction dated November 27, 1979. Government subsequently issued Ext. P-5 Govt. Order ordering that the benefit of Higher Grade would apply also to all cases of appointments by direct recruitment either through Public Service Commission or through Employment Exchange. It also stated that a doubt was raised whether the appointment by transfer was qualified for higher grade and that thereafter examining the question in detail, the Government was pleased to order that the appointment by transfer will also be treated as equivalent to direct recruitment for allowing the benefit of Higher Grade. The 2nd respondent issued Ext P-6 order dated August 20, 1982 granting Higher Grade to certain Workshop Superintendents appointed by direct recruitment with effect from July 1, 1979. The 2nd respondent issued proceedings granting Higher Grade to ten Lecturers/Heads of Section in Polytechnics in the scale of Rs. 750-1450 who were appointed to the cadre by transfer in terms of G.O. dated September 27, 1984. The petitioner alleges that he completed 13 years of service in the category of Workshop Superintendent/1st Grade Instructor (Mechanical) of Engineering Colleges in the State Service by September 1, 1980 and, therefore, he was entitled to the benefits of Higher Grade on and from September 2, 1980, The petitioner was not granted

Higher Grade. He filed a representation dated January 17, 1986, before the 2nd respondent requesting to grant him Higher Grade on and from September 2, 1980. As there was no response to the above representation, the petitioner was constrained to file O.P. No. 2508/1986 praying for a direction to the respondents to grant him Higher Grade with effect from September 1, 1980. This Court disposed of the above Original Petition by judgment dated April 3, 1986 directing the respondents to consider and dispose of the representation as expeditiously as possible. Thereafter, the 3rd respondent, by his letter dated June 11, 1986, informed the 2nd respondent that 'appointments by transfer' involving the normal line of promotion in a department to be made on the basis of select list prepared by the Departmental. Promotion Committee will not come under the purview of Ext.P5 Govt. Order and the 'transfer' is actually promotion from the feeder categories and the appointment technically termed as 'appointment by transfer' since it involves transfer from Subordinate Service to State Service. Thereafter, the petitioner received a letter dated July 6, 1986 from the 2nd respondent. It stated that appointment of the petitioner as Workshop Superintendent from the feeder category cannot be treated as direct recruitment in terms of Ext P-8. In Ext.P-9 it has been further stated that the orders already issued granting Higher Grade to certain Section Officers who are not direct recruits to the cadre are being reviewed. Thereafter, Ext. P-10 order was issued stating persons mentioned therein were not eligible for the benefit of Higher Grade, and therefore, the orders issued granting Higher Grade to such persons were cancelled with retrospective effect. The petitioner states that Ext. P-10 order was challenged by certain affected persons in O.P. No. 5484/1986 before this Hon'ble Court. The petitioner also filed O.P. No. 7379/86 challenging Ext. P-8 and Ext. P-10 orders. This Hon'ble Court disposed of the above Original Petitions by a common judgment (Dt-30-7-1987). This Hon'ble Court observed that the Government had not made up its mind as to whether it did really mean to confine upgradation only to such categories in which persons as were initially appointed in Government Service who had to stagnate for 13 years in that grade or post This Court finally quashed Ext. P-8 and Ext. P-10 orders and directed the Government to take a decision in the matter after hearing the petitioners. Ext P-11 is the judgment. Pursuant to this direction, the matter was taken up for hearing. Subsequently the 1st respondent

passed G.O. dated December 8, 1988 ordering that the petitioner in the Original Petition and those similarly placed are not eligible for Higher Grades sanctioned in the G.O. dated November 27, 1979. Ext P-12 is the order.

3. In the O.P. petitioner has challenged Ext. P-12 order which is patently illegal. It is pointed out that Ext P-5 G.O. dated September 27, 1984 ordering that 'appointment by transfer' will also be treated as equivalent to 'direct recruitment' for allowing Higher Grade is not cancelled or modified.

4. Learned Counsel appearing for the petitioner invited my attention to Rule 2(13) of the Kerala State and Subordinate Service Rules which reads thus:

'A candidate is said to be recruited by transfer to a service:

(i) if his appointment to the service is in accordance with the orders issued or rules prescribed for recruitment by transfer to the service; and

(ii) if at the time of his first appointment thereto-

(a) he is either a full member or an approved probationer in any other service, the rules for which prescribe a period of probation for members thereto;

Provided that where the Special Rules for a service provide for recruitment by transfer to any class or categories thereof from any specified class or category of another service, a candidate shall, unless the recruitment is made from a post carrying an identical scale of pay, be a full member or an approved probationer in the class or category so specified, or

(b) he is the holder of a post in any other service for which no probation has been prescribed, and has put in satisfactory service in that post for a period of two years on duty within a continuous period of three years.'

'Promotion' is defined in Rule 2(ii) of the Kerala State and Subordinate Service Rules as meaning the appointment of a member of any category or grade of a service or a class of service to a higher category or grade of such service or class. On the basis of these definitions Learned Counsel contended that promotion and recruitment by transfer are not the same and they are distinct and separate

methods of recruitment/ appointment in the service jurisprudence. Learned Counsel further pointed out that the method of recruitment of Workshop Superintendent has been prescribed in the Special Rules for the Kerala Technical Education Service. Clause (C) relates to appointment of Polytechnics and category 3 relates to Workshop Superintendent. Rule 2 of the Special Rules provided that the appointment to the post of Workshop Superintendent shall be-

(i) by transfer from the category of Workshop Foreman in Polytechnics and Junior Technical Schools or

(ii) in the absence of suitable candidates for transfer, by direct recruitment.

The qualification prescribed for the post of Workshop Superintendents for transfer or direct recruitment are

(i) a degree in Mechanical Engineering:

(ii) 3 years experience in Mechanical Workshop equipped with modern machine tools or (1) Diploma in Mechanical Engineering or a pass in Sections A and B of AMIE (India) (2) Five years experience in Mechanical Workshop equipped with modern machine tools.

It can be seen from this that the qualifications prescribed for appointment by transfer as well as appointment by direct recruitment are the same. Learned Counsel appearing for the petitioner submitted that both the categories were absorbed in one cadre, namely, Workshop Superintendents and once it is done there cannot be any discrimination either in the matter of promotion or for granting higher grade with reference to the source from which they came to occupy the post. He argued that they form one class and they cannot be discriminated for the purpose of further promotion or higher grade. He submitted that the denial of higher grade to the petitioners on the ground that their appointment is termed technically only as appointment by transfer and it is really a promotion and therefore they are not entitled to the higher grade sanctioned by Ext. P-5 would amount to hostile discrimination and violation of Articles 14 and 16 of the [Constitution of India](#). He further pointed out that Ext. P-5 clearly states that the

appointments by transfer also will be entitled for the higher grade and that Ext. P-5 has not been modified or cancelled. Ext. P-8 is only a letter, and it cannot override Ext. P-5 which is an order issued by the order of the Governor in exercise of powers conferred by Article 166 of the Constitution. He also submitted that denial of higher grade to the petitioner will also violate the theory of equal pay for equal work.

5. I am of the view that there is great force in the contention raised by learned counsel for the petitioner. Higher grade was given for the reason that there is likelihood of stagnation in the category of Work Superintendent. On this aspect, there cannot be any difference between the direct recruits and appointees by transfer. In the circumstances, I am unable to find any justification for meeting out a discriminatory treatment to the appointee by transfer by denying the benefit of higher grade to them. The petitioner was given only the pay and allowance of the Workshop Superintendent at the minimum as in the case of appointees by direct recruitment and both appointees by direct recruitment and appointees by transfer are all similarly situated except that they were drawn from two different sources.

6. In this connection learned counsel invited my attention to the decision in *Roshan Lal Thandon v. Union of India* (1968-I-LLJ-576 at 580):

'In our opinion, the constitutional objection taken by the petitioner to this part of the notification is well-founded and must be accepted as correct. At the time when the petitioner and the direct recruits were appointed to Grade D there was one class in Grade 'B' formed of direct recruits and the promotees from the grade of artisans. The recruits from both the sources to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade 'C'.'

In *M.P. Singh v. Union of India* AIR 1987 SC 485 also the Supreme Court considered a similar situation where classification was made as deputationists and non-deputationists and said (para 10):-

'in the cadre of Sub-Inspectors, Inspectors and Deputy Superintendents of Police in the Central Investigating Units of the Central Bureau of Investigation has

nothing to do with any compensation for which the deputationists may be entitled either on the ground of their richer experience or on the ground of their displacement from their parent departments in the various States, but it relates only to the arduous nature of the duties that is being performed by all of them irrespective of the fact whether they belong to the category of the 'deputationists' or to the category of the 'non-deputationists'. That being the position, the classification of the officers working in the said cadres into two groups, namely, for paying different rates of Special Pay does not pass the test of classification permissible under Articles 14 and 16 of the [Constitution of India](#) since it does not bear any rational relation to the object of classification.'

7. Learned Counsel for petitioner is also right in his submission that the impugned order violates the principle of equal pay for equal work. He relied on the decision of the Supreme Court in P.K. Ramachandra Iyer v. Union of India (1984-I-LLJ-314). In that case Supreme Court observed that it is not permissible to provide unequal scale of pay based on no classification or irrational classification.

In Savita v. Union of India (1986-I-LLJ-79) again Supreme Court pointed that classification of senior draftsmen into two groups and recommendation of higher pay to one group is violative of Article 14 of the Constitution.

8. The foregoing discussion would show that the impugned orders Ext. P8 and Ext. P9 and Ext. 10 are unsustainable and are liable to be quashed. It is declared that the petitioner will be entitled to higher grade with effect from the date on which he completed 13 years' service in the entry grade. Petitioner has filed C.M.P. 3045 of 1993 seeking the relief of interest at the rate of 18%. Since the petitioner was denied the increment without any justification, I do not find any reason to deny the claim made by the petitioner. However, the interest claimed is excessive and it is ordered that the petitioner is entitled to 12% interest. O.P. is allowed as above.