

**Vijayan Vs. Accountant General**

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**Court :** Kerala

**Decided On :** Jun-27-2005

**Reported in :** 2005(3)KLT733

**Judge :** Pius C. Kuriakose, J.

**Acts :** Kerala Service Rules - Rule 56

**Appeal No. :** W.P.(C) No. 16020 of 2005

**Appellant :** Vijayan

**Respondent :** Accountant General

**Advocate for Def. :** M. Vijayakumar, Adv. and; M.A. Thomaskutty, Government Pleader

**Advocate for Pet/Ap. :** K.V. Pavithran and; Jayanandan Maadayi Puthiyaveettil, Advs.

**Disposition :** Appeal dismissed

**Judgement :**

**Pius C. Kuriakose, J.**

1. This Writ Petition is instituted by a teacher of M.M. High School, New Mahe, Thalassery who contends that the offer submitted by him, under Rule 56(iv) of Part

III of Kerala Service Rules for voluntary retirement has not become effective and that he has withdrawn from such offer before the same became effective, seeking inter alia the following reliefs:-

- 1) a direction to respondents 4, and 5, the Manager and Headmaster respectively of the school to allow him to continue as High School Assistant in the school;
- 2) to direct the Deputy Director of Education, the District Educational Officer and the Manager (respondents 2 to 4) to accept his letters seeking withdrawal of the application for voluntary retirement; and
- 3) to prohibit the respondents from terminating his service;

2. According to the petitioner, his wife is a teacher in Cheruvancherry U.P. School, Kuthuparamba; his eldest daughter is studying in Engineering College, Moothakunnam with two more years for completing the course; and his younger son is a mentally retarded boy who needs special care and attention. The petitioner was medically advised by Ayurvedic physicians that his son needs prolonged medical treatment and constant care and supportive attention of the parents, particularly the father. Due to the said extenuating reason and to impart treatment to his only son, the petitioner applied on 15.12.2004 to voluntarily retire from service with effect from 1.4.2005 as per Rule 56, Part III, K.S.R., he having put in 21 years, one month and one day of service. Ext.P1 produced along with the Writ Petition is a true copy of the letter addressed by the petitioner to the Deputy Director of Education through the Manager. Ext.P1, according to the petitioner, was submitted by him in the melancholic mood of the family which was turning all stones to find out a way for relief to the only son. Petitioner states that later he received further medical advice that the treatment suggested by Ayurvedic physicians will only add on to the misery of the child by inflicting physical and mental torture on him and accordingly it was decided not to go for Ayurveda treatment for the son. Consequently the necessity to opt for voluntary retirement also ceased. Thereafter, the petitioner approached the Manager-4th respondent and explained about his intention to withdraw from the application, for voluntary retirement which, according to the petitioner, had not been thitherto decided by the concerned officials. According to the petitioner, the Headmaster assigned him

invigilator's duty for Second Year B.A. and B.Com. examinations held at M.M. High School, Mahe in the first and second week of May, 2005 which, according to him, indicates that even after 1.4.2005, the date in which he opted to retire voluntarily as per Ext.P1, he continued in service. Petitioner sent Ext.P2 letter dated 3.5.2005 to the 3rd respondent-D.E.O. under copies to the 2nd respondent and the 4th respondent informing them of his withdrawal of what he describes as 'offer for voluntary retirement'. He also sent a letter to the Accountant General, the 1st respondent requesting him to cancel his application for voluntary retirement and Ext.P3 is the true copy of the said letter. According to the petitioner, he has not so far received any information or reply to the letters he sent to the Departmental officers or the Accountant General. He states that the Department has not so far accorded sanction for voluntary retirement. Therefore, he is entitled to withdraw the offer. Petitioner states that after receiving copy of Ext.P3 letter, the 4th respondent-Manager has issued a letter dated 16.5.05 which is produced as Ext.P4. Under Ext.P4 he is informed that the retirement has already become effective from 31.3.2005 and therefore withdrawal is not possible. Producing Ext.P5 issued by the Government physician attached to the Primary Health Centre, Pattiam to show the condition of his son, he states that he wishes to continue in service but apprehends that the 4th respondent will not permit him to pursue his job. On the above facts and on Grounds A to F raised in the Memorandum, the Writ Petition is filed seeking the reliefs already mentioned.

3. The 4th respondent-Manager has filed a detailed counter-affidavit. It is contended therein that the petitioner who has been working in the school from 8.12.1982 as H.S.A. (Malayalam) committed serious irregularities by unauthorised absence and dereliction of duty and had to be given a penalty of withholding of one annual increment without cumulative effect. Ext.R4(a) is produced along with the counter to prove this aspect. The petitioner submitted a request for voluntary retirement on 15.12.2004. The same was submitted to the 2nd respondent-D.D.E. through the 3rd respondent-D.E.O. for necessary action. Ext.R4(b) produced along with the counter-affidavit is the forwarding letter of the Manager. Even after submitting Ext.R4(b), the attitude of the petitioner towards his duties did not change and he continued to commit serious irregularities. This necessitated the issuance of a memo of charges together with statement of allegations to the

petitioner. He submitted a statement and requested to drop further proceedings on the ground that he has already submitted a request for voluntary retirement with effect from 31.3.2005. Therefore, a lenient view was taken and accepting the explanation offered by the petitioner the proceedings proposed against him were dropped under Ext.R4(c) order. According to the counter-affidavit, the petitioner has retired from service on 31.3.2005. He has not attended the school since 31.3.2005 and vacation salary was not paid to him. His request for withdrawal from the request for voluntary retirement was submitted only on 3.5.2005 and he was given a reply to the effect that the voluntary retirement has already taken effect and Ext.R4(d) is the true copy of the above letter dated 16.5.2005. The counter-affidavit further states that the petitioner has ceased to be in service with effect from 31.3.05 and in view of Rule 56(iv) of Part III, K.S.R., he is not entitled to continue since his voluntary retirement became effective on the grant of permission to retire by the authority competent to make appointment to the post. Referring to the proviso to Rule 56(iv) it is contended that if permission to retire has not been refused before the date on which the employee wishes to retire, then the retirement will become effective from the date specified in the notice of retirement. Withdrawal on 3.5.2005 after the retirement became effective is not legally possible. The contention of the petitioner that he has continued in service and that he has worked in the school even after 31.3.2005 are all stoutly denied.

4. A reply affidavit is filed by the petitioner through which he has reiterated the averments in the Writ Petition and denied those in the counter-affidavit. According to the reply affidavit, the Department has not so far sanctioned his voluntary retirement and before the department accorded sanction, he has submitted his withdrawal request. Therefore, according to him, Rule 56(iv) has no application in his case. Again he points out that he worked as an invigilator in the examinations conducted by the University and he could so work only because of his capacity as teacher. Ext.R4(a) and (c), according to the reply affidavit are not relevant and they are the results of collusion between the Manager and the Headmaster. According to him, he approached respondents 4 and 5 on 2.6.2005 seeking permission to work as teacher producing the interim order of this Court but they did not permit him to work. He further states that no prejudice will be caused to the school by allowing him to continue to work and it is pointed out that at the moment

there is just one Malayalam teacher who works in the school and it is in the interest of the student-community that he is permitted to work.

5. Petitioner filed I.A.9113 of 2005 seeking amendment of the Writ Petition so as to incorporate 'Ground 12(a)' raising the contention that the Manager of the aided school is not competent to grant permission for voluntary retirement and therefore the case is covered by Clause (vi) of Rule 56, Part III, K.S.R. In such cases the appointing authority shall refer the matter to the Government with intimation to the petitioner before the date specified in the notice as the date of retirement. No such reference has so far been made by the 4th respondent and no intimation received by the petitioner so far. The entire proceedings of the 4th respondent are vitiated due to the same, according to the petitioner. The amendment seeks incorporation of another ground, 'Ground 12(b)', which is to the effect that Ruling No. 2 in Rule 56 of Part III, K.S.R. is illegal having no sanction of law. The amendment application was allowed.

6. I have heard the submissions of Sri. K.V. Pavithran, learned counsel for the petitioner and Sri. M. Vijayakumar, learned counsel for the 4th respondent-Manager. I have also heard the submissions of Sri. M.A. Thomaskutty, learned Government Pleader for official respondents 1 to 3.

7. Mr. Pavithran addressed submissions on the basis of the pleadings in the Writ Petition as well as the reply affidavit. Depicting the melancholic mood under which the decision to go in for voluntary retirement was taken, the learned counsel submitted that denying permission to withdraw from the offer to retire voluntarily will be very unkind. Rule 56(iv) of Part III, K.S.R. has no application in this case and the applicable rule is Rule 56(vi). Though the Manager is the appointing authority, he is not competent to grant permission in this case to the petitioner for retiring voluntarily. This, according to learned counsel, was the reason why the Manager forwarded the notice dated 15.12.2004 submitted by the petitioner to the Deputy Director requesting for orders. No orders were passed by the competent authority, the D.D.E. and the letter withdrawing from voluntary retirement was submitted by the petitioner even before orders were passed and therefore withdrawal has become operative. According to Mr. Pavithran, the principle

underlying Rule 56(iv) of the K.S.R. is that voluntary retirement of an employee will become effective only upon grant of permission by the competent authority. In this case the competent authority had not granted permission at the time when the withdrawal request was submitted by the petitioner. Therefore, the view of the Manager that the petitioner is deemed to have retired from service on 31.3.2005 even prior to the day he was assigned with invigilator's duty in the examinations is not logical.

8. Sri. M. Vijayakumar, learned counsel for the 4th respondent made submissions on the basis of the counter-affidavit filed by his client. Referring to Ext.R4(a) the learned counsel submitted that the petitioner was found guilty of having committed serious irregularities like unauthorised absence and dereliction of duty and that was why Ext.R4(a) was passed. Referring to Ext.R4(b) forwarding letter of the petitioner's application for voluntary retirement, learned counsel submitted that the very fact that the Manager forwarded the application for voluntary retirement under Ext.R4(b) will show that the Manager was all willingness in the matter of permitting the petitioner to have voluntary retirement. Counsel submitted that even as the petitioner's application for voluntary retirement was pending, he continued to commit irregularities and this necessitated the issuance of a memo of charges against the petitioner. To the memo of charges the petitioner submitted a statement requesting to drop further proceedings, taking into account the fact that he has already submitted a request for voluntary retirement with effect from 31.3.05. This was why a lenient view was taken and further proceedings were dropped as per Ext.R4(c) order. Counsel submitted that Ext.R4(d) was issued to the petitioner as a reply to the petitioner's request on 3.5.2005 to withdraw from his request for voluntary retirement. Ext.R4(d) will clearly show that the petitioner's voluntary retirement has taken effect on 31.3.05. According to learned counsel, Rule 56(iv) of Part III, K.S.R. makes it clear that the authority to grant permission to an employee to retire voluntarily is the authority competent to make appointment to the post. The Manager, being the appointing authority, alone is the authority competent to grant permission. Petitioner's interpretation of the proviso to Rule 56(iv) of Part III, K.S.R., according to learned counsel, was wrong.

9. I have considered the rival submissions. I have gone through the pleadings as well as the materials placed on record by parties.

10. Rule 56(iv), Part III, K.S.R. reads as follows:-

'(iv) Voluntary retirement of an employee shall become effective on the grant of permission to retire by the authority competent to make appointment to the post.

Provided that where the authority competent to make appointment to the post does not refuse to grant permission for retirement before the date on which the employee wishes to retire specified in the notice under Clause (i), the retirement shall become effective from the date specified in the notice;'

The argument of the petitioner that it is not for the Manager to grant permission to the petitioner to retire voluntarily cannot be accepted, in view of the conceded position that the Manager is the authority who was competent to make appointment to the post and did actually appoint the petitioner to that post. The further argument of the learned counsel for the petitioner was that the rule applicable in the case of the petitioner is Clause (vi) of Rule 56 of Part III, K.S.R. which reads:-

'Cases in which permission cannot be given by the appointing authority shall be referred to Government intimating the fact to the person concerned, before the date specified in the notice as the date on which the employee desires to retire;'

But then Clause (vi) of Rule 56, Part III cannot be read in isolation. Clauses (iv), (v) and (vi) of Rule 56 of Part III, K.S.R. will have to be read together for understanding the meaning and context of Clause (vi). Clause (v) is quoted as follows:-

'(v) Permission to retire shall be given in all cases except those in which disciplinary proceedings are pending for imposition of major penalty or the disciplinary authority, having regard to the circumstances of the cases, is of the view that the imposition of the penalty of removal or dismissal from service would be warranted or in which prosecution is contemplated or may have been launched in a court of law against the Officer;'

Obviously the cases referred to in Clause (vi) are cases which are exempted under Clause (v), i.e. cases in which disciplinary proceedings are pending for imposition of major penalty or the disciplinary authority, having regard to the circumstances of the case, is of the view that imposition of the penalty of removal or dismissal from service is warranted or in which prosecution is contemplated or may have been launched in a court of law. As far as the present case is concerned, the petitioner does not contend that the Manager is not competent to grant permission to the petitioner to retire in view of the pendency of disciplinary proceedings for imposition of major penalty or the Manager is of the view that imposition of penalty of removal or dismissal from service will be warranted or that prosecution is contemplated or is already initiated. In other words, in the case on hand, the Manager himself being the appointing authority was quite competent to grant permission to the petitioner to retire voluntarily.

11. One circumstance which is highlighted in the reply affidavit is that the petitioner's services were solicited as an invigilator in a University examination even after the date stipulated by him for his voluntary retirement to become effective. But then, the General Education Department has absolutely nothing to do with the University soliciting the petitioner's services as an invigilator. I am therefore not prepared to accept the contention that the petitioner's performance of duties as invigilator in University examination amounted to continuance of his duties in the General Education Department.

The result of the above discussion is that the Writ Petition fails and the same will stand dismissed, but without any order as to costs.

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