

State of Kerala Vs. Saiful Islam

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Court : Kerala

Decided On : Nov-05-2005

Reported in : 2006(1)KLT619

Judge : M. Ramachandran and; A.K. Basheer, JJ.

Acts : Kerala Service Rules - Rules 3C, 23A, 28A and 30

Appeal No. : W.A. No. 944 of 2004 and connected cases

Appellant : State of Kerala

Respondent : Saiful Islam

Advocate for Def. : K.R.B. Kaimal,; K. Jagadishchandran Nair,; Krishnakumar

Advocate for Pet/Ap. : Lal George, Special Government Pleader,; N. Nandakumara Menon,;

Judgement :

M. Ramachandran, J.

1. According to the Government, in respect of pay fixation of a few officers working in the Public Works Department as also the Agriculture Department, an error had been crept in, and it had come to the notice of the Accountant General when fixation was made at the time of conferment of grade promotions on the officers

completing 20 years of service. After notice to the persons concerned, recovery steps were initiated in respect of the over payments alleged to have been made. Original Petitions had come to be filed at this juncture. A batch of cases so filed, at the instance of officers of both the Departments, had been disposed of by Mr. Justice M.R. Hariharan Nair on 03-06-2002. The learned Judge had held that the Government had right reserved for ordering re-fixation, when the Accountant General had noticed the error in such pay fixation. The Original Petitions were thereupon dismissed. It had been held as following:

The petitioners are all persons who got the benefit of Rule 28 A fixation once. Their claim is that they should continue to get the same benefit whenever the successive Pay Commissions proceed to grant revised Higher Grades. The said contention does not appear to be justified. Merely because the Government granted the benefit at the time when the first fixation was allowed pursuant to the grant of Higher Grade as recommended by the Third Pay Commission, the petitioners cannot claim it as a matter of right, the way Rule 28A is worded. It is for the Government to decide the question whether the same benefit should be continued to be given whenever there is a revision of scales or when a still Higher Grade is sanctioned pursuant to the recommendation of the new Pay Commissions. What is apparent from the relevant orders is that the Government stopped by saying that pay would be fixed in accordance with the Rules in force. If a strict interpretation is given based on Rule 28A and 30 of Part I KSR, it is only Rule 30 that can apply for the fixation of pay. The petitioners have no legally sustainable claim for the benefit of fixation of pay under Rule 28 A. The Original Petitions, in the circumstances, are found to be without merit and are hence dismissed.

Aggrieved by the judgment, Writ Appeal Nos.2225, 2253, 2295, 2438, 2538, 2539, 2577,2653 and 2930 of 2002 and Writ Appeal No.979 of 2003 have been filed by the officers, who were petitioners in the respective petitions, and who belong to the Public Works Department of the State. Writ Appeal No.844 of 2003 has been filed by officers of the Agricultural Department. Some of the appellants have retired from service. The appellants submit that the learned single Judge had erred in comprehending the issue. According to them, the fixation of pay at all levels were

authorised, and consequently the recovery steps were illegal and not permissible.

2. Without perhaps noticing the judgment rendered on the subject, as above, Mr. Justice Kurian Joseph, by judgment dated 20-06-2003, while dealing with the similar claims urged in a writ petition filed by officers of the Agricultural Department in O.P.No.2503 of 1996, had taken a view that the fixation as had been given to the persons concerned could not have been treated as erroneous. The recovery steps thereupon had been set aside. Following the judgment, similar original petitions arising from both the Departments had been disposed of on the self same line. Judgment in O.P. No. 8249 of 1993 has resulted in W.A.No. 1567 of 2004 O.P.No.2083 of 1993 (W.A. No. 1691 of 2004) pertains to the Public Works Department. O.P.No.3354 of 1996 from which w.A.No.968 of 2004, also had been allowed by the learned single Judge, which had been filed by personnel belonging to the Agricultural Department. The principal judgment is reported in : 2003(3)KLT384 Saifid Islam v. State of Kerala. It had been held as following:

6. It is the submission of the learned Government Pleader that the time bound higher grade promotions are granted by separate Government Orders/Clarifications issued from time to time and hence the provisions in Rule 28A of Part I of the Kerala Service Rules are strictly applicable. But there is no stipulation in any pay revision order that while re-fixing the pay under the pay revision, the benefit under Rule 28 A will not be granted. There is no dispute regarding entitlement of the 20 years grade. Having not prescribed any restrictions either in the rule or in the pay revision orders, there is no justification in issuing a subsequent clarification that while granting the benefit of time bound grade promotion the incumbent who had already enjoyed 2 or 3 of Rule 28 A fixations in the meanwhile will not get the benefit of Rule 28 A fixation, even if there is a change in the time scale. The only restriction is to the minimum of the time scale in the lower post. It is also significant to note that in the Government decision No. 1 under Rule 28A, it is specifically provided that the 'provisions of this rule will not apply to cases of revision of scales of pay referred to in Rule 30.'

7. Rule 30 is attracted only when there a change in the existing scale of pay attached to a post, in which case the holder of the post is free to opt for the new

pay or even postpone the new scale. But in the case of fixation under Rule 28A, it is done when there is change in the time scale of an employee. In other words, Rule 28 A is to be applied when there is change in time scale of an employee whereas Rule 30 is to be applied only when there is change in the existing pay attached to the post.

xxx xxx xxx xxx9. But it has to be seen that there is no case for the respondents that the petitioners are not eligible to get the second higher grade promotion on completion of 20 years of service. The only contention is that they will not be eligible for fixation under Rule 28 A Part I KSR while granting the second higher grade on completion of 20 years of service. As already admitted by the Government there is no such stipulation in any of the pay revision orders granting time bound higher grades or in any other order at the time of granting the benefit. Therefore, the clarification and the attempted recovery are arbitrary and illegal. The impugned orders are set aside.

Respondents are directed to maintain the original fixation in the second higher grade granting the benefit of Rule 28A Part I of the Kerala Service Rules and grant consequential benefits including arrears of salary and pensionary benefits. This shall be done within a period of three months from the date of receipt of a copy of this judgment.

3. The rest of the writ appeals before us are filed at the instance of the Government, raising a contention that the decision as above requires a reconsideration. Along with the said two batches of appeals, pending Original Petitions on the subject, which were yet to be disposed of, challenging the Government Orders proposing recovery of excess pay, also had been listed for hearing.

4. As divergent findings have come, we feel, it may be appropriate that the issues are independently examined. We may first take notice of the circumstances in which there was a proposal to suggest a re-fixation of salary of officers belonging to the Public Works Department and consequential recovery steps, which led to the filing of the Original Petitions.

5. In the Public Works Department of the State, the initial appointment offered to the petitioners in the Original Petitions was as Junior Engineer. The posts 'had been later on redesignated as Assistant Engineer. The Government, after taking notice of the recommendation of the 3rd Pay Commission, had decided to implement it from 15.11.1979. A ratio of promotion, in a proportion of 3:1, prescribing Lower and Higher Grades for the Junior Engineers had been accepted to be implemented. There were writ petitions filed, in the matter or prescription of eligibility criterion, and finally the Higher Grade was implemented consequent to the directions issued by this Court, with reference to seniority. Such orders dated 22-07-1985 were effective from 01-07-1975. A total of 418 Assistant Engineers were granted higher grade on ratio promotion. In respect of persons, who had been given higher grade on applying the ratio, fixation benefits as admissible under Rule 28A Part I KSR had been extended, including benefit of increment.

6. By this, time, the report of the 4th Pay Commission had come in 1983, and the ratio had been refixed as 1:1. For the purpose of time bound promotion, service period was reduced from 13 years to 10 years. This report had been accepted as per G.O.(P) No.515/85/Fin dated 16-09-1985. The Assistant Engineers were on a pay scale of Rs. 1050-2000. The pay scale of the promotional post viz., Assistant Executive Engineer was Rs. 1250-2500. The scale given to higher grade of Assistant Engineer was Rs. 1150-2270. During 1988, the 5th Pay Commission Report had come, and as far as the Public Works Department was concerned, the higher grade in the post of Assistant Engineer was recommended to be discontinued. The two scales (Rs. 1050-2000 and Rs. 1150-2270) were merged to a new scale of Rs. 1450-2825. The pay scale of promotional post of Assistant Executive Engineer had been revised as Rs. 1650-3175 (from Rs. 1250-2500). Therefore, the officers became entitled to the ten year grade promotion to the said scale, viz., Rs. 1650-3175.

7. It so happened that earlier when the seniors were put on a higher grade of Rs. 1150-2270, by virtue of prescription of ratio promotion, other officers, who had completed minimum prescribed service as on their dates of entitlement, were conferred with grade promotion to the pay scale of Assistant Executive Engineers, namely Rs. 1750-2500. This had worked as an anomaly; for a position had

resulted that the juniors became entitled to a higher scale by applying the principle of grade promotion. As referred to earlier, in order to rectify the anomaly, the posts of Assistant Engineer and Assistant Engineer (Higher Grade) were unified and revised by prescribing the pay scale of Rs. 1450-2825 with effect from 01-07-1988. Thus, in effect, such officers were deemed as having been not recipients of any promotions. A promotion would have interfered with their rights for claiming grade promotion, as they were not to go together.

8. As a result, benefits of higher grade became payable after ten years of service and instead of originally prescribed thirteen years. By changes in the pattern, the first promotion post of Assistant Engineer became Assistant Executive Engineer, and on the revised pay scale of Rs. 1650-3175. All Assistant Engineers, including those who were recipients of earlier higher grade, on completion of 10 years service became eligible for 10 years time bound higher grade, in the pay scale of Rs.1650-3175 and next higher grade, by completing 20 years of service. This was to the pay scale of Rs.2070-3550.

9. It was only at the time of grant of the second higher grade, the Government noticed that a group of officers had received a higher benefit, which was not envisaged by pay revision orders or other relevant government orders. In the case of Junior Engineers, whoever got the ratio promotion, they had been given Rules 23A benefits, when they received the higher grade admissible at that time. Thereafter, there was only a unification of scales and when they were given the grade promotions, after completing 10/13 years, it would not have been possible for them to claim again Rule 28A fixation, since they had already received such benefits on the first occasion. However, according to the Government, the mistake committed was that when grade promotions were given, in the pay scale of Assistant Executive Engineers Rs. 1650-3175, they were given yet another Rule 28A fixation. This went unnoticed for some time. Therefore, at the stage of grant of higher grade after 10/13 years, according to the Government, it should have been worked out as provided for by Rule 30 of Part I KSR alone and hence though the error had been discovered only later, they had the right for readjusting the pay. This mistake was sought to be regularised, and this alone had been done, according to them.

10. Now we may go to the case of officers in the Agricultural Department. The hierarchy of posts in the Department are Agricultural Officers, Assistant Directors, Deputy Directors and Joint Directors. Initially i.e. prior to 01-07-1988, there were two scales for Agricultural Officers, being Grade I and Grade II, with pay scale of Rs. 1050-200 and Rs. 1150-2270. As a consequence of the pay revision orders of 1988, they were unified to a single pay scale of Rs. 1450-2325. As happened exactly in the Public Works Department, when officers got the higher grade viz., Grade-I, they were given Rule 28A fixation. The anomaly that was there in respect of junior getting a higher pay, at the time of grade promotion, was experienced in the Agricultural Department as well, and that was the reason for the unification of the scales. When the grade promotion, admissible after 10/13 years service, was implemented and officers were given the next higher grade of Rs. 1650-3175, by an error, instead of grant of Rule 30 fixation, 28 A fixation came to be extended, by an oversight. This also came to be noticed only later and in the meanwhile the officers had been drawing the higher pay than what was legitimately admissible. The fixation benefits granted had therefore to be retraced and with due notice recovery steps were contemplated.

11. This appears to be the factual position. We had opportunity to hear Mr. Krishnamany, appearing on behalf of the group of officers belonging to Public Works Department, Mr. K.R.B. Kaimal, Sri. K.K.M. Sherif and Mr. Jagadishchandran Nair represented the group of officers in the Agricultural Department, Mr. Lal George appeared on behalf of the Government.

12. Mr. Krishnamani traces out the history of the grant of grade promotions and submits that at every stage there was proper scrutiny and the officers had not received anything more than what was legally admissible to them. Mr. Kaimal submits that in respect of pay fixation, there is no principle that Rule 28 A fixation is not admissible more than once and therefore the basic approach, on an assumption that an irregularity had been committed, was erroneous. The benefit of the Rule could not have been restricted, even if such a course was found inconvenient by the Government. The officers were entitled to the pay fixed without any drop. When ratio promotion was given, it being a promotion to the higher post, as of right Rule 28A fixation was admissible, and was granted. He

states that when a unification was there because of the merger, there was no demand for any fixation. But when they became entitled to grade promotion, after 10/13 years, as per the governing norms, they became entitled to a fresh Rule 28A fixation, as nothing operated against this right. It was not to be mixed up as a contingency attracting Rule 30. Therefore, when the next grade promotion on completion of 20 years became admissible again a Rule 28A fixation was to come to them as of right. Thus there was no irregularity in fixation and no circumstances existed for a re-fixation or recovery.

13. Although there was certain amount of confusion because of the proliferation of the materials, such as the Pay Commission Reports, Pay Revision Orders and proceedings, prescribing principles of fixation, we feel that the Government has been successful in establishing that the impugned orders are issued in proper exercise of powers validly, and bonafide. At the initial stages, in both the Departments, what had happened was that for the self same fixation entitlement by an oversight, two fixations in the pattern postulated under Rule 28A of Part I K.S.R. inadvertently came to be granted. In the case of Junior Agricultural Officers and in the case of Assistant Engineers, when a higher pay scale as a result of ratio promotion became admissible, Rule 28A fixation had been given. As a result of the Pay Revision Orders, when they became entitled for grade promotion, by virtue of putting in 10/13 years of service, they were granted yet another similar fixation. True, in the meanwhile, they had come to occupy a different pay scale. The unified scale had been granted so as to annul the mischief of a junior getting a higher pay than the senior. But basically an officer would have been entitled to only one fixation at the time of getting a grade promotion (and this too because of the benevolence of the Government, since it had been specifically provided that Rule 23A fixation will be admissible for grade promotion). The pay made admissible to the senior officers was taking note of Rule 28A fixation. But, ultimately it resulted in a position that both set of officers (Higher Grade) in the Public Works Department and Agricultural Department came to occupy a scale of Rs. 1450-2325, as if it was only a change in the scale of pay admissible to them. But the seniors, who were already beneficiaries of a Rule 28A fixation, actually might have been entitled to a fixation as envisaged by Rule 30 of Part I K.S.R. only, which provided that:

The holder of a post, the pay of which is changed, shall be treated as if he were transferred to a new post on the new pay....

But the earlier fixation benefits were not taken back, and on grant of higher grade, this very well took care of the individual's interests. Though while stating the facts, it is contended in some of the Original Petitions that the fixation was annulled when the scales were unified, the Government, in the counter affidavit, have specifically denied this.

14. A more simple approach would have been to enquire into a circumstance as to one's normal admissible right of getting two fixation at the time of two grade promotions, and to see whether he had been denied this benefit. The answer is in the negative. A fortuitous ratio promotion, which was thereafter practically withdrawn, could not have contributed to a more advantageous and differential treatment to him than their colleagues. The reasonable stand of the Government ought to have been appreciated, instead of going on with litigation on technical grounds. We find that re-fixation of pay and recovery orders were valid.

15. Consequently, Writ Appeal Nos.2225, 2253, 2295, 2438, 2538, 2539, 2577, 2653 and 2930 of 2002, 844 and 979 of 2003 will stand dismissed. O.P.Nos.13348 of 1993,4147, 9603 and 16116 of 1994 and 16420 of 1995 are also dismissed. Writ Appeal Nos.944,968, 1567 and 1691 of 2004, filed by the Government, are allowed.

16. As a consequence, since the Government, rightly contends that there has been an over payment by mistake, in view of Rule 3-C of Chap.I of Part III K.S.R, the Government will have the right to recover the excess pay, by resorting to appropriate mode, as envisaged by the Rules.