

K.P. George, Retired as Senior Grade Vs The Law Secretary, Law (B) Department, The Advocate General and The Accountant General (A and E)

Court: High Court Of Kerala

Date of Decision: Feb. 5, 2009

Acts Referred: Kerala Service Rules, 1958 " Rule 1, 10, 11, 110B, 29
Kerala State and Subordinate Services Rules, 1958 " Rule 2(1)

Citation: (2009) 1 ILR (Ker) 665 : (2009) 1 KLT 655

Hon'ble Judges: P.R. Ramachandra Menon, J; Kurian Joseph, J

Bench: Division Bench

Advocate: N. Sugathan, for the Appellant; Government Pleader, for the Respondent

Judgement

Kurian Joseph, J.

Whether a non-permanent officer in regular service, who has not completed probation in the entry grade, availing leave

without allowance is entitled to count his service prior to the leave for the purpose of pension is the question to be considered in this appeal.

2. Leave is not a matter of right. But once leave is granted, the incumbent shall be bound by the conditions attached to the leave. Appendix XII-A

prescribes the rules for the grant of leave without allowances for taking up employment abroad or within India. Rule 88 Part I KSR deals with

leave without allowances. Sub-rule (ii) of Rule 88 provides that "except in the case of an officer in permanent employ, the duration of leave without

allowances shall not exceed 3 months on any one occasion". However Exception 2 provides that the limitation in Sub-rule (ii) shall not apply to the

grant of leave without allowances regulated by the rules in Appendices XIIA, XIIB and XIIC. Rule 110B deals with leave for taking up

employment abroad or within India. The Rule provides that "rules for grant of leave without allowances for taking up employment abroad or within

India are given in Appendix XIIA." Appendix XIIA of Part I opens with the following introduction:

The following rules shall regulate the grant of leave without allowances to officers for taking up employment abroad or within India.

Therefore, the purpose of Appendix XIIA is to provide for rules to regulate the grant of leave without allowances for taking up employment. Rule

4 regulates the leave of permanent officers and non-permanent officers who have completed probation in their entry grade in the regular service of

the Government and Rule 5 deals with non-permanent Officers in regular service who have not completed probation in the entry grade. Rules 4

and 5 are extracted below:

4. Permanent Officers and non-permanent Officers who have completed probation in their entry cadre in the regular service of Government may

be granted leave without allowances under these rules. In such cases, for, and during the currency of, the period of leave, the officers shall lose all

service benefits such as the earning of leave including half pay leave, pension, gratuity, increment, etc., and also promotion chances as may arise

with reference to their seniority in the posts from which they proceeded on leave. They shall also lose seniority in the higher grade/grades with

reference to their juniors who might get promoted to such grade/grades before they rejoin duty.

5. In the case of non-permanent Officers in regular service who have not completed probation in the entry grade, leave without allowances may be

granted subject to the condition that they will have to start afresh and complete their probation on return from the leave without allowances. In

other words, the Officers will forfeit the service benefits that had accrued to them prior to their proceeding on leave and they will be deemed as

new entrants to Government service on return from leave. What is protected is only their right to rejoin Government service in the same entry grade

as if they were new entrants.

It is clearly provided under Rule 4 of Appendix XIA that the leave period shall not be reckoned for service benefits such as earned leave,

pension, gratuity, increment etc. and also for promotion during the leave period. It is also provided that such incumbents will lose seniority in the

higher grade with reference to juniors who might get promoted to such grades before the expiry of the leave.

3. As far as non-permanent Officers in regular service, who have not completed probation in the entry grade, are concerned, they are also liable to

be granted leave without allowance subject to the condition that on the expiry of the leave period they will have to start afresh and complete their

probation on return from the leave. That part of Rule 5 of Appendix XIA has been clarified and explained with the expression ""in other words"",

providing that such non-permanent officers, who have not completed their probation in the entry grade and who avail leave without allowances, will

have to forgo the service benefits that had accrued to them prior to their proceeding on leave and they will be deemed as new entrants to

Government service on return from leave. There is also a further clarification that what is protected in such cases is only their right to rejoin

Government service in the same entry grade as if they were new entrants. It is the stand of the State that the expression forfeiture of service

benefits would take in the forfeiture of the service as such. In other words, the service rendered by a non-permanent officer in regular service, who

has not completed the probation and who avails leave without allowance, will not be entitled to count the service rendered prior to the leave even

for pension.

4. Rule 10 of Appendix XIIA provides that the rules apply in all cases of grant of leave without allowances on or after 16-12-1983, whether in

extension of the leave already granted or otherwise. The Rule reads as follows:

10. These rules shall apply to all cases of grant of leave without allowances on or after the 16th December, 1983 whether in extension of the leave

already granted or otherwise and such leave granted before that date shall be reckoned for applying the 20 years limit under Rule 6 above.

A Note is also provided under Rule 10, further clarifying the position. The note reads as follows:

Note:- Notwithstanding anything contained in these rules those who have proceeded on leave for taking up employment abroad or within the

country before the commencement of these rules, after obtaining permission of Government will continue to be governed by the conditions laid

down in G.O(P)274/70/Fin. dated 29th April 1970 for the leave granted to them even if it extends beyond 16-12-1983.

A conjoined reading of Rule 10 and the Note makes it clear that only the leave without allowance granted on 16-12-1983 or thereafter will be

governed by the Rules contained in Appendix XIIA. It makes no difference whether such grant of leave on or after 16-12-1983 is a fresh grant or

in extension of the leave already granted. In other words, even if an extension of leave already granted in terms of the 1970 government order

dated 29-4-1970 is extended on or after 16-12-1983, such extension will be governed by Appendix XIIA and not by the conditions of the leave

already granted prior to 16-12-1983. The leave already granted prior to 16-12-1983 will be reckoned only for the purpose of counting the total

period of leave without allowances as provided under Rule 6. In fact this position has been settled by a Bench decision of this Court in The

K.S.R.T.C. Vs. A. Noorudeenkutty, .

5. Whether the service benefit as referred to in Rule 5 of Appendix XIIA would include seniority has been considered by this Court in the Bench

decision of this Court in Unnikrishna Panicker v. Bhasi 2001(1) KLT 449, single Bench decision in Sreekala v. State of Kerala 2007 (1) KLT 903

and another Bench decision in Yesodhari Devi M.G. Vs. State of Kerala and Others, . The law has been well settled by those decisions to the

effect that a probationer availing leave without allowance will not be entitled to claim service seniority on the basis of the date of initial joining duty

since the service benefits have been forfeited. Whether pension is a service benefit has not so far been considered by any of the decisions of this

Court, in the background of Appendix XIA.

6. Before analysing the legal position, it is necessary to refer to the facts. Petitioner entered service as LDC in the Harijan Welfare Department on

15-11-1976. His probation was declared on 29-11-1978 (Ext.P1). On appointment as Assistant Grade II in the Advocate General's Office he

was relieved from the Harijan Welfare Department on 29-2-1980 and joined the Advocate General's Office on 1-3-1980 (Ext.P2). On 1-3-1981

he was granted annual increment. The period of probation is two years. While on probation, as per Ext.P3 the petitioner was granted leave without

allowance for five years with effect from 23-12-1981 to seek employment abroad. The leave was granted as per government order dated 29-4-

1970 (Ext.P4). The following are the conditions under Ext.P4 government order dated 29-4-1970:

(1) The leave period will not be counted for pension;

(2) In the case of eligibility for appointment to selection post, the performance will be assessed afresh on rejoining duty after the leave.

(3) The person already in the select list will be appointed only subject to availability of vacancy on return from leave; and

(4) In the case of non-selection post he will be appointed to such post and allowed to continue on leave.

It is significant in this context to note that the 1970 government order did not make any difference as to whether an employee is permanent, non-

permanent or probationer. During the currency of the leave without allowance from 23-12-1981 to 22-12-1986, Appendix XIA was introduced

with effect from 16-12-1983.

7. Petitioner applied for leave for another term of five years with effect from 23-12-1986 and that application was recommended by the Advocate

General. That leave was sanctioned as per Ext.P6 by the Government. The order reads as follows:

Government are pleased to sanction leave without allowance to Sri. K.P. George, Assistant Grade II, Office of the Advocate General, Ernakulam

for a further period of five years with effect from 23-12-1986 subject to the terms and conditions laid down in the G.O. read as 3rd paper above.

(Appendix XIA). If the officer does not return to duty on expiry of the leave sanctioned as per this order, his service will stand terminated

automatically.

It is to be noted that Ext.P6 was a sanction order of leave for a period of five years with effect from 23-12-1986, of course a further period of

leave, subject to the terms and conditions in Appendix XIA. Petitioner was again sanctioned leave for another term of five years with effect from

23-12-1991 (Ext.P7). He rejoined duty on 1-2-1993 after cancelling the unavailed portion of leave. On 9-12-1993 he was again sanctioned leave

without allowance with effect from 28-12-1993 and as per Ext.P10 for another period of five years also he availed leave without allowance. On 2-

5-2000 he rejoined duty after cancelling the unavailed portion of leave (Ext.P11) and as per Ext.P12 his probation was declared with effect from

4-10-2002. On 30-6- 2005 he retired on superannuation. The stand of the State is that for the purpose of pension and pensionary benefits, the

service rendered by the petitioner prior to the leave without allowance period cannot be counted, since that service has been forfeited in terms of

Rule 5 of Appendix XIIA. Only as a probationer he availed the leave. The disputed periods of service are from 1-3-1980 to 22-12-1981 and 1-

2-1993 to 27-12-1993. The former one year, nine months Twentytwo days and the latter ten months and twenty seven days.

8. The contention advanced by Sri. Sugathan, learned Counsel appearing for the appellant is that Appendix XII-A can only be treated as an

Appendix to the Kerala Service Rules and hence the claims otherwise protected for counting the service rendered by an incumbent as qualifying

service as per Rules for the purpose of pension cannot be forfeited. It is further contended that forfeiture of service is dealt with only under Rule 29

of part III KSR wherein it is provided that resignation, dismissal or removal from service only entail forfeiture of past service. The Rule reads as

follows:

29. Resignation and Dismissals.--(a) Resignation of the Public Service or dismissal or removal from it, entails forfeiture of past service.

(b) Resignation of an appointment to take up another appointment, the service in which counts is not resignation from public service.

Note:- The break between the two appointments should not exceed the joining time admissible under the service rules plus the public holidays.

Qualifying service is dealt with in Chapter II of Part III KSR. Rules 9, 10 and 11 are relevant. To the extent required for the purpose of the

present issue, the rules read as follows:

9. Beginning of Service.--(a) Except for compensation gratuity, an employee's service does not qualify till he has completed 18 years of age.

(b) In other cases, unless it be otherwise provided by special rule or contract, the service of every employee begins when he takes charge of the

office to which he is first appointed.

10. The service of an employee does not qualify for pension unless he is appointed, his duties regulated and paid by the Government or under

conditions determined by the Government.

11. Notwithstanding the provisions of Rule 10, the Government may,

(1) declare that any specified kind of service rendered shall qualify for pension; and

(2) in individual cases, and subject to such conditions as they may think fit to impose in each case, allow service rendered by an employee to count

for pension.

The expression "appointed to a service" is defined under Rule 2(1) of the Kerala State and Subordinate Service Rules, 1958. The rule reads as

follows:

2(1). A person is said to be "appointed to a service" when in accordance with these rules or in accordance with the rules applicable at the time as

the case may be, he discharges for the first time the duties of a post borne on the cadre of such service or commences the probation, instruction or

training prescribed for members thereof;

Rule 31 Part III of the Kerala Service Rules provides for interruption in service wherein it is prescribed that interruption in service of an employee

will count for pension provided it is not specifically laid down in the rules or otherwise ordered by competent authority and recorded accordingly in

the service book. Appendix XIIA is a set of comprehensive rules dealing with leave without allowance. It is part and parcel of the Kerala Service

Rules. Rule 110B of Part I KSR comes u/s XIB. It is provided in the Rules that "Rules for the grant of leave without allowances for taking up

employment abroad or within India are given in Appendix-XIIA". Therefore, there is no basis for the contention that Appendix XIIA is not part of

the Kerala Service Rules. Merely because it is given as an Appendix to the Rules, it does not cease to have the status and force of the Service

Rules. They are rules prescribed in detail in the Appendix and it has to be read along with Rule 110-B of Part I KSR. That is why Appendix XIIA

itself is captioned as "Rules for the Grant of Leave Without Allowances for Taking up Employment Abroad or Within India".

9. The Rules in Appendix XIIA are intended to regulate the grant of leave without allowances. Leave is not a matter of right and more so in the

case of those employees, who have not completed probation since long absence during the period of probation visits the employees with other

consequences as well. Therefore, while regulating the leave of employees who have not completed their probation, the Government has not taken

away any right of the probationers. In fact Rule 5 has only conferred a benefit on them, by way of a concession. By that concession only, they are

in a position to avail long leave without allowance while on probation. But the grant of leave is subject to rigorous conditions. Being a mere

concession, the Government is fully justified, apart from being well within its powers, in prescribing such conditions. The main condition is that if a

probationer takes leave, what is protected is only his right to re- entry in service as a new entrant. The former part of Rule 5 specifically provides

that such probationers availing leave without allowance will have to start afresh and complete the probation. The expression ""start afresh"" has been

explained in the latter portion with the expression ""in other words"". The expression ""in other words"" is intended to explain a position in different

words conveying the same sense. The explanation is intended to clarify any ambiguity in the sense and intention already expressed in different

words. True, such explanation cannot introduce a new notion and cannot carry a different sense and meaning. But the Legislature is competent to

explain the intention in different words so as to clarify the expressions otherwise used in the rule and that is the purpose of the expression ""in other

words"". In the instant case the expression ""start afresh"" has been explained that it is starting afresh in service for all purposes as if they are new

entrants and as if they are first appointed. It is further explained that what is protected is only the right to rejoin government service in the very same

entry grade as a new entrant. Therefore, when a probationer proceeds on leave and rejoins duty after the leave without allowance period, the

expression ""appointed to a service"" as appearing under Rule 2(1) of the Kerala State and Subordinate Service Rules has to be understood as

discharge of the duties attached to the post borne on the cadre for the first time when he comes back and joins duty. His service as a probationer

prior to the availing of leave without allowance has to be completely ignored since he is starting afresh in service. Yet another contention of Sri.

Sugathan is that what is forfeited is only the service benefit and not service. As rightly pointed out by Sri. Benny Gervasis, learned Senior

Government Pleader, pension is also a service benefit under the KSR. It is a benefit earned from the service. That is why in terms of what is earned

only the pension is computed u/s III "Amount of pension". True, pension is neither a bounty nor a matter of grace, depending upon the sweet will

of an employer and that it is not an ex gratia payment, as held by the Division Bench of this Court in Board of Revenue v. Parameswaran Nair

2000(1) KLT 227. But as the Bench itself has made it clear, it is a payment for the past service rendered by an employee. That past service is the

qualifying service. Part III of the KSR provides for the comprehensive set of rules for pension. Chapter I Section I Rule 1 provides that it is open

to the Government to prescribe that the service of any class of employees under them does not qualify for pension. Rule 1(a) reads as follows:

1.(a) The pension of all employees to whom these Service Rules apply are regulated by the rules in this Part;

Provided that it is open to Government to rule that the service of any class of employees serving under them does not qualify for pension.

Thus under Rule 110-B read with Appendix XIIA of Part I KSR Government has classified a group of employees, namely employees who are

probationers and who availed leave at that stage. They have been made ineligible to count their service prior to the leave without allowance period

to be counted as qualifying service for the purpose of pension. That is a prescription made in addition to Rule 29 of Part III KSR wherein the

forfeiture of past service pertains only to resignation, dismissal or removal from service. Such restriction is permissible under Rule 10 of Part III, by

prescribing conditions for the grant of leave. Rule 31 of Part III KSR also makes it clear that it is open to the Government to specifically lay down

the rules that certain interruptions do not count for pension. Under Rule 11 of Part III KSR the Government is competent to declare that any

specified kind of service rendered by any employee shall qualify for pension. Inferentially, even without a specific prescription the Government is

competent to declare that any specified kind of service is not liable to be counted as qualifying service for the purpose of pension. Therefore, a

conjoined reading of the various provisions referred to above as appearing under the Kerala State and Subordinate Service Rules and Kerala

Service Rules makes it clear that the service rendered by a probationer in regular service prior to the leave without allowance period will not count

for pension. For such a probationer his only right is to join service in the same entry grade as a new entrant, starting afresh in service, ignoring the

past service for all purposes. 10. As far as the factual matrix in the present case is concerned, there is yet another issue to be resolved as to what is

the impact of the leave without allowance availed by the probationer prior to Appendix XIIA. As we have already referred to above, that position

is settled in Noorudeenkutty's case (supra). Rule 10 of Appendix XIIA read with the Note provided thereunder and even without the Note also,

makes the position clear. Any leave availed prior to 16-12-1983 will be governed by the 1970 government order and nothing more and nothing

less. It is unambiguously provided under Rule 10 that Appendix XIIA applies only to the cases where grant of leave without allowance is on or

after 16-12-1983 whether it is in extension of leave or otherwise. Such an interpretation is required to do justice to the provisions of the Statute

and also to the petitioner. Pension is a social welfare measure, rendering socio economic justice to those who have rendered qualifying service to

the Government. While interpreting such a provision, as held by the Supreme Court in The Workmen of Firestone Tyre and Rubber Co. of India

(Pvt.) Ltd. Vs. The Management and Others, , the courts should adopt a beneficent rule of construction. To quote:

In construing the provision of a welfare legislation, courts should adopt beneficent rule of construction. As far as reasonably possible construction

furthering the policy and object of the Act and more beneficial to the employees has to be preferred, Act intended to improve and safeguard the

service conditions of an employee should be liberally interpreted according to its plain words and without doing violence to the language used by

the Legislature, bearing in mind the principles laid by the Supreme Court.

The order sanctioning leave without allowance after the introduction of Appendix XIIA in the case of the appellant is Ext.P6, which we have

already referred to above. The Government has ordered that the said leave for a period of five years with effect from 23-12-1986 had been

sanctioned in terms of Appendix XIIA. Therefore, in terms of the order sanctioning the leave, in terms of Rule 10 of Appendix XIIA, and applied

in the light of the principle which has otherwise been laid down in Noorudeenkutty"s case (supra), it is clear that the appellant is entitled to count

the leave without allowance period granted in terms of the 1970 Government Order, G.O(P) No. 274/70/Fin. dated 29-4-1970, prior to 16-12-

1983 as qualifying service. It has also to be noted that what is restricted in the 1970 Government Order is that the leave period will not count for

pension meaning thereby that the service rendered prior to the leave period or after the leave period will be counted as qualifying service for the

purpose of pension.

11. The learned single Judge, as can be seen from the judgment, has partially accepted the above contentions; however, refused to grant any relief

to the petitioner on the ground that once leave without allowance has been granted after the introduction of Appendix XIIA, that would take in its

sweep and take away the benefits also of the leave already granted in terms of 1970 government order. That stand cannot be legally sustained as

we have already explained above. Therefore, we set aside the judgment of the learned single Judge and allow the appeal in part. It is declared that

the appellant/petitioner shall be entitled to count the period of service rendered by him with effect from 1-3-1980 to 22-12-1981 as qualifying

service. He shall not be entitled to count the service between 1-2-1993 to 27-12-1993. The eligible benefits shall be worked out and disbursed to

the appellant/petitioner within a period of two months from the date of production of a copy of this judgment.