



2023/KER/64359

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

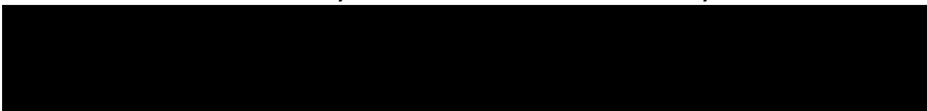
THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

THURSDAY, THE 19<sup>TH</sup> DAY OF OCTOBER 2023 / 27TH ASWINA, 1945

WP(C) NO. 35727 OF 2019

PETITIONER:

VIJU P VARGHESE  
AGED 53 YEARS  
OCIO ASSISTANT, EDP DIVISION, FINANCE DEPARTMENT,  
COCHIN PORT TRUST, WILLINGTON ISLAND, ERNAKULAM-682009,



BY ADVS.  
KALEESWARAM RAJ  
SRI.VARUN C.VIJAY  
KUM.A.ARUNA  
SMT.MAITREYI SACHIDANANDA HEGDE

RESPONDENTS:

- 1 THE COCHIN PORT TRUST  
REPRESENTED BY ITS CHAIRMAN, COCHIN PORT TRUST,  
WILLINGTON ISLAND, ERNAKULAM - 682 009
- 2 THE CHAIRMAN  
COCHIN PORT TRUST, WILLINGTON ISLAND,  
ERNAKULAM - 682 009
- 3 THE SECRETARY  
COCHIN PORT TRUST, WILLINGTON ISLAND,  
ERNAKULAM - 682 009
- 4 FINANCIAL ADVISOR AND CHIEF ACCOUNTS OFFICER  
COCHIN PORT TRUST, WILLINGTON ISLAND,  
ERNAKULAM - 682 009
- 5 SABU VARGHESE  
SENIOR OPERATOR CUM INPUT/OUTPUT ASSISTANT,  
EDP DIVISION, FINANCE DEPARTMENT, COCHIN PORT TRUST,  
WILLINGTON ISLAND, ERNAKULAM - 682 009  
BY ADVS.  
SMT.LATHA ANAND, SC, COCHIN PORT TRUST  
SRI.S.SHYAM  
SRI.SAJI VARGHESE KAKKATTUMATTATHIL  
SRI.VINAY KUMAR VARMA

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON  
19.07.2023, THE COURT ON 19.10.2023 DELIVERED THE FOLLOWING:



C.R

**ANU SIVARAMAN, J.**-----  
**W.P.(C) No. 35727 of 2019**  
-----**Dated this the 19<sup>th</sup> day of October, 2023****JUDGMENT**

Prayers in this Writ Petition are as follows :

“i. To issue a writ of certiorari quashing Exhibit P8 as unjust, arbitrary and unsustainable.

ii. To issue a writ of certiorari quashing Exhibit P7 to the extent to which it denies promotion to the petitioner as Senior OCIOA w.e.f. 01.12.2016 and promotes the 5<sup>th</sup> respondent as Senior OCIOA w.e.f. 01.12.2016.

iii. To declare that petitioner is entitled to be promoted to the post of Senior OCIOA w.e.f. 01.12.2016 in the retirement vacancy of Sri.P.A. Sasidharan and that he is entitled to be promoted to the post of programmer ahead of the 5<sup>th</sup> respondent.

iv. To issue a writ of mandamus directing the respondents 1, 2 and 3 to pass orders, promoting the petitioner to the post of Senior OCIOA w.e.f. 01.12.2016 and to promote him to the post of programmer reckoning his seniority in the post of Senior OCIOA.”

2. Heard learned counsel appearing for the petitioner, learned Standing Counsel appearing for respondents 1 to 4 and the learned counsel appearing for 5<sup>th</sup> respondent

3. It is submitted that the petitioner was appointed as Lower Division Clerk (for short 'LDC') in the 1<sup>st</sup> respondent on 19.02.1996 and



was promoted as Upper Division Clerk/Shed Clerk and thereafter as Operator cum Input/ Output Assistant (for short OCIOA). His appointment as OCIOA was on 30.12.1999 and he was included as Rank No.4 out of 13 candidates for promotion to the post of Senior OCIOA/Programmer. It is submitted that the 5<sup>th</sup> respondent who had lesser marks than the petitioner was included as rank No.12 in the list. By virtue of the Recruitment Rules as it stood in 2016, the post of Senior OCIOA is to be filled up by promotion from the post of OCIOA with two years regular service or from Accountant with three years regular service. The petitioner contends that the 5<sup>th</sup> respondent who was his immediate senior in the seniority list of OCIOA was punished for unauthorised absence from 01.05.2015 to 18.05.2015. By Ext.P3 order dated 08.02.2016, the period from 01.05.2015 to 18.05.2015 was treated as non-duty for all purposes other than pension. It is contended that due to treating of the said period of 18 days as non-duty, the 5<sup>th</sup> respondent became junior to the petitioner and it was the petitioner who ought to have been promoted as Senior OCIOA w.e.f. 01.12.2016. The petitioner therefore filed Exts.P5 and P6 representations which were rejected by Ext.P8. The 5<sup>th</sup> respondent was promoted as Senior OCIOA by Ext.P7 order dated 01.12.2016.



4. The learned counsel for the petitioner relies on the decisions of the Apex Court in **Ajith Singh & Ors. v. State of Punjab and others** [(1999) 7 SCC 209], **Sarabjit Singh v. Ex.Major B.D. Gupta and others** [(2000) 7 SCC 67] and **Major General H.M. Singh, VSM v. Union of India & Anr.** [(2014) 3 SCC 670] to contend that the right to be considered for promotion is a fundamental right. Relying on the decision of the Apex Court in **State of Punjab v. Dr.P.L. Singla** [2008(3) KHC 968], it is contended that when the period of unauthorised absence is found after conducting due disciplinary proceedings and the period is specifically treated as unauthorised absence and 'non-duty' for all purposes except pension, then, the period cannot be taken into account for any purposes except pension. It is submitted that this would include the treating of the period as 'non-duty' for the purpose of reckoning seniority as well and that therefore, the period would have to be ignored to consider the inter-se seniority of the incumbents. It is contended that the rejection of the petitioner's request by Ext.P8 is completely unsustainable.

5. A counter affidavit has been placed on record by respondents 1 to 4. It is contended in the counter affidavit that the 5<sup>th</sup> respondent was senior to the petitioner as evidenced by the orders of appointment and the seniority list which are produced along with the counter



affidavit. It is submitted that in all the seniority lists which were published periodically, the 5<sup>th</sup> respondent is shown as senior to the petitioner. It is submitted that Ext.R4(c) seniority list dated 05.12.2017 had also been prepared and circulated which showed the 5<sup>th</sup> respondent as being senior to the petitioner and that the same was also signed by the petitioner.

6. An additional affidavit is also placed on record stating that the punishment imposed against the 5<sup>th</sup> respondent by Ext.P3 was only 'censure' and that the said punishment would not stand in the way of consideration of the claim for promotion of the 5<sup>th</sup> respondent. Since the absence has been treated as unauthorised absence and 'non-duty' for all purposes other than pension and since the punishment imposed is not 'break in service' as assumed by the petitioner, the said period has to be considered for seniority of the 5<sup>th</sup> respondent.

7. Relying on the Rules on the subject and the Central Government directions issued, it is contended that unless the period of unauthorised absence is specifically treated as a break in service, the said period would be liable to be considered as duty for the purpose of seniority. It is submitted that it is only where there is a consideration of the claim for promotion by the DPC during the currency of a penalty that the promotion can be delayed and since, in the instant case, the



punishment imposed was only censure, the said punishment cannot be considered as an impediment to promotion. It is contended that the period which is liable to be reckoned for pension is to be taken into account for seniority as well.

8. The 5<sup>th</sup> respondent has also placed a counter affidavit on record stating that he entered service on 16.02.1996 as LDC earlier than the petitioner who joined on 19.02.1996 and since he has been considered as senior to the petitioner in all posts, he is entitled to be promoted in preference to the petitioner on the basis of his seniority cum suitability. It is submitted that the period of absence from 01.05.2015 to 18.05.2015 was ordered by the 4<sup>th</sup> respondent to be treated as non duty for all purposes except pension. However, since the period is treated as duty for pension and that there was no break in service under F.R. 17-A, the 5<sup>th</sup> respondent is entitled to treat that period as service for pension and seniority. It is stated that the 5<sup>th</sup> respondent was promoted as Senior OCIOA in December, 2016 and that the writ petition was filed only in December 2019, after a gap of three years. It is therefore contended that the writ petition is liable to be dismissed.

9. A reply affidavit has been filed by the petitioner to the counter affidavit filed by respondents 1 to 4 stating that the Fundamental Rules and the Supplementary Rules and the Central Civil Service



(Pension) Rules are applicable to the respondent-Port Trust. An Office Memorandum dated 28.03.2013 which contains relevant provisions of the Fundamental Rules and the Pension Rules is also produced in support of the contention that unauthorised absence on desertion of post shall be deemed to cause an interruption or break in service unless otherwise decided by the competent authority. In the instant case, it is contended that the period is directed to be treated as duty only for the purpose of pension and therefore it cannot be counted as duty for any other purpose including seniority.

10. On a consideration of the pleadings and arguments, it is clear that the parties are in agreement that the provisions of the Fundamental Rules and the Central Civil Services (Pension) Rules and the principles contained therein apply to the service in question.

11. F.R.9(6) of the Fundamental Rules and Supplementary Rules defines 'duty' as follows:

“(6) Duty- (a) Duty includes -

(i) service as a probationer or apprentice provided that such service is followed by confirmation; and

(ii) joining time.

(b) A Government servant may be treated as on duty-

(i) during a course of instruction or training in India, or



(ii) in the case of a student, stipendiary or otherwise, who is entitled to be appointed to the service of Government on passing through a course of training at a University, College or School in India, during the interval between the satisfactory completion of the course and his assumption of duties.”

‘Lien’ is defined in Rule 9(13) as under

“(13) Lien means the title of a Government servant to hold on regular basis, either immediately or on the termination of a period or periods of absence, a post, including a tenure post, to which he has been appointed on regular basis and on which he is not on probation:

Provided that the title to hold a regular post shall be subject to the condition that the juniormost person in the grade will be liable to be reverted to the lower grade if the number of persons so entitled is more than the posts available in that grade.”

F.R.13 provides as follows:

“F.R. 13. A Government servant who has acquired lien on a post retains the lien on that post;

- (a) while performing the duties of that post;
- (b) while on foreign service, or holding a temporary post, or officiating in another post;
- (c) during joining time on transfer to another post, unless he is transferred along with his title to a post on lower pay, in which case his lien is transferred to the new post from the date on which he is relieved of his duties in the earlier post;
- (d) while on leave; and
- (e) while under suspension.

Provided that no lien of a Government servant shall be retained:





- (i) Where a Government servant has proceeded on immediate absorption basis to a post or service outside his service/cadre/post in the Government from the date of absorption; and
- (ii) On foreign service/deputation beyond the maximum limit admissible under the orders of the Government issued from time to time.”

F.R.14-A further provides as follows:

“F.R. 14-A. (a) Except as provided in Rule 13 and Clause (d) of this rule, a Government servant's lien on a post may in no circumstances be terminated, if the result will be to leave him without a lien upon a regular post.

(b) Deleted.

(c) Deleted.

(d) A Government servant's lien on a post shall stand terminated on his acquiring a lien on another post (whether under the Central Government or State Government) outside the cadre on which he is borne.”

F.R.17-A of the Fundamental Rules and Supplementary Rules is as follows:

“F.R. 17-A. Without prejudice to the provisions of Rule 27 of the Central Civil Services (Pension) Rules, 1972, a period of an unauthorized absence—

(i) in the case of employees working in industrial establishments, during a strike which has been declared illegal under the provisions of the Industrial Disputes Act, 1947, or any other law for the time being in force;

(ii) in the case of other employees as a result of action in combination or in concerted manner, such as during a strike, without



any authority from, or valid reason to the satisfaction of the competent authority; and

(iii) in the case of an individual employee, remaining absent unauthorizedly or deserting the post,

shall be deemed to cause an interruption or break in the service of the employee, unless otherwise decided by the competent authority for the purpose of leave travel concession, quasi-permanency and eligibility for appearing in departmental examinations, for which a minimum period of continuous service is required.

EXPLANATION 1.— For purposes of this rule, “strike” includes a general, token, sympathetic or any similar strike, and also participation in a bandh or in similar activities.

EXPLANATION 2.— In this rule, the term "Competent Authority" means the "Appointing Authority".

Rule 27 of the CCS (Pension) Rules is as follows:

“27. Effect of interruption in service

(1) An interruption in the service of a Government servant entails forfeiture of his past service, except in the following cases:-

(a) authorised leave of absence;

(b) unauthorised absence in continuation of authorized leave of absence so long as the post of absentee is not filled substantively;

(c) suspension, where it is immediately followed by reinstatement, whether in the same or a different post, or where the Government servant dies or is permitted to retire or is retired on attaining the age of compulsory retirement while under suspension;

(d) transfer to non-qualifying service in an establishment under the control of the Government if such transfer has been ordered by a Competent Authority in the public interest;

(e) joining time while on transfer from one post to another.



(2) Notwithstanding anything contained in sub-rule (1), the Appointing Authority may, by order, commute retrospectively the periods of absence without leave as extraordinary leave. “

12. From a conjoint reading of the above provisions, the position which emerges is that there is a clear distinction between a person who holds a lein to a post and a person who is deemed to be on duty in the post. When a period of unauthorised absence is treated as ‘non-duty’ for all purposes except pension, the consequence would be that the period will not constitute a break in service for the purpose of pension and the officer will not lose his lein in the post. However, he cannot treat the period as duty for any other purpose including seniority.

13. This is more so in view of the decision of the Apex Court in **Dr.P.L. Singla** (cited supra) where the Apex Court specifically held as follows :

“8. Unauthorized absence (or overstaying leave), is an act of indiscipline. Whenever there is an unauthorised absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of the unauthorized absence in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct.

9. An employee who remains unauthorisedly absent for some period (or who overstays the period of leave), on reporting back to



duty, may apply for condonation of the absence by offering an explanation for such unauthorized absence and seek grant of leave for that period. If the employer is satisfied that there was sufficient cause or justification for the unauthorized absence (or the overstay after expiry of leave), the employer may condone the act of indiscipline and sanction leave post facto. If leave is so sanctioned and the unauthorized absence is condoned, it will not be open to the employer to thereafter initiate disciplinary proceedings in regard to the said misconduct unless it had, while sanctioning leave, reserved the right to take disciplinary action in regard to the act of indiscipline. We may note here that a request for condoning the absence may be favourably considered where the unauthorized absence is of a few days or a few months and the reason for absence is stated to be the sudden, serious illness or unexpected bereavement in the family. But long unauthorized absences are not usually condoned. In fact in Security services where discipline is of utmost importance, even a few of days overstay is viewed very seriously. Be that as it may.

10. Where the employee who is unauthorizedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorised absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence. Where the punishment is either dismissal or removal, it may not be necessary to pass any consequential orders relating to the period of unauthorized absence (unless the rules require otherwise). Where the punishment awarded for the unauthorized absence, does not result in severance of employment and the employee continues in service, it will be necessary to pass some



consequential order as to how the period of absence should be accounted for and dealt with in the service record. If the unauthorized absence remains unaccounted, it will result in break in service, thereby affecting the seniority, pension, pay etc., of the employee. Any consequential order directing how the period of absence should be accounted, is an accounting and administrative procedure, which does not affect or supersede the order imposing punishment.”

14. Ext.P3 order was passed on 08.02.2016 and it was found that the 5<sup>th</sup> respondent was unauthorisedly absent from 01.05.2015 to 18.05.2015 and penalty of censure was also imposed on the 5<sup>th</sup> respondent. Further, his absence for that period was found to be unauthorised and treated as **“non-duty for all purposes other than pension”**. Though the 5<sup>th</sup> respondent had filed W.P.(C) No.24867 of 2017, Ext.P3 order was not interfered with and the same has become final. The 5<sup>th</sup> respondent was only enabled to make representations against the cancellation of leave for an earlier period. Therefore, it is only after Ext.P3 order was rendered that the question of claim of seniority of the petitioner over the 5<sup>th</sup> respondent arose.

15. The petitioner as well as the 5<sup>th</sup> respondent were considered for promotion to the post of Senior OCIOA. When the 5<sup>th</sup> respondent was promoted to the post ignoring the petitioner’s claim, the petitioner had raised objections by filing representations as evidenced by Exts.P5 and



P6. Those representations were rejected by Ext.P8 dated 06.08.2019. It is thereupon that the petitioner has preferred the present writ petition. Therefore, the contention that the writ petition is belated or that the petitioner had not challenged the seniority list where the 5<sup>th</sup> respondent is admittedly shown as senior cannot be a reason to nonsuit the petitioner. The specific case of the petitioner is that, while considering the inter-se seniority between the petitioner and the 5<sup>th</sup> respondent, the specific contention of the petitioner that the period of unauthorised absence of the 5<sup>th</sup> respondent is liable to be ignored for reckoning seniority had not been considered by the respondents.

16. I notice that though the punishment imposed on the 5<sup>th</sup> respondent in Ext.P3 is only one of censure, there is a specific finding that the period from 01.05.2015 to 18.05.2015 was unauthorised absence and that the said period will be counted as duty only for the purpose of pension. Therefore, the only logical conclusion is that since the period is declared as unauthorised absence, the same will not be counted for any other purpose except as stated hereinabove. In the above view of the matter, I am of the opinion that the contention of the petitioner that the said period cannot be treated as duty for reckoning seniority is liable to be accepted in view of the fact that



Ext.P3 order has become final without any challenge being raised by the 5<sup>th</sup> respondent.

In the result, Ext.P8 is set aside. There will be a direction to the respondents to consider the claim of the petitioner for promotion to the post of Senior OCIOA in preference to the 5<sup>th</sup> respondent, treating the period of service of the 5<sup>th</sup> respondent from 01.05.2015 to 18.05.2015 as non-duty for the purpose of reckoning seniority. Appropriate orders shall be passed, revising the dates of promotion of the petitioner and 5<sup>th</sup> respondent as Senior OCIOA and refixing their seniority in the said post accordingly, within a period of two months from the date of receipt of a copy of this judgment.

This writ petition is ordered accordingly.

Sd/-

**ANU SIVARAMAN, JUDGE**

**APPENDIX OF WP(C) 35727/2019****PETITIONER'S EXHIBITS**

- EXHIBIT P1** A COPY OF THE RELEVANT PART OF THE PRE-AMENDED RECRUITMENT RULE FOR THE POST OF PROGRAMMER AS IT STOOD BEFORE 2016.
- EXHIBIT P2** A COPY OF THE RELEVANT PART OF THE RECRUITMENT RULE 2016 FOR THE POST OF PROGRAMMER.
- EXHIBIT P3** A COPY OF THE ORDER NO.FIN.DEPT/ADMN/A6/SV/2015 DATED 8.2.2016.
- EXHIBIT P4** A COPY OF THE JUDGMENT DATED 26.9.2018 IN W.P.(C) 24867/2017.
- EXHIBIT P5** A COPY OF THE REPRESENTATION DATED 30.1.2019
- EXHIBIT P6** A COPY OF THE REPRESENTATION DATED 12.6.2019
- EXHIBIT P7** A COPY OF THE ORDER NO.FIN.D/ADMN/A6/PROMOTION/2016 DATED 1.12.2016.
- EXHIBIT P8** A COPY OF THE LETTER DATED 6.8.2019 ISSUED BY THE FINANCE ADVISOR AND CHIEF ACCOUNTS OFFICER, COCHIN PORT TRUST.
- Exhibit P8(A)** TRUE COPY OF THE RELEVANT PORTION OF THE OFFICE MEMORANDUM DATED 28.03.2013 WHICH CONTAINS THE RELEVANT PROVISIONS OF THE FR AND THE RELEVANT PROVISIONS OF CCSP RULES 1972.
- Exhibit P9** TRUE COPY OF THE WRIT APPEAL MEMORANDUM (WITHOUT DOCUMENTS) FILED BY THE 5TH RESPONDENT.
- Exhibit P10** TRUE COPY OF THE RELEVANT PORTION OF THE SENIORITY LIST AS ON 01.09.2020.

**RESPONDENTS' EXHIBITS**

- Exhibit R4 (a)(1)** TRUE COPY OF RELEVANT PAGE OF SENIORITY LIST DATED 1/1/1999.
- Exhibit R4 (a)(2)** TRUE COPY OF OFFICE ORDER NO.A10/3661/99-S DATED 29/10/1999
- Exhibit R4 (b)** TRUE COPY OF SENIORITY LIST DATED 26/8/2015
- Exhibit R4 (c)** TRUE COPY OF SENIORITY LIST DATED 5/12/2017
- Exhibit R4 (d)** TRUE COPY OF THE PROCEEDINGS DATED 28/11/2016 OF THE DEPARTMENTAL PROMOTION COMMITTEE