
(2016) 03 KL CK 0084

In the High Court Of Kerala

Case No : O.P. (KAT) No. 120 of 2015 (Z) and O.P. (KAT) Nos. 123, 129, 144, 145, 157, 188 and 316 of 2015

Abdul Jawad M.F. and Others

APPELLANT

Vs

R. Raj Pradeep and Others

RESPONDENT

Date of Decision : 11-03-2016

Acts Referred:

Constitution of India, 1950 — Article 227, Article 32

Citation : (2016) 03 KL CK 0084

Hon'ble Judges : K. Surendra Mohan and S.P. Chaly, JJ.

Bench : Division Bench

Advocate : K.P. Satheesan, Sr. Adv., M.R. Jayaprasad, P. Mohandas, Anoop V. Nair, S. Vibheeshanan and N. Manu Thampi, Advocates, for the Appellant; K. Jaju Babu, Sr. Adv., M.U. Vijayalakshmi and Brijesh Mohan, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Chaly, J.—1. The captioned Original Petitions except O.P. No. 316 of 2015 are filed by the Respondents against the order of the Kerala Administrative Tribunal in T.A. No. 171 of 2013, O.A. No. 1375 of 2014, O.A. No. 1002 of 2014 and O.A. No. 735 of 2014, by which the Administrative Tribunal allowed the Original Applications and the seniority lists prepared to the post of Executive Officer Grade-I under the Panchayat Common Service Rules were set aside and directed the respective statutory authorities to re-cast the list after providing sufficient opportunity to the respective parties of being heard. O.P. No. 316 of 2015 is filed by the applicant in O.A. No. 735 of 2014 alleged to be against the partial relief granted by the Administrative Tribunal in accordance with the common order passed in the above Original Applications. The subject matter of the Original Petitions are relatively connected, which were disposed of by the Tribunal by a common order, and therefore we also propose to dispose of the same by this common judgment.

2. Narration of facts discernible from T.A. No. 171 of 2013 and O.A. No. 1002 of 2014 alone are required in order to dispose of the Original Petitions. Same was the method adopted by the Tribunal.

O.P.(KAT) Nos. 120 of 2015 & 145 of 2015

3. O.P.(KAT) No. 120 of 2015 is filed by additional Respondents 6 and 7 in T.A. No. 171 of 2013. Respondents 1 to 5 are the applicants 1 to 5 in the said T.A. O.P. (KAT) No. 145 of 2015 is filed by Respondents 1 and 2 in T.A. No. 171 of 2013. The T.A. was filed before this Court as W.P.(C) No. 28911 of 2010 and on constitution of the Tribunal, same was transferred and accordingly re-numbered.

4. Respondents 1 to 5 were originally appointed through Kerala Public Service Commission (K.P.S.C) as Executive Officers. Respondents 1 and 2 are working as Assistant Director of Panchayats and 3 to 5 are Panchayat Secretaries/Senior Superintendents. The service conditions of the Kerala Panchayat Subordinate Service are now governed by the Special Rules for the Kerala Panchayat Subordinate Service Rules, 1994 published on 16.06.1994 with retrospective effect from 01.01.1990.

5. The claim of Respondents 1 to 5 is that Upper Division Clerks were promoted in excess of their quota before the commencement of the Special Rules. Thereupon, it is contended that 97 Upper Division Clerks were promoted in excess of their quota prior to 01.01.1990. It is the contention of the Respondents 1 to 5 that these promotions shall be treated as provisional and those promotees shall not be given regularization on the basis of their dates of promotion. Respondents 1 to 5 challenged Government Order (Rt.) No. 2010/10/LSGD dated 17.06.2010, ordering regularization of 61 persons with effect from 01.01.1990. The challenge was based on the contention that originally the Travancore-Cochin Panchayat Raj Act, 1950 was governing the method of appointment and other service conditions of the Executive Officers of the Panchayat. As per Rule 3(2) of the said Rules, appointment to the post of Panchayat Executive Officers in the special grade shall be made by transfer from Extension Officers for Panchayat-cum-Panchayat Inspectors. The said Rule 3(2) was amended as per G.O.(Ms) No. 90/81/LA & SWD dated 23.05.1981. As per Annexure-A1 amended Rules, posts in the First Grade Executive Officers shall be filled up by promotion of the Second Grade Panchayat Executive Officers and by transfer of U.D. Clerks in the Panchayat Department in the ratio of 1:1. This practice was being followed by the Department from 1981 till 1994, the date on which the Special Rules came into force.

6. After the commencement of the Special Rules, the Director of Panchayats published the final seniority list of Executive Officers Grade-I as on 01.01.1990, by order dated 17.06.1997. The Respondents 1 to 5 were not included in the said seniority list on the pretext that they were not eligible for promotion as Executive Officer Grade-I prior to 01.01.1990. When the said seniority list was published, it was noticed that there was a deficiency of 36 Executive Officers Grade-I as on

31.12.1989. In order to fill up these 36 vacancies, 36 U.D. Clerks were recruited by transfer as Executive Officers Grade-I notionally with effect from 01.01.1990. This was done on the pretext that there were 36 vacancies in existence and qualified Executive Officers were not available to fill up the said vacancies so as to maintain the ratio of 1:1. The said appointment was made by order dated 16.02.1998 with retrospective effect, from 01.01.1990. The affected persons challenged the same by filing O.P. Nos. 8395 and 9355 of 1998 before this Court. Thereupon, judgment dated 10.01.2008 was rendered by a Division Bench of this Court and the following directions were issued:

"Going by the pleadings and materials in this Original Petition, we notice that the 2nd respondent does not specifically deny the allegation of the petitioners that the U.D. Clerks were promoted in excess of their quota. But, it is not clear how many of them were promoted in excess of the posts set apart for them. The claim of the 2nd respondent that there were vacancies and therefore, promotions were ordered and the petitioners being ineligible for promotion cannot challenge that, cannot be accepted. They have a legal right to say that the vacancies should not be filled up contrary to the Rules, so that their interest is safeguarded. In view of the above position, we feel that the Government should examine the correctness of the promotions ordered as per Ext. P15. The Government should ascertain as to how many persons among Executive Officer Grade-I in position as on 01.01.1990 were promotees from the cadre of Executive Officer Grade-II and how many came from the cadre of U.D. Clerk. If the U.D. Clerks were promoted in excess of the quota set apart for them, the excess promotees shall be treated as provisional promotees and they shall be removed from the seniority list of Executive Officer Grade-I as on 01.01.1990. Needless to say, they can be considered for promotion subsequently in accordance with the new Rules, according to their turn and seniority. Along with a copy of this judgment, the petitioners may move the Government by filing a representation. In that event the Government shall pass orders on the said representation, in the light of the observations made hereinabove in accordance with law within four months from the date of production of a copy of this judgment. The representatives of the petitioners and the beneficiaries of Ext. P15 shall also be given an opportunity of being heard before final orders are passed."

7. In compliance with the said directions, the Government issued Ext. P2 order dated 29.08.2008, whereby it was held that as on 01.01.1990 there were 97 excess promotees from the stream of U.D. Clerks. The Government after evaluating the pros and cons and the law involved in the subject matter in terms of the Travancore-Cochin Special Rules and the provisions of Part-II of Kerala State and Subordinate Services Rules (for short, K.S.&S.S.R) had issued the following directions:

"The Director of Panchayats is directed to treat the 97 excess U.D. Clerks promoted as Executive Officer Grade-I as provisional promotees who occupy the positions in between Sl. No. 999 to 1400 in the seniority list read as 1st paper

above and 36 U.D. Clerks promoted retrospectively as per order read as 2nd paper above and to remove them from their present position in the seniority list No. S.14788/93 dated 17.06.1997 and E8-28176/97 dated 16.02.1998 and to assign the rank and seniority in the above positions in the seniority list to the Executive Officer Grade-I based on their eligibility for promotion. The promotions of the 97 excess U.D. Clerks should be considered in accordance with the Kerala Panchayat Subordinate Service Rules, 1994 according to their turn and seniority".

8. While matters being so, third parties filed Review Petition No. 1122 of 2008 against Ext. P1 judgment and the same was disposed of by this Court by Ext. P3 order dated 30.01.2009. In the review order, it was clarified that if the Government are exceeding the direction of the judgment under review, to review the promotions covered by Ext. P15 impugned order and the review petitioners are aggrieved by that, they will be free to challenge the action taken by the Government in this regard in appropriate proceedings.

9. In compliance with Ext. P2 order passed by the Government, the Director of Panchayats issued Ext. P4 draft seniority list on 01.12.2009. While the matters being so, the judgment of the Division Bench of this Court interfering with the new Special Rules issued in 1994 with retrospective effect from 01.01.1990 was modified by the Apex Court as per Ext. P5 order and thereby the retrospectivity given by the Special Rules became the subject matter of the Civil Appeal before the Supreme Court. To put it more elaborately, in the High Court, the learned Single Judge upheld the retrospectivity but a Division Bench of the High Court found fault with the retrospectivity given to the Rules and issued certain directions interfering with the decision of the learned Single Judge. The Apex Court upheld the retrospectivity given to the Rules, but clarified that same will not affect the persons who were regularly promoted between 01.01.1990 and 20.10.1993 in accordance with law and the relevant rules then in force. It was further directed that the provisional promotees promoted during the said period need not be reverted, but they are not eligible for other benefits.

10. In the light of the order of the Apex Court, the Government issued Ext. P7 order dated 17.06.2010, by which out of 97 excess promotees covered by Ext. P2, 61 persons provisionally promoted prior to 01.01.1990 were entitled to continue in the said posts provisionally by virtue of the order of the Apex Court. But the Government went beyond that and ordered that the promotions shall be treated as regular with effect from 01.01.1990. The clear and categorical finding in Ext. P2 that there were 97 excess promotees from U.D. Clerks stream was modified without any grounds in Ext. P7, is the contention advanced by Respondents 1 to 5. Challenging Ext. P7, the writ petition pertaining to T.A. No. 171 of 2013 was filed before this Court. Thereafter, the Director of Panchayats issued Ext. P10 proceedings dated 09.11.2010, finalizing the list of employees in the Panchayat Department as on 01.01.1990 in accordance with the Special Rules which remained in force up to 01.01.1990. It is the contention of Respondents 1 to 5 that since Ext. P10 being a dependent proceeding pursuant

to Ext. P7, the same is liable to be interfered with and accordingly the writ petition was amended. According to the party Respondents, even assuming that Ext. P7 is correct, still certain ineligible persons have been assigned seniority over them in Ext. P10 order. According to the party Respondents, by issuing Ext. P10, the 2nd Respondent has virtually bypassed the directions of this Court in Ext. P1 judgment. It is the further contention that pursuant to Ext. P1, Ext. P2 order was issued by the 1st Respondent directing to treat 97 U.D. Clerks promoted as Executive Officers Grade-I as provisional promotees, and also to remove them from their present position in the seniority list and to assign rank and seniority in the post of Executive Officers Grade-I based on their eligibility for promotion.

11. The Government by Ext. P3(a) order, directed implementation of Ext. P2 as such, based on which Ext. P4 draft seniority list of Executive Officers Grade-I was published, contends the party Respondents. Later, Ext. P4 was cancelled as per Ext. P6 which is challenged in W.P.(C) No. 13850 of 2010. By Ext. P7, the Government ordered that removal from Ext. P2 list should be limited to 36 and balance 61 should not be removed. It is the further contention that while publishing Ext. P10, even persons among 36 were placed above the Respondents 1 to 5. The party Respondents have demonstrated in the O.A. the manner in which the ineligible persons were given seniority above the party Respondents as well as other eligible persons. Therefore, they contended that Ext. P10 is the outcome of total non-application of mind and advertence to the relevant Rules under the Special Rules as well as the provisions of K.S.&S.S.R and therefore the party Respondents herein sought interference with Ext. P7 and Ext. P10 consequential orders.

12. The Respondents filed reply affidavits in support of the impugned proceedings and contended that the orders under challenge are passed by the Government and the respective statutory authority in accordance with law and therefore no interference with the same was warranted.

13. After evaluating the entire facts and circumstances and the attendant provisions of the Special Rules as well as the provisions of K.S.&S.S.R, the Tribunal entered into a finding that as per Ext. P2 order dated 29.08.2008, the Government have found that there were 97 excess promotees to the cadre of Executive Officer Grade-I as on 01.01.1990 and the said finding was entered based on the number of vacancies available and the application of the ratio of 1:1 for promotion to the post of Executive Officer Grade-I between U.D. Clerks and Executive Officer Grade-II correctly. It was further found by the Tribunal that in the said order, the seniority list of Executive Officers Grade-I (No.S.14788/93 dated 17.06.1997), 1400 officers were included and up to Sl. No. 998 were promoted prior to 31.12.1989 and further that there were 402 officers, in between Sl. No. 999 to 1400. Sl. Nos. 1056, 1128, 1134 were retired from service prior to 31.12.1989. So, the balance number were 399 (402-3=399) and 36 persons promoted retrospectively prior to 31.12.1989 as per order No.

E8-28176/97 dated 16.2.1998. Thus, the total strength of Executive Officers Grade-I as on 01.01.1990 were 435 and out of them, 315 persons promoted from U.D. Clerks and 120 from the Executive Officer Grade-II. It was further held, in Ext. P2 based on the then existing ratio, 1:1 for promotion to Executive Officer Grade-I from among U.D. Clerks and Executive Officer Grade-II, out of the total 435 posts, 217 have to be set apart towards the promotion post of Executive Officer Grade-II, but only 120 were seen promoted from Executive Officer Grade-II for the posts earmarked for them and therefore in order to attain the ratio of 1:1, 97 Executive Officers Grade-II had to be promoted. In the above circumstances, 97 officers were found to be promoted in excess from the U.D. Clerk cadre and finding was rendered that they have to be removed from the seniority list in order to maintain the ratio.

14. It is also found by the Tribunal that it was based on the above finding in Ext. P2, the Director of Panchayats was directed to remove 97 excess U.D. Clerks promoted as Executive Officers Grade-I provisionally, from the seniority list of Executive Officers published on 17.06.1997.

15. It was also found by the Tribunal that even though in Ext. P1 judgment this Court dealt with 36 cases of excess promotees, the principles stated therein will apply to all excess promotees and that apart, it was found that though 61 excess promotees were not parties to the said judgment, the principle laid down therein will bind them as a precedent. So, there is no reason not to apply the principle laid down in Ext. P1 to the 61 excess promotees also. Therefore, it was held that the protection given to the 61 provisional promotees in Ext. P7 is untenable.

16. That apart, it was also found that the decision of the Apex Court in Ext. P5 judgment will in no way come to the rescue of the said 61 excess promotees as they were only provisional promotees and they can continue only provisionally in the cadre of Executive Officer Grade-I by virtue of the said judgment, and in other words, they were not entitled to have a place in the seniority list of Executive Officer Grade-I as on 01.01.1990.

17. Thereupon, the Tribunal held that if any provisional promotees among U.D. Clerks were eligible for regular promotion in accordance with the old Rules before 20.10.1993, the Government can grant the same to them, so that they can enjoy the benefit of the order of the Apex Court. By holding so, the Tribunal quashed Ext. P7 order passed by the State Government dated 17.06.2010 and the consequential Ext. P10 order passed by the Director of Panchayats dated 09.11.2010. It is thus aggrieved by the order of the Tribunal, O.P. No. 120 of 2015 is filed by the party Respondents 6 and 7 in the Original Application and the State Government O.P. No. 145 of 2015.

O.P.(KAT) Nos. 129, 144 & 188 of 2015

18. The above Original Petitions are filed against O.A. No. 1002 of 2014 by the party Respondents as well as the State Government.

19. The material facts in these cases are similar to O.P. (KAT) No. 120 of 2015. The 1st Respondent herein was the first applicant in T.A. No. 171 of 2013 also and the Original Application was for all practical purposes and material aspects, a continuation of T.A. No. 171 of 2013. So narration of the common facts is not endeavoured by us and the relevant material facts distinguishable from the facts in O.P.(KAT) No. 120 of 2015 alone are referred to hereunder.

20. Aggrieved by Annexure-A3 seniority list, which is corresponding to Ext. P10 in O.P.(KAT) No. 120 of 2015, the petitioner herein/12th Respondent filed appeal under Rule 27(b) of Part-II of K.S.&S.S.R. The petitioner joined the Panchayat Department as L.D. Clerk on 19.06.1986. He was promoted on 03.04.1989 as U.D. Clerk and thereafter promoted as Head Clerk on 04.03.1998. Later he was promoted as Secretary, Grama Panchayat on 13.08.2001 and as Junior Superintendent on 06.02.2003 and thereafter as Special Grade Secretary on 03.07.2007. The sequence of promotion so stated, was disputed by the petitioner. While the appeal under Rule 27(b) was pending, petitioner filed W.P. (C) No. 19470 of 2012 before this Court and secured a direction to the Government to consider and pass orders on the appeal preferred by the petitioner. In compliance with the said direction issued by this Court, Government issued Annexure-A10 order. By the said order, the 97 excess promotees from the stream of U.D. Clerks of the Panchayat Department were ordered to be treated as regular. It was pointed out by the 1st Respondent herein before the Tribunal that Annexure-A10 order was issued based on Annexure-A11 order of the Government dated 19.07.2012. The 1st Respondent also contended that Annexure-A11 order was passed without hearing anyone of the affected parties and behind the back of all concerned and therefore contended that Annexure-A11 was passed absolutely in violation of the principles of natural justice, and further contending that Annexure-A10, which is a dependent order of Annexure-A11 order, cannot be sustained in any manner.

21. Anyhow, as per Annexure-A11 order, the 61 excess promotees to the cadre of Executive Officer Grade-I before 01.01.1990 were treated as regular promotees with effect from the respective dates of provisional promotion granted to them. Therefore, the party Respondents herein contended that the regularization of promotion of 61 excess promotees provided under Annexure-A11 and Annexure-A10 was plainly arbitrary and unauthorized vis-?-vis the Special Rules and therefore sought to quash Annexure-A11 and Annexure-A10. The State Government has filed a reply contending that the action taken by the Government pursuant to Annexure-A11 and Annexure-A10 are purely legal and the same did not suffer from any illegality or irrationality warranting interference of the Tribunal. The thrust of the contention advanced by the Government was that the post of Executive Officer Grade-I was the promotion post of Executive Officer Grade-II and U.D. Clerk in the ratio of 1:1 and the promotion depends upon passing obligatory departmental tests and declaration of probation. The vacancies which arose in the cadre of Executive Officer Grade-I cannot be kept vacant for long period. Hence, when vacancies arose even if qualified hands were

not available at a time, proportionate appointment by promotion from both the cadre was made. It was also contended that the contention raised by the party Respondents herein that the request for reviewing Annexure-A7 order dated 17.06.2010 was turned down by the Government as per Annexure-A12 dated 15.03.2011, cannot be sustained since the same being baseless. It was further contended that the Government issued Annexure-A12 order stating that the action taken by the Government to remove 36 persons who were given notional promotion to the post of Executive Officer Grade-I prior to 01.01.1990, from the seniority list of Executive Officer Grade-II as on 01.01.1990 was in the right direction. It was also contended that Annexure-A10 order was issued on the basis of appeal filed by D. Rajan that the seniority or gradation list with effect from 01.01.1990 was issued without granting the protection of promotion as envisaged by the Apex Court. It is also the case of the Government that the request of D. Rajan for restoration of seniority to him by ensuring protection of promotion as per the relevant Rules, allowed by the Apex Court has no connection with Annexure-A12 Government Order and in those circumstances, it was contended that the case of the party Respondents that Government have examined the request for regularization of promotion from 01.01.1990 to 20.10.1993 was turned down by the Government Order, Annexure-A12, is absolutely baseless.

22. It was also contended that prior to 20.06.1978, promotion to the post of Executive Officer Grade-I was made from Executive Officer Grade-II alone. The Government as per notification G.O.(Ms) No. 90/81/LA&SWD dated 23.05.1981 amended the Travancore-Cochin Rules. By the said amendment, posts in the grade of Executive Officer Grade-I were being filled up by promotion of the second Grade Panchayat Executive Officer and by transfer of U.D. Clerks in the ratio of 1:1. From the explanatory note of the said order, it is clear that the persons who are promoted to the post of U.D. Clerks after 20.06.1978 and the senior U.D. Clerks who were in service prior to 20.06.1978 and who opted to be posted temporarily as First Grade Executive Officers retaining their claim for promotion to the cadre of Panchayat Inspectors would be promoted as First Grade Executive Officers in the above ratio of 1:1. Hence, the finding of the Government in Annexure-A10 order was in tune with the provisions of the then existing Travancore-Cochin Rules. Therefore, it was contended that no seniority list has ever been published based on Annexure-A7, as alleged by the applicants. It was also contended that the Government had not in any way disturbed the conclusions in Annexure-A7 while issuing Annexure-A10.

23. The 5th Respondent herein, (3rd Respondent in the O.A.) has filed a reply supporting Annexures-A10 and A11 and other consequential proceedings and contended inter alia that all the provisional promotions made from the U.D. Clerks of the Panchayat Department were treated as regular when the Panchayat Director issued Annexure-R3(a) seniority list on 17.06.1997 and the notional promotions granted thereunder were never challenged by anyone. Other party Respondents have also filed reply statements supporting the impugned

proceedings and some of them contended that the Government took a policy decision to merge the Panchayat Department and employees in the Panchayat Common Service and issued an executive order dated 03.02.1987 and thereupon all promotions were being carried out under the proviso thereto, for filling up the 60% promotion quota and there will be an internal ratio of 9:1 between Head Clerks of Panchayats and Head Clerks of Panchayat Department. The petitioner herein has also filed reply statement with similar contentions and particularly contending that as per Annexure-A5 order, Government wrongly found that 97 excess U.D. Clerks were promoted as Executive Officer Grade-I including the above said 36 persons shown in Ext. P15. It was also contended that the direction issued by the Government to remove their names from the seniority list and the promotion of these 97 persons shall be considered in accordance with Kerala Panchayat Subordinate Service Rules were beyond the directions issued by this Court in Annexure-A4 judgment and the order in the Review Petition thereunder.

24. Based on the judgment of the Division Bench of this Court, several other contentions were raised by the petitioner and other party Respondents. It was also contended that Annexure-A11 order passed as early as on 19.07.2012 was not challenged by anyone and it was for the first time that the said order was challenged in the Original Application. It was the further contention of the petitioner that Annexure-A7 Government Order was assailed by Kerala Panchayat Secretaries Association by filing representation to the Government and the main grievance voiced by them was that the 61 persons were promoted as per the Travancore-Cochin Rules, but they were ordered to be regularized by Annexure-A7 following the Kerala Panchayat Subordinate Service Rules with effect from 01.01.1990. It was the further contention that actually the promotions were made prior to 01.01.1990 based on the vacancies then in existence and following the ratio of 1:1 as per the Travancore-Cochin Rules and hence the direction to regularize the service of these 61 persons following the Kerala Panchayat Subordinate Service Rules was a patent anomaly and thus understanding the correct rule position only the Government has reviewed Annexure-A7 Government Order after obtaining report from the Director of Panchayats. It was also contended that the Director of Panchayats has reiterated to the Government that promotion to the post of Executive Officer Grade-I is on the ratio of 1:1 equally from Executive Officers Grade-II and U.D. Clerks of Panchayat Department and the promotions were made on rotation basis and not on quota basis and rotation basis was followed from 1981 till 16.06.1994 and based on the said contention advanced, it is the contention of the petitioner that the promotion given to 61 U.D. Clerks as Executive Officers Grade-I prior to 01.01.1990 is regular and should be given effect from the date of promotion as the same was done in conformity with Travancore-Cochin Rules which were in force then. Yet again a distinguished contention was raised by the petitioner that, the promotions were ordered up to 16.06.1994 following the rotation and without following the quota. Therefore, it was contended that the fixation of cadre

strength came into existence by introducing Note (3) under Rule 5 of Part-II K.S.&S.S.R. Hence, the quota cannot be followed based on the cadre strength up to 16.06.1994.

25. That apart, it was contended by the petitioner that the Director of Panchayats during April 2010 issued a draft seniority/gradation list of all categories from U.D. Clerk to Special Grade Secretaries on the basis of the order of the Apex Court. Objections were called for and after considering all the objections, the Director of Panchayats finalized the seniority list by order dated 24.11.2010 and in the said seniority list those who were promoted as Junior Superintendents and Special Grade Secretaries from 01.01.1990 to 16.06.1994 were protected as per the direction of the Apex Court. That apart, it was contended that in the case of Executive Officers Grade-I (Secretary, Grama Panchayat), Head Clerks and U.D. Clerks who were promoted during the above period, the protection was not granted even though they were eligible for protection as per the judgment of the Apex Court. It is also the contention of the petitioner that the reasons stated by the Director was that the promotion of 61 U.D. Clerks were not eligible for protection and as against this seniority list of 24.11.2010, large number of appeals were received by the Government including appeals under Rule 27(b). On the basis of these appeals, Government issued Annexure-A10 order dated 19.05.2014, which is the subject matter of challenge in the Original Application.

26. Taking into account the rival contentions raised by the parties, the Tribunal has found that the question for consideration was with regard to the filling up of the vacancies in the cadre of Executive Officer Grade-I from the two streams, namely U.D. Clerks of the Panchayat Department and Executive Officers Grade-II of the Panchayat Common Service before 01.01.1990 in the ratio of 1:1 as on the date of occurrence of vacancy. Thereupon, the Tribunal found that, up to 01.01.1990, the vacancies will have to be filled up by the Travancore-Cochin Rules and thereafter in accordance with Annexure-A1 Special Rules. It was also held by the Tribunal that appointment means appointment on a regular basis in accordance with the Rules. That apart, the Tribunal found that provisional promotees can only claim salary of the post and they cannot make preferential claim for regular promotion based on the provisional promotions made, which was one of the fundamental principles of Service jurisprudence. It was also held that even if a person is provisionally promoted and later if he is found eligible for regular promotion from an anterior date or from the date of provisional promotion, orders can be passed in such cases accordingly. It was also found by the Tribunal that it is undisputed that the promotions up to 01.01.1990 have to be regulated in the light of the Special Rules then in force viz. Travancore-Cochin Rules framed by the Government under Section 24(3) of the Travancore-Cochin Panchayats Act, 1950, read with Sections 97 and 98 thereof. The method of appointment to the post of Executive Officer Grade-I was by promotion of Second Grade Panchayat Executive Officers and by transfer of the U.D. Clerks of the Panchayat Department in the ratio of 1:1 and for the purpose of promotion, the persons in the feeder category should be approved probationers and should also

clear the prescribed tests. It was also held that Rule 12 of the Special Rules provides that where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post in the First Grade Executive Officer by promotion from the Second Grade Executive Officer and there would be undue delay in making such promotion in accordance with the Rules, the Director may with the approval of the Government, promote a member of the service, otherwise than in accordance with the Rules, temporarily until a person is promoted in accordance with the Rules. It was also found that a person so promoted temporarily shall be replaced as soon as possible by a member of the service who is entitled to promotion under the Rules. That apart, the Tribunal held that since the issuance of the Special Rules dated 16.06.1994, which was published in the Gazette on 21.06.1994, all promotions were made in accordance with the provisions thereof and as per the said Rules, the post of Executive Officer/Secretary (Grama Panchayat) is category No. 3. The method of appointment is by promotion from the Head Clerks and by direct recruitment in the ratio of 6:4. The Tribunal has also discussed the ratio provided under the proviso to Rule 3 and has arrived at definite findings on the said aspect also.

27. Taking into account Annexure-A4 judgment of this Court, it was held that the claim for regularization of 61 persons covered by Annexure-A11 has to be decided in the light of the principles stated by a Division Bench of this Court, that is as per the Travancore-Cochin Rules then in force and with reference to the date of occurrence of vacancies. It was also found that when the Rules were very much alive, the promotions or regularization of promotions in violation of the Rules cannot be ordered based on sympathy or on extraneous grounds. Therefore, the Tribunal found that the accelerated promotions given overlooking the Rules in vogue was in absolute violation of the Rule of law prevailing. It was also held that the order of the Apex Court concerns only with the promotions made from 01.01.1990 to 23.10.1993 on which date the State Government approved new Rules, Annexure-A1, which was published in the Gazette on 21.06.1994. The Tribunal has also formulated the principles laid down by the Apex Court and has streamlined the same in the following manner:

"(1) All regular promotees during the period of retrospectivity will not be affected by the amendment; and

(2) Temporary promotees during the said period will not get any benefit, except retention as provisional promotees."

28. It was also held that it is the common ground that after the State Government issued order dated 03.02.1987, nobody in the Panchayat Department was promoted regularly and all promotions were made provisional. The Tribunal also held that though the second part of the direction is intended to those promotees after 01.01.1990, the same will also apply to the provisional promotions made earlier, the beneficiaries of which happened to be remain as provisional employees as on 01.01.1990 and it was also held that obviously the earlier promotees will be seniors when compared to the persons provisionally

promoted subsequently and if juniors are entitled to continue as provisional promotees, such benefits cannot be denied to the earlier provisional promotees.

29. The Tribunal has also found that by Annexure-A11 order, the Government ordered regularization of promotions of 61 U.D. Clerks to the cadre of First Grade Executive Officer with effect from the date of their provisional promotions and going by the Travancore-Cochin Rules, which were in force before 01.01.1990, the U.D. Clerks could not have been promoted unless they came within the 50% quota set apart for them from the Panchayat Department. It was also found that the official Respondents as per its earlier order concluded that, there were altogether 97 excess promotees as on 01.01.1990 and out of them, 61 persons were already promoted before 01.01.1990, and 36 persons long after the commencement of the new Rules, were notionally promoted on 16.02.1998 that the promotees other than 97 excess promotees from U.D. Clerks alone could find a place in the post of Executive Officer Grade-I as on 01.01.1990, going by 1:1 ratio which can be applied with reference to the cadre strength. Therefore, the Tribunal held that without reference to the cadre strength and the vacancies available, the omnibus regularization of promotion given to 61 U.D. Clerks under Annexure-A11 made with effect from their dates of provisional promotion was unsustainable and accordingly the same was quashed. It was found that the consequential order Annexure-A10 pursuant to Annexure-A11 order has been issued forgetting the basic principle that claim of an incumbent for promotion has to be considered with reference to the date of occurrence of the vacancy in the light of the relevant Rules then in force. That apart, it was found that as per the order of the Apex Court, nobody was entitled to get protection as a regular hand since nobody was promoted on a regular basis between 1990 and 1993. Therefore, the Tribunal held that Annexure-A10 was issued without any reference to the legal principles governing promotion and consequential assignment of seniority and therefore Annexure-A10 was also quashed. The Tribunal also refused to accept the contention of the party Respondents that in view of the seniority list dated 17.06.1997, they were regularized and have become final and thereupon held that such promotions stood cancelled by Annexure-A5 order dated 29.08.2008. The Tribunal has also protected the provisional promotees from the Panchayat Department stream by holding that their claim for regular promotion if they were eligible on a regular basis shall be provided and necessary directions were thereupon issued by the Tribunal with respect to the manner of appreciation of the old Rules and the new Special Rules by taking into account the respective dates 01.01.1990 and 20.10.1993, which thus means, the old Rules guide the field till the new Special Rules were introduced. Based on the said findings, the Tribunal has directed the State Government to take a decision with regard to the respective claims of the parties after affording an opportunity of being heard to the applicants in the Original Applications as well as the respective affected persons and all concerned within a period of three months from the date of order and further directed to draw and publish a fresh seniority list of Executive Officers Grade-I as on 01.01.1990. The seniority list published

pursuant to Annexure-A11 and Annexure-A10 were held to be dependent proceedings and they were directed to be modified in the light of the new promotion list drawn up assigning correct date of promotion to the promotees, if any, from the Panchayat Department. It is the said order of the Tribunal that is challenged in the captioned Original Petitions supra.

30. Heard learned counsel for the petitioners, Advocates Dr. K.P. Satheesan, Sri. Elvin Peter P.J., Special Government Pleader, Sri. T.T. Muhamood, Sri. Benny Gervacis and others. We also heard learned counsel for the Respondents, Senior Advocate Sri. K. Jaju Babu, Sri. V.A. Muhammed and Sri. Pauly Mathew Muricken for the intervenors and perused the entire records.

31. The main contention advanced by learned counsel appearing for the petitioners are based on "sit back theory". It is the contention of the learned counsel that 61 excess promotees found out by the Government from the total 97 persons as per its order dated 29.08.2008, except 5, all others have retired and therefore no effective purpose will be served by re-casting the list prior to 01.01.1990 since they were all promoted prior to the said date. That apart, it is also contended that the Apex Court vide its judgment has only taken care of the promotions which were effected between the period 1990 and 1993 and therefore there was no occasion for the Tribunal to have interfered with the impugned orders by disturbing the promotions made prior to 01.01.1990. It is also the contention of the petitioners that the new Special Rules was brought into force with effect from 01.01.1990 and therefore the ratio of 1:1 prescribed thereunder can be taken into account for and with effect from the said date only. It is also the specific contention of the petitioner in O.P.(KAT) No. 129 of 2015 that the cadre strength was brought into force only with effect from 1994 and therefore the promotions could not be made on the basis of the cadre strength prior to the same. That apart, it is the common contention of all the petitioners that the 61 persons found to be ineligible were all promoted successively to various posts and their probations were declared thereunder and therefore the Tribunal was not right in setting aside the impugned orders of the seniority list prepared thereunder. It is also contended that by doing so, the Tribunal has fallen into grave error and has rendered gross injustice by disturbing the list prepared. It is also the contention of the petitioners that the promotions made from the department stream was regular in nature and therefore there is no justification in holding that the appointments were provisional. It is also contended that the appointments and promotions were made to the regular posts and therefore it can never be heard to say that they were provisional. Apart from that, it is the common contention that even if assuming that the promotions given to 61 Executive Officers Grade-I prior to 31.12.1989 was provisional, still they were given regular promotion to the higher categories viz. Junior Superintendent and Special Grade Secretaries. The probation of the said officers were also declared in the higher category and they were included in the final seniority list in each category. Therefore, it was unjustifiable on the part of the Tribunal to upset the promotions after 26 years. In that context, it is

contended by the petitioners that the theory of sit back applies since they were remaining in their respective posts of promotion without being disturbed and therefore as laid down by the Apex Court in its various judgments regarding the sit back theory, the Tribunal should not have disturbed the promotions effected to the 61 employees.

32. That apart, it is contended that the orders promoting the petitioners to the higher categories of Junior Superintendent and Special Grade Secretaries have not been challenged by anyone till date. That being so, the Tribunal was not right in upsetting the appointment made to the posts of Executive Officers Grade-I without making any challenge by any of the party Respondents to the promotions made. It is also contended that the party Respondents have not challenged the basic order giving promotion to the 61 Executive Officers Grade-I also and therefore the Tribunal has committed gross injustice to the said employees, those of whom are retired long back, except a few. It is also contended that one of the petitioners by misleading the Government challenged the promotions given to 129 Executive Officers Grade-I and the Government travelling beyond the scope of the directions issued by this Court in one of its judgments declared that the promotions given to 97 Executive Officers Grade-I, which included the 61 Executive Officers Grade-I was provisional. When the Government realised the mistake, corrected the same by issuing Annexures-A11 and A10 orders and it was the said orders only that were challenged by Respondents before the Tribunal.

33. The Government in its Original Petitions have contended that the 61 U.D. Clerks were granted promotion as Executive Officers Grade-I prior to 31.12.1989 and at the time of promoting them or even on 01.01.1990 there were no qualified hands available in the category of Executive Officer Grade-II to be promoted as Executive Officer Grade-I against the aforementioned vacancies. It is also contended that until the Special Rules were brought into force on 16.06.1994, the vacancies were being filled up in the ratio of 1:1 as and when each vacancy arose and therefore there is nothing illegal in promoting the qualified and eligible U.D. Clerks to the existing vacancies since there were no qualified Executive Officers Grade-II. It is the further contention of the Government that consequent to the setting aside of the seniority list by the Tribunal, it has become practically impossible to revise the seniority list after long years and therefore the same will create administrative deadlock in the department for long years. That apart, it is contended that the review of the seniority list of Executive Officers Grade-I as on 01.01.1990 as found by the Tribunal, will lead to review of seniority list of Junior Superintendent/Panchayat Inspectors and Special Grade Executive Officers as on 01.01.1990. That apart, learned Special Government Pleader has contended that except 7 persons, all have retired from service and no purpose will be served by re-casting the list as directed by the Tribunal. It is also the contention of the Government that the promotions even though named as provisional, were made against regular vacancies and therefore it cannot be termed as excess promotion. It is also

contended that the Tribunal in fact has overlooked the directives of the Apex Court in which it was held that the promotions made from 01.01.1990 to 23.10.1993 were not correct.

34. It is also the common contention of the petitioners that the finding of the Tribunal that the Apex Court protected the promotions made from 01.01.1990 to 23.10.1993 is not correct since the Special Rules were published only on 16.06.1994 and given retrospective effect from 01.01.1990, and that is why the Apex Court ordered that the provisional promotions that were made during the period from 01.01.1990 to 23.10.1993 cannot be regularized even though they were not liable to be reverted. It is also contended that the reasoning given by the Tribunal that the direction of the Apex court is of no avail to anybody is incorrect and the second part of the direction is intended to those promotees after 01.01.1990. It is also contended that it was not legal on the part of the Tribunal to have held that the promotions were made without reference to the cadre strength and the omnibus promotions given to 61 U.D. Clerks with effect from the date of promotion is unsustainable. It is also contended that the Tribunal failed to note that 61 U.D. Clerks were promoted prior to 01.01.1990 based on the ratio of 1:1 depending upon the number of vacancies that arose from time to time. It is also contended that from 1981 to 2004, the question of cadre strength was not considered.

35. Per contra, learned counsel for the party Respondents contended that since a ratio was fixed in the proportion of 1:1, even if there are no qualified hands and any promotions are made from the department candidates, same can only be treated as provisional to meet the exigencies of service. Therefore, whenever there is qualified hand to be promoted from the post of Executive Officer Grade-II, it was incumbent upon the Government to effect promotion by removing the provisional hands already promoted from the department stream to the quota earmarked to the Panchayat stream. It is also contended that the Government have in categoric terms found that 97 U.D. Clerks were promoted in excess of the quota in the proportion of 1:1 from the department hands and therefore the promotions so made can only be treated as provisional and in those circumstances, the party Respondents were entitled to succeed in that regard and the seniority list has to be re-cast in terms of the finding accorded by the Government with respect to 97 excess promotions made from the department stream.

36. Learned counsel for the party Respondents also invited our attention to Rules 27(a) and 31 of Part-II of K.S.&S.S.R and contended that the seniority of a person in service, class, category or grade shall, unless he has been reduced to a lower rank as punishment, be determined by the date of the order of his first appointment to such service, class, category or grade. Our attention was also drawn to the explanation thereunder, wherein it is explained that for the purpose of the sub-rule, "appointment" shall not include appointment under Rule 9 or appointment by promotion under rule 31. It is also the contention of the party

Respondents that if there is a fixed ratio prescribed to any post by promotion, by transfer and by direct recruitment in a fixed ratio or percentage, same shall be done as provided under third proviso to Rule 27(a). Rule 31(a)(i) of the aforesaid Rules speaks about promotions made in public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a higher category in a service or class by promotion from a lower category and there would be undue delay in making such promotion in accordance with the rules, the Appointing Authority may promote a person otherwise than in accordance with the rules, temporarily. It is thus contended that all the promotions effected to the posts of Executive Officers Grade-I from the department stream overlooking the ratio of 1:1 were only provisional in nature in order to comprehend the emergency situation and therefore as and when qualified hands were there, the excess promotion effected to the stream of Executive Officers Grade-II ought to have been cancelled and due promotions should have been effected accordingly from the respective stream. Thus, it is contended that the Tribunal was right in setting aside the list especially in view of the order passed by the Government finding that 97 excess promotions were made in violation of the quota earmarked to the stream of Executive Officers Grade-II.

37. Having considered the rival submissions and assimilating the facts situations, we are of the considered opinion that the Tribunal has based its findings and conclusions basically on the order passed by the Government finding that there were 97 excess promotions made to the post of Executive Officer Grade-I from the Department stream. That apart, the Tribunal has found that no promotions were made on a regular basis between 1990 and 1993 and therefore nobody was entitled to get protection as a regular hand and according to the Tribunal, the Apex Court in its judgment has held so. The Tribunal has also found that going by the orders of the Government which are passed detrimental to the stream of Executive Officers Grade-II, same was done forgetting the basic principle that claim of an incumbent for promotion has to be considered with reference to the date of occurrence of the vacancy in the light of the relevant rules then in force. The Tribunal also found that the order passed by the Government regularizing the promotions of 61 U.D. Clerks to the cadre of First Grade Executive Officer with effect from the dates of their provisional promotions and going by the Travancore-Cochin Rules, which were in force before 01.01.1990, the U.D. Clerks should not have been promoted unless they were entitled to the 50% quota set apart for them from the Panchayat Department. It was also held by the Tribunal that the promotions effected to 61 excess promotees before 01.01.1990 and 36 persons long after the commencement of the new Rules were notionally promoted on 16.02.1998 with retrospective effect in the light of the Travancore-Cochin Rules.

38. So far as the common contentions raised by the petitioners with regard to the promotion effected to 61 employees are concerned, the Tribunal has found that if juniors are entitled to continue as provisional promotees, such benefit

cannot be denied to the earlier provisional promotees. The Tribunal has also found that "appointment" means appointment on a regular basis in accordance with the rules and the provisional promotees can only claim salary of the post and they cannot claim preferential claim for regular promotion based on their provisional promotion.

39. The paramount arguments advanced by the learned counsel for the petitioners is based on the "sit back theory" and in order to substantiate the contentions put forth, the judgment of the Apex Court in "Rabindra Nath Bose and others v. Union of India and others" [, AIR 1970 SC 470] is pressed into service, wherein the Apex Court held that no relief can be given to the petitioners, who, without any reasonable explanation, approach Supreme Court under Article 32 of the Constitution of India after inordinate delay. It was further held in the said judgment that it could not have been the intention that Supreme Court would go into stale demands after a lapse of many years. Though Article 32 is itself a guaranteed right, it does not follow from this that, it was the intention of the Constitution makers, that Supreme Court should discard all principles and grant relief in petitions filed after inordinate delay.

40. So also, the judgment of the Apex Court in "Malcom Lawrence Cecil D'Souza v. Union of India and others" [, AIR 1975 SC 1269], wherein it was held that the seniority list of Assistant Commissioner of Income Tax issued in 1956 was challenged in a writ petition filed in 1971 was not maintainable. It was held in the said judgment that although security of service cannot be used as a shield against administrative action for lapses of a public servant, by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It was also held that it is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties.

41. So also, the Full Bench judgment of this Court in "Sajeeve N.J. v. Union of India and Others" [, 2009 (4) KHC 627 (FB)], wherein also the principles of sit back theory was discussed taking into account the judgments rendered by the Apex Court in the cases of "Rabindra Nath" (supra) and "K.R. Mudgal".

42. Further, the judgment of the Apex Court in "Maya Mathew v. State of Kerala and others" [, (2010) 4 SCC 498] was placed before us in order to canvass the principles of ratio prescribed and invited our attention to paragraphs 2 and 10 of the said judgment and contended that if the language is clear and unqualified, the subsequent General Rule would prevail despite repugnancy. If the intention of the rule-making authority is to sweep away all the Special Rules and to establish a uniform pattern for computation of the ratio or percentage of direct recruits and by transfer, in such a case, the Special Rules will give way.

43. On the other hand, learned counsel for the party Respondents has invited our attention to the judgment rendered by this Court in O.P.(KAT) No. 530 of 2013 dated 28.10.2015, wherein the theory of "sit back" was considered by this Court taking into account all the previous decisions of the Apex Court and this Court and held that if the list was under challenge by the affected persons, the same can never be heard to be settled and undisturbed. While evaluating the pros and cons so far as "sit back theory" is concerned, we are of the considered opinion that in order to avail the benefit of that theory, it should be established that a list was drawn and the same was in vogue for a number of years without being undisturbed. According to us, so far as the cases at hand are concerned, the facts explained above show that the list was being subjected to challenge in various Original Petitions before this Court ever since the Government found that there were 97 excess employees in the post of Executive Officer Grade-I so far as the Department stream of U.D. Clerks is concerned. Even though by virtue of an order dated 19.07.2012, the Government have passed the order Annexure-A10, party Respondents contended that the said order was passed behind the back of all affected parties and therefore the same was violative of the principles of natural justice. In that view of the matter, the Tribunal has found that the promotions if any made were provisional in nature, and therefore the theory of sit back cannot be applied. In order to attract the theory of sit back, it should be established that the promotions made were regular in nature which thus provided a reasonable apprehension in the mind of a person who had acquired such a promotion to think that he was entitled for that promotion and to continue in the said post without being disturbed. That apart, apart from applying the sit back theory against individuals who were promoted to regular posts, so far as the sit back theory concerning a list drawn is entirely different. Here, in the cases at hand, the principle of sit back theory is canvassed on the basis of disturbance of the seniority list drawn and therefore it should be established by the petitioners that the list stood undisturbed for a number of years in spite of the knowledge of the affected parties that such a list was drawn.

44. Circumstances being so, we are of the considered opinion that the Tribunal never fell into error by setting aside the list drawn by the Government overlooking the quota earmarked for the Executive Officers Grade-II. Moreover, the Tribunal has directed the Government to re-cast the list after hearing all affected persons concerned. Therefore, the contentions advanced before the Tribunal are available to the petitioners before the Government, except the contentions advanced based on the cadre strength by the petitioner herein, which was the subject matter of consideration of a Division Bench of this Court in O.P. No. 8395 of 1998 dated 10.01.2008, which has become conclusive. The petitioners were also not able to impress upon us any other legal or factual points, warranting our interference in this jurisdiction. We are also conscious of the power of judicial review conferred on us under Article 227 of the Constitution of India, wherein we are empowered to interfere with the order passed by the Tribunal only when any illegality, irrationality or violation of the settled legal

principles are noted.

45. Having gone through the order of the Tribunal and the pleadings and evidence on record, we are of the considered opinion that there are no circumstances enabling us to exercise the power interfering with the order passed by the Tribunal. Therefore, the Original Petitions fail and accordingly they are dismissed.

46. Certain impleading petitions were filed by certain intervenors supporting the order passed by the Tribunal. We are well aware of the law laid down by the Apex Court that no challenge can be made without raising the contentions before the Tribunal. We heard the intervenors by invoking our power under Sec. 152 of the Kerala High Court Rules. While disposing of the writ petitions we have noted the arguments made by such applicants before us. So also, the said intervenors are not challenging the order passed by the Tribunal, but they filed impleading applications with an intention to vacate the interim order passed by this Court so as to enable the Government to finalize the list in accordance with the directions issued by the Government.

O.P.(KAT) No. 316 of 2015

47. So far as O.P.(KAT) No. 316 of 2015 is concerned, the petitioners are the applicants in O.A. No. 735 of 2014 before the Tribunal, they are also beneficiaries of the order of the Tribunal interfering with the list prepared by the Government. However, the directions sought for in the said Original Petition is to direct the official Respondents to grant notional or retrospective promotions to the petitioners and all similarly placed direct cadre Executive Officers Grade-II in consequence of the implementation of the final impugned order Ext. P8 passed by the Tribunal by recomputing the seniority list of Executive Officers Grade-I as on 01.01.1990, without considering whether the employee is retired or not and for other related reliefs.

48. Obviously, the said Original Petition is nothing but an abuse of process of this Court. When Original Petitions are filed before this Court challenging the order of the Tribunal, a writ petition of the said nature is not warranted. Moreover, we do not find any reason to exercise our visitorial jurisdiction conferred under Article 227 of the Constitution of India to issue a direction to execute the order of a Tribunal, especially when the Tribunal is vested with ample powers to implement its own order. Moreover, the directions of the Tribunal in the impugned order is yet to be complied with in view of the pendency of these Original Petitions. Necessarily, the said Original Petition also fails and accordingly the same is also dismissed. O.P.(KAT) Nos. 123 & 157 of 2015

49. In view of the judgment delivered in the other Original Petitions, these Original Petitions are also dismissed.

50. However, the time fixed by the Tribunal having expired, it is ordered that the directions of the Tribunal shall be complied with, within a period of three months

from the date of receipt of a copy of this judgment.