

(1987) 04 KL CK 0021
In the High Court Of Kerala
Case No : W.A. No. 591 of 1984

Chacko and Others

APPELLANT

Vs

K.S. Joseph and Others

RESPONDENT

Date of Decision : 09-04-1987

Acts Referred:

Constitution of India, 1950 — Article 14, 309
Kerala Police Act, 1960 — Section 69
Kerala Public Services Act, 1968 — Section 28
Kerala State and Subordinate Services Rules, 1958 — Rule 28, 28(10)

Citation : (1987) 04 KL CK 0021

Hon'ble Judges : V.S. Malimath, C.J;V. Bhaskaran Nambiar, J

Bench : Division Bench

Advocate : S. Easwara Iyer and E. Subramoni, for the Appellant; C.S. Rajan and Sankarankutty for Respondents 1 to 10 and P. Mukesh Raman and N. Harindran for Respondents 14 to 18, Government Pleader, for the Respondent

Judgement

Bhaskaran Nambiar, J.—The Appellants and Respondents 1 to 18 are Police Constables born on district-wise basis in the Ernakulam District, the Appellants being juniors to Respondents 1 to 10. The post of Head Constable is a selection post. It is the Appellants contention that they became qualified to be promoted earlier than their seniors, Respondents 1 to 10, and therefore, they have a preferential right to be promoted as Head Constables, to the vacancies that arose in July 1982. Respondents 1 to 10, on the other hand, contend that when the vacancies arose in July 1982, they had also passed the prescribed test, that they were also eligible for selection and they had, in fact, been selected for promotion and thus their seniority in the lower category of Police Constables cannot be ignored and they cannot be superseded on the only ground that the Appellants secured test qualification earlier. The Appellants rely on an executive order issued by the Government on 17th May 1963. The learned Single Judge who disposed of the writ petition filed by Respondents 1 to 10 herein, held that the executive instructions cannot prevail over the Kerala State and Subordinate Services Rules,

in force under the Kerala Public Services Act and directed that promotions shall be effected with reference to Rule 28 of the Kerala State and Subordinate Services Rules, Rule 28(bb) in particular. It is against this judgment that this appeal has been filed.

2. We shall therefore refer to the facts a little more in detail.

3. The Government as per G.O. (Ms.) No. 252/Home, dated 17th May 1963 (Ext. P-1), issued orders regarding appointments by promotion and by transfer to certain posts in the Police Department. Promotion to the rank of Head Constables shall be made from select list prepared from among eligible officers on the basis of merit and ability, seniority being considered only where merit and ability are approximately equal. The select list is prepared on the basis of the results of the general Head Constables Test. It is specifically mentioned that no personal files are maintained for Police Constables. Promotion tests have to be held at least once in a year before the 30th of June so as to ensure "that the number of persons in the select list is not ordinarily less than 10 per cent and not more than 20 per cent of the sanctioned establishment of Head Constables in the District. The promotion tests are to be held on district basis for assessing the fitness of eligible constables for promotion as Head Constables. Constables who qualify at the tests have to be included in the "select" list for promotion as Head Constables. The next provision is important for our purpose. It reads thus:

The ranking in the "select" list of constables who qualify at the promotion tests shall be in accordance with the dates of passing the test. Those who qualify at the test on the same date will be ranked according to the length of continuous service as constable.

Lists of Police Constables who have passed the test in 1978 were published on 2nd September 1980 and 20th July 1981. The first list contained the names of 45 Police Constables and the second list that of 40 Constables. 7 Police Constables who were senior-most in this list have already been promoted as Head Constables. The Appellants have passed the test as early as 1978 and they have been included in the 1980 list. Respondents 1 to 10 passed the Head Constables test conducted in July 1981, the results of which were declared in February 1982. Vacancies for the posts of Head Constables arose in July 1982. All the Appellants were provisionally promoted to those vacancies. The Government takes the stand that as per the executive order, Ext. P-1 Respondents 1 to 10 would become eligible for promotion as Head Constables only after all those already included in the earlier list are promoted as Head Constables. In view of the fact, therefore, that Appellants and Respondents 14 to 18 have been selected as early as 1978 and included in the 1980 or 1981 list, they are entitled to be promoted earlier as Head Constables, notwithstanding the fact that when the vacancies arose in 1982, Respondents 1 to 10 were also qualified and were also included in the select list. This is because, the select list in which Respondents 1 to 10 were included, was issued later than the select list in which the names of the Appellants and Respondents 14 to 18 have been included.

4. The relevant rules in the Kerala State and Subordinate Services Rules, for considering these contentions, are these. Rule 28(b)(i) of the Kerala State and Subordinate Services Rules, reads thus:

28(b)(i) Promotion and appointment by transfer according to merit and ability. Appointments to a selection category or grade in a service or class shall be made from a select list prepared from among members eligible for appointment to such category or grade in accordance with these rules and the special rules on the basis of merit and ability, seniority being considered only where merit and ability are approximately equal. The select list shall be prepared in the manner indicated herein.

Rule 28(b)(ii) reads:

Promotion and appointment by transfer to higher posts according to seniority. All other promotions or appointments by transfer to higher posts shall, subject to the provisions of these rules and the special rules, be made in accordance with seniority subject to the person being considered suitable for the post. Punishments other than censure awarded within a period of three years immediately preceding such promotion or appointment by transfer shall be taken into account in determining the suitability of a person for promotion or appointment by transfer.

and Rule 28(bb) provides:

Promotion which depends upon the passing of any examination. Promotion in a service or class which depends upon the passing of any examination (General or Departmental) shall ordinarily be made with reference to the conditions existing at the time of occurrence of the vacancies and not with reference to those at the time when the question of promotion is taken up.

5. The parties to this appeal, the constables in the Police Department are bound by the provisions of the statutory general rules contained in the Kerala State and Subordinate Service Rules. These rules were originally framed under the proviso to Article 309 of the Constitution and later are deemed to be statutory rules under the Kerala Public Services Act, 1968. These general rules do not prescribe the qualifications to be acquired or the special tests to be passed during probation or for earning promotion. They may legitimately be provided by the special rules applicable to any particular department. In the absence of special rules, the Government can issue executive orders prescribing those special tests. There are no special rules framed so far, prescribing any test for promotion to the cadre of Head Constable. Therefore, the Government was competent to issue an executive order prescribing tests for promotion to that cadre. Thus the Government Order, Ext. P-1, in so far as it prescribes the General Head Constables Test for promotion to the cadre of Head Constables is valid and is not opposed to any statutory rule.

6. Promotion to the cadre of Held Constables depends upon the passing of the eligibility test. Rule 28(bb) is therefore attracted and promotion shall "ordinarily be made with reference to the conditions existing at the time of occurrence of vacancies and not with reference to those at the time when the question of promotion is taken up". When, therefore, on the date when the vacancies occur, they are sought to be filled up on those dates or with effect from those dates, the claims of all persons who were eligible to be considered for appointment on those dates have to be considered. If on those dates, persons already selected for appointment are also available, their claims also have to be considered. When thus there are several persons, eligible and selected for appointment, available to fill up the vacancies, can the appointing authority overlook their seniority and make appointments. If the special rules prescribe that the persons selected earlier will have preference, the special rules prevail over the general rules. If there are no special rules and there are only executive orders, general rules which govern such appointment prevail over the executive orders. It is in this context that we have to refer to three provisions, Rule 28(b)(i), 28(b)(ii) and 28(bb) of the Kerala State and Subordinate Services Rules.

7. Rule 28(b)(i) provides for promotion and appointment by transfer according to merit and ability and states that selection has to be made from a select list prepared from among members eligible for appointment to such category or grade in accordance with the general rules and the special rules on the basis of merit and ability. This rule then proceeds to state how a select list has to be prepared and enjoins on the Constitution of a Departmental Promotion Committee consisting of a member of a Public Service Commission, the appointing authority and the Head of the Department. In all cases where such selection is not made Rule 28(b)(ii) provides that all other promotions shall be made in accordance with seniority subject to the person being considered suitable and Rule 28(bb) insists that it is the condition that exists at the time of the occurrence of vacancy that matters.

8. It has to be remembered that the Government are not bound to fill up all vacancies. Administrative necessity, financial constraints and other relevant considerations may compel the Government not to fill up all vacancies. But it may not be open to the Government to keep a post vacant to accommodate any person who may get qualified in future. When there are no valid and ostensible reasons for not filling up the vacancies or when vacancies are kept unfilled malafide, or on extraneous grounds or as acts of favouritism, the inaction itself will attract the constitutional axe under Article 14.

9. The provisions in an executive order which are in conflict with the principles contained in Rule 28(bb) cannot, therefore, have any validity. Ext. P-1 Government order specifically states that the ranking in the select list of constables shall be in accordance with the dates of passing the test and in the counter affidavit it is asserted that for vacancies which arose in July 1982, those constables who have already been included in the earlier select list have to be

promoted first in spite of the fact that Respondents 1 to 10 already selected and found eligible and admittedly seniors are also available. This seems to be patently opposed to Rule 28(bb) for the reason that on the date when the vacancy arose, when there are several persons qualified to be appointed or eligible to be promoted, the junior-most person who happened to pass the test earlier, get promotion under Ext. P-1 in spite of Rule 28(b)(ii). The statutory rule does not provide for the supersession of a senior who is found to be eligible and suitable on the date of the vacancy, in favour of a junior who became eligible or acquired the necessary test qualification earlier.

10. It was, however, contended by the Appellants counsel, Shri Easwara Iyer, that Ext. P-1 Government order should be construed as a statutory rule and be placed reliance on Section 69 of the Kerala Police Act which enabled the Government by notification in the gazette to regulate the recruitment and conditions of service of police officers other than the members of the Indian Police Service. But, this contention cannot succeed for the reason that there is no evidence to show that Ext. P-1 has been notified in the gazette. We gave opportunity to the counsel for the Appellants and to the Government Pleader to produce a copy of the gazette where Ext. P-1 was published. We gave time to produce a copy of the said gazette in which Ext. P-1 was published. It was submitted that they were not able to trace out any gazette and the Government Pleader was not able to state whether it was published in any gazette at all. Ext. P-1 cannot, therefore, be treated as a rule u/s 69 of the Kerala Police Act. In fact, no such contention was raised before the learned Single Judge.

11. The Government Pleader has no contention that Ext. P-1 are rules made under the proviso to Article 309 of the Constitution. The learned Single Judge who disposed of the writ petition has observed that even the files relating to Ext. P-1 Government order were not traceable. The Government has no case before us that Ext. P-1 was made under the proviso to Article 309. Ext. P-1 has therefore to be treated as an executive order only.

12. When Rule 28(b)(i) provided for promotion and appointment by transfer according to merit and ability and referred to the preparation of a select list, it was contended by Shri Easwara Iyer that Rule 28(b)(i) can have no application because the select list in this department for promotion to the category of Head Constables is not prepared according to these rules. We agree with this submission. Rule 28(b)(i) can have no application to the present case for the reason that the select list is not prepared in accordance with the procedure u/s 28(b)(i), but under an entirely different procedure under the executive order, Ext. P-1. But that does not help the Petitioners for in that case Rule 28(b)(ii) applies and all other promotions and appointments to higher posts shall be in accordance with seniority.

13. It is also relevant to note that Rule 28(10) states thus:

The claims of a person who qualifies himself for a post, after the select list in

respect of that post has been prepared but before the date of occurrence of the vacancy in the higher post shall not be over looked.

Even if the select list prepared according to the executive order under Ext. P-1 is treated as a select list for purposes of Rule 28(b)(i) the above Clause 28(10) shows that the claims of Respondents 1 to 10 who became qualified subsequently cannot be overlooked for vacancies that arose in 1982, when Respondents 1 to 10 also were qualified and eligible.

14. We are therefore in entire agreement with the reasoning and conclusion of the learned Single Judge that for vacancies which arose in 1982, the claims of Respondents 1 to 10 should not have been overlooked and no preferential treatment should have been given to Appellants or Respondents 14 to 18 on the only ground that they became test qualified earlier. It is of course for the Government to consider whether on the facts and in the light of Rule 28(bb), Respondents 1 to 10 were qualified and eligible to be promoted in 1982, when the vacancies arose.

15. We have been told by the Government Pleader that the Government are taking steps to frame statutory rules regarding appointment to the post of Head Constables. As the Government can make rules both prospectively and retrospectively, it is unnecessary for us to consider the effect of Ext. P-1 in further detail.

16. It was also brought to our notice that some persons had already been promoted even prior to the filing of the writ petition based on the inclusion of their names in the select lists. We make it clear that the declaration now given and the decision now rendered regarding the effect of Ext. P-1 cannot affect any promotions made to the post of Head Constables prior to 20th July 1982, when this writ petition was filed. The writ appeal therefore thus disposed of. In the circumstances of the case there will be no order as to costs.