

(2008) 07 KL CK 0084

In the High Court Of Kerala

Case No : Writ Petition (C) No. 14856 of 2005

Garvasees P.J.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 18-07-2008

Acts Referred:

Kerala State and Subordinate Services Rules, 1958 — Rule 28(b)

Citation : (2008) 2 KLJ 1013

Hon'ble Judges : C.N. Ramachandran Nair, J

Bench : Single Bench

Advocate : Kaleeswaram Raj, for the Appellant; N. Sugathan, A.V. Ramakrishna Panicker, Varsha Bhaskar and Smitha Sukumaran (GP), for the Respondent

Judgement

C.N. Ramachandran Nair

1. The petitioner is challenging the select list wherefrom 5th respondent was appointed as Assistant Director (Documents Civil) in the Forensic Science Laboratory, Trivandrum. According to the petitioner, petitioner having joined service earlier than the 5th respondent, should have been selected. I heard counsel appearing for the petitioner and counsel appearing for the 5th respondent and Government Pleader. The petitioner, 5th respondent and three others were advised by the PSC for appointment to the post of Scientific Assistant in the Forensic Science Laboratory simultaneously. In the advise list, 5th respondent admittedly stood as No. 1 and petitioner was the 5th. However, since 5th respondent was in another department at the time of selection and was on maternity leave, she joined service as Scientific Assistant after the petitioner joined. The petitioner joined on 3.12.1998 and 5th respondent joined on 27.1.1999. According to the petitioner, petitioner qualified for promotion by acquiring five years' service in terms of the Special Rules-on 2.12.2003. Admittedly when the vacancy first arose 9.4.2003, no one was qualified for promotion. However, petitioner's case is that since petitioner was the first to be qualified, he should have been appointed to the post of Assistant Director. The

case of the 5th respondent on the other hand is that all those who joined as Scientific Assistant were to undergo training for six months and the said training was completed on 21.9.1999 and since all qualified simultaneously, selection has to be made based on seniority in the feeder category. Government Pleader clarified that when DPC met on 11.9.2004, they considered the 5th respondent along with one Sulekha who were holding position No. 1 and 2 respectively in the seniority list of Scientific Assistants and between them, the senior namely, 5th respondent got selected. Rule 2(b) of the Special Rules provides the method for appointment among others to the post of Assistant Director from the post of Scientific Assistant. The said Rule is as follows:

R.2(b) Promotion to the posts of Director and Joined Director and transfer of Scientific Assistant as Assistant Directors shall be made from select lists of eligible persons prepared on the basis of merit and ability, seniority being considered only when merit and ability are approximately equal. Persons included in a select list shall be ranked in the order of their seniority.

Rule 28(b) of KS & SSR containing the principle for promotion is the same as contained in the above said Rule. It is clear from the above that selection from among qualified persons have to be based on merit and ability. If someone is found exceptionally able and found superior to others among the persons considered, he will get listed above others irrespective of whether he is the seniormost in the feeder category or not. Seniority comes into play only when those considered for selection rank on merit and ability approximately equal. In other words, seniority applies only among equals or approximately equals and the exceptional or outstanding stand separately. However, since no one was found to have exceptional merit, this principles was not applied. Note to Rule 28(6) specifies the minimum number of candidates to be considered while selection is made for promotion. It says that the field of choice shall as far as possible be thrice and atleast twice the number of vacancies expected within the year plus the number of superceded officers of the previous year, for eg:- if there are two anticipated vacancies and the number of superceded officers of the previous years is two, the panel for field of choice shall normally contain 10 names (6+4) or atleast 8 (4+4). In this case there is only one post to be filled up in the cadre of Assistant Director by promotion and there was none from superceded category. It is seen that two persons who were 1 and 2 in the seniority list of Scientific Assistants, were considered and the 5th respondent was selected between them, which is not questioned by the other person i.e. No.2 in the list who lost to the 5th respondent in the selection process. The petitioner admittedly stands below in the list and his claim is only based on his joining in the cadre of Scientific Assistant one month before the 5th respondent. As already noticed, 5th respondent was No. 1 in the advise list sent by the PSC wherein petitioner was No.5. Similarly, petitioner, 5th respondent and three others underwent training together and all of them completed six months training on 21.9.1999. In other words, all of them had acquired qualification after training on the very same date i.e.20.9.2004. I do not think petitioner can claim any

seniority over the 5th respondent because 5th respondent was senior to him in the advise list and she continues to be senior in the seniority list prepared for Scientific Assistants. Division Bench of this court in Nandan Vs. Jyothish Kumar, stated that training period will not be counted as qualifying service for promotion. In this case since all the candidates had to undergo six months training, required qualification for promotion to the higher grade i.e. five years' experience, was acquired by all the candidates simultaneously. Therefore, seniority was rightly reckoned based on advise memo and the seniority list prepared in the cadre of Scientific Assistant wherein 5th respondent stood No. 1 and petitioner No.5. I do not think any Rule is violated in the selection and appointment of 5th respondent to the post of Assistant Director. Counsel for the petitioner relied on Rule 28(13)(1A) of KS & SSR and contended that if training period is excluded, nobody was qualified when the DPC held its meeting on 11.8.2004 and therefore, 5th respondent should not have been selected by the DPC in that meeting. I do not think there is any justification to interfere with the appointment of 5th respondent on this ground because if this agreement is accepted, petitioner was also not qualified to be considered by the DPC which held its meeting on 11.8.2004. Since the post was already lying vacant, there was nothing wrong for the DPC to have considered the eligible persons who are acquiring experience just within a month from the date of holding of the DPC meeting. In fact, the select list was published only after the 5th respondent acquired the required experience. Therefore, the selection and appointment of 5th respondent is not to be interfered on this ground. As already pointed out it is to be noted that the person who was considered along with 5th respondent and who lost in the selection process who stood as No.2 in the seniority list of Scientific Assistants has not even questioned the appointment of 5th respondent. In any case since I have already held that the 5th respondent was senior to the petitioner in the feeder category and since DPC has completed the selection process for promotion in accordance with the Rules and since selection of the 5th respondent was not contested by the person who participated and lost in the selection process, there is no scope for challenge of appointment of the 5th respondent by the petitioner who was not even considered for promotion by the DPC as he was junior in the feeder category. The W.P. is therefore, devoid of any merit and is dismissed.