

(1973) 11 KL CK 0001
In the High Court Of Kerala
Case No : W.A. No. 17 of 1972

K. Viswanathan nair

APPELLANT

Vs

Kseb

RESPONDENT

Date of Decision : 30-11-1973

Acts Referred:

Citation : (1973) 11 KL CK 0001

Hon'ble Judges : P. Govinda Nair, J;K. Sadasivan, J

Bench : Division Bench

Advocate : M.P. Menon and M. Ramachandran, for the Appellant; N. Raghava Kurup, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal raises a somewhat difficult question and it arises from the application of two Government orders, one dated 7-5-1951 and the other dated 26-7-1961 in relation to the peculiar rule that was applicable in the Travancore-Cochin State where the seniors who had been overlooked in the matter of promotion because they did not possess at the time the vacancies occurred the requisite qualifications, were allowed to regain their seniority if they acquired the qualifications and got promoted before the juniors promoted had been confirmed. The question for consideration is the true scope of this rule. On this aspect two learned judges of this Court sitting independently have taken different views. Justice Subramonian Poti in the judgment under appeal has taken the view that weight must be given to the date of occurrence of the vacancies in the promotion cadre and if on that date the seniors who had been overlooked did not possess the test qualifications the fact that the order of confirmation of the juniors had been passed after the acquisition of the test qualifications by the seniors does not matter and the juniors will not lose their seniority based on the date of occurrence of the vacancies. Justice Eradi on the other hand, has taken the view that the relevant date is the date of the order of confirmation and if the order had actually not been passed the seniors who had been overlooked and to whom

had accrued a vested right to get confirmation in the higher cadre on the date of the acquisition of the test qualification by them cannot be deprived of their vested right by an order of confirmation subsequently passed in favour of the juniors earlier promoted. We shall deal with this difference of opinion between the two learned judges arising from the different approaches in understanding the two relevant orders that we have referred to. We must refer to the relevant parts of these two Government orders. We may also mention before doing so that there is an order of 1954 in between these two orders which we need not refer to because nothing turns on the wording of that order for determining the questions arising in this appeal. The relevant part of the order of 7-5-1951 is in Para. 4 thereof and that is in these terms:

Notwithstanding the provisions contained in R.3, a person who was superseded by his junior for want of test qualification will not lose his claim for confirmation in the higher grade or post, if by the time the permanent vacancy arises the senior person passes the test.

The Government order of 26th July, 1961 contains this provision in Para. 2 thereof:

According to the orders of the T.C. Government contained in the G. Ps. cited a senior without test qualification superseded in the matter of promotion by his junior with test qualification can regain his seniority over such junior on his (senior's) acquisition of the test qualification and promotion, unless by that time the junior gets confirmed in the higher category. Suppose; "A" and "B" are two lower division clerks in a Departmental unit in that order of seniority and "B" gets promotion to the upper division first on account of the test qualification. If and when "A" passes the test and gets promoted to the upper division in a future vacancy, he becomes automatically senior to "B" in the upper division unless "B" has already been confirmed in the upper division by that time. The benefit of this rule can be claimed by Travancore Cochin Officers (including those appointed by the Kerala Government during the period from 11-11-1956 to 16-12-1958).

We must also refer to Para. 4(iii) of the same G.O. which runs thus:

Under Art. 335 (a) of the Travancore Financial and Account Code, promotions and confirmations depending upon the passing of any examination (General) or (Departmental) should ordinarily be made with reference to conditions existing at the time of occurrence of the vacancies and not with reference to those at the time when the question of confirmation or promotion is taken up. This is also in consonance with the Madras Rules. The above principle should be followed strictly in all cases.

2. The question that arises before us is about the seniority of the appellant vis-a-vis respondents 3 to 6. Respondents 3 to 6 were admittedly juniors of the appellant in the cadre of lower division clerks. They however were promoted to the upper division cadre earlier than the appellant as the appellant did not at that time possess the test qualifications. The appellant too acquired the test

qualifications in 1965. He too had been promoted to the upper division cadre. Neither at the time of the passing of the test by the appellant nor at the time he was promoted to the upper division cadre, orders had been passed confirming respondents 3 to 6 in the cadre of upper division clerks. The promotions of respondents 3 to 6 were to posts temporarily sanctioned. The Electricity Board was considering the question of making these posts permanent and they had passed two orders Exts. R1 and R2 produced by the Electricity Board in which they stated that certain posts which had existed for a period of three years from certain dates should be confirmed. The matter appears to have been settled before the arbitrator and the arbitrator ordered that the posts temporarily created should be made permanent from the dates of those posts too. That date, as far as respondents 3 to 6 are concerned is admittedly 1-4-1964. So permanent vacancies must be taken to have been available from 1-4-1964. Permanent posts can be created from the dates on which those posts existed temporarily, is not disputed. Nor is it disputed that what may be termed retrospective confirmations can be given from an earlier date to the date of the order. What is called confirmation order reflects a rule that was available in the Travancore and Cochin areas of the State to confirm a candidate apparently appointed in a regular manner, after his original appointment. At times the confirmation can take place years after the original appointment. Now speaking in terms of the rules applicable, if there has been an appointment to a regular post, which is not a temporary appointment under R.9 (a) (i) of the Kerala State and Subordinate Services Rules, by the mere fact of the appointment, a person where probation is required would become a probationer and on satisfactorily completing his probation, an approved probationer and so a full member. But if the appointment had been under R.9(a) (i) in a temporary manner, a regularisation from any date prior to the order regularising the appointment can be passed. This is clearly provided in R.24 of the Kerala State and Subordinate Services Rules. The provision in R.24 for retrospective regularisation, we think, is analogous to the power of passing confirmation orders with retrospective effect. So the orders of Government creating posts from 1-4-1964 permanently and confirming respondents 3 to 6 from those dates are perfectly valid. But these orders were passed, at least the confirmation order, only in 1970, long after the appellant acquired the test qualifications and got promotion. The question is whether we should give sanctity to the date of the confirmation order and repel the claims of respondents 3 to 6 for seniority or whether we should take the realities of the existence of the permanent post on 1-4-1964 and the confirmation of respondents 3 to 6 as upper division clerks from that date. In Para. 4 of the Government order dated 7-5-1951 there is no mention whatever of the confirmation of juniors. It speaks only of the confirmation of seniors, and that, from the date of occurrence of the vacancies if they had test qualifications at that time. Perhaps a different note is struck in Para. 2 of the order dated 26-7-1961; but we think the provision in Para. 2 must be understood in the light of Para. 4 (iii) and the two must be read with the order dated 7-5-1951 so as to harmonise the two orders. So read, the date of the confirmation order is

unimportant and it is the date of occurrence of the vacancies and the insistence of test qualifications of the overlooked seniors at that time that is vital. The Government order of 26th July, 1961 is not in supersession of the Government order of 7-5-1951. It is merely a clarificatory G.O. and nobody had understood it so far as laying down a principle or a rule different from that laid down in the G.O. of 7-5-1951. Reading Para. 2 and 4(iii) of the G.O. of 26-7-1961 with Para. 4 of the G.O. of 7-5-1951 as they should be, we are inclined to agree with the view taken by Justice Poti in the judgment under appeal that respondents 3 to 6 are seniors to the appellant in the cadre of upper division clerks, as at the time the vacancies occurred on 1-4-1964 the appellant did not pass the test qualifications. We accordingly dismiss this Writ Appeal. There will be no order as to costs.

Dismissed.